

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION (AT CINCINNATI)**

PHYSICIANS HEALTHSOURCE, INC.,)	Civil Action No.: 1:17-cv-225
individually, and as the representatives of a)	
class of similarly-situated persons,)	
)	Judge:
Plaintiff,)	
)	
v.)	<u>CLASS ACTION COMPLAINT</u>
)	
THE MASSACHUSETTS MEDICAL)	
SOCIETY and JOHN DOES 1-5,)	
)	
Defendants.)	

Plaintiff Physicians Healthsource, Inc. (“Physicians Healthsource”) brings this action on behalf of itself and all others similarly situated, through its attorneys, and except as to those allegations pertaining to Physicians Healthsource or its attorneys, which allegations are based upon personal knowledge, alleges the following upon information and belief against Defendant The Massachusetts Medical Society (“MMS”) and John Does 1-5:

PRELIMINARY STATEMENT

1. The Telephone Consumer Protection Act (“TCPA”), which was modified and renamed the Junk Fax Prevention Act (“JFPA”) in 2005, is codified at 47 U.S.C. § 227. Under the JFPA, it is unlawful to send an unsolicited advertisement to someone’s fax machine. The JFPA allows private rights of action and provides statutory damages of \$500.00 per violation.

2. MMS sent an unsolicited advertisement to Physicians Healthsource on March 13, 2017 (“the 3/13 Fax Ad”). A copy of the 3/13 Fax Ad is attached hereto as Exhibit A. The 3/13 Fax Ad promotes the commercial availability and/or quality of MMS’s goods or services.

3. The receipt of an unsolicited advertisement via facsimile (or “junk fax”) causes damage to the recipient. A junk fax uses the office supplies of the recipient such as paper, toner, and the fax machine itself. A junk fax also ties up the phone line and the fax machine of the recipient, thereby precluding their use for legitimate, authorized facsimiles and other business. Finally, a junk fax wastes the recipient’s time in reviewing and discarding unwanted solicitations.

4. Based on information, belief, and the appearance of the 3/13 Fax Ad itself, MMS also sent the 3/13 Fax Ad to numerous other persons via their respective fax numbers/fax machines. MMS will likely continue to send such advertisements via facsimile absent an injunction or other action prohibiting such conduct.

5. The claims of Physicians Healthsource and the other recipients of the 3/13 Fax Ad are all based on the same legal theory; *i.e.*, violations of the JFPA. This action seeks, among other items of damages, the following relief expressly authorized by the JFPA: (i) an injunction prohibiting MMS (and its employees, agents, representatives, contractors, affiliates, and all persons and entities acting in concert with MMS) from sending more advertisements to Physicians Healthsource via facsimile; (ii) statutory damages, and (iii) treble damages.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 as the JFPA is a federal statute and, therefore, gives rise to federal question jurisdiction.

7. This Court has personal jurisdiction over MMS because MMS transacted business within this judicial district, made contracts within this judicial district, and/or committed tortious acts within this judicial district.

8. This Court has venue under 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claim occurred in this district.

PARTIES

9. Physicians Healthsource is an Ohio corporation, and it operates a chiropractic clinic located at 3328 Westbourne Drive in Cincinnati, Ohio 45248.

10. MMS is a Massachusetts corporation, and its principal place of business is located at 860 Winter Street, Waltham Woods Corporate Center in Waltham, Massachusetts 02451.

11. MMS produces and sells continuing education materials for the medical industry.

12. John Does 1-10 assisted MMS in its facsimile advertising activities by providing a list of fax numbers, transmitting the 3/13 Fax Ad, providing advice or assistance on the content of the 3/13 Fax Ad, *etc.* The identity of the John Doe defendants is not presently known but will be identified through discovery.

FACTS

13. On March 13, 2017, MMS used a telephone facsimile machine, computer, or other device to send a facsimile (“the 3/13 Fax Ad”) to Physicians Healthsource. A copy of the 3/13 Fax Ad is attached hereto as Exhibit A.

14. The 3/13 Fax Ad touts the commercial availability and quality of NEJM Knowledge+.

15. NEJM Knowledge+ is a product of NEJM Group, which is a division of MMS.

16. On information and belief, MMS receive some or all of the revenues from the sale of NEJM Knowledge+. Likewise, MMS profits and benefits from the sale of NEJM Knowledge+.

17. Physicians Healthsource did not give prior express invitation or permission to MMS to transmit the 3/13 Fax Ad to Physicians Healthsource via its office facsimile machine.

18. On information and belief, MMS faxed the same and other unsolicited facsimiles to Physicians Healthsource and at least forty other recipients or sent the same and other advertisements by fax without first receiving the recipients' express invitation or permission and/or without having an established business relationship as defined by the JFPA and its regulations.

19. There is no reasonable means for Physicians Healthsource (or any other class member) to avoid receiving unauthorized faxes. Fax machines are left on and ready to receive the communications their owners desire to receive.

CLASS ACTION ALLEGATIONS

20. In accordance with Fed. R. Civ. P. 23(b)(1), (b)(2) and (b)(3), Physicians Healthsource brings this class action pursuant to the JFPA on behalf of the following classes of persons:

All persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising the commercial availability or quality of any property, goods, or services by or on behalf of MMS, (3) from whom MMS did not obtain prior express invitation or permission to send advertisements via facsimile, or (4) with whom MMS did not have an established business relationship, or (5) where the fax advertisements do not include an opt-out notice compliant with 47 C.F.R. § 64.1200(a)(4)(iii).

Physicians Healthsource seeks to certify a class that includes but is not limited to the 3/13 Fax Ad and reserves the right to amend the class definition upon completion of class certification discovery.

18. Numerosity: Advertisements, including those transmitted via facsimile, are typically broadcast to hundreds if not thousands of persons. Based on information, belief, and its general appearance, the 3/13 Fax Ad was sent to over forty persons. The joinder of such a large group of persons in a single lawsuit would be impracticable.

19. Commonality: Common questions of law and fact apply to the claims of the putative class members. These include the following:

- (a) Whether the 3/13 Fax Ad constitutes an “unsolicited advertisement” within the meaning of the JFPA;
- (b) Whether the opt-out notice on the 3/13 Fax Ad complies with the requirements of the JFPA;
- (c) Whether MMS violated the JFPA and the regulations promulgated thereunder with regard to the 3/13 Fax Ad; and
- (d) Whether MMS sent the 3/13 Fax Ad intentionally, knowingly, or willfully.

20. Typicality: Physicians Healthsource claim is typical of the claims of the putative class members. Physicians Healthsource is asserting the same claim under the same federal statute as the other members of the putative class. Physicians Healthsource is also seeking the same relief for itself and the other members of the putative class.

21. Adequacy: Physicians Healthsource will fairly and adequately represent the interests of the putative class members. Physicians Healthsource has no interests in conflict with the putative class members, has the resources and inclination to prosecute this action to completion, and has retained experienced counsel to assist it in doing so.

22. Predominance: The questions of law and fact common to the putative class members predominate over any questions affecting only individual members because:

- (a) Physicians Healthsource's claim depends on the same factual and legal issues as that of the putative class members;
- (b) the evidence supporting MMS's likely defenses will come solely from MMS's own records and will not require any information or inquiries from individual class members;
- (c) the damages for all putative class members are set by statute and will, therefore, be the same for each and every member of the putative class; and
- (d) the identity of the putative class members can be readily ascertained from MMS or its agents' computer records, phone records, or other business records.

23. Superiority: A class action would be superior to individual actions by the putative class members for the following reasons:

- (a) the damages suffered by any one class member are too low to justify a stand-alone lawsuit;
- (b) the JFPA contains no provision for awarding attorney fees. As such, individual claimants would, as a practical matter, have to proceed *pro se* against a large, sophisticated defendant;
- (c) many of the putative class members are legal entities that would not be permitted to proceed in court *pro se*; and
- (d) the evidence concerning each of putative class member's claims is so similar that the adjudication of each on an individual basis would be repetitive, inefficient, and wasteful.

VIOLATION OF THE JUNK FAX PREVENTION ACT

24. Under the JFPA, it is "unlawful for any person to . . . use any telephone facsimile machine, computer or other device to send, to a telephone facsimile machine, an unsolicited advertisement . . ." 47 U.S.C. 227(b)(1)(C).

25. Under the JFPA, "the term "unsolicited advertisement" means any material

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

26. **Opt-Out Notice Requirements.** The JFPA strengthened the prohibitions against the sending of unsolicited advertisements by requiring, in § (b)(1)(C)(iii) of the JFPA, that senders of faxed advertisements place a clear and conspicuous notice on the first page of the transmission that contains the following among other things (hereinafter collectively the "Opt-Out Notice Requirements"):

- (a) A statement that the recipient is legally entitled to opt-out of receiving future faxed advertisements – knowing that he or she has the legal right to request an opt-out gives impetus for recipients to make such a request, if desired;
- (b) A statement that the sender must honor a recipient's opt-out request within 30 days and the sender's failure to do so is unlawful – thereby encouraging recipients to opt-out, if they did not want future faxes, by advising them that their opt-out requests will have legal "teeth";
- (c) A statement advising the recipient that he or she may opt-out with respect to all of his or her facsimile telephone numbers and not just the ones that receive a faxed advertisement from the sender – thereby instructing a recipient on how to make a valid opt-out request for all of his or her fax machines;
- (d) The opt-out language must be conspicuous.

The requirement of (a) above is incorporated from § (b)(D)(ii) of the JFPA. The requirement of (b) above is incorporated from § (b)(D)(ii) of the JFPA and the rules and regulations of the Federal Communications Commission (the "FCC") in ¶ 31 of its 2006 Report and Order (*In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act, Junk Prevention Act of 2005*, 21 F.C.C.R. 3787, 2006 WL 901720, which rules

and regulations took effect on August 1, 2006). The requirements of (c) above are contained in § (b)(2)(E) of the JFPA and incorporated into the Opt-Out Notice Requirements via § (b)(2)(D)(ii). Compliance with the Opt-Out Notice Requirements is neither difficult nor costly. The Opt-Out Notice Requirements are important consumer protections bestowed by Congress upon the owners of the telephone lines and fax machines giving them the right, and means, to stop unwanted faxed advertisements.

27. **The Fax.** On March 13, 2017, MMS sent an advertisement via facsimile transmission from telephone facsimile machines, computers, or other devices to the telephone lines and facsimile machines of Physicians Healthsource and members of the proposed class. These faxes constituted advertisements under the JFPA. MMS failed to comply with the Opt-Out Requirements in connection with these faxes. These faxes were transmitted to persons or entities without their prior express invitation or permission. By virtue thereof, MMS violated the JFPA and the regulations promulgated thereunder by sending these faxes via facsimile transmission to Physicians Healthsource and members of the Class. Physicians Healthsource seeks to certify a class which includes these faxes and all others sent during the four years prior to the filing of this case through the present.

28. **MMS' Other Violations.** Physicians Healthsource is informed and believes, and upon such information and belief avers, that during the period preceding four years of the filing of this Complaint and repeatedly thereafter, MMS has sent via facsimile transmission from telephone facsimile machines, computers, or other devices to telephone facsimile machines of members of the proposed class other faxes that constitute advertisements under the JFPA that were transmitted to persons or entities without their prior express invitation or permission. By virtue thereof, MMS violated the JFPA. Physicians Healthsource is informed and believes, and

upon such information and belief avers, that MMS may be continuing to send unsolicited advertisements via facsimile transmission in violation of the JFPA and the regulations promulgated thereunder, and absent intervention by this Court, will do so in the future.

29. The JFPA provides a private right of action to bring this action on behalf of Physicians Healthsource and the proposed class to redress MMS' violations of the JFPA. The JFPA also provides for statutory damages. 47 U.S.C. § 227(b)(3). The JFPA also provides for injunctive relief. *Id.*

30. The JFPA is a strict liability statute, so MMS are liable to Physicians Healthsource and the other class members even if their actions were only negligent.

31. The MMS knew or should have known that (a) Physicians Healthsource and the other class members had not given prior express invitation or permission for MMS or anybody else to fax advertisements about MMS' products, goods, or services; (b) Physicians Healthsource and the other class members did not have an established business relationship with MMS; (c) MMS transmitted advertisements; (d) MMS' faxes did not contain the required Opt-Out Notice; and (e) MMS' transmission of advertisements that did not contain the required opt-out notice or were sent without prior express invitation or permission was unlawful.

32. MMS' actions caused damage to Physicians Healthsource and the other class members. Receiving MMS' junk faxes caused Physicians Healthsource and the other recipients to lose paper and toner consumed in the printing of these faxes. Moreover, MMS faxes used Physicians Healthsource's and the other class members' telephone lines and fax machines. MMS' faxes cost Physicians Healthsource and the other class members time, as Physicians Healthsource and the other class members and their employees wasted their time receiving, reviewing, and routing MMS' unauthorized faxes. That time otherwise would have been spent

on Physicians Healthsource's and the other class members' business activities. MMS' faxes unlawfully interrupted Physicians Healthsource's and other class members' privacy interests in being left alone.

WHEREFORE, Plaintiff Physicians Healthsource, Inc., individually and on behalf of all others similarly situated, demands judgment in its favor and against Defendant The Massachusetts Medical Society and John Does 1-5 as follows:

- (1) that the Court adjudge and decree that the present case may be properly maintained as a class action, appoint Physicians Healthsource as the representative of the class, and appoint Physicians Healthsource's counsel as counsel for the class;
- (2) that the Court award actual or statutory damages to Physicians Healthsource and the other class members for each violation of the JFPA by MMS;
- (3) that the Court enjoin MMS from additional violations of the JFPA; and
- (4) that the Court award pre-judgment interest, post-judgment interest, attorney fees, treble damages, costs, and such other relief as may be just and proper.

Respectfully submitted,

PHYSICIANS HEALTHSOURCE, INC.,
individually and as the representative of a class of
similarly-situated persons,

/s/ Matthew E. Stubbs

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MATTHEW E. STUBBS (0066722)

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Counsel for Physicians Healthsource, Inc.



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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
Physicians Healthsource, Inc.
(b) County of Residence of First Listed Plaintiff Hamilton
(c) Attorneys (Firm Name, Address, and Telephone Number)
George D. Jonson/Matthew E. Stubbs, Montgomery Rennie & Jonson
36 E. Seventh Street, Suite 2100
Cincinnati, OH 45202 (513-241-4722)

DEFENDANTS
The Massachusetts Medical Society, John Does 1-5
County of Residence of First Listed Defendant Middlesex (Massachusetts)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
1 1 Incorporated or Principal Place of Business In This State
2 2 Incorporated and Principal Place of Business In Another State
3 3 Foreign Nation
4 4
5 5
6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, etc.

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District
6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
47 U.S.C. Section 227
Brief description of cause:
Violation of the Telephone Consumer Protection Act

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$
CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY
(See instructions): JUDGE DOCKET NUMBER

DATE 04/06/2017 SIGNATURE OF ATTORNEY OF RECORD s/Matthew E. Stubbs

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Ohio

Physicians Healthsource, Inc.

Plaintiff

v.

The Massachusetts Medical Society

Defendant

Civil Action No. 1:17-cv-225

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) The Massachusetts Medical Society
860 Winter Street
Waltham Woods Corporate Center
Waltham, Massachusetts 02451

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

George D. Jonson
Matthew Stubbs
MONTGOMERY, RENNIE & JONSON
36 East Seventh Street
Cincinnati, OH 45202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. 1:17-cv-225

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify):* _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Massachusetts Medical Society Hit with Junk Fax Class Action](#)
