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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

9 RETINA ASSOCIATES MEDICAL
10 GROUP, INC., individually and on behalf
11 of all others similarly situated,

CLASS ACTION COMPLAINT

12 Plaintiff,

13 v.

14 321 WEST KATELLA, LLC d/b/a
15 MCFADDEN’S RESTAURANT AND
16 SALOON ANAHEIM and d/b/a
17 MCFADDEN’S ANAHEIM,

18 Defendant.

19 Plaintiff Retina Associates Medical Group, Inc., individually and on behalf of all
20 others similarly situated, brings this class action under Rule 23 of the Federal Rules of
21 Civil Procedure against Defendant 321 West Katella, LLC d/b/a McFadden’s
22 Restaurant and Saloon and d/b/a McFadden’s Anaheim for violations of the Telephone
23 Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”), and the regulations promulgated
24 thereunder.

25 **PRELIMINARY STATEMENT**

26 1. Congress first addressed the growing problem of abusive telemarketing
27 practices, including the transmission of unsolicited advertisements via facsimile
28 machines, in the Telephone Consumer Protection Act of 1991 (“TCPA”), Pub. L. No.

1 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227). As the legislative
2 history explained, because facsimile machines “are designed to accept, process, and
3 print all messages which arrive over their dedicated lines,” facsimile advertising
4 imposes burdens on unwilling recipients that are distinct from the burdens imposed by
5 other types of advertising. H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991).

6 2. In 2005, Congress amended the facsimile advertising provisions of the
7 TCPA in the Junk Fax Prevention Act of 2005 (“JFPA”), Pub. L. No. 109-21, 119 Stat
8 359 (2005), among other things, by requiring that an “opt- out” notice be provided on
9 advertisements transmitted by facsimile machines. 47 U.S.C § 227(b)(1)(C)(iii).

10 3. Defendant, or some person authorized to do so on Defendant’s behalf, has
11 routinely and systematically caused to be sent out to Plaintiff and Class Members one
12 or more “blasts” of fax advertisements for products, goods, or services without the
13 proper opt-out notice required by the TCPA and its regulations (“opt-out notice”).

14 4. Defendant’s violation of this procedural right, by sending fax
15 advertisements without the mandated opt-out notice, is sufficient to satisfy the injury in
16 fact requirement for Article III standing analysis. In addition, Plaintiff and members of
17 the proposed class have suffered an invasion of a legally protected interest that is
18 concrete and particularized.

19 5. Plaintiff and Class Members have suffered actual harm as a direct result of
20 Defendant’s transmission of unsolicited fax advertisements in violation of the TCPA.
21 The subject harm caused by Defendant’s conduct is a concrete injury because the
22 unsolicited and violative fax advertisements interfere with the legitimate business
23 enterprise of Plaintiff and Class Members. The injury caused by Defendant’s conduct
24 is particularized because it affects Plaintiff in a personal and individual way. Plaintiff
25 received the fax advertisement from Defendant that is the subject of the instant action.
26 Defendant’s transmission of the subject fax was intrusive and potentially dangerous to
27 Plaintiff. Defendant’s transmission of the unsolicited fax advertisements interfered
28 with Plaintiff’s legitimate business enterprise.

1 6. The TCPA provides a private cause of action for violation of its
2 provisions and violations of the rules promulgated under the Act. Defendant is
3 therefore liable to Plaintiff and the proposed Class of similarly situated persons under
4 the TCPA, and for Class Members and itself individually, Plaintiff seeks an injunction,
5 requiring Defendant to cease all junk faxes and an award of statutory damages to
6 Plaintiff and Class Members, together with costs and reasonable attorneys' fees.

7 **JURISDICTION AND VENUE**

8 7. This Court has federal question subject matter jurisdiction pursuant to 28
9 U.S.C. § 1331 and 47 U.S.C. § 227.

10 8. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(2),
11 because a substantial part of the events or omissions giving rise to the claims in this
12 case occurred in this District.

13 9. The Court has personal jurisdiction over Defendant because it is a
14 Californian company, conducts business in this state, including substantial business in
15 this district, and has committed tortious acts within this state, including conversion of
16 fax recipients' paper, ink, and toner.

17 **PARTIES**

18 10. Plaintiff Retina Associates Medical Group, Inc., is a citizen of the state of
19 California, with its principal place of business in Orange County, California.

20 11. Defendant is a California limited liability company, with its principal
21 address at 400 W. Disney Way, Suite 212, Anaheim, CA 92802.

22 12. Defendant had been registered with the California Secretary of State,
23 under file number 201407910659, to transact business in California, but Defendant is
24 no longer in good standing with the California Secretary of State.

25 13. Defendant operates a restaurant and saloon and has as its website
26 <http://www.mcfaddensanaheim.com/> (last visited Aug. 17, 2017).

27 14. Defendant holds a license, number 546368, from the California
28 Department of Alcoholic Beverage Control.

1 15. Defendant, directly or through other persons acting on its behalf,
2 conspired to, agreed to, contributed to, assisted with, or otherwise caused all of the
3 wrongful acts and omissions, including the dissemination of the junk faxes that are the
4 subject matter of this Complaint.

5 **THE TCPA AND CORRESPONDING REGULATIONS**

6 16. The Telephone Consumer Protection Act of 1991 (“TCPA”), Pub. L. 102-
7 243, § 3(a), added Section 227 to Title 47 of the United States Code, 47 U.S.C. § 227.

8 17. In pertinent part, 47 U.S.C. § 227(b) provides “[i]t shall be unlawful for
9 any person within the United States, or any person outside the United States if the
10 recipient is within the United States . . . to use any telephone facsimile machine,
11 computer, or other device to send an unsolicited advertisement to a telephone facsimile
12 machine.”

13 18. An “unsolicited advertisement” is defined in the TCPA as “any material
14 advertising the commercial availability or quality of any property, goods, or services
15 which is transmitted to any person without that person’s prior express invitation or
16 permission.” 47 U.S.C. § 227(a)(5). Under TCPA regulations, “[t]he term
17 advertisement means any material advertising the commercial availability or quality of
18 any property, goods, or services.” 47 C.F.R. § 64.1200(f)(1).

19 19. In enacting 47 U.S.C. § 227(b), Congress concluded that a prohibition on
20 unsolicited facsimile advertisements is “the *minimum* necessary to protect unwilling
21 recipients from receiving fax messages that are detrimental to the owner's uses of his or
22 her fax machine.” S. Rep. No. 178, 102d Cong., 1st Sess. 6 (1991), 1991 U.S.C.C.A.N
23 1969, 1975-76 (emphasis added).

24 20. Under the TCPA and 47 C.F.R. § 64.1200(a)(3)(iii), the opt-out notice
25 required for unsolicited facsimile advertisements must meet the following criteria:

26 (A) The notice is clear and conspicuous and on the first page of the
27 advertisement;

1 (B) The notice states that the recipient may make a request to the sender of
2 the advertisement not to send any future advertisements to a telephone
3 facsimile machine or machines and that failure to comply, within 30 days,
4 with such a request meeting the requirements under paragraph (a)(4)(v) of
5 this section is unlawful;

6 (C) The notice sets forth the requirements for an opt-out request under
7 paragraph (a)(4)(v) of this section;

8 (D) The notice includes--

9 (1) A domestic contact telephone number and facsimile machine number
10 for the recipient to transmit such a request to the sender; and

11 (2) If neither the required telephone number nor facsimile machine
12 number is a toll-free number, a separate cost-free mechanism including a
13 Web site address or e-mail address, for a recipient to transmit a request
14 pursuant to such notice to the sender of the advertisement. A local
15 telephone number also shall constitute a cost-free mechanism so long as
16 recipients are local and will not incur any long distance or other separate
17 charges for calls made to such number; and

18 (E) The telephone and facsimile numbers and cost- mechanism identified in
19 the notice must permit an individual or business to make an opt-out
20 request 24 hours a day, 7 days a week.

21 **DEFENDANT'S UNLAWFUL COURSE OF CONDUCT**

22 21. Upon information and belief, Defendant has, from prior to the date of the
23 filing of the instant Complaint through the present, systematically and under a uniform
24 policy and procedure sent or arranged to be sent hundreds, or thousands, of fax
25 advertisements, advertising the commercial availability or quality of any property,
26 goods, or services, to fax machines in California, including those of Plaintiff and Class
27 Members, which did not contain proper opt-out notices under by the TCPA.
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1 22. The fax advertisements that Defendant caused to be sent contain
2 preprinted, standardized text and format.

3 23. Defendant's advertising by fax was not sporadic or unorganized, but
4 instead was part of a well-organized mass advertising tactic and campaign.

5 24. All of Defendant's unsolicited fax ads must have the required opt-out
6 notice, which uniformly they did not. Each fax advertisement sent to Plaintiff and to
7 each Class Member routinely failed to include the opt-out notice required by the TCPA
8 and its regulations.

9 25. An exemplar of one of the fax advertisements that Defendant sent or
10 caused to be sent to Plaintiff and Class Members is attached hereto as **Exhibit A**.

11 26. The opt-out notice in Exhibit A lacks a fax number.

12 27. Upon information and belief, Defendant's sending of the foregoing fax
13 and others, or Defendant's causing them to be sent, was conscious and deliberate.
14 Defendant either directly participated in sending the faxes itself or an agent or
15 contractor or third party did so on Defendant's behalf with Defendant's knowledge.

16 28. Upon information and belief, Defendant's sending of the faxes or its
17 causing them to be sent was performed without due care; with reckless disregard
18 concerning the rights and obligations under the TCPA; or when Defendant had reason
19 to know, or should have known, that its conduct or the conduct of those acting on its
20 behalf could constitute a violation of the statute.

21 29. Upon information and belief, Defendant's course of conduct set out above
22 is ongoing and adverse to the public interest and the policies underlying the TCPA.
23 Unless enjoined and restrained by an order of this Court, Defendant will continue to
24 engage in the unlawful acts and practices set out herein. Such actions and conduct by
25 Defendant have violated the TCPA rights of Plaintiff and Class Members and
26 Defendant's duties to them under the TCPA, and unless enjoined by the Court
27 Defendant will continue to aggrieve Plaintiff and Class Members and others in the
28 future.

1 **FACTS CONCERNING THE REPRESENTATIVE PLAINTIFF**

2 30. Plaintiff still has and had, at all relevant times to this action, telephone
3 facsimile service at (714) 633-7470 at its place of business at 436 South Glassell St.,
4 Orange, CA 92666.

5 31. Plaintiff receives facsimile transmissions (“faxes”) at this number, using a
6 telephone facsimile machine (“fax machine”).

7 32. On May 17, 2017, Defendant, without Plaintiff’s express invitation or
8 permission, arranged for or caused a telephone facsimile machine, computer, or other
9 device to send an unsolicited fax advertisement, advertising the commercial
10 availability or quality of any property, goods, or services, to Plaintiff’s fax machine
11 located at its principal place of business. A copy of the fax advertisement is attached
12 hereto as **Exhibit A** and is incorporated herein by reference.

13 33. **Exhibit A** was wholly unsolicited in that Defendant sent it to Plaintiff
14 without Plaintiff’s express invitation or permission. In addition, as stated above,
15 **Exhibit A** does not contain the opt-out notice required by the TCPA.

16 34. **Exhibit A** identifies property, goods, or services advertised by Defendant,
17 including an open bar and a happy hour.

18 35. **Exhibit A** is not the only recent unsolicited faxed advertisement from
19 Defendant to Plaintiff.

20 **CLASS ACTION ALLEGATIONS**

21 36. Plaintiff brings this class action under Rule 23(a), (b)(2), and (b)(3) of the
22 Federal Rules of Civil Procedure on behalf of itself and of a similarly situated “Class”
23 or “Class Members” defined as:

24 All persons in California who on or after four years prior to the filing of
25 this action, (1) were sent by or on behalf of Defendant a telephone
26 facsimile message of material advertising the commercial availability or
27 quality of any property, goods, or services, (2) with respect to whom
28 Defendant cannot provide evidence of prior express invitation or
permission for the sending of such fax or (3) with whom Defendant did
not have an established business relationship, and (4) the fax identified in
subpart (1) of this definition (a) did not display a clear and conspicuous
opt-out notice on the first page stating that the recipient may make a

1 request to the sender of the advertisement not to send any future
2 advertisements to a telephone facsimile machine or machines and that
3 failure to comply, within 30 days, with such a request meeting the
4 requirements under 47 C.F.R. § 64.1200(a)(4)(v) is unlawful, (b) lacked a
5 telephone number for sending the opt-out request, or (c) lacked a facsimile
6 number for sending the opt-out request.

7 Excluded from the Class Defendant, its employees, agents, and members
8 of the federal judiciary.

9 37. This action has been brought and may properly be maintained as a class
10 action against Defendant pursuant to Rule 23 of the Federal Rules of Civil Procedure
11 because there is a well-defined community of interest in the litigation and the proposed
12 Class is easily ascertainable. Plaintiff reserves the right to amend the Class definition if
13 discovery and further investigation reveal that any Class should be expanded or
14 otherwise modified.

15 38. **Numerosity:** At this time, Plaintiff does not know the exact number of
16 Class Members, but among other things, given the nature of the claims and that
17 Defendant's conducted consisted of a standardized fax campaign and widely
18 disseminated standardized fax electronically sent to particular telephone numbers,
19 Plaintiff believes, at a minimum, there are hundreds of Class Members. Plaintiff
20 believes that the Class is so numerous that joinder of all members of the Class is
21 impracticable and the disposition of their claims in a class action rather than
22 incremental individual actions will benefit the Parties and the Court by eliminating the
23 possibility of inconsistent or varying adjudications of individual actions.

24 39. Upon information and belief, a more precise Class size and the identities
25 of the individual members thereof are ascertainable through Defendant's records,
26 including, but not limited to Defendant's fax and marketing records.

27 40. Members of the Class may additionally or alternatively be notified of the
28 pendency of this action by techniques and forms commonly used in class actions, such
as by published notice, e-mail notice, website notice, fax notice, first class mail, or

1 combinations thereof, or by other methods suitable to this class and deemed necessary
2 or appropriate by the Court.

3 **41. Existence and Predominance of Common Questions of Fact and Law:**

4 There is a well-defined community of common questions of fact and law affecting the
5 Plaintiff and members of the Class. Common questions of law or fact exist as to all
6 members of the Class and predominate over the questions affecting individual Class
7 members. These common legal and/or factual questions include, but are not limited to,
8 the following:

9 (a) Whether Defendant or someone acting on Defendant's behalf sent fax
10 advertisements promoting the commercial availability or quality of any property,
11 goods, or services to Plaintiff and Class Members and the legal relationship
12 between Defendant and any person sending those faxes on its behalf;

13 (b) Whether the fax advertisements sent to Plaintiff and Class Members were
14 sent via mass or organized advertising campaigns and how Defendant acquired
15 the names and fax numbers of Plaintiff and Class Members;

16 (c) Whether the fax advertisements sent to Plaintiff and Class Members
17 contained the opt-out notice required by the TCPA and its regulations;

18 (d) Whether the fax advertisements sent to Plaintiff and Class Members
19 violate the TCPA and its regulations;

20 (e) Whether Defendant willfully or knowingly violated the TCPA or the rules
21 prescribed under it;

22 (f) Whether Plaintiff and the members of the Class are entitled to statutory
23 damages, treble damages, and attorney fees and costs for Defendant's acts and
24 conduct;

25 (g) Whether Plaintiff and members of the Class are entitled to statutory
26 damages per facsimile or per violation of the TCPA and its regulations; and
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1 (h) Whether Plaintiff and members of the Class are entitled to a permanent
2 injunction enjoining Defendant from continuing to engage in its unlawful
3 conduct.

4 42. One or more questions or issues of law or fact regarding Defendant's
5 liability are common to all Class Members and predominate over any individual issues
6 that may exist and may serve as a basis for class certification under Rule 23(c)(4).

7 43. **Typicality:** Plaintiff's claims are typical of the claims of the members of
8 the Class. The claims of the Plaintiff and members of the Class are based on the same
9 legal theories and arise from the same course of conduct that violates the TCPA.

10 44. Plaintiff and members of the Class each received at least one fax
11 advertisement, advertising the commercial availability or quality of any property,
12 goods, or services, which contained no opt-out notice with a facsimile number, which
13 Defendant sent or caused to be sent to Plaintiff and the members of the Class.

14 45. **Adequacy of Representation:** Plaintiff is an adequate representative of
15 the Class because Plaintiff's interests do not conflict with the interests of the members
16 of the Class. Plaintiff will fairly, adequately and vigorously represent and protect the
17 interests of the members of the Class and has no interests antagonistic to the members
18 of the Class. Plaintiff has retained counsel competent and experienced in litigation in
19 the federal courts, TCPA litigation, and class-action litigation.

20 46. **Superiority:** A class action is superior to other available means for the
21 fair and efficient adjudication of the claims of the Class. While the aggregate damages
22 which may be awarded to the members of the Class are likely to be substantial, the
23 damages suffered by individual members of the Class are relatively small. As a result,
24 the expense and burden of individual litigation makes it economically infeasible and
25 procedurally impracticable for each member of the Class to individually seek redress
26 for the wrongs done to them. Plaintiff does not know of any other litigation concerning
27 this controversy already commenced against Defendant by any member of the Class.
28 The likelihood of the individual members of the Class prosecuting separate claims is

1 remote. Individualized litigation would also present the potential for varying,
2 inconsistent or contradictory judgments, and would increase the delay and expense to
3 all parties and the court system resulting from multiple trials of the same factual issues.
4 In contrast, the conduct of this matter as a class action presents fewer management
5 difficulties, conserves the resources of the parties and the court system, and would
6 protect the rights of each member of the Class. Plaintiff knows of no difficulty to be
7 encountered in the management of this action that would preclude its maintenance as a
8 class action.

9 47. **Class-Wide Injunctive Relief and Rule 23(b)(2):** Moreover, as an
10 alternative to or in addition to certification of the Class under Rule 23(b)(3), class
11 certification is warranted under Rule 23(b)(2) because Defendant have acted on
12 grounds generally applicable to Plaintiff and members of Class, thereby making
13 appropriate final injunctive relief with respect to Plaintiff and Class Members as a
14 whole. Plaintiff seeks injunctive relief on behalf of Class Members on grounds
15 generally applicable to the entire Class in order to enjoin and prevent Defendant's
16 ongoing violations of the TCPA, and to order Defendant to provide notice to them of
17 their rights under the TCPA to statutory damages and to be free from unwanted faxes.

18 **COUNT I**

19 **Telephone Consumer Protection Act**

20 **(Violation of 47 U.S.C. § 227)**

21 48. Plaintiff repeats each and every allegation contained in all of the above
22 paragraphs and incorporates such allegations by reference.

23 49. Plaintiff brings this action individually and on behalf of the Class defined
24 above against Defendant for violation of the TCPA and the rules prescribed under it by
25 the FCC.

26 50. At all times material to this action, Defendant was a person that used or
27 caused to be used a “telephone facsimile machine, computer, or other device” to send,
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1 to a “telephone facsimile machine” an “unsolicited advertisement” or an
2 “advertisement” within the meaning of the TCPA and its regulations.

3 51. Defendant sent or caused to be sent hundreds or thousands of these
4 advertisements exemplified by Exhibit A. Plaintiff and each Class Members received
5 at least one of them.

6 52. Each of the foregoing unsolicited advertisements violated the TCPA
7 because they failed to contain the opt-out notice required by 47 U.S.C §
8 227(b)(1)(C)(iii); 47 C.F.R. § 64.1200(a)(4)(iv); and 47 C.F.R. § 64.1200(a)(4)(iii).

9 53. Accordingly, Plaintiff and the members of the Class are entitled to
10 statutory damages under 47 U.S.C. § 227(b).

11 54. If it is found that Defendant willfully or knowingly sent or caused to be
12 sent fax advertisements to Plaintiff and the members of Class in violation of the TCPA,
13 Plaintiff requests an increase by the Court of the damage award against Defendant,
14 described in the preceding paragraph, to three times the amount available under 47
15 U.S.C. § 227(b)(3)(B), as authorized by 47 U.S.C. § 227(b)(3) for willful or knowing
16 violations.

17 55. Furthermore, Plaintiff and members of the Class are entitled to an order
18 enjoining Defendant’s violations of the TCPA under 47 U.S.C. § 227(b), because:
19 Defendant has violated their TCPA rights and Defendant’s duties owed to them under
20 the statute; Defendant’s violations continue and will continue to violate the statutory
21 rights of Plaintiff and Class Members and others in the future; there is no fully
22 adequate remedy at law for Defendant’s conduct; irreparable injury will be suffered
23 unless an injunction is issued to stop Defendant from violating the TCPA; any potential
24 injury to Defendant attributable to an injunction is outweighed by the injury that
25 Plaintiff and Class Members and the public will suffer if such injunction is not issued;
26 and the injunction would not be adverse to the public interest.

27 **WHEREFORE**, Plaintiff prays that the Court enter judgment in favor of it and
28 the Class and against Defendant for:

- 1 A. An order certifying the Class under Rule 23(a); and Rule 23 (b)(2), (b)(3)
- 2 or both, or as to particular issues under Rule 23(c)(4); and appointing
- 3 Plaintiff as the representative of the Class; and appointing Plaintiff's
- 4 counsel as counsel for the Class;
- 5 B. An award to Plaintiff and the members of the Class of statutory damages
- 6 pursuant to 47 U.S.C. § 227(b)(3), for each of Defendant's violations of
- 7 that statute.
- 8 C. If it is found that Defendant willfully or knowingly sent or caused to be
- 9 sent fax advertisements to the Class in violation of the TCPA, an increase
- 10 by the Court of the award of statutory damages pursuant to 47 U.S.C. §
- 11 227(b) prayed for to three times that amount described in the previous
- 12 paragraph, as authorized by 47 U.S.C. § 227(b)(3), for willful or knowing
- 13 violations.
- 14 D. An injunction against Defendant, prohibiting Defendant from committing
- 15 further violations of the TCPA and the regulations promulgated
- 16 thereunder;
- 17 E. An award of attorney's fees and costs; and,
- 18 F. Such other and further relief as the Court may deem just and proper.

19 **JURY DEMAND**

20 Plaintiff requests a trial by jury.

21 **DOCUMENT PRESERVATION DEMAND**

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23 Plaintiff demands that Defendant take affirmative steps to preserve all records,
24 lists, electronic databases or other itemization of telephone or fax numbers associated
25 with Defendant and the communication or transmittal of faxed advertisements.
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1 Dated: November 21, 2017

Respectfully submitted,

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3 /s/ Seth M. Lehrman

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5 **EDWARDS POTTINGER, LLC.**

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9 *Attorney for Plaintiff*

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Exhibit A

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Exhibit A

FRIDAY, MAY 19th 2017

Congratulations your office has won an

**ON THE HOUSE
OPEN BAR**

Between 6-9pm at



PLEASE RSVP

Located @ Anaheim Gardenwalk

The best happy hour in Anaheim

To RSVP call Mary at 657.201.3924

Or email her at mary@mcfaddensanaheim.com

McFadden's Anaheim

400 W. Disney Way

657-201-3924 | www.McFaddensAnaheim.com | F:McFaddensAnaheim | IG:@McFaddensanaheim

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