

**UNITED STATES DISTRICT COURT
FOR DISTRICT OF MASSACHUSETTS**

KENNETH A. THOMAS MD, LLC, a
Connecticut limited liability company,
individually and on behalf of all others
similarly situated,

Plaintiff,

v.

BEST DOCTORS, INC.,

Defendant.

Case No. 1:18-cv-10957-DPW

ANSWER TO AMENDED CLASS ACTION COMPLAINT

Pursuant to Federal Rule of Civil Procedure 8, defendant Best Doctors, Inc. (“**Best Doctors**”), by and through undersigned counsel, generally denies all of the averments in plaintiff Kenneth A. Thomas MD, LLC’s (“**Plaintiff**”) Amended Putative Class Action Complaint (“**Complaint**”), except for those averments specifically admitted herein. In doing so, Best Doctors replies specifically to the correspondingly numbered paragraphs in the Complaint as follows:

NATURE OF THE ACTION

1. This paragraph recites the reasons why Plaintiff allegedly filed this action, to which no response is required. Best Doctors, however, denies that it sent unsolicited faxes to doctors’ offices in violation of the Telephone Consumer Protection Act. Exhibit A speaks for itself. To the extent this paragraph contains any factual averments or allegations that are inconsistent with this Answer or any Defense, Best Doctors denies such averments and allegations.

2. The faxes referred to in this paragraph speak for themselves. Best Doctors denies that there are “advertising related reasons” that Best Doctors sends the faxes.

3. The first sentence of this paragraph contains a legal conclusion to which no response is required. Also, the facsimiles referred to in this paragraph speak for themselves. The information packet cited in this paragraph speaks for itself. Best Doctors denies the remainder of this paragraph, including that Plaintiff is a potential direct customer and was sent the facsimile to become a Best Doctor's employer member and that Best Doctors would have provided Plaintiff with "complimentary" access to Best Doctors' list of Best Doctors physicians for Plaintiff's "professional and personal use" if Dr. Kenneth A. Thomas responded to the fax.

4. Denied. The information packet cited in this paragraph speaks for itself.

5. Denied.

6. Denied.

7. This paragraph contains legal conclusions to which no response is required. To the extent this paragraph contains any factual averments or allegations that are inconsistent with this Answer or any Defense, Best Doctors denies such averments and allegations.

8. This paragraph contains legal conclusions to which no response is required. To the extent this paragraph contains any factual averments or allegations that are inconsistent with this Answer or any Defense, Best Doctors denies such averments and allegations.

9. This paragraph recites the reasons why Plaintiff allegedly filed this action, to which no response is required. To the extent this paragraph contains any factual averments or allegations that are inconsistent with this Answer or any Defense, Best Doctors denies such averments and allegations.

PARTIES

10. Best Doctors is without knowledge or information sufficient to form a belief as to the truth of the averments in this paragraph.

11. Admitted.

JURISDICTION & VENUE

12. Admitted.

13. Admitted.

COMMON FACTUAL ALLEGATIONS

14. Best Doctors is a global benefits provider that provides services to consumers and organizations (“Members”) and sells Best Doctors’ branded goods to doctors included in the Best Doctors database. These services include providing Members access to a network of physicians selected as the best in their field by their peers. Otherwise denied as stated.

15. Denied.

16. Denied.

17. The facsimiles referred to in this paragraph speak for themselves. Otherwise, denied.

18. The website cited in this paragraph speaks for itself. Otherwise, denied.

19. The first sentence is denied. As to the second sentence, the information packet cited in this paragraph speaks for itself. Otherwise, denied.

20. The webpage cited in this paragraph speaks for itself. Otherwise, denied.

21. The information packet cited in this paragraph speaks for itself. Otherwise, denied.

22. The press release and information packet cited in this paragraph speak for themselves. Otherwise, denied.

23. Denied.

24. The webpage cited in this paragraph speaks for itself. Otherwise, denied.

25. Denied.

26. The fax, information packet, and agreement cited in this paragraph speak for themselves. Otherwise, denied.

27. Denied.

28. The faxes referred to in this paragraph speak for themselves. Otherwise, denied.

29. Denied.

30. Admitted.

FACTS SPECIFIC TO PLAINTIFF THOMAS¹

31. Best Doctors admits that, on or about May 16, 2017, it used a telephone facsimile machine to send a single fax to Dr. Kenneth A. Thomas. Best Doctors denies the remaining allegations and averments in this paragraph, including that it sent any fax to Plaintiff and that the faxes attached as Exhibit A to the Complaint are “true and accurate copies” of the fax sent to Dr. Kenneth A. Thomas on May 16, 2017. Further, Best Doctors states that “Plaintiff Thomas” is not a party to the above-captioned action.

32. Denied.

33. Denied. Further, Best Doctors states that “Plaintiff Thomas” is not a party to the above-captioned action.

34. The facsimiles referred to in this paragraph speak for themselves. Otherwise, denied.

CLASS ACTION ALLEGATIONS

35. This paragraph recites Plaintiff’s description of the Complaint and this action and of who should be included and excluded from the putative class, to which no response is required. To the extent this paragraph contains any factual averments or allegations that are inconsistent

¹ “Plaintiff Thomas” is not a party to the above-captioned action.

with this Answer or any Defense, Best Doctors denies such averments and allegations. Further, Best Doctors states that “Plaintiff Thomas” is not a party to the above-captioned action.

36. Best Doctors is without knowledge or information sufficient to form a belief as to the truth of the averments in the first sentence of this paragraph, but states that the putative class cannot be certified in this action. Best Doctors denies the remainder of this paragraph.

37. Denied.

38. Denied.

39. Denied as to the averments about Plaintiff. As to the averments about counsel, Best Doctors is without knowledge or information sufficient to form a belief as to the truth of those averments.

40. Denied.

41. Denied.

FIRST CAUSE OF ACTION
Violation of 47 U.S.C. § 227
(On Behalf of Plaintiff and the Class)

42. Best Doctors incorporates by reference its responses to paragraphs 1-41 as though fully set forth herein.

43. The statute cited in this paragraph speaks for itself.

44. The statute cited in this paragraph speaks for itself.

45. Denied.

46. Denied.

47. Denied.

48. Denied.

49. Denied.

50. Denied.

DEFENSES

Best Doctors asserts that Plaintiff's claims should be denied, in whole or in part, by the defenses set forth below. By setting forth the following affirmative and other defenses, Best Doctors does not concede that it should bear the burden of proof or persuasion on any of the defenses. Also, Best Doctors asserts that some of the allegations and claims in the Complaint are vague and, as a result, Best Doctors is not able to ascertain what, if any, other defenses may be available to deny those allegations and claims in whole or in part. Therefore, Best Doctors hereby gives notice that it intends to rely on additional defenses that become available or apparent during discovery and reserves the right to amend this Answer to assert such additional defenses. Furthermore, Best Doctors asserts the following affirmative defenses to with respect to the Plaintiff's individual claims and putative class-action claims to the extent any class is certified, which Best Doctors will oppose. If the Court certifies a class in this case over Best Doctors' opposition, then Best Doctors asserts these defenses against each and every member of the certified class.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff and/or the putative class members lack standing because they have not incurred any monetary damages or other injury.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's class-wide claims should be dismissed, in whole or part, because the putative class is overly broad as it would include persons who: (a) suffered no injury at all; (b) consented

to the transmission of the subject facsimile; and/or (c) had an established business relationship with Best Doctors. Also, the proposed class-definition defines an impermissible fail-safe class and impermissibly attempts to shift the burden of proof to Best Doctors in that it seeks to impose liability on Best Doctors should Best Doctors not have “a record of prior express consent” to send the subject facsimiles.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff’s class-wide claims should be dismissed, in whole or part, as Plaintiff is not an adequate class representative.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff’s and/or the putative class members’ claims are barred, in whole or in part, to the extent Plaintiff and/or the putative class members consented to the transmission of the subject facsimile.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff’s and/or the putative class members’ claims are barred, in whole or in part, because Plaintiff and/or the putative class members had an established business relationship with Best Doctors.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff’s and/or the putative class members’ claims are barred, in whole or part, because Best Doctors’ actions were taken in good faith, including Best Doctors’ reliance on information provided by facsimile recipients, and with a reasonable belief that such actions were legal, appropriate and necessary. The conduct alleged to be in violation of a statute, if any such conduct occurred, was purely unintentional, and occurred, if at all, despite Best Doctors’ reasonable and appropriate efforts to avoid any such violation.

EIGHTH AFFIRMATIVE DEFENSE

This action cannot properly be maintained as a class action because Plaintiff cannot satisfy the requirements of Fed. R. Civ. P. 23 and the case law decided thereunder, including, without limitation: (a) Plaintiff cannot establish the necessary procedural elements for class action treatment; (b) a class action is not an appropriate method for the fair and efficient adjudication of the claims described in the Complaint and is not superior to other available methods; (c) there is no commonality between Plaintiff and the putative members of the class it seeks to represent; (d) common issues of fact or law do not predominate, and, to the contrary, individual issues predominate; (e) Plaintiff's claims are not representative or typical of those of the putative class; (f) Plaintiff is not an adequate or proper class representative; (g) the putative class Plaintiff seeks to represent is not so numerous as to render joinder of all members impracticable; (h) Plaintiff cannot satisfy any of the requirements for class action treatment, and class action treatment is neither appropriate nor constitutional; and (i) the alleged putative class is not ascertainable and its members are not identifiable.

NINTH AFFIRMATIVE DEFENSE

Certification of a class, as applied to the facts and circumstances of this case, would constitute a denial of Best Doctors' procedural rights and right to trial by jury and to substantive and procedural due process, in violation of the Fourteenth Amendment of the United States Constitution.

TENTH AFFIRMATIVE DEFENSE

Any award of punitive or statutory damages against Best Doctors would be unconstitutional because it would violate both the Due Process Clause of the Fourteenth

Amendment to the United States Constitution and the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's and/or the putative class members' claims are barred, in whole or in part, by the doctrine of primary jurisdiction.

TWELFTH AFFIRMATIVE DEFENSE

To the extent that Plaintiff and/or any putative class may seek recovery of attorneys' fees or costs, such fees or costs are not recoverable under the TCPA.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's and/or the putative class members' claims are barred because the facsimiles at issue are not unsolicited advertisements under the TCPA or, to the extent they contain any advertising, such advertising is incidental to the primary purpose of the facsimile, which is to obtain information and provide notice to recipients of their nomination by their peers to be a "best doctor."

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff's and/or the putative class members' claims are barred because facsimile number(s) were obtained from a directory, advertisement, or site on the Internet to which the recipient(s) voluntarily agreed to make available their facsimile numbers for public distribution.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's and/or the putative class members' claims are subject to arbitration.

WHEREFORE, Best Doctors respectfully requests that judgment enter dismissing the Complaint, with prejudice, and that Best Doctors be awarded its reasonable costs and attorneys' fees from this action, together with whatever further relief this Court deems just and equitable.

Dated: December 7, 2018

Respectfully submitted,

BEST DOCTORS, INC.

By its attorneys,

/s/ Emily H. Bryan

David G. Thomas (BBO # 640854)

James Ponsetto (BBO # 556144)

Emily H. Bryan (BBO # 687935)

Greenberg Traurig, LLP

One International Place, Suite 2000

Boston, MA 02110

Tel: (617) 310-6000

Fax: (617) 310-6001

thoamsda@gtlaw.com

ponsettoj@gtlaw.com

bryane@gtlaw.com

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and that paper copies will be sent all those non-registered participants on December 7, 2018.

/s/ Emily H. Bryan