

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

**DR. BARRY SARTIN**

**Plaintiff,**

**V.**

**EKF DIAGNOSTICS, INC. & STANBIO  
LABORATORY, L.P.**

**Defendants.**

\* **CIVIL ACTION 2:16-cv-01816**  
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\* **JUDGE SARAH S. VANCE**  
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\* **MAGISTRATE WILKINSON**  
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**PLAINTIFF’S OPPOSITION TO DEFENDANTS’ CONSOLIDATED  
MOTION TO DISMISS OR MOTION TO STRIKE**

**NOW INTO COURT**, through undersigned counsel, comes Plaintiff, Dr. Barry W. Sartin, M.D., who respectfully requests that this Court deny the Consolidated Motion to Dismiss or Motion to Strike filed by Defendants, EKF Diagnostics, Inc. and Stanbio Laboratory, L.P. (hereinafter collectively referred to as “EKF”), for the following reasons:

**FACTS**

The facts of this case are simple and straightforward. On September 24, 2015, Dr. Barry Sartin received an unsolicited fax advertisement sent by defendants, EKF. The fax sent to Dr. Sartin contained no opt out whatsoever. The defendants claim the fax was addressed and sent to East Jefferson General Hospital; however, this is incorrect. An examination of the fax itself makes clear that the fax was intended for Dr. Sartin, which is made abundantly clear when one examines the body of the fax. After the headers and the subject line, the body of the fax begins, “Dear Dr. Sartin.” As will be explained in greater detail below, Dr. Sartin was a recipient of the fax, was damaged by being sent the junk fax, and he has standing to bring the present claim

under the TCPA.

The defendants further take issue with the plaintiff's allegation that defendants sent faxes to "thousands of persons or entities." While plaintiff makes those allegations on information and belief at present, it is not unreasonable to conclude that defendants likely sent similar unsolicited junk faxes to other similarly situated individuals or entities, as plaintiff never requested the September 24, 2015 fax. The defendants also make the unsupported claim in their factual summary that East Jefferson General Hospital requested the fax and further requested Dr. Sartin's name be placed on same. While this is immaterial for the present TCPA claim due to the complete lack of an opt out, it should be noted that plaintiff disputes this allegation and does not believe the hospital or anyone affiliated with the hospital requested the September 24, 2015 fax be sent or that Dr. Sartin be named as a recipient of same.

Lastly, the defendants claim that Dr. Sartin does not allege any injury or damages arising from his receipt of the fax separate and apart from his statutory claim; this is simply wrong. At paragraph twenty-six of his Complaint, it is alleged that by violating provisions of the TCPA, defendants "caus[ed] Plaintiff and Plaintiff Class to sustain statutory damages, **in addition to actual damages, including but not limited to those contemplated by Congress and the FCC.**" Accordingly, Dr. Sartin has alleged actual damages beyond the statutory damages allowed for by the TCPA, despite defendants' claim to the contrary.

### **ARGUMENT**

#### **I. Plaintiff has alleged actual damages and has Article III standing.**

The defendants first argue that Dr. Sartin's claims must be dismissed because he has not alleged any actual damages. This is simply untrue. Dr. Sartin's time was wasted by the junk fax, an actual damage beyond the statutory violation of the TCPA, and a claim for actual damages

was specifically pled in paragraph twenty-six of plaintiff's petition. The Sixth Circuit has squarely addressed the issue of standing under the TCPA and the issue of damages:

... unsolicited fax advertisements impose costs on all recipients, irrespective of ownership and the cost of paper and ink, because such advertisements waste the recipients' time and impede the free flow of commerce. *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684 (7th Cir.2013) (“Even a recipient who gets the fax on a computer and deletes it without printing suffers *some* loss: the value of the time necessary to realize that the inbox has been cluttered by junk.”) (emphasis in original); *Owners Ins. Co. v. European Auto Works, Inc.*, 695 F.3d 814, 820 (8th Cir.2012) (explaining that the TCPA was intended in part to “keep[ ] telephone lines from being tied up” by unsolicited fax advertisements); *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 655 (8th Cir.2003) (noting that “unsolicited fax advertising interferes with company switchboard operations and burdens the computer networks of those recipients who route incoming faxes into their electronic mail systems”).<sup>1</sup>

Moreover, the Eleventh Circuit has reached the same conclusion in *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 (11th Cir. 2015)(“Congress created a private right of action for enforcement of violations of the statute in section 227(b)(3) and provided statutory damages for a “junk” fax recipient. TCPA, 47 U.S.C § 227(b)(3) (2006). Notably, a prevailing plaintiff need not have suffered any monetary loss in order to recover statutory damages.”)

In the case at bar, Dr. Sartin wasted valuable time reviewing the fax, time that was taken away from his medical practice and time that he could have otherwise spent performing billable medical procedures. Thus, defendants' argument that any damages such as loss of time belong solely to the hospital is factually incorrect and legally unsupportable. In fact, the Sixth Circuit held:

Recovery under the TCPA's private-right-of-action provision, moreover, is not premised on the ownership of a fax machine. *See* 47 U.S.C. § 227(b)(3); *see also* *Chapman v. Wagener Equities, Inc.*, 747 F.3d 489, 492 (7th Cir.2014) (holding

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<sup>1</sup> *Am. Copper & Brass, Inc. v. Lake City Indus. Products, Inc.*, 757 F.3d 540, 544-45 (6th Cir.2014).

that ownership of a fax machine is not a prerequisite for standing under the TCPA).<sup>2</sup>

Provided the foregoing, plaintiff avers that defendants' motion to dismiss his claim for lack of Article III standing must be denied.

## II. Plaintiff's proposed class is ascertainable.

The defendants next argue that should this Court not dismiss plaintiff's claims for lack of standing, that plaintiff's proposed class allegations are flawed and must be stricken pursuant to Rule 12(f). Defendants then make two arguments related to the class allegations, first they argue the class cannot be ascertained because the hospital's number was faxed while Dr. Sartin was the recipient of the fax, and second, they revive their argument that Dr. Sartin cannot represent the class because he is not the subscriber to the fax line. For the reasons explained more fully below, both of the arguments are without merit.

As to the ascertainability of the proposed class, the Eighth Circuit, in *Sandusky Wellness Center, LLC v. MedTox Scientific, Inc.*, released an opinion on May 3, 2016 that is precisely on point. -- F.3d --, 2016 WL 1743037 (2016). The case involved similar questions of who the proper class members would be if junk faxes were sent to recipients that may not have been the owners of the fax machines or subscribers to the fax lines to which the faxes were transmitted. The Eighth Circuit discussed the issue at length and held as follows:

MedTox urges that—despite the fax logs—there is no possible way to objectively ascertain the class in this case. Sandusky's definition of the class includes all persons who “were sent” the faxes. **MedTox believes that, by this definition, the class cannot be ascertained because multiple persons may claim injury for each fax: the subscriber to the fax number, the owner of the fax machine, (perhaps) a lessee of the fax machine, or any user disrupted by the fax.** *But cf. Chapman v. Wagener Equities, Inc.*, 747 F.3d 489, 492 (7th Cir.2014) (noting that the TCPA does not require ownership of the fax machine but adding “[t]here is no doubt that many of the current class members do own their fax machines.”).

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<sup>2</sup> *Am. Copper & Brass, Inc. v. Lake City Indus. Products, Inc.*, 757 F.3d 540, 544 (6th Cir.2014).

6§ 227(b)(1) (six references to “recipient”). The TCPA does mention the “telephone facsimile machine” but the “recipient” is not the machine, nor is it necessarily the person or entity that owns the machine. *See American Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 757 F.3d 540, 544 (6th Cir.2014) (“Recovery under the TCPA's private-right-of-action provision ... is not premised on the ownership of a fax machine.”); *Chapman*, 747 F.3d at 491 (“But what the Act prohibits is faxing unsolicited fax advertisements ‘to a telephone facsimile machine.’ ... There is no mention of ownership.”). Rather, the recipient is the person or entity that gets the fax. *See* § 227(b)(3) (authorizing a private right of action to a “person or entity” for actual monetary loss or statutory damages due to a violation).

The best objective indicator of the “recipient” of a fax is the person who subscribes to the fax number. *See* § 227(b)(1)(C)(ii)(I) (outlining an exception when the sender “obtained the *number* of the telephone facsimile machine through ... voluntary communication of such *number*, within the context of such established business relationship, from the *recipient* of the unsolicited advertisement”) (emphasis added). **True, the subscriber to the fax number may not be the recipient of the fax. However, fax logs showing the numbers that received each fax are objective criteria that make the recipient clearly ascertainable.** *See American Copper*, 757 F.3d at 545 (finding that “the record in fact demonstrates that the fax numbers are objective data satisfying the ascertainability requirement”); *Chapman*, 747 F.3d at 492 (affirming class certification in a TCPA class action involving 10,145 persons and explaining that recipients “of faxes who don't have rights under the [TCPA] just wouldn't be entitled to share in the damages awarded to the class by a judgment or settlement”). Because the proposed class is clearly ascertainable, the district court abused its discretion in denying class certification.

The Eighth Circuit’s reasoning applies just the same in the present case. The defendants are making the same flawed argument as MedTox, and the class proposed by Dr. Sartin is easily ascertainable, as a review of the fax lists utilized by defendants will allow for identification of all putative class members. Defendants’ argument that it would be administratively unfeasible to review the fax lists and the faxes to determine to whom each fax was addressed is absurd. Through routine discovery this task can be easily accomplished by plaintiff’s counsel and their staff. To suggest that a task will cause “insurmountable administrative problems” simply because

it involves thousands of pages of documents ignores the advances in computer technology and software that make the completion of such tasks fairly straightforward.

The defendants then rehash their argument relative to Dr. Sartin not being a member of the class by arguing again that only the hospital was a subscriber to the fax line and that the class must only include a list of subscribers. For the reasons previously discussed relative to an individual's right of action under the TCPA and the ascertainability of a class of recipients who may not own the fax lines or fax machines involved, Dr. Sartin is clearly a member of the proposed class.

Because neither defendants' argument relative to the ascertainability of the class members nor their argument about Dr. Sartin's membership in the class withstand scrutiny, the proposed class definition should not be stricken.

**III. This case should not be stayed given the United States Supreme Court's recent decision in *Robins v. Spokeo*.**

Defendants have alternatively sought a stay of these proceedings in light of the pending decision in *Robins v. Spokeo*. -- S.Ct.--, 2016 WL 2842447 (2016). However, the United States Supreme Court issued its opinion yesterday (May 16, 2016) vacating the Ninth Circuit's ruling and remanding the matter so that the Ninth Circuit could perform a complete analysis of plaintiff's Article III standing based upon long held Supreme Court principles. The *Spokeo* Court held that while the Ninth Circuit found that plaintiff's damages were "particularized," that the Ninth Circuit failed to determine whether the alleged damages were "concrete" under the traditional Article III standing analysis. The Supreme Court did not take a position as to whether plaintiff had standing, and left the determination to the Ninth Circuit on remand. Since the Supreme Court has issued its ruling in *Spokeo*, defendants' request for a stay is moot.

Moreover, the *Spokeo* Court's holding did not revolutionize the way courts analyze Article III standing, as hoped by defendants. In fact, the *Spokeo* Court confirmed that there has been no legal shift that would now prevent a plaintiff such as Dr. Barry Sartin from ever seeking statutory damages conferred by Congress to redress the violation of a statutory right, even where no additional harm could be shown beyond violation of the statutory right. In so holding, the *Spokeo* Court opined that:

Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. *Spokeo, Inc. v. Robins*, No. 13-1339, 2016 WL 2842447, at 7 (U.S. May 16, 2016). Article III standing requires a concrete injury even in the context of a statutory violation. *Id.* For that reason, *Robins* could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III. See *Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 129 S. Ct. 1142, 1150, 173 L. Ed. 2d 1 (2009) (“[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation ... is insufficient to create Article III standing”); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness. See, e.g., *Clapper v. Amnesty Int'l USA*, 568 U.S. ——. For example, the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure. See, e.g., Restatement (First) of Torts §§ 569 (libel), 570 (slander *per se*) (1938). **Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified.** See *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20–25, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998) (confirming that a group of voters' “inability to obtain information” that Congress had decided to make public is a sufficient injury in fact to satisfy Article III); *Public Citizen v. Department of Justice*, 491 U.S. 440, 449, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (holding that two advocacy organizations' failure to obtain information subject to disclosure under the Federal Advisory Committee Act “constitutes a sufficiently distinct injury to provide standing to sue”). (Emphasis added).

Accordingly, based on the Supreme Court's recent ruling discussed above, defendants' request for a stay pending the *Spokeo* decision is moot. Also, as discussed above, the Supreme Court's holding in *Spokeo* did not revolutionize the way courts, such as this Court, should analyze Article III standing and therefore, should not have any affect on this case.

### **CONCLUSION**

For the reasons stated more fully above, the defendants Consolidated Motion to Dismiss or Motion to Strike should be denied. Dr. Sartin suffered actual damages as a result of the junk fax sent to him on September 24, 2015 by the defendants, accordingly he has Article III standing to bring these claims. The class proposed by Dr. Sartin is easily ascertainable and he is a member of the proposed class. Lastly, this case should not be stayed given the United States Supreme Court's recent ruling in *Spokeo*, as this case involves both actual and statutory damages, not solely statutory damages. Accordingly, plaintiff prays that the defendants' present motion be denied in its entirety.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on **May 17, 2016**, 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 counsel of record.

**/s/ George B. Recile**  
**GEORGE B. RECILE**