

**IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA**

ANNE H. WALLACE, individually and)	
on behalf of all others similarly situated,)	
)	
PLAINTIFFS,)	
)	CIVIL ACTION FILE NO.
v.)	
)	05-CV3464-2
EQUAL ACCESS HEALTH, INC.,)	
BRADY J. SPEERS,)	JURY TRIAL DEMANDED
CHRISTOPHER A. NOVINGER,)	
and DOES 1-10 inclusive,)	
)	
DEFENDANTS.)	
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SECOND AMENDED COMPLAINT

COMES NOW Anne H. Wallace (hereinafter “Wallace”), and all other persons or entities similarly situated, as Plaintiffs and file this their Second Amended Complaint against Equal Access Health, Inc. (hereinafter "EAH"), Brady J. Speers (hereinafter “Speers”), Christopher A. Novinger (hereinafter “Novinger”), and Does 1-10, respectfully showing the following:

INTRODUCTION

1.

Named Plaintiff filed her verified Complaint in this action with this Court on March 2, 2005 (hereinafter the “Original Complaint”). The Original Complaint avers violations of the facsimile provisions of the Telephone Consumer Protection Act (hereinafter the “TCPA”) pursuant to 47 U.S.C. §227 and the tort of Misappropriation under Georgia law. Service of process was properly affected upon Defendant EAH on March 3, 2005. The original Affidavit of Service was subsequently filed with this Court.

2.

Contemporaneous with service of the Original Complaint, Plaintiff's First Request For Admissions (hereinafter the "Admission Requests") and First Request for Production of Documents (hereinafter the "Document Requests") were also filed with this Court and served upon Defendant EAH. The Admission Requests and Document Requests are hereinafter collectively referred to as "Plaintiff's First Discovery Requests".

3.

The Original Complaint averments are supported by Exhibit "A" to the Original Complaint (hereinafter the "Unauthorized Facsimiles"). The Unauthorized Facsimiles were transmitted, or caused to be transmitted, by the Defendants to named Plaintiff's home telephone facsimile machine and to the facsimile machines of other Georgia citizens.

4.

Defendants did not have any prior express permission to send facsimiles to named Plaintiff nor did they have a prior Established Business Relationship ("EBR") with named Plaintiff, as that term is defined by the Federal Communication Commission's Rules and Regulations. Therefore, the transmission of the Unauthorized Facsimiles and their receipt on named Plaintiff's telephone facsimile machine directly violated the TCPA and also constituted Misappropriation of named Plaintiff's personal property by an unauthorized appropriation of her facsimile machine and the unlawful taking of its facsimile receipt capacity, paper, toner, etc. for the receipt of the Unauthorized Facsimiles. This persistent and willful course of unlawful conduct by Defendants continued over a multi-month period against named Plaintiff and other citizens of

Georgia.

5.

April 18, 2005 was the forty-five (45) day Final Default deadline for Defendant EAH to file an answer and for responding to the named Plaintiff's First Discovery Requests (hereinafter the "Final Default Date").

6.

Defendant EAH did not file an answer by the Final Default Date nor did Defendant EAH respond in any way to named Plaintiff's First Discovery Requests.

7.

Final Default automatically obtained after April 18, 2005 by operation of law against Defendant EAH. Therefore, pursuant to *OCGA § 9-11-55 (a)*, Defendant EAH, "...is in the position of having admitted each and every material allegation of the plaintiff's petition except as to the amount of damages alleged. The default concludes the defendant's liability, and estops him from offering any defenses which would defeat the right of recovery." *Conseco Finance Servicing Corp. v. Hill*, 252 Ga. App. 774, 777 (2), 556 SE2d 468 (2001); *Mitchell v. Gilwill Group, Inc.*, 261 Ga. App. 882, 583 SE2d 911 (2003).

8.

By operation of law each and every Admission Request now stands as admitted by Defendant EAH pursuant to *O.C.G.A. § 9-11-36 (a) (2)*. Out of a total of thirty one (31) Admission Requests, all of which now stand admitted, seven (7) conclusively evidence Defendant Speers' direct involvement in the unlawful conduct complained of in the Original Complaint. An additional seven (7) Admission Requests conclusively

evidence Defendant Novinger's direct involvement in the same unlawful conduct.

9.

Controlling legal authority in Georgia holds that “a corporate officer who takes part in the commission of a tort by the corporation is personally liable therefor...”. *Fussell v. Jones*, 198 Ga. App. 399 (1), 401 S.E.2d 593 (1991); *Fussell v. Carl E. Jones Development, Inc. et al.*, 207 Ga. App. 521, 428 S.E.2d 426 (1993). Count 3 of the Original Complaint, Misappropriation, is an intentional tort under Georgia law. Upon information and belief, Defendant Speers and Defendant Novinger are both executive officers of Defendant EAH. Additionally, since the TCPA is a part of the Communications Act, personal liability against Defendant Speers and Defendant Novinger also obtains pursuant to 47 U.S.C. § 217. As set forth in Paragraph 8 herein, Defendant EAH has unconditionally admitted the direct involvement of Defendant Speers and Defendant Novinger in the unlawful conduct complained of by named Plaintiff.

10.

On or about June 28, 2005, named Plaintiff filed her Motion to Amend and Add Party Defendants Brady J. Speers and Christopher A. Novinger (hereinafter “Plaintiff's Motion”).

11.

On or about July 5, 2005, this Court entered an order granting Plaintiff's Motion in its entirety (hereinafter the “July 5th Order”).

12.

Plaintiff filed her verified First Amended Complaint on August 9, 2005 (hereinafter the “First Amended Complaint”). Service of process of the First Amended

Complaint was properly affected upon all Defendants on August 25, 2005 by a licensed Texas Process Server. The original Affidavits of Service were subsequently filed with this Court.

13.

Contemporaneous with service of the First Amended Complaint, Plaintiff's First Request For Admissions to Defendant Brady J. Speers (hereinafter the "Speers Admission Requests") and Plaintiff's First Request For Admissions to Defendant Christopher A. Novinger (hereinafter the "Novinger Admission Requests") were properly served. Additionally, Plaintiff's First Request for Production of Documents to Defendant Brady J. Speers (hereinafter the "Speers Document Requests") and Plaintiff's First Request for Production of Documents to Defendant Christopher A. Novinger (hereinafter the "Novinger Document Requests") were properly served. The foregoing respective Admission Requests and Document Requests shall hereinafter collectively be referred to as "Plaintiff's Speers and Novinger Discovery Requests".

14.

On or about September 26, 2005, the Answer to Plaintiff's First Amended Complaint by Defendants Brady J. Speers and Christopher A. Novinger (hereinafter the "Speers and Novinger Answer") was filed with this Court.

15.

On or about September 26, 2005, Defendants Speers and Novinger filed their respective responses to Plaintiff's Speers and Novinger Discovery Requests. However, Defendants Speers and Novinger did not physically deliver documents, in response to the respective Document Requests, until October 12, 2005.

16.

On or about October 11, 2005, the Amended Answer to Plaintiff's First Amended Complaint by Defendants Brady J. Speers and Christopher A. Novinger (hereinafter the "Speers and Novinger Amended Answer") was filed with this Court.

17.

Both named Plaintiff and Defendants Speers and Novinger currently have various motions pending before this Court.

18.

Based upon Defendants Speers' and Novinger's responses to named Plaintiff's Document Requests, there is credible evidence that millions of unsolicited facsimiles, advertising the products or services Defendant EAH, were transmitted throughout the country including to citizens of Georgia (hereinafter the "Unsolicited Facsimiles"). Therefore, this Second Amended Complaint is requesting Class Action certification pursuant to the provisions of *O.C.G.A. § 9-11-23*.

PARTIES, JURISDICTION, AND VENUE

PLAINTIFF:

19.

Named Plaintiff, Anne H. Wallace, is a citizen and resident of the State of Georgia.

20.

The claims of the class of persons represented by named Plaintiff arise pursuant to the provisions of the Telephone Consumer Protection Act, *47 U.S.C. § 227*, *47 U.S.C. § 217*, and Georgia law.

DEFENDANTS:

21.

Defendant EAH is a Nevada Corporation whose physical and mailing address is 600 Six Flags Drive, Suite 624, Arlington, Texas 76011. Defendant EAH's principal business is the sale of medical discount programs (hereinafter the "Medical Discount Programs") including to citizens of Georgia. Such Medical Discount Programs are not the legal equivalent of medical insurance programs and consequently are not generally regulated by the Insurance Commissioners of the various States. Upon information and belief, Defendant EAH extensively utilizes "Fax Blasting" activities to advertise its products and services. Defendant EAH's unlawful "Fax Blasting" activities involve the transmission of thousands of Unsolicited Facsimiles, throughout the country including to citizens of Georgia, in an intentional and persistent course of conduct. Said facsimile transmission activities to named Plaintiff and other Georgia citizens have violated certain provisions of (i) the TCPA, (ii) *47 C.F.R. 68.318(d)*, and (iii) *O.C.G.A. § 46-5-25*. Said facsimile transmission activities also constitute the intentional tort of Misappropriation under Georgia law.

On or about February 9, 2005, Defendant EAH was issued an official Citation (No. EB-05-TC-010) by the United States Federal Communications Commission for its unlawful activities in transmitting unsolicited advertisements, advertising its products and services, to telephone facsimile machines (hereinafter the "FCC Citation"). A true and correct copy of the FCC Citation is annexed hereto as Exhibit "A" and incorporated herein by reference.

On or about April 28, 2005, the Attorney General of Texas filed a civil action

against Defendant EAH and certain other parties. *State of Texas v. The Capella Group, Inc. et al.*; 98th District Court of Travis County; Case No. GV501264. Said legal action alleges *inter-alia* violations the Texas Deceptive Trade Practices-Consumer Protection Act and the Texas Telemarketing Disclosure and Privacy Act.

Defendant EAH (i) solicits business in Georgia, (ii) does business with clients residing in Georgia, and (iii) derives income from Georgia, all through an unlawful persistent course of conduct. Therefore, Defendant EAH is subject to the jurisdiction and venue of the Court pursuant to *O.C.G.A. §§ 9-10-91(1), 9-10-91(3) and 9-10-93*. Due and legal service of this Second Amended Complaint can be perfected upon Defendant EAH by serving its attorney of record in this case, Robert T. Trammell, Jr., Esq., Trammell Camp & Lewis, LLC, 128 N. Main Street, Luthersville, Georgia 30251

22.

Whenever in this Complaint reference is made to Defendant EAH, such reference shall be deemed to include the various tradenames that Defendant EAH utilizes.

23.

Upon information and belief, Defendant Speers is Chief Executive Officer of Defendant EAH. Personal liability for Defendant Speers, for the conduct complained of herein, arises pursuant to *47 U.S.C. § 217* and also Georgia law wherein “a corporate officer who takes part in the commission of a tort by the corporation is personally liable therefor...”. *Fussell v. Jones*, 198 Ga. App. 399 (1), 401 S.E.2d 593 (1991). Count 3 of this Complaint, Misappropriation, is an intentional tort under Georgia law. In addition to the Admissions cited in Paragraph 8 herein, documents produced in response to Plaintiff’s Speers and Novinger Discovery Requests indisputably evidence Defendant

Speers' direct involvement in the unlawful activity complained of herein. Exhibit "B", annexed hereto and incorporated herein by reference, conclusively evidences Defendant Speers' communications and instructions to the "Fax Blaster" used to disseminate facsimiles advertising Defendant EAH's products and services during the Relevant Period (as that term is defined in Paragraph 34 herein).

Defendant Speers is subject to the jurisdiction and venue of the Court pursuant to *O.C.G.A. §§ 9-10-91(3) and 9-10-93*. Due and legal process of this Second Amended Complaint can be perfected upon Defendant Speers by serving his attorney of record in this case, Robert T. Trammell, Jr., Esq., Trammell Camp & Lewis, LLC, 128 N. Main Street, Luthersville, Georgia 30251

24.

Upon information and belief, Defendant Novinger is President of Defendant EAH. Personal liability for Defendant Novinger, for the conduct complained of herein, arises pursuant to *47 U.S.C. § 217* and also Georgia law wherein "a corporate officer who takes part in the commission of a tort by the corporation is personally liable therefor...". *Fussell v. Jones*, 198 Ga. App. 399 (1), 401 S.E.2d 593 (1991). Count 3 of this Complaint, Misappropriation, is an intentional tort under Georgia law. In addition to the Admissions cited in Paragraph 8 herein, documents produced in response to Plaintiff's Speers and Novinger Discovery Requests indisputably evidence Defendant Novinger's direct involvement in the unlawful activity complained of herein. . Exhibit "C", annexed hereto and incorporated herein by reference, conclusively evidences Defendant Novinger's communications and instructions to the "Fax Blaster" used to facsimiles advertising Defendant EAH's products and services during the Relevant Period (as that

term is defined in Paragraph 34 herein).

Defendant Novinger is subject to the jurisdiction and venue of the Court pursuant to *O.C.G.A. §§ 9-10-91(3) and 9-10-93*. Due and legal process of this Second Amended Complaint can be perfected upon Defendant Novinger by serving his attorney of record in this case, Robert T. Trammell, Jr., Esq., Trammell Camp & Lewis, LLC, 128 N. Main Street, Luthersville, Georgia 30251

25.

Upon information and belief, the Does Defendants 1 through 10 are past or present directors, officers, and/or other employees or agents of Defendant EAH whose identities are currently unknown, but who committed, abetted, participated in, and/or furthered the unlawful acts set forth in this Complaint. Plaintiff will amend this Complaint, pursuant to *O.C.G.A. § 9-11-15*, with the identity of these Does by their proper names and capacities when that information is ascertained. Does Defendants 1 through 10 are subject to the jurisdiction and venue of this Court pursuant to *O.C.G.A. §§ 9-10-91(3) and 9-10-93*.

26.

Does Defendants 1 through 10 are hereinafter collectively referred to as the “Does Defendants”.

27.

Defendant EAH, Defendant Speers, Defendant Novinger, and the Does Defendants are hereinafter collectively referred to as the “Defendants”

28.

Whenever reference is made in this Complaint to any act or transaction of

Defendant EAH, or any separate legal entity subsequently joined in this action as a DOES Defendant, such allegation shall be deemed to mean that the said Defendant(s) and its owners, officers, directors, agents, employees, or representatives did or authorized such unlawful acts while engaged in the management, direction, or control of the affairs of the Defendant(s) and while acting within the scope of their respective duties.

29.

Whenever in this Complaint reference is made to any act of any Defendant, such allegation shall be deemed to mean that said Defendant was acting (a) as a principal, (b) under express or implied agency, and/or (c) with actual or ostensible authority to perform the acts so alleged.

30.

Pursuant to controlling legal authority in Georgia and the Federal 11th Circuit, subject matter jurisdiction for the TCPA claims lies exclusively with the state court system of Georgia. Subject matter jurisdiction for the Georgia law claim also lies with the state court system of Georgia.

31.

Venue is proper in Dekalb County, Georgia.

**CLASS ACTION REGARDING SIMILARLY
SITUATED PLAINTIFFS**

32.

Plaintiff brings this action as a class action pursuant to the provisions of *O.C.G.A. § 9-11-23*. The proposed Class of Plaintiffs is so numerous that joinder of all members is impractical. Upon information and belief, named Plaintiff shows that unsolicited facsimile advertisements, sent on behalf of Defendant EAH to advertise its products or

services, have been transmitted to hundreds of other telephone facsimile machines in Georgia through an intentional and persistent course of conduct. Each such transmission constitutes a separate violation of the TCPA and an unlawful taking of personal property under Georgia law. As a result thereof, there are questions of law or fact common to the proposed Class, and such questions predominate over any questions affecting only individual members. A class action is superior to other available methods for fair and efficient adjudication of this controversy.

33.

The claim of the representative Plaintiff is typical of the claims of the proposed Class.

34.

For the purposes of this action, the proposed Class consists of the following:

All persons and entities within the State of Georgia who received one or more unsolicited facsimile advertisements on any telephone facsimile machine, transmitted by or on behalf of Defendant Equal Access Health, Inc. to advertise its products or services, at any time from January 1, 2004 through December 31, 2004 (hereinafter the “Relevant Period”).

The foregoing definition expressly excludes the following:

- (i) **all recipients from whom Defendant Equal Access Health, Inc. obtained prior express permission before sending the facsimile advertisements;**
- (ii) **all recipients with whom Defendant Equal Access Health, Inc. had a prior Established Business Relationship as that term is defined in the *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12405 (1995) (1995)**

TCPA Reconsideration Order); and the *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, FCC 05-132 (rel. June 27, 2005).

- (iii) **the Defendants, including any parent, subsidiary, affiliate or controlled person of these entities and their officers, agents, employees and members of their immediate families.**

35.

The named Plaintiff and her counsel are capable of and are willing to represent the other members of the proposed Class fairly and adequately.

FACTUAL ALLEGATIONS PERTINENT TO PLAINTIFFS' CLAIMS

**COUNT 1
VIOLATIONS OF THE TELEPHONE CONSUMER
PROTECTION ACT**

36.

Plaintiff realleges and incorporates Paragraphs 1 through 35 above as if fully set forth herein.

37.

Upon information and belief, telephone facsimile machines, computers or other devices are used to transmit unsolicited and unauthorized advertisements, advertising the products or services of Defendant EAH, to other telephone facsimile machines within the United States including the State of Georgia.

38.

Named Plaintiff Wallace resides in Dekalb County, Georgia. Commencing on or about April 23, 2004 and continuing through June 28, 2004, a series of advertisements

concerning Defendant EAH's products or services were transmitted, in a persistent and intentional course of conduct, to a large number of telephone facsimile machines in Georgia including named Plaintiff's residence telephone facsimile machine. Said transmissions were made without the prior express invitation or permission of either named Plaintiff or of the other proposed Class members (hereinafter the "Unsolicited Facsimiles"). Further, Defendants did not have an Established Business Relationship, as that term is defined by the Federal Communications Commission (hereinafter the "FCC") in its Rules and Regulations, with either named Plaintiff or the other proposed Class members. True and correct copies of the Unsolicited Facsimiles received by named Plaintiff are annexed hereto as Exhibit "D" and incorporated herein by reference.

39.

47 U.S.C. § 227(b)(1)(B) makes it unlawful for Defendants to use any telephone facsimile machine, computer or other device to send an unsolicited advertisement to another telephone facsimile machine in the United States.

40.

Under the TCPA, and controlling legal authority in Georgia, the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the TCPA provision banning unsolicited facsimile advertisements.

41

Pursuant to controlling FCC Rules and Regulations there is no duty on the part of named Plaintiff or the proposed Class to mitigate damages.

42.

As a result of the foregoing, named Plaintiff and the proposed Class are entitled to

\$500.00 in damages for each TCPA violation pursuant to *47 U.S.C. § 227(b)(3)(B)*.

COUNT 2
TREBLE DAMAGES

43.

Plaintiff realleges and incorporates Paragraphs 1 through 42 above as if fully set forth herein.

44.

Defendants' actions, and/or those of their agents, have shown that the Defendants willfully or knowingly violated the Telephone Consumer Protection Act.

45.

As a result of the foregoing, the Court may, in its discretion, increase the amount of the statutory damages up to an amount equal to \$1,500.00 per TCPA violation pursuant to *47 U.S.C. § 227(b)(3)(C)*.

46.

The Court should use its discretion to increase the amount of statutory damages to an amount equal to \$1,500.00 per TCPA violation due to the Defendants willful and knowing conduct.

COUNT 3
MISAPPROPRIATION

47.

Plaintiff realleges and incorporates Paragraphs 1 through 46 above as if fully set forth herein.

48.

Each Unsolicited Facsimile, transmitted by Defendants to named Plaintiff's

telephone facsimile machine and those of the proposed Class, constitute willful and intentional Misappropriation and unlawful taking by Defendants of named Plaintiff's personal property (paper, toner, facsimile receipt capacity, etc.), and that of the proposed Class, for the purpose of furthering Defendants' unlawful conduct.

49.

Pursuant to Georgia law the claim of Misappropriation sounds in tort. Further, under Georgia law Misappropriation is considered a "Positive Tort" and therefore there is no duty on the part of named Plaintiff or the proposed Class to mitigate damages.

50.

As a direct and proximate result of Defendants' conduct, named Plaintiff and the proposed Class have sustained economic damages.

51.

Named Plaintiff and the proposed Class are entitled to recover damages in an amount to be proved in a trial before this Court.

52.

Because the conduct of the Defendants has been willful, intentional and reckless, named Plaintiff and the proposed Class are entitled to an award of punitive damages against the Defendants in an amount of at least \$250,000, or such greater amount as to be awarded in the enlightened conscience of this Court, along with the costs of this litigation, including Plaintiffs' attorney fees.

COUNT 4
INJUNCTIVE RELIEF

53.

Plaintiff realleges and incorporates Paragraphs 1 through 52 above as if fully set

forth herein.

54.

Defendant EAH and/or its respective agents or independent contractors have possession, custody and control of the business records, databases, computer systems and other information necessary to identify the members of the proposed Class including but not limited to the names and telephone facsimile numbers of the proposed Class members. Unless immediate injunctive relief is ordered, Defendant EAH will alter, erase, delete, destroy or otherwise dispose or remove such systems, records and equipment. For this reason, Plaintiffs are entitled to an order prohibiting and enjoining Defendant EAH and its respective agents from altering, deleting or destroying or otherwise disposing of any documents, records, databases or computer systems which are necessary to identify the members of the proposed Class.

55.

Defendants should be enjoined from further violations of the Telephone Consumer Protection Act.

56.

Upon information and belief, the aggregate of the Class claims is less than Five Million (\$5,000,000) Dollars inclusive of all damages for all claims set forth herein. Further, under no circumstances will an aggregate amount of all damages greater than Five Million (\$5,000,000) be sought or accepted in this action.

WHEREFORE, Plaintiffs respectfully pray for the following relief:

- a. That the Court enter its order certifying the claims of the named Plaintiff and all other persons similarly situated as class action claims set forth

regarding Counts 1, 2, 3, and 4 as provided by *O.C.G.A. § 9-11-23*;

- b. Pursuant to Count 1, that the Court enter judgment in favor of named Plaintiff and the proposed Class against Defendants, in an amount of \$500.00 for each and every violation of the Telephone Consumer Protection Act;
- c. Pursuant to Count 2, that the Court find that Defendants willfully or knowingly violated the Telephone Consumer Protection Act and increase the statutory damages against the Defendants to a total of \$1,500.00 for each and every violation of the Telephone Consumer Protection Act;
- d. Pursuant to Count 3, that the Court enter judgment in favor of named Plaintiff and the proposed Class against Defendants for an amount of compensatory damages to be proven at trial;
- e. Pursuant to Count 3, that the Court enter judgment in favor of named Plaintiff and the proposed Class against Defendants for punitive damages in an amount of at least \$250,000 or such greater amount as to be awarded in the enlightened conscience of the Court;
- f. Pursuant to Count 4, that the Court enter a temporary restraining order, interlocutory injunction and permanent injunction enjoining Defendants from further violations of the Telephone Consumer Protection Act;
- g. Pursuant to Count 4, that the Court enter an appropriate order enjoining and restraining Defendant EAH, including its officers, employees, and contractors from altering, erasing, changing, deleting, destroying or otherwise disposing of any documents, records, databases, computer

systems and the like currently in its possession or control, or in the possession or control of its agents and contractors which are used or useful in identifying all persons, corporations or other entities to whom facsimile advertisements of Defendant EAH were transmitted during the Relevant Period;

- h. That all costs of this action, including reasonable attorney's fees, be assessed against Defendants;
- i. Trial by Jury as to all issues so triable;
- j. That the total award to named Plaintiff and the proposed Class shall under no circumstances exceed Five Million (\$5,000,000) Dollars; and
- k. That the named Plaintiff and the members of the proposed Class be granted such other and further relief as is just and equitable under the circumstances.

This the 23rd day of November, 2005.

Respectfully submitted,

By: _____
Henry A. Turner
Georgia State Bar No. 719310

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