Akin Gump
STRAUSS HAUER & FELD LLP

JENNIFER L. RICHTER
+1 202.887.4524/fax: +1 202.887.4288
jrichter@akingump.com

April 1, 2019

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,*** **CG Docket No. 02-278;** ***Rules and Regulations Implementing the Junk Fax Prevention Act of 2005,*** **CG Docket No. 05-338.**

On March 28, 2019 the undersigned met with the following in the Consumer & Governmental Affairs Bureau ("CGB"): Mark Stone, Deputy Bureau Chief; Kurt Schroeder, Chief, Consumer Policy Division; Nancy Stevenson, Deputy Chief, Consumer Policy Division; Daniel Margolis, Acting Legal Advisor; and Erica McMahon, Attorney-Advisor, Consumer Policy Division.

During the meeting, we discussed Akin Gump's pending petition for expedited clarification or declaratory ruling in the above-referenced proceedings (the "Petition").[1] In the Petition, Akin Gump requests that the Commission clarify what it meant in the *2006 Junk Fax Order*,[2] when it said that the party whose goods and services are advertised in an unsolicited fax ***is not always*** the liable sender.[3] Specifically, Akin Gump requests that the Commission clarify that a party whose goods and services are advertised is not the liable sender when its fax broadcaster "both commits TCPA violations and engages in deception or fraud against the advertiser (or blatantly violates its contract with the advertiser) such that the advertiser cannot control the fax campaign or prevent TCPA violations."[4]

[1] Akin Gump Strauss Hauer & Feld LLP, Petition for Expedited Clarification or Declaratory Ruling, CG Docket Nos. 02-278, 05-338 (filed Feb. 26, 2019).

[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd. 3787 (2006) ("*2006 Junk Fax Order*").

[3] *Petition* at 2.

[4] *Id.* at 3.

We discussed a variety of fact patterns in junk fax cases that would benefit from the requested clarification, including those summarized in the attached document. The requested clarification would provide valuable guidance to courts, leading to earlier resolutions, fewer unnecessary and unjustified settlements, and more consistent treatment of defendants.

Respectfully submitted,

/s/ Jennifer Richter
Jennifer L. Richter
Lyndsey Grunewald

Attachment

cc: Mark Stone
Kurt Schroeder
Nancy Stevenson
Daniel Margolis
Erica McMahon

TYPES OF JUNK FAX CASES THAT WOULD BENEFIT FROM THE REQUESTED CLARIFICATION

In its Petition, Akin Gump requests that the Commission clarify that "a fax broadcaster is the sole liable 'sender' [of a fax], when it both commits TCPA violations and engages in deception or fraud against the advertiser (or blatantly violates its contract with the advertiser) such that the advertiser cannot control the fax campaign or prevent TCPA violations."[1] The requested clarification would provide valuable guidance to courts, leading to earlier resolutions, fewer unnecessary settlements, and more consistent treatment of defendants. The following table provides examples of the types of cases that would benefit from the requested clarification. As evident in the table below, without guidance from the Commission, currently similarly situated defendants are receiving widely diverging treatment depending on the federal district court or circuit in which the case is brought.

Cases in which a fax broadcaster both commits TCPA violations and engages in deception or fraud against the advertiser, or blatantly violates its contract with the advertiser, such that the advertiser cannot control the fax campaign or prevent TCPA violations.
Bridgeview Health Ctr. Ltd. v. Clark, No. 09 C 5601, 2015 U.S. Dist. LEXIS 45710 (N.D. Ill. April 8, 2015); *aff'd*, 816 F.3d 935 (7th Cir. 2016): Defendant Clark hired the fax broadcaster B2B Solutions to send faxes advertising his small business, specifically instructing B2B to send the faxes to approximately 100 local businesses within a 20-mile radius of his company. Unbeknownst to the defendant and in violation of defendant's contract and clear instructions, B2B sent more than 4,849 faxes to businesses in several states. After a lengthy trial, the district court found, based on a totality of the circumstances test, that Clark was not liable for faxes sent outside the 20-mile radius; the 7th Circuit affirmed the decision on appeal.

[1] Akin Gump Strauss Hauer & Feld LLP, Petition for Expedited Clarification or Declaratory Ruling, CG Docket Nos. 02-278, 05-338 (filed Feb. 26, 2019) (*Petition*).

Cases in which a fax broadcaster both commits TCPA violations and engages in deception or fraud against the advertiser, or blatantly violates its contract with the advertiser, such that the advertiser cannot control the fax campaign or prevent TCPA violations.
Cin-Q Automobiles, Inc. v. Buccaneers Limited Partnership, No. 8:13-CV-1592, 2014 U.S. Dist. LEXIS 174134 (M.D. Fla. Dec. 17, 2014): Defendant engaged a fax broadcaster, FaxQom, to send a series of faxes advertising Tampa Bay Buccaneers tickets. FaxQom deceived the defendant by providing false assurances in its contract that 100% of its numbers were "opt-in," that FaxQom used "legal techniques" in gathering its fax data, and that industry practices outlined by the Direct Marketing Association would be followed by FaxQom. The executive at FaxQom that induced defendant into the contract used an alias "to keep his name out of it." He also farmed out the actual fax transmissions to third parties, about which the defendant had no knowledge and over which the defendant had no control. Those third party fax companies did nothing to ensure compliance with the TCPA. The court recognized the fraud on the defendant and asserted the view that the defendant was the victim of a "tortured path of lies and deceit." The court nevertheless determined that summary judgment was inappropriate because "the Eleventh Circuit has unflinchingly defined the [question of sender liability under the junk fax rules] as engendering 'a question of fact to be decided by a jury.'" The case remains pending.
Avio v. Alfoccino, 18 F. Supp. 3d 882 (E.D. Mich. 2014); *Imhoff Investment, LLC v. Alfoccino, Inc.*, 792 F.3d 627 (6th Cir. 2015): Defendant owned two restaurants in Southeast Michigan and engaged B2B Solutions to send 20,000 faxes to businesses and residents in that area in Nov. and Dec. 2006. B2B compiled the list of fax recipients based on the criteria provided by Alfoccino, but deceived the defendant into believing that the list of recipients was compiled solely of individuals who had consented to receiving unsolicited faxes. After the district court granted summary judgment to the defendant, on appeal the Sixth Circuit remanded the case on the basis that defendant was the directly liable sender merely because its goods were advertised in the subject faxes. Alfoccino settled the TCPA claims for $7 Million.
Siding and Insulation Co. v. Alco Vending, 822 F.3d 886, (6th Cir. 2016) / No. 1:11-cv-01060 (N.D. Oh.): Defendant engaged B2B Solutions to send faxes to consenting recipients. B2B deceived the defendant by falsely representing that its fax lists consisted solely of businesses that B2B had communicated with and that B2B had a right to send faxes to because it had a business relationship with them. B2B falsely assured the defendant that every advertisement would be "100 percent legal." Based on these false assurances and deception the defendant authorized the fax campaign. The district court granted summary judgment to the defendant, but on appeal, the Sixth Circuit remanded the case, advising the district court to engage in additional discovery on the question of sender liability. The parties settled the case for undisclosed amount.

Cases in which a fax broadcaster both commits TCPA violations and engages in deception or fraud against the advertiser, or blatantly violates its contract with the advertiser, such that the advertiser cannot control the fax campaign or prevent TCPA violations.

Physician's Healthscore, Inc. v. Vertex Pharms., Inc., 247 F. Supp. 3d 138 (D. Mass. Mar. 28, 2017): Defendant Vertex engaged a marketing company to create and promote an informational broadcast to gastroenterologists regarding its new product. The marketing company provided a warranty in its services agreement that it would "comply with applicable law" and agreed to only send faxes to gastroenterologists. But, violating these contract assurances, the marketing company sent unsolicited faxes to non-physicians and non-gastroenterologists. The defendant filed a motion for summary judgment on the basis that, *inter alia*, it was not the "sender" of the subject faxes because the marketing company violated its reps and warranties by sending faxes to non-gastroenterologists. The district court denied the motion for summary judgment, holding that "the only relevant consideration" in determining sender liability is whether "the defendant has hired an independent contractor to transmit facsimiles advertising the defendant's goods or services." The defendant settled the TCPA claims for $4.75 million.

Cases in which a fax broadcaster's independent actions stripped the advertiser of its control over the fax campaign.

Palm Beach Golf Ctr.-Boca Inc. v. Sarris, 781 F.3d 1245 (11th Cir. 2015): Defendant had hired a marketing manager to promote its business and gave the manager "free rein" to legally advertise its dental practice. The manager communicated with B2B Solutions regarding a possible fax campaign. The defendant was completely unaware of the fax campaign, and the manager testified that he did not provide final approval of the content of the faxes or authorize B2B to proceed with the fax campaign. B2B, however, sent over 7,000 faxes advertising the defendant's services. The district court granted summary judgment to the defendant, but on appeal, the Eleventh Circuit found that summary judgment was inappropriate because there was sufficient record evidence to support having a jury decide whether the fax was sent on behalf of the defendant, and "the question of on whose behalf the fax advertisement was sent is a question to be decided by a jury." The defendant settled the TCPA claim for $400,000.

Cases in which a fax broadcaster's independent actions stripped the advertiser of its control over the fax campaign.
Garner Properties Management, LLC v. Marblecast, No. 17-cv-11439, 2018 U.S. Dist. LEXIS 216068 (E.D. Mich. Dec. 26, 2018): Marblecast of Michigan, a kitchen and bath contractor, sent faxes advertising its own services and cabinetry products sold by Marblecast and manufactured by American Woodwork Corporation. Marblecast had a distributorship agreement with American Woodwork that provided that Marblecast would "use its best effort to promote, maintain and increase the sales of [American Woodwork's] products," but the agreement was silent as to whether fax advertising could be used as a means of promotion. Marblecast hired jBlast, a fax broadcaster, to send the subject fax without American Woodwork's consent or knowledge. After over a year of litigation, the court granted summary judgment to American Woodwork. The court found that the TCPA "does not purport to impose liability upon parties that did not 'send' the fax at all," and that no reasonable jury could find that American Woodwork 'sent' the fax given its clear lack of knowledge and involvement.
Bais Yaakov v. Varitronics, LLC, 200 F. Supp. 3d 837 (D. Minn. 2016): Defendant Varitronics offers a product line known as "VariQuest," which is sold exclusively through authorized dealers. R&M Letter Graphics is the only authorized VariQuest dealer for several counties in New York state. Pursuant to its dealership agreement with Varitronics, R&M is required to "exercise its best efforts to promote the sale of the Products within the territory," and may "[u]se [Varitronics'] trade designations (including trademarks) only in the manner authorized by [Varitronics]." Over several months between 2013 and 2014, plaintiff Bais Yaakov and others received eight unsolicited fax advertisements promoting the sale of VariQuest products, seven of which identified R&M as the company selling the advertised products. The court rejected plaintiff's argument that Varitronics could be held liable as the sender merely because the fax promoted Varitronics' products. The court found, however, that the alleged facts were sufficient to defeat a motion to dismiss because, given the allegations, it was at least plausible that the faxes were sent on behalf of Varitronics. The court opined that Varitronics could be held liable as the sender if discovery showed that it "authorized, sent, or otherwise approved" the fax advertisements. The parties settled for an undisclosed amount.

Cases in which a fax broadcaster's independent actions stripped the advertiser of its control over the fax campaign.
Supply Pro Sorbents, LLC v. RingCentral Inc., No. 16-cv-2113, 2016 U.S. Dist. LEXIS 140033 (N.D. Cal. Oct. 7, 2016); *aff'd*, 743 Fed. Appx. 124 (9th Cir. 2018): Defendant RingCentral provides its customers with cloud-based software services that, *inter alia*, allow customers to send faxes using cover sheet templates supplied by RingCentral. Plaintiff Supply Pro Sorbents filed suit against RingCentral after it received a fax from a RingCentral user that included a cover sheet bearing the RingCentral logo and the slogan: "Send and receive faxes with RingCentral." RingCentral provided the template coversheet that the user chose to use for the fax, and the technical means to send the fax, but had no control over the fax. The district court found that RingCentral could qualify as the "sender" under the FCC's definition merely because the fax included a promotion of RingCentral's services. But the district court granted RingCentral's motion to dismiss on other grounds, which were upheld on appeal.
JWD Automotive, Inc. v. DJM Advisory Group LLC, 218 F. Supp. 3d 1355 (M.D. Fla. Nov. 21, 2016): Plaintiff JWD Automotive received unsolicited fax advertisements inviting recipients to submit their information to receive a complimentary, personalized quote for a DJM Advisory Group life insurance policy underwritten by Banner Life Insurance Company or William Penn Life Insurance Company of New York. JWD Automotive subsequently sued DJM Advisory Group and the policy underwriters for violating the TCPA. The underwriter defendants moved to dismiss the case against them, arguing that the complaint lacked sufficient allegations tying them to the creation or distribution of the faxes. The district court denied the defendant underwriter's motion to dismiss after finding that "the FCC's current view is that one whose goods or services are promoted in the unsolicited fax may be held strictly liable under the TCPA for its transmission, even absent a showing that the fax was sent on its behalf." Because the fax at issue advertised life insurance products underwritten by the defendants, the court found that the complaint adequately alleged that the underwriter defendants "sent" the fax, "so as to state a claim of strict direct-sender liability under the TCPA against each." DJM and the underwriter defendants settled the class action suit for $3.5 million.

Cases brought against entities whose goods or services appear in unsolicited faxes but who had no knowledge of, or involvement in, the sending of the fax.
Helping Hand Caregivers v. Darden Restaurants, No. 17-1282, 2016 U.S. Dist. LEXIS 176401 (N.D. Ill. Dec. 21, 2016); *aff'd*, 900 F.3d 884 (7th Cir. 2018): Defendant Darden Restaurants, which owns Olive Garden, was sued after a third party, Social Wellness, sent allegedly unsolicited faxes promoting a wellness seminar that included a complimentary lunch from Olive Garden. Darden filed a motion for summary judgment, arguing that it had no knowledge of the faxes and noting that it obtained a permanent injunction against Social Wellness that prohibited Social Wellness from using the Olive Garden logo shortly after the faxes were sent. The district court determined that the faxes were not sent "on behalf of" Darden and granted the defendant summary judgment, which was affirmed on appeal by the 7th Circuit.
Health One Med Ctr. v. Bristol Myers Squibb Co., No. 16-cv-13815, 2017 U.S. Dist. LEXIS 110285 (E.D. Mich. July 17, 2017); 889 F.3d 800 (6th Cir. 2018): The subject fax advertised several pharmaceutical products, including the products manufactured by the defendants. To order these drugs, the customer was directed to fax, call, or email order@mohawkmedical.com, and each fax bore Mohawk Medical's name, address, website, and email address at the top. The defendants are the manufacturers of the products advertised in the fax, but otherwise did not appear to have any connection to the sending of the fax. The court dismissed plaintiff's complaint because plaintiff failed to allege that the pharmaceutical manufacturers had any knowledge of, relationship with, or contact with Mohawk. On appeal, the Sixth Circuit affirmed the district court decision.