

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC**

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In the Matter of:

Akin Gump Strauss Hauer & Feld LLP  
Petition for Expedited Clarification or  
Declaratory Ruling

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) CG Docket No. 02-278  
) CG Docket No. 05-338  
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**COMMENTS OF VINCENT A. LAVIERI**

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**COMMENTS OF VINCENT A. LAVIERI**

I, Vincent A. Lavieri (“Lavieri”) of Gardiner Koch Weisberg & Wrona, hereby file comments in support of the Petition for Expedited Clarification or Declaratory Ruling (the “Petition”) of Akin Gump Strauss Hauer & Feld LLP (“Akin Gump”). In the Petition, Akin Gump requests that the Commission clarify what it meant in the *2006 Junk Fax Order*,<sup>1</sup> when it said that the party whose goods and services are advertised in an unsolicited fax **is not always** the liable sender. I agree with Akin Gump that the Commission should clarify that a party whose goods and services are advertised is not liable as a “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.”<sup>2</sup>

As an attorney who has represented clients in over 30 TCPA class action cases, including *Bridgeview Health Care Ctr. Ltd v. Clark*,<sup>3</sup> I have unique insight into this issue. I agree with

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<sup>1</sup> *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*”).

<sup>2</sup> Petition of Akin Gump Strauss Hauer & Feld LLP, CG Docket Nos. 02-278, 05-338 at 3 (filed February 26, 2019) (the “Petition”).

<sup>3</sup> *Bridgeview Health Care Ctr. Ltd. v. Clark*, No. 09-cv-5601, 2015 U.S. Dist. LEXIS 45710 (N.D. Ill. Apr. 8, 2015), *aff’d*, 816 F.3d 935 (7th Cir. 2016), *cert. denied*, \_\_\_ U.S. \_\_\_, 137 S.Ct. 200 (2016).

Akin Gump that clarification regarding the FCC's facsimile "sender" definition is desperately needed in order to curtail damaging lawsuits against innocent players, to provide guidance to the courts and to correct conflicting interpretations among the courts.

**I. The Requested Clarification Would Encourage More Expeditious Resolution of Junk Fax Cases and Support the Judicial Policy of Avoiding Expensive and Unnecessary Litigation That Encourages Defendants to Concede Liability Simply to Avoid the Expense of Trial.**

I agree with Akin Gump that there is substantial confusion among the federal courts regarding the FCC's definition of a "sender" under the "junk fax rules,"<sup>4</sup> and application of the exception to sender liability set forth in the *2006 Junk Fax Order*. I have experienced firsthand how this lack of clarity can prolong litigation at substantial expense for the defendant. I represented Jerry Clark in *Bridgeview Health Care Center v. Clark*, a junk fax case that was originally filed in Illinois state court in August 2009.<sup>5</sup> Through the final denial of the plaintiff's Petition for a Writ of Certiorari in October 2016, Mr. Clark spent over seven (7) years litigating. Had the FCC granted the clarification requested by Akin Gump prior to this case, it would have been very helpful to both the court and Mr. Clark, and would have likely shortened the time required for disposition of the lawsuit.

As explained by the district court in *Bridgeview*, Mr. Clark owned a small business that sold and repaired hearing aids. Mr. Clark's clientele lived and worked in and around Terre Haute, Indiana. Mr. Clark received an unsolicited telephone call from an employee of Business to Business Solutions ("B2B"), a fax broadcaster, who was soliciting business on behalf of B2B. After a few discussions, Mr. Clark verbally authorized B2B to send facsimile advertisements to

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<sup>4</sup> The rules regarding unsolicited fax advertisements, or "junk faxes" are found in 47 C.F.R. §§ 64.1200(a)(4) and 64.1200 (f).

<sup>5</sup> The case was removed to federal court.

100 local businesses within 20 miles of Terre Haute, Indiana. Mr. Clark approved the design and content of the facsimiles. Based on his discussions with and verbal directions to the fax broadcaster, Mr. Clark unequivocally understood and believed that the faxes would only be sent to the 100 businesses within 20 miles of Terre Haute, as he had clearly specified to the fax broadcaster. However, the fax broadcaster went “rogue,” and sent the approved faxes to 6,112 persons and entities within and outside of the 20-mile radius of Terre Haute. Over one-third of the facsimiles were sent to Ohio, where Mr. Clark does not conduct any business. All but 32 of the 6,112 facsimiles were sent to persons or businesses outside of the 20-mile radius of Terre Haute. In other words, 99.5% of the facsimiles sent by the fax broadcaster were sent to persons or entities outside of the specified 20-mile radius. The unilateral expansion of the scope of where the facsimiles were to be sent was done without Mr. Clark’s knowledge or consent and in blatant disregard of Mr. Clark’s express direction. Mr. Clark lost control over the fax campaign with regard to those faxes sent outside of a 20-mile radius of Terre Haute.

Despite the facts established by the evidence and Mr. Clark’s clear lack of responsibility for faxes sent outside of a 20-mile radius of Terre Haute, the district court struggled with the FCC’s definition of a “sender” under the junk fax rules, and application of the exception to sender liability set forth in the *2006 Junk Fax Order*. Initially, the district court focused on the “on whose behalf” language in the FCC’s “sender” definition and determined that “sender” liability in the junk fax context should be analyzed according to principles of vicarious liability and agency. After a bench trial, the district court found that Mr. Clark was liable only for 32 faxes sent to businesses that were within a 20-mile radius of Terre Haute.

The plaintiff in the *Bridgeview* case, however, requested that the district court reconsider

its decision, arguing that, in light of a letter brief<sup>6</sup> submitted by the FCC to the 11th Circuit in *Palm Beach Golf Ctr.-Boca Inc. v. Sarris*,<sup>7</sup> the court had erred by relying on principles of vicarious liability and instead should have applied strict liability. On reconsideration, the district court rejected the strict liability approach advocated by the TCPA plaintiff, citing language from the 2006 *Junk Fax Order* that articulates the exception to sender liability – the same clause that is the focus of the Akin Gump Petition. Here, the court noted that “[t]he FCC itself does not appear to endorse a rule of strict liability because, as explained in the 2006 [*Junk Fax Order*], a person whose goods or services are advertised in an unsolicited fax will not always be a ‘sender.’” To determine when an advertiser is not the liable sender, the district court applied a totality of the circumstances test, which focused on the advertiser’s level of control over the fax broadcaster. The *Bridgeview* court again found that the faxes sent beyond a 20-mile radius from Terre Haute were not sent “on behalf of” Mr. Clark.

On appeal, the Seventh Circuit in *Bridgeview* upheld the district court’s decision, noting that the district court “correctly rejected strict liability by recognizing that it would lead to ‘absurd results.’” The Seventh Circuit also explained that, although “the district court appeared hesitant to label [its totality of the circumstances test] an agency theory,” the district court’s decision was based on an application of agency principles. The Seventh Circuit thus held that in applying the regulatory definition of a fax sender, “agency rules are properly applied to determine whether an action is done ‘on behalf’ of a principal.” Based on this framework, the Seventh Circuit affirmed that Mr. Clark was not liable as a sender of the faxes sent beyond a 20-mile radius of Terre Haute.

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<sup>6</sup> Letter from Laurence N. Bourne, Counsel, Federal Communications Commission, to John Ley, Clerk of Court, United States Court of Appeals for the Eleventh Circuit (July 17, 2014) (ECF Dkt. No. 55).

<sup>7</sup> 771 F.3d 1274 (11th Cir. 2014).

As explained in the Akin Gump Petition, providing courts with guidance that would allow them to decide cases more easily at the summary judgment stage would be consistent with the established judicial policy of avoiding expensive and unnecessary litigation that encourages defendants to concede liability to avoid the expense of trial. This type of guidance would have a direct impact on cases like *Bridgeview*, where the delay in resolving the dispute was due to the court's uncertainty over how the FCC's rules, and the 2006 exception, should apply. Had the requested clarification existed at the time the district court decided *Bridgeview*, the district court could have made a straightforward determination at summary judgment.<sup>8</sup> Instead, the case was prolonged as the district court – and later, the Seventh Circuit – engaged in multiple attempts to decipher the meaning of “sender” based on inconsistent and ambiguous statements from the FCC. The fees in defending Mr. Clark incurred over the course of seven (7) years of litigation were enormous and Mr. Clark was required to defend himself against liability for 99.5% of the facsimiles, over which he obviously had no control.

For these reasons, I strongly agree with Akin Gump that the Commission should clarify what it meant in the *2006 Junk Fax Order* when it said that the party whose goods and services are advertised in an unsolicited fax is not always the a “sender” under the TCPA. The Commission should close loopholes and provide courts with the tools they need to decide these cases early on, without the need for costly and protracted litigation which is, itself, substantially damaging for innocent advertisers and for parties that are duped by an unscrupulous fax advertiser. The requested guidance could have broad impact, producing fairer, more consistent

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<sup>8</sup> In June 2011, Mr. Clark filed a Motion for Summary Judgment based, in part, upon the lack of authority of B2B to send facsimiles outside of a 20-mile radius of Terre Haute. Mr. Clark's Motion for Summary Judgment was denied by the district court. *Bridgeview Health Care Ctr. Ltd v. Clark*, No. 09-cv-5601, 2011 WL 4585028 (N.D. Ill .Sep. 30, 2011).

results without imposing undue expense on TCPA defendants or pressuring them into early settlement in cases where their liability is questionable.

## **II. Conclusion**

For all the foregoing reasons, the Commission should clarify what it meant in the *2006 Junk Fax Order* when it stated that the party whose goods and services are advertised in an unsolicited fax *is not always* the liable sender. I agree with Akin Gump that the Commission should 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.” The Commission also should clarify that its junk fax regulations do not impose strict liability on entities simply because their goods and services are advertised. These clarifications would give courts the tools they need to decide these cases more efficiently, reducing the pressure on innocent defendants to settle and saving litigants the time and expense associated with excessively prolonged litigation.

Dated: April 8, 2019

Respectfully submitted,

/s/ Vincent A. Lavieri

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