

ANDERSON + WANCA
ATTORNEYS AT LAW

3701 ALGONQUIN ROAD, SUITE 500, ROLLING MEADOWS, IL 60008

TEL: (847) 368-1500 * FAX: (847) 368-1501

EMAIL: BUSLIT@ANDERSONWANCA.COM

April 11, 2019

Via ECF Filing

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

Re: Notice of Ex Parte Presentation by Various TCPA Plaintiffs,
CG Docket Nos. 05-338 and 02-278

Dear Madam Secretary,

On April 9, 2019, undersigned counsel, Glenn L. Hara of Anderson + Wanca, on behalf of Career Counseling, Inc. and Scoma Chiropractic, P.A. ; Daniel A. Edelman of Edelman Combs Lattuner & Goodwin, LLC, on behalf of Florence Mussat, M.D., S.C. and Dr. Gress; and Avi Kaufman of Kaufman P.A., on behalf of Kenneth A. Thomas MD, LLC, met with Rebecca Hirselj, Daniel Margolis, Kurt Schroeder, Erica McMahon, and Nancy Stevenson, Consumer & Governmental Affairs Bureau.

At the meeting we discussed the Petition for Expedited Declaratory Ruling filed by Amerifactors Financial Group, LLC ("Amerifactors Petition"). We explained that our TCPA clients are small businesses, mostly in health-care related fields, that use fax machines in their day-to-day business, and that health-care related companies tend to use fax technology because they believe it to be more HIPPA-compliant for transmitting personal patient information. I explained that Career Counseling is a small staffing franchisee in Lexington, SC, that uses faxes for communicating with its corporate headquarters or with persons it has placed in employment positions, explaining that some employees do not have reliable internet access and use fax technology to send tax-election forms and other documents.

We explained that, in addition to the legitimate faxes they send and receive in their business, our clients receive many junk faxes. These faxes disrupt our clients' businesses, and impose costs: our clients pay employees to review faxes to determine if they are junk or something important, they waste their time making those decisions, and junk faxes are annoying. We explained these costs exist regardless whether an employee is looking at a fax printed on paper from a stand-alone fax machine or looking on a computer screen at an email attachment or through a portal maintained by an e-fax service provider the business pays for.

We argued that the TCPA's private right of action has been effective at curbing junk faxing and that, although our clients in health-care fields still receive a disproportionate number of junk faxes, TCPA private enforcement has overall been an effective deterrent. We also discussed the Commission's orders, which have consistently interpreted the TCPA to protect consumers from attempts to evade the junk-fax prohibitions. In particular, we discussed the Commission's 2002 notice of rulemaking to update its rules in light of "developing technologies, such as computerized fax servers," Public Notice, 17 FCC Rcd. 17459, and the subsequent Order ruling that when a fax is sent to a "computerized fax server," the "computerized fax server" is a "telephone facsimile machine." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14133 ¶ 200 (rel. July 3, 2003) ("2003 Order"). We argued that the Commission's ruling that the "computerized fax server" need not actually print the fax for a TCPA violation to have occurred clearly covers the "e-fax" scenario described in the Amerifactors Petition and Ex Parte submission by MasterCard (against whom Dr. Mussat, Scoma Chiropractic, P.A., and Dr. Gress have a private TCPA action), which essentially ask the Commission to undo the 2003 Order.

We also urged the Commission to consider the Reply Comments filed September 1, 2017, by Robert Biggerstaff, arguing that Mr. Biggerstaff is the only expert on fax technology to have filed comments, and that he urged the Commission to reaffirm the 2003 Order because every fax transmission received and processed by a "fax server" is indeed "sent to" and "received by" a "telephone facsimile machine" as defined by the TCPA, even if the fax is then converted to another format and forwarded to its ultimate destination. We argued that, once it is accepted that an "unsolicited advertisement" sent to a "fax server" is sent to a "telephone facsimile machine," the only question is who has standing to sue for the TCPA violation. We explained that the courts have held it is the "recipient" who has standing to sue, and the "recipient" is the e-fax "customer" who pays for the service, essentially leasing the fax number and space on the fax server, and *not* the e-fax service provider. *See J2 Global Commc'ns, Inc. v. Protus IP Sols.*, 2010 WL 9446806, at *8 (C.D. Cal. Oct. 1, 2010); *Whiteamire Clinic, P.A. Inc. v. Cartridge World N. Am., LLC.*, 2017 WL 561832, at *3 (N.D. Ohio Feb. 13, 2017). We argued that is the only reasonable way to read the TCPA, which is a remedial statute that should be construed to protect consumers, not e-fax service providers.

Finally, we discussed that, in our experience, the "e-fax" customer pays a fee to send and receive a certain allotment of faxes. I have attached an example of one such subscription option from one of the major e-fax providers, j2 Global, Inc., stating that its "efax Pro" service allows the customer to "Send 200 pages/mo" and "Receive 200 pages/mo" for \$19.95 per month (approximately \$0.05 per page) and a \$10 setup fee, with additional faxes at \$0.10 per page. (*See* attached Exhibit A, *available at* <https://www.efax.com/pricing>).

Pursuant to Section 1.1206(b) of the Commission's rules, this letter is being filed electronically. If there are questions, please feel free to contact me.

Sincerely,

Ms. Marlene H. Dortch
April 11, 2019
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s/ Glenn L. Hara