

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of Best Doctors, Inc.'s	)	
Petition for Declaratory Ruling	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telecommunications Consumer Protection	)	
Act of 1991	)	
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338

**PETITION FOR DECLARATORY RULING**

**BEST DOCTORS, INC.**

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## SUMMARY

Best Doctors, Inc. (“Best Doctors”), requests that the Commission issue a declaratory ruling clarifying that a request sent to a telephone facsimile machine asking the recipient to verify the contact information and operational status of a medical practice for inclusion in a database when the request does not state the commercial availability or quality of property, goods, or services is not an “advertisement” under the Telephone Consumer Protection Act, as modified by the Junk Fax Protection Act (“TCPA”) (codified at 47 U.S.C. § 227 and implemented by the Commission in 47 C.F.R. § 64.1200). The TCPA prohibits the sending of an unsolicited advertisement to a telephone facsimile machine unless the sender has an established business relationship with the recipient, the sender obtained the facsimile number through certain enumerated methods, and the faxed communication includes opt out language.

Best Doctors is a global benefits provider that provides its members with access to a network of renowned physicians, known as the Best Doctors in America<sup>®</sup> List. The doctors included on the list have been selected as the best in their respective fields and have had their qualifications verified by Best Doctors. As part of Best Doctors’ verification process, Best Doctors sends a fax to each physician recommended by his or her peers inviting them to be included in the Best Doctors in America<sup>®</sup> List subject to the physician verifying his or her contact information and confirming that he or she is currently seeing patients. The fax does not promote or even mention the commercial availability of any property, good, or service. One of the fax recipients filed a complaint against Best Doctors in the federal district court in Massachusetts alleging that the fax is an unsolicited advertisement in violation of the TCPA. Therefore, Best Doctors requests that the Commission rule on this Petition promptly.

The Commission explained in its *Junk Fax Order* (21 FCC Rcd 2787 (2006)) that the TCPA does not prohibit sending informational messages to a facsimile machine, even if those

messages contain an incidental advertisement. The Commission further advised in the *Junk Fax Order* that a facsimile message offering goods or services at no charge, but that is a pretext or part of an overall marketing campaign to advertise a commercial product or service, may be an advertisement subject to the TCPA. However, the Commission did not provide clear guidance in the *Junk Fax Order* nor in subsequent orders regarding what factors should be considered when determining whether an informational message sent via fax may be a pretext or part of an overall marketing campaign to advertise a good or service.

The clarification requested by Best Doctors is necessary because federal courts have issued conflicting opinions regarding whether a pretext to an advertisement must be apparent in the initial faxed message or whether subsequent communications to the fax recipient can be evidence of pretext. Specifically, some courts have held that it is important to look at non-faxed communications that occur after the initial fax to determine whether the initial fax is an advertisement, while other courts have relied solely on the content of the fax message itself to decide if the fax is an advertisement. The Commission should clarify that only the fax itself should be examined to determine whether it is an advertisement for TCPA purposes when the fax lacks any references to the commercial availability or quality of property, goods, or services. This clarification would be consistent with the TCPA, which only governs advertisements sent to a facsimile machine, and not any other subsequent non-faxed communications or conduct. In addition, the clarification would be consistent with the *Junk Fax Order*'s statement that facsimile communications that are informational are not prohibited by the TCPA. The content of the fax itself discloses whether the fax is informational. Finally, review of the fax sent by Best Doctors indicates that the fax does not promote or even mention the commercial availability of any property, good, or service, and therefore, is not an advertisement under the TCPA.

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**PETITION FOR DECLARATORY RULING**

Best Doctors, Inc. (“Best Doctors”), by its attorneys, pursuant to Section 1.2 of the Commission’s Rules (47 C.F.R. § 1.2), hereby requests that the Commission issue a declaratory ruling clarifying the scope of the term “advertisement” as contained in the Telephone Consumer Protection Act, as modified by the Junk Fax Protection Act (“TCPA”).<sup>1</sup> Specifically, this Petition asks the Commission to clarify that a request sent via facsimile asking the recipient to verify the contact information and operational status of a medical practice for inclusion in a database when the request does not state the commercial availability or quality of property, goods, or services is not an “advertisement” under the TCPA and the Commission’s implementing regulations. The issue addressed in this Petition is the subject of a lawsuit pending in the United States District Court for the District of Massachusetts.<sup>2</sup> Therefore, Best Doctors requests that the Commission consider its Petition promptly.

As explained in this Petition, there are significant unresolved questions regarding whether a communication sent to a facsimile machine is an advertisement under the TCPA when the

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<sup>1</sup> 47 U.S.C. § 227; *see also* 47 C.F.R. § 64.1200, the Commission’s regulations implementing the TCPA.

<sup>2</sup> *Kenneth A. Thomas MD, LLC v. Best Doctors, Inc.*, No. 1:18-cv-10957-DPW (D. Mass. 2018).

actual content of the fax communication lacks any material advertising the commercial availability or quality of any property, goods, or services. As described in Section III.B of this Petition, a series of inconsistent federal court decisions regarding the meaning of “advertisement” under the TCPA have made it necessary for the Commission to resolve the meaning of advertisement.<sup>3</sup> Furthermore, there are two other petitions for declaratory ruling pending before this Commission that also seek clarifications regarding the meaning of the term advertisement in the TCPA.<sup>4</sup> As such, resolution of the questions presented by this Petition and the other pending petitions would provide significant guidance to courts, as well as to business entities that initiate informational communications to facsimile machines and recipients of such communications. Clarification would also eliminate, or at least, reduce, the inconsistent court rulings.

## **I. BACKGROUND**

### **A. Best Doctors’ Best Doctors in America® List.**

Best Doctors, founded in 1989 by Harvard Medical School professors, is a global benefits provider that serves more than 40 million members in every major region of the world. Best Doctors’ innovative services include access to a broad network of physicians who have been selected as the best in their respective fields by other leading doctors. Best Doctors’ services

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<sup>3</sup> The Commission is the expert agency authorized by Congress to interpret and enforce the TCPA, including the Junk Fax Protection Act provisions.

<sup>4</sup> *See* Invalon, Inc. Petition for Declaratory Ruling Clarifying Unsolicited Advertisement Provision of Telephone Consumer Protection Act and Junk Fax Prevention Act, CG Docket No. 02-278 (filed Feb. 20, 2018) (seeking, in part, a declaration that faxes that offer free or “no cost” electronic health record collection, and which do not offer any commercially available product or service to the recipients, are not advertisements under the TCPA); Petition of M3 USA Corporation for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Mar. 20, 2017) (seeking, in part, a declaration that informational faxes are not pretexts for advertisements under the TCPA unless they promote specific, commercially available property, goods, or services to the recipient of the fax).

help people in need obtain appropriate diagnosis and treatment, significantly improving health outcomes.

This Petition relates to communications sent by Best Doctors to the facsimile machines of doctors regarding the Best Doctors network of physicians, known as the Best Doctors in America<sup>®</sup> List. Best Doctors conducts one of the largest ongoing peer physician polls in health care to identify the physicians most trusted by other physicians. Best Doctors does not pay physicians to be included in its Best Doctors in America<sup>®</sup> List database, nor can physicians or their organizations pay Best Doctors to be included in the database. In addition, a physician cannot apply to become a Best Doctors physician. The only way for a physician to be selected to be included in the database is to be nominated by and then receive voting consensus from Best Doctors physicians. As a result, Best Doctors has a proprietary, global database of renowned physicians free from commercial and financial bias.

After Best Doctors reviews the results of the polls and identifies the physicians most recommended by other physicians, Best Doctors researches and verifies each physician for clinical activity, licensure and disciplinary actions. As part of the verification process, Best Doctors contacts each physician recommended by his or her peers to confirm the address of the relevant medical office and verify that the physician is currently seeing patients. Best Doctors conducts the verification process by sending a form to a physician's facsimile machine or by calling the physician's office to confirm the office address and operational status. A copy of a sample form that Best Doctors faxes to physicians is provided herein as Exhibit 1. Absent from that form is any solicitation to purchase any product or service, or even to receive any product or service at no charge.

The form is an invitation to the recipient to be included in the Best Doctors in America<sup>®</sup> List subject to the doctor verifying his or her contact information and confirming that he or she is currently seeing patients. The form states that the information provided by the recipient to Best Doctors will be used “to determine your eligibility for inclusion in the Best Doctors in America list” and “facilitate delivery of your formal inclusion letter.” The form also advises the recipient that “[i]f you are not accepted for inclusion, Best Doctors will not use or disclose the information you provide any further.” Finally, the form does not contain any language regarding the commercial availability or quality of any property, goods, or services.

When the verification process is complete and Best Doctors finalizes its decisions regarding those physicians who qualify for inclusion in the Best Doctors network, Best Doctors sends a formal inclusion letter and an information packet to the accepted doctors using a delivery method other than a facsimile machine.<sup>5</sup> The information packet provides information regarding Best Doctors, the benefits of being included in the Best Doctors in America<sup>®</sup> List, the process for selecting physicians to be included in the Best Doctors in America<sup>®</sup> List, the location and types of doctors included on the list, and other resources available to doctors on the list. The 18-page information packet includes one page that offers the option of purchasing a plaque to physicians who are selected as a Best Doctor physician. Purchase of the plaque is not required for doctors included in the Best Doctors s in America<sup>®</sup> List to access any associated benefits, such as use of the logo, or other available resources. As noted above, the fax transmissions sent to doctors seeking confirmation of address and that the doctors are still seeing patients nowhere mention the commercial availability of such plaques or any other property, good, or service.

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<sup>5</sup> Typically, those inclusion letters and information packets are sent via first class U.S. Mail.

## **B. TCPA Litigation Against Best Doctors.**

On October 31, 2018, Plaintiff Kenneth A. Thomas MD, LLC (“KAT, LLC”) filed an Amended Complaint initiating a putative class action against Best Doctors in the United States District Court for the District of Massachusetts.<sup>6</sup> In the Amended Complaint, KAT, LLC alleged that on May 16, 2017, Best Doctors used a telephone facsimile machine to send unsolicited fax advertisements to Dr. Thomas in violation of the TCPA. A copy of the faxed document is provided as Exhibit 1 to this Petition. As explained above, the faxed document is an invitation from Best Doctors to the recipient to be included in the Best Doctors in America<sup>®</sup> List subject to the doctor verifying his or her contact information and confirming that he or she is currently seeing patients. It is not an advertisement under the TCPA.

KAT, LLC asserted in the Amended Complaint that the faxed form is an advertisement under the TCPA because there are advertising related reasons for sending the fax.<sup>7</sup> KAT, LLC alleged that one of the advertising related reasons Best Doctors had for sending the fax was that the fax was a “pretext” to advertise Best Doctors branded merchandise.<sup>8</sup> KAT, LLC further alleged that Best Doctors attempts to sell plaques to fax recipients in an order form contained in an information packet subsequently sent to the fax recipients (by a transmission means other than fax) who respond to the request for verification.<sup>9</sup> Best Doctors will raise various defenses in response to KAT, LLC’s allegations, including that the faxed communication is not an

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<sup>6</sup> *Kenneth A. Thomas MD, LLC v. Best Doctors, Inc.*, No. 1:18-cv-10957-DPW, Am. Compl. (D. Mass. Oct. 31, 2018). KAT, LLC initially filed a complaint against Best Doctors on December 28, 2017, based on the same single-page facsimile that is at issue in the Amended Complaint. *Kenneth A. Thomas MD, LLC v. Best Doctors, Inc.*, No. 1:17-cv-12563-DJC (D. Mass, Dec. 28, 2017). KAT, LLC filed a Notice of Voluntary Dismissal on April 6, 2018, and refiled its complaint on May 14, 2018.

<sup>7</sup> Am. Compl. ¶ 2.

<sup>8</sup> Am. Compl. ¶ 4.

<sup>9</sup> *Id.*

advertisement under the TCPA because it does not include any language by which Best Doctors attempted to sell anything to Dr. Thomas, *i.e.*, that the fax contained no language regarding the commercial availability or quality of any property, goods, or services. Neither does it include language indicating that the communication was a pretext to advertise any Best Doctors' products or services.<sup>10</sup> There are conflicting court decisions<sup>10</sup> regarding whether communications or other conduct occurring subsequent to a faxed communication can transform an otherwise informational faxed communication into an advertisement. Best Doctors requests that the Commission clarify that an informational fax containing no reference to any commercial product or service offered by the sender is not a pretext to advertise a good or service unless the actual content of the fax indicates that the sender is attempting to advise the recipient of the commercial availability of a good or service.

## **II. THE TCPA'S DEFINITION OF "ADVERTISEMENT" AND COMMISSION RULINGS INTERPRETING THAT DEFINITION**

The TCPA provides that "it shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States ... to send, to a telephone facsimile machine, an unsolicited advertisement" unless (1) the sender has an established business relationship with the recipient; (2) the sender obtained the facsimile number through certain enumerated methods; and (3) the faxed communication includes language informing the recipient how to opt out of receiving further communications.<sup>11</sup> An "unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of

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<sup>10</sup> See generally, *Kenneth A. Thomas MD, LLC v. Best Doctors, Inc.*, No. 1:18-cv-10957-DPW, Answer (D. Mass. Dec. 7, 2018).

<sup>11</sup> See 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(4).

any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise."<sup>12</sup>

The Commission has stated that the TCPA does not prohibit messages that contain information, such as industry news articles, legislative updates or employee benefits information.<sup>13</sup> Informational messages that contain a *de minimis* amount of advertising or an incidental advertisement, such as a company logo, are not considered to be advertisements.<sup>14</sup> The Commission also looks to the "primary purpose" of a faxed communication when determining whether the communication is an advertisement.<sup>15</sup> For example, a trade organization's newsletter is not an unsolicited advertisement "so long as the newsletter's primary purpose is informational, rather than to promote commercial products."<sup>16</sup>

The Commission further concluded in the *Junk Fax Order* that "facsimile messages that promote goods or services even at no cost ... are unsolicited advertisements under the TCPA's definition."<sup>17</sup> The Commission explained that a facsimile message offering goods or services at

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<sup>12</sup> 47 U.S.C. § 227(a)(5); *see also* 47 C.F.R. § 64.1200(f)(1) (defining "advertisement" as "material advertising the commercial availability or quality of any property, goods, or services").

<sup>13</sup> *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 2787, ¶ 53 (2006) ("Junk Fax Order")*.

<sup>14</sup> *See id.* ¶¶ 51, 53.

<sup>15</sup> *Id.* ¶ 51 ("a company logo or business slogan found on an account statement would not convert the communication into an advertisement, so long as the primary purpose of the communication is, for example, to relay account information to the fax recipient.").

<sup>16</sup> *Id.* ¶ 53.

<sup>17</sup> *Id.* ¶ 52. Federal courts do not agree on how to interpret this statement. The Fourth Circuit held that the *Junk Fax Order* creates a per se rule that a fax promoting a free good or service is an advertisement under the TCPA. *See Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC et al.*, 883 F.3d 459 (4<sup>th</sup> Cir. 2018). However, the Sixth Circuit held that the same statement in the *Junk Fax Order* supports a rebuttable presumption that a fax promoting a free good or service is an advertisement under the TCPA. *See Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92 (2d Cir. 2017).

no charge, but that is a pretext or part of an overall marketing campaign to advertise a commercial product or service, is an advertisement subject to the TCPA. The Commission noted that in many instances offering a free seminar can serve as a pretext to advertise commercial products and services (presumably at the seminar) and that offering a free publication is often part of an overall marketing campaign to sell products contained in the publication.<sup>18</sup> The Commission further stated that a message purporting to be a survey can serve as a pretext to an advertisement.<sup>19</sup> While the Commission stated that facsimile messages that are pretexts or part of overall marketing campaigns to advertise a commercial good or service are advertisements under the TCPA, in the *Junk Fax Order*, the Commission did not provide clear guidance as to what information should be considered when determining whether a non-advertisement message sent via fax may be a pretext or part of an overall marketing campaign to advertise a good or service.<sup>20</sup>

Subsequent Commission decisions do not clarify whether a determination that a fax message constitutes an “advertisement” under the TCPA is to be based only on what is contained in the body of the fax, or whether additional information, such as subsequent non-faxed solicitations, should be reviewed to determine if a facsimile message is a pretext to advertising. For example, the Commission’s Consumer and Governmental Affairs Bureau denied a petition for a declaratory ruling seeking clarification that resumes faxed by a third party on a job seeker’s behalf in response to online job postings are not advertisements under the TCPA.<sup>21</sup> The Bureau

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<sup>18</sup> *See id.*

<sup>19</sup> *See id.*, ¶ 54.

<sup>20</sup> Significantly, nothing in the TCPA states or suggests that a fax containing no language mentioning the commercial availability of any property, good, or service can be transformed into an advertisement if viewed as part of an “overall marketing campaign.”

<sup>21</sup> *See iHire, LLC Petition for Declaratory Ruling et al.*, 30 FCC Rcd 8628 (2015).

considered the amount of space on the faxed message devoted to advertising versus the amount of space used for information and found that two thirds of the printed lines on each fax encouraged the recipient to visit iHire’s website, instructed the recipient on how to do so, and advised the recipient that a potential employer must register on the website.<sup>22</sup> The Bureau also concluded that the primary purpose of the faxes was to sell iHire’s services rather than to inform the recipient about the job candidate because the faxes included minimal information about the job candidate rather than full resumes, promoted iHire, and provided instructions on how to access iHire’s website to view full resumes (which were available for a fee).<sup>23</sup> The Bureau stated that the “advertising on iHire’s faxes is clearly not de minimis; it is a type of ‘pretext to advertise commercial products and services’ and ‘marketing campaign to sell property, goods, or services’ that the Commission previously cautioned would violate the TCPA.”<sup>24</sup> Thus, the Bureau referenced the fax itself to discern that it was a pretext to advertise commercial products and services. In short, the Bureau based its determination on the content of the fax itself, not on speculating as to whether the fax might have been part of an overall marketing campaign.

In another matter, the Commission mainly relied on the content of a fax itself, but also asserted that subsequent calls to consumers indicated that the fax was part of an overall marketing campaign to sell goods or services (even though it is unclear that any calls were placed to consumers). As described in a 2010 Notice of Apparent Liability, the Commission received numerous consumer complaints alleging that Presidential Who’s Who, Inc. (“Presidential Who’s Who”) faxed unsolicited advertisements for entry in and sale of the

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<sup>22</sup> *See id.* ¶ 8.

<sup>23</sup> *See id.* ¶ 9.

<sup>24</sup> *Id.*

publication “Presidential Who’s Who.”<sup>25</sup> The Commission stated that it had previously determined that “when promotions for ‘free’ services serve as pretext for later solicitations, the original promotional fax constitutes an advertisement.”<sup>26</sup> As a basis for issuing the Notice of Apparent Liability, the Commission stated that although there was no cost to individuals for inclusion in the publication, the faxes offered “an opportunity to purchase the compilation publication.”<sup>27</sup> The Commission also mentioned the allegation of one complainant that when she called the company after receiving the fax, she was offered the publication for a price.<sup>28</sup> Even though neither the 2010 nor the 2011 Notice of Apparent Liability referred to calls initiated by Presidential Who’s Who to consumer complainants, the Commission, in a Forfeiture Order found: “The faxes at issue offer entry in the publication ‘Presidential Who’s Who’ and advertise that publication either explicitly or in conjunction with follow-up phone calls from Presidential Who’s Who.”<sup>29</sup> The Commission further stated that “the faxes serve[d] as part of an ‘overall marketing campaign to sell property, goods, or services.’”<sup>30</sup> Given that the faxes themselves included an overt advertisement to purchase a publication, the Commission did not need to rely on subsequent interactions between the fax recipients for a finding that the faxes were

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<sup>25</sup> See *Presidential Who’s Who, Inc.*, Notice of Apparent Liability, 25 FCC Rcd 13759 (2010).

<sup>26</sup> *Id.* (citing *Junk Fax Order*, ¶ 52).

<sup>27</sup> See *id.* ¶ 6. The FCC also noted that products associated with the publication, including professional directories and plaques are commercially available. *Id.* ¶¶ 6-7.

<sup>28</sup> See *id.* A subsequent Notice of Apparent Liability issued in 2011 discusses the 2010 Notice of Apparent Liability when it stated that there were “follow up calls between the complainant and the company,” but did not provide further details about any other calls between consumers and the company. See *Presidential Who’s Who, Inc., Notice of Apparent Liability*, 26 FCC Rcd 8989, ¶ 8 (2011).

<sup>29</sup> See *Presidential Who’s Who, Inc.*, Forfeiture Order, FCC 14-31, ¶ 9 (Mar. 28, 2014).

<sup>30</sup> *Id.* ¶ 9 (quoting *Junk Fax Order*, ¶ 52).

advertisements under the TCPA. In contrast, the fax sent by Best Doctors contained no explicit or implicit advertisement to purchase anything.

The *iHire* and *Presidential Who's Who* orders demonstrate that the Commission needs to clarify whether a fax constitutes an advertisement even if there is no indication on the face of the fax that it is an advertisement or a pretext for an advertisement. Moreover, as discussed below, courts have issued conflicting opinions regarding whether a pretext to an advertisement must be apparent in the initial faxed message or whether subsequent communications to the fax recipient can be evidence of pretext.

### III. ARGUMENT

#### A. The Commission Has Authority to Issue a Declaratory Ruling to Clarify the Meaning of an “Advertisement” under the TCPA.

The Commission has authority “in its sound discretion” to “issue a declaratory order to terminate a controversy or remove uncertainty.”<sup>31</sup>

#### B. A Declaratory Ruling Is Needed to Resolve Conflicting Court Decisions Regarding What Information Can Be Considered to Determine Whether a Faxed Communication Is an Advertisement Under the TCPA.

A declaratory ruling will resolve confusion among the courts concerning the scope of the inquiry that is warranted to determine whether an unsolicited fax is an advertisement prohibited by the TCPA. As stated above, the TCPA prohibits the sending of an “unsolicited advertisement” which is defined by statute as “material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.”<sup>32</sup> In the *Junk Fax Order*, the Commission advised that a fax may serve as a pretext to an advertisement even when

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<sup>31</sup> 5 U.S.C. § 554(e); *see also* 47 C.F.R. § 1.2(a) (“The Commission may ... on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”).

<sup>32</sup> 47 U.S.C. § 227(a)(5); *see also* 47 C.F.R. § 64.1200(f)(1) (defining advertisement).

the fax appears to be informational (such as a survey) or offers a good or service for free (such as a free seminar or publication). The Commission did not clearly state whether information beyond that contained in the fax can be considered to determine whether a fax qualifies as an advertisement under the TCPA. Some courts have held that it is important to look at non-faxed communications that occur after the initial fax to determine whether the initial fax is an advertisement, while other courts have relied solely on the content of the fax message itself to decide if the fax is an advertisement.

Several federal courts have looked to the content of a fax to determine whether a fax is a pretext to advertise goods or services. For example, a federal district court in Missouri denied a motion to dismiss a complaint that faxes sent by a pharmaceutical company were unsolicited advertisements. In that case, the faxes invited a doctor to attend a medical discussion, but also included the logo and safety information for a drug sold by the company which had sent the unsolicited fax.<sup>33</sup> The court found that the “product-driven content *in the fax message*” raised an issue of fact whether the medical discussion referenced in the fax was a pretext for advertising commercial products or services.<sup>34</sup>

A federal district court in New Jersey similarly looked to the content of the fax itself when assessing a motion to dismiss a complaint regarding a fax sent by a pharmaceutical company.<sup>35</sup> The fax at issue advised the recipients that a certain drug had been recategorized so that it was available for a lower copayment. The fax further stated that the recipient could contact a consumer communications center to obtain more information and included the

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<sup>33</sup> See *St. Louis Heart Center, Inc. v. Forest Pharmaceuticals, Inc.*, No. 4:12-CV-02224, 2013 U.S. Dist. LEXIS 35563 (E.D. Mo. Mar. 13, 2013) (emphasis added).

<sup>34</sup> *Id.* at \*12.

<sup>35</sup> See *Physicians Healthsource, Inc. v. Janssen Pharmaceuticals, Inc.*, No. 12-2132, 2013 U.S. Dist. LEXIS 15952 (D.N.J. Feb. 6, 2013) (unpublished).

marketing logo of the sender. The plaintiff argued that the fax was sent as a pretext to market the named drug. The court granted the motion to dismiss, stating that “the Court finds that *on its face*, the content of the fax at issue does not suggest the presence of a commercial pretext.”<sup>36</sup>

A federal district court in Pennsylvania also reviewed the content of a fax when examining a motion to dismiss a claim that a satisfaction survey sent to a doctor by a healthcare management services company was a pretext to increase awareness and use of the company’s services and increase traffic to its website.<sup>37</sup> The faxed document included a website address as an alternative means to complete the survey. The court granted the motion to dismiss, explaining that the fax was not a pretext for future advertising simply by mentioning a website.<sup>38</sup>

In contrast, in a recent case in the United States Court of Appeals for the Sixth Circuit, the court held: “A court could not possibly resolve a claim that a fax was pretextual if it confined its evaluation to the fax itself.”<sup>39</sup> In *Fulton*, a dental practice alleged that it received a fax number verification form from Defendants, companies that maintain a Master Provider Referential Database that they sell to their customer base. The verification form asked recipients to validate or update contact information in the Defendants’ system so clients could use the information to send clinical summaries, prescription renewals, and other sensitive information. The fax included a website address for Frequently Asked Questions (“FAQs”). The FAQs disclosed that the contact information gathered by the fax is used to build the Master Provider

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<sup>36</sup> *Id.* at \*21 (emphasis added).

<sup>37</sup> See *Mauthe v. National Imaging Assocs., Inc.*, No. 17-1916, 2018 U.S. Dist. 72906 (E.D. Pa. Apr. 25, 2018).

<sup>38</sup> See *id.* at \*6. Although the court noted that the website offered nothing for sale, that point is not relevant to the court’s reasoning because the complaint did not allege that the defendant sold products and services to providers such as the plaintiff.

<sup>39</sup> *Fulton v. Enclarity, Inc. et al.*, 907 F.3d 948 (6<sup>th</sup> Cir. Nov. 2, 2018).

Referential Database which is sold to Defendants' customers.<sup>40</sup> Plaintiff, the Fulton dental practice, alleged that the fax was a pretext to obtain participation in Defendants' database and consent for Defendants and third parties to send additional marketing faxes to recipients. Plaintiff attached the FAQs from the website as support for the TCPA claims in its complaint. In the opinion denying a motion to dismiss, the court stated that "[f]inding a fax to be pretext for a subsequent advertising opportunity would require looking at what came after the fax."<sup>41</sup> The court denied the motion to dismiss, finding that "Fulton has adequately alleged that the fax Fulton received was an unsolicited advertisement because it served as a pretext for future advertising opportunities."<sup>42</sup>

The federal district court in the District of Columbia similarly looked at what actions occurred after receipt of a fax to determine if a plaintiff had sufficiently alleged that a fax was a pretext to advertise commercial products and services.<sup>43</sup> In *Drug Reform Coordination Network, Inc.*, the plaintiff alleged that a fax offering a free listing in a media contact directory was a prelude to subsequent offers for the sale of that directory when the defendant emailed to plaintiff three direct solicitations offering the directory for sale seven days after sending the fax.<sup>44</sup> The court concluded that "on its face the Fax is not an 'unsolicited advertisement.'"<sup>45</sup> However, the court denied a motion to dismiss because the fax, when read together with the subsequent direct

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<sup>40</sup> *See id.* at 951.

<sup>41</sup> *Id.* at 953.

<sup>42</sup> *Id.* at 955.

<sup>43</sup> *See Drug Reform Coordination Network, Inc. v. Grey House Publishing, Inc.*, 106 F. Supp. 3d 9 (D.D.C. 2015).

<sup>44</sup> *See id.* at 11, 13.

<sup>45</sup> *Id.* at 13.

solicitation emails supports a finding that the plaintiff sufficiently alleged that the fax was an unsolicited advertisement under TCPA.<sup>46</sup>

Based on the foregoing, courts have issued conflicting decisions regarding whether materials outside of the fax itself can be reviewed to determine if a fax is a pretext to advertising even when the fax itself lacks statements about the commercial availability or quality of property, goods, or services.

**IV. The Commission Should Clarify That Faxes Requesting Verification of Information, But That Contain No References to the Commercial Availability or Quality of Property, Goods, or Services, Are Not Advertisements Under the TCPA.**

The Commission should clarify that only the fax itself should be examined to determine whether it is an advertisement for TCPA purposes when the fax lacks any references to the commercial availability or quality of property, goods, or services. This clarification would be consistent with the TCPA itself and with the Commission's statements in the *Junk Fax Order* regarding what types of faxes are pretexts to an advertisement. Specifically, 47 U.S.C. § 227(B)(1)(c) prohibits the sending of "an unsolicited advertisement" to a telephone facsimile machine. Therefore, an "advertisement" must be sent to a facsimile machine to fall under the provisions of the TCPA. If no advertisement is sent to a facsimile machine, then the TCPA is not relevant. Subsequent communications sent to a fax recipient by other means, are not governed by the TCPA, and therefore, should not provide a basis for transforming a fax that advertises nothing into an advertisement subject to the TCPA.

The requested clarification would also be consistent with the *Junk Fax Order's* pronouncements regarding informational faxes. The *Junk Fax Order* referenced facsimile messages that promote goods or services at no cost, such as free seminars or free publications. The Commission stated that free seminars can serve as a pretext to advertise commercial

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<sup>46</sup> *See id.* at 14-15.

products or services, presumably because the seminar discusses those products or services. The Commission also noted that any publications provided for free may advertise products or services that are commercially available. The Commission then contrasted situations in which goods or services are promoted (even when they are promoted for free) with facsimile communications that are informational only. Regarding informational faxes, the Commission stated: “facsimile communications that contain only information ... would not be prohibited by the TCPA rules.”<sup>47</sup> Furthermore, the *Junk Fax Order* indicated that even when such informational faxes contain an incidental advertisement, such as a reference to a website or a company logo, the fax is not considered an advertisement so long as promotion of commercial products is not the primary purpose of the fax.<sup>48</sup> A determination of the incidental nature of any advertisement material on an otherwise informational fax, as well as the primary purpose of the fax, can be gleaned from the fax itself.

Review of the fax sent by Best Doctors to KAT, LLC, indicates that the fax does not promote or even mention the commercial availability of any property, good, or service. Rather, the fax serves only as a notification to Dr. Thomas that he was being considered for selection as a “Best Doctor” and a request that he verify his contact information and that he was currently seeing patients. If Dr. Thomas did not respond to the request for verification, he would not be included in the Best Doctors in America<sup>®</sup> List nor would he receive an informational packet providing detailed information about the list from Best Doctors. The fax does not include any offers to sell Dr. Thomas any product or service. The fax does not even offer to provide to the recipient any product or service for free. Although the fax references two services (Find a Best Doctor<sup>™</sup> and InterConsultation<sup>®</sup>), those services are mentioned in a disclaimer footnote, and

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<sup>47</sup> *Id.* ¶ 53.

<sup>48</sup> *See id.* ¶ 53.

more importantly, they are not being not being offered for sale. At most, any reference to those services (even if those references were considered to be advertisements) would be incidental to the overall fax. The inclusion of the Internet address for Best Doctors' webpage is similarly incidental. In conclusion, the fax sent to Dr. Thomas contained no content that would support a conclusion that it is an advertisement under the TCPA.

### **CONCLUSION**

Accordingly, Best Doctors respectfully requests that the Commission grant its request for a declaratory ruling clarifying that a faxed request to verify the contact information and operational status of a medical practice for inclusion in a database when the request does not state the commercial availability or quality of property, goods, or services is not an "advertisement" under the TCPA. This requested clarification would eliminate the uncertainty which has arisen as a result of a series of court decisions which have reached inconsistent conclusions regarding the meaning of "advertisement" for purposes of the TCPA. Furthermore, Best Doctors requests that the Commission rule on this Petition promptly, given the pending litigation regarding the issues addressed in this Petition.

Respectfully submitted,

**BEST DOCTORS, INC.**



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(202) 331-3100

*Its Attorneys*

December 14, 2018

# **EXHIBIT 1**



Fax

<b>Attention of: Dr. Kenneth A. Thomas</b>	<b>Fax No: 203-377-6497</b>
<b>From: Tommysina Bryant (return fax: 866-904-0913)</b>	<b>Date: 5/16/2017</b>
<b>Ref: Review your Best Doctors inclusion data</b>	<b>Pages (including cover): 1</b>

Dear Dr. Thomas,

Best Doctors® is preparing to notify the clinicians selected for the newest Best Doctors database. Physicians are included based on the result of our extensive, confidential peer-review process. As you may know, we accept no fees from doctors in exchange for a listing in our database. Physicians not currently seeing patients, even though selected by their peers to be a Best Doctor, will not be included in our Best Doctors in America List.

One step in this process is to verify and update your clinical address and to confirm that you are currently seeing patients to insure the accuracy of your information and to facilitate delivery of your formal inclusion letter this summer.

Please review the information below and either confirm its accuracy or indicate required corrections or additions. In particular, please let us know if the clinical address below is incomplete, or if it is not the address where you see patients.

**To help us meet our deadline, please respond within 7 days of your receipt of this request.**

<b>CLINICAL ADDRESS**</b> Dr. Kenneth A. Thomas 305 Boston Ave, Ste 205  Stratford, CT 06614	<b>MAILING ADDRESS (if different)</b>
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**Appointment Phone: 203-377-7670    Administrative Fax: 203-377-6497**  
**Email address:**

Thank you for taking the time to update this information. If you have any questions or concerns, please do not hesitate to contact me at the number or email listed below. You will find some helpful information about us at <http://bestdoctors.com/for-physicians>.

Sincerely,

Tommysina Bryant  
Best Doctors, Inc. | Polling and Research Division  
5280 Woodside Executive Court  
Aiken, SC 29803  
ph: 800-675-1199 x3201 | fax: 866-904-0913  
[research@bestdoctors.com](mailto:research@bestdoctors.com)

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<b>CURRENTLY SEEING PATIENTS?</b> <input type="checkbox"/> YES <input type="checkbox"/> NO
If YES, are you accepting NEW patients?
<input type="checkbox"/> Yes, all patients <input type="checkbox"/> Yes, referral required
<input type="checkbox"/> Not accepting new patients
If NOT currently seeing patients, what is the reason?
<input type="checkbox"/> Administrative only <input type="checkbox"/> Research only <input type="checkbox"/> Retired
<input type="checkbox"/> Other (explain:)

\*\*The information you provide at this time will be used by Best Doctors to determine your eligibility for inclusion in the Best Doctors in America list. If you are not accepted for inclusion, Best Doctors will not use or disclose the information you provide any further. If you are accepted as a Best Doctor and included in the Best Doctors in America list, we may use and disclose your information as follows: Best Doctors will use, and may disclose to subcontractors, your contact information only for purposes of administering our programs and services. Best Doctors may list your name, clinical address and affiliation, and specialty in local and regional magazines and newspapers as recognition of your inclusion in the Best Doctors in America® List. Prior to any publication, we will notify you and provide you with the ability to opt out of your inclusion in such publication. We may disclose your name, clinical address, and specialty to our members as part of our Find a Best Doctor™ service in which members request names of Best Doctors who treat their specific condition and who are in their geographic location. Finally, we may reach out to you from time to time to invite you to participate in other Best Doctors programs such as our virtual medical review service called InterConsultation®.

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