

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Petition for Waiver of the Stryker Entities) CG Docket No. 02-278
)
Rules and Regulations Implementing the) CG Docket No. 05-338
Telephone Consumer Protection Act of 1991)
)

REPLY COMMENTS OF HOWMEDICA OSTEONICS CORPORATION, STRYKER CORPORATION, STRYKER SALES CORPORATION AND STRYKER BIOTECH, LLC

Howmedica Osteonics Corporation, Stryker Corporation, Stryker Sales Corporation and Stryker Biotech, LLC (the “Stryker Entities” or “Petitioners”), through their counsel, respectfully submit these reply comments in response to the comments filed by a group of TCPA plaintiffs represented by serial TCPA class action counsel Brian Wanca and his law firm, Anderson + Wanca.¹

I. BACKGROUND – *PHI v. STRYKER*

The Anderson + Wanca Comments oppose the Stryker Entities’ Petition for Waiver, arguing that the Stryker Entities are not “similarly situated” to the original petitioners. Anderson + Wanca speculates that the Stryker Entities either knew or should have known that the TCPA’s opt-out regulations applied to consensual facsimiles, and also challenges the nature of the consent given by the Physicians Healthsource, Inc. (“PHI”) employee. These comments are mere conjecture and misdirection. Nothing in Anderson + Wanca’s Comments warrants denial of the Stryker Entities’ Petition for Waiver.

Anderson + Wanca is at the forefront of “junk fax” litigation, currently serving as counsel in over 60 “junk fax” class actions throughout the United States. Its client, PHI, is currently the lead plaintiff in at least 18 class action suits involving alleged TCPA violations. In *Physicians Healthsource, Inc. v.*

¹ TCPA Plaintiffs’ Comments on Petitions for Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by Alma Lasers, ASD Specialty Healthcare, Den-Mat Holdings, and Stryker Corp., CG Dockets No. 02-278, 05-338 (filed Dec. 12, 2014) (the “Anderson + Wanca Comments”).

Stryker Sales Corporation, et al., No. 1:12-cv-00729-RJR (W.D. Mich.) (“*PHI v. Stryker*”) PHI, through Anderson + Wanca, has sued Howmedica and other Stryker entities based on its receipt of a single fax that PHI’s own management-level employee clearly, unequivocally invited.

In October 2009, Howmedica sent a single fax notification to Dr. Jose Martinez, a primary care physician employed by PHI, inviting him to attend a seminar on “Recent Advancements in Orthopedics.”² Howmedica obtained Dr. Martinez’s fax number from an authorized licensee of the American Medical Association’s “Physician Masterfile.” The Physician Masterfile is the AMA’s compilation of contact and medical practice information for all doctors in the United States. It maintains this masterfile in order to facilitate communications with medical professionals on topics relating to public health and public interest.

For more than 60 years, the AMA has made the AMA Physician Masterfile available to the health care community to serve the public good and medical industry. ... Users of the AMA Masterfile include hospitals, medical schools, pharmaceutical companies, medical equipment and supply companies, consultants, market research firms, insurance companies, and commercial organizations.³

While the AMA collects much of its information from public records, it only obtains fax numbers from physicians themselves. It does this by distributing a census form to physicians on an annual basis, asking them to provide contact information. In 2003, Dr. Martinez *voluntarily* responded to AMA’s physician census. The census form informed Dr. Martinez that if he provided a facsimile number, he would “receive medically-related information, including advertising approved by the AMA.” (*See* 2003 AMA Census Form, DE #93.) Dr. Martinez supplied PHI’s fax number in response to this census form.

² The Stryker Entities contend that neither the fax invitation nor the seminar announced the commercial availability of a property, good or service and therefore did not constitute an “unsolicited advertisement” under 47 U.S.C. §227(a)(5).

³ AMA Website at <http://www.ama-assn.org/ama/pub/about-ama/physician-data-resources/ama-database-licensing.page?> (accessed on Dec. 19, 2014).

There can be no doubt that Dr. Martinez knew exactly the kind of information he would receive as a result of supplying the fax number. The AMA additionally provided a detailed Privacy Statement, which reiterated that information included in AMA's Physician Masterfile would be shared with third-party licensees, who would use the contact information provided to communicate with physicians on medically-related information, including, inter alia, "CME programs" and "general practice-related commercial offers of interest to physicians and consumers." (See AMA Privacy Statement, DE #93-1.)

The Privacy Statement further identified two different ways that Dr. Martinez could exclude himself from receiving faxes:

Physicians who choose NOT to receive information on the products and/or services offered through our Database Licensees may specify this preference as part of our *Do Not Release* policy. If you request this status, the AMA will prohibit the release of your Masterfile information to all entities and their direct affiliates outside the AMA except for national emergencies.

Specifically: The *Do Not Release* policy prohibits the AMA from releasing any Masterfile information on the physician....AMA Database Licensees will no longer have the right to use Masterfile information for the purpose of contacting the physician, including health warnings and drug recalls.....

[T]he AMA also offers you a less stringent No Contact option.

....[I]f a physician chooses No Contact, AMA Database Licensees will not be permitted to use his/her Masterfile information for purposes of distributing drug samples, journals or for other promotional purposes.⁴

The Privacy Statement enabled physicians such as Dr. Martinez to contact the AMA by email, telephone, facsimile, mail or the web to elect the Do Not Release or No Contact option.⁵

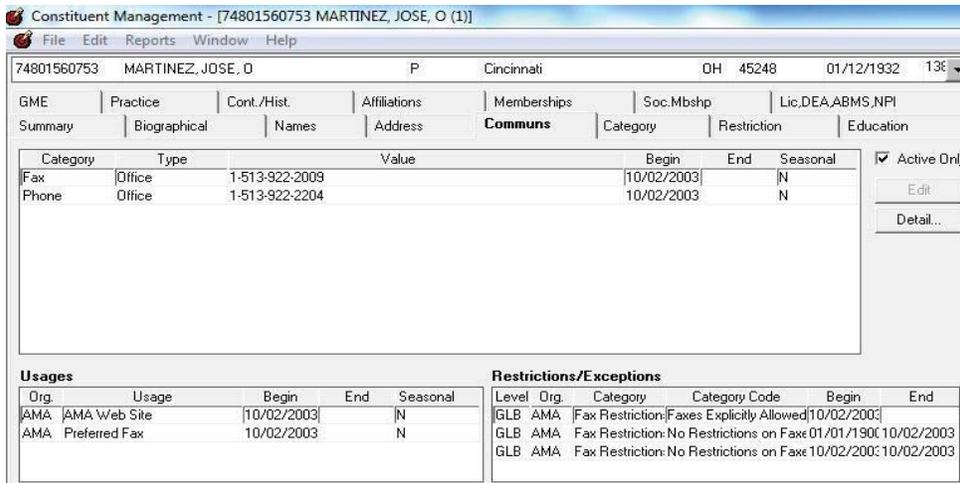
It is undisputed that Dr. Martinez never availed himself of any of these exclusion options, despite the fact that he received a substantially identical copy of AMA's census form and Privacy Statement

⁴ *Id.*

⁵ *Id.*

every year. (See Deposition Transcript of Tammy Weaver, AMA 30(b)(6) Representative, at 59:23-60:13; 62:2-63:14 & 75:23-76:14, DE #92-2.)

Dr. Martinez’s provision of facsimile contact information to the AMA, along with his decision not to impose any contact restrictions this contact information, is evidenced in this screen shot, created and maintained by the AMA in the normal course of its business:



(See also DE #92 at 8.) Dr. Martinez’s actions clearly qualify as consent under federal circuit court authority.⁶

II. ANDERSON + WANCA’S CONJECTURE DOES NOT WARRANT DENIAL OF RETROACTIVE WAIVER

Anderson + Wanca argues that the Commission should deny the Stryker Entities’ Petition for Waiver because the AMA’s standard contract for its database licensees required facsimiles sent by its users to contain an opt-out notice complying with “all laws and regulations governing the transmission

⁶ See, e.g., *CE Design v. King Architectural Metals, Inc.*, 637 F.3d 721, 726 (7th Cir. 2011) (stating that, under the TCPA, consent must be treated on a “case-by-case” basis, given the myriad ways consent can be given, such as through “business cards, advertisements, directory listings, trade journals, or by membership in an association”); *Practice Mgmt. Support Servs., Inc. v. Appeal Solutions, Inc.*, No. 09-cv-1937, 2010 WL 748170, at *3 (N.D. Ill. Mar. 1, 2010) (“plaintiff’s voluntary communication of its fax number precludes [it] from asserting that faxes were unsolicited under the TCPA.”); *Landsman & Funk, P.C. v. Loran Bus. Ctr., Inc.*, No. 08-cv-481, 2009 WL 602019, at *2 (W.D. Wis. Mar. 9, 2006) (“By sending its fax number to defendant, plaintiff cannot assert that the fax advertisements it received . . . were ‘unsolicited’ so as to fall within the category of fax advertisements regulated under 47 U.S.C. § 227.”); *Pinkard v. Wal-Mart Stores, Inc.*, No. 3:12-cv-2902, 2012 WL 5511039, at *6 (N.D. Ala. Nov. 9, 2012) (holding that plaintiff provided prior express consent by virtue of providing her number to the caller).

of unsolicited advertisements and facsimile communications.” (See Anderson + Wanca Comments at 39.) From this, Anderson + Wanca leaps to the unfounded and unsupportable conclusion that “if Stryker had investigated the ‘regulations’ it promised to follow” it “would have known” about the existence of the Commission’s opt-out regulations. (*Id.*) (emphasis added). Going on, Anderson + Wanca conversely, and illogically, posits that the Stryker Entities would not have learned of footnote 154 from the 2006 Junk Fax Order, nor of the “inadequate notice of rulemaking that was issued years earlier.” (*Id.*) Anderson + Wanca argues that this “evidence rebuts any ‘presumption’ of confusion under the Opt-Out Order.” (*Id.*) (emphasis added).

The Anderson + Wanca Comments simply attempt to re-litigate the alleged facts of the underlying court case as a means of diverting attention from the issues presented in the Stryker Entities’ Petition for Waiver. Anderson + Wanca’s wild speculation about what the Stryker Entities *would/should have known* is neither evidence nor a basis on which to deny a waiver. There is no evidence in *PHI v. Stryker* that the AMA’s contractual provisions were ever brought to Howmedica’s attention, or that the Stryker Entities knew that the Commission’s opt-out regulations pertained to consensual facsimiles. Moreover, there is no evidence that Dr. Martinez knew of these provisions either, such that his consent was never conditioned on the inclusion of this language.

It is important to keep in mind that it is merely a one-time fax that PHI has raised as a basis for its claim. All the opt-out notices in the world would have made no difference to PHI’s receipt of this one fax. Much, however, can be inferred from the fact that Dr. Martinez never notified the AMA to ask that the fax number be removed from the Physician Masterfile. Indeed, as of October 31, 2013, the AMA testified that it still had not received a request to remove Dr. Martinez’s fax number from its masterfile – which probably explains why PHI has been able to bolster its operating income with the proceeds of its TCPA deprecations. One of many perverse incentives created by the TCPA is that serial

litigants, when they do receive information that permits them to opt out, have no incentive to use it. Continuing to receive faxes allows them to receive an additional \$500-\$1,500 per transmission.

III. THE STRYKER ENTITIES ARE SIMILARLY SITUATED TO PREVIOUS PETITIONERS

In the Fax Order, the Commission found good cause existed to grant retroactive waivers to the 24 original petitioners, and invited other “similarly situated entities” to request a retroactive waiver as well.⁷ In granting a retroactive waiver to the original petitioners, the Commission noted that the lack of explicit notice in its Notice of Proposed Rulemaking “may have contributed to confusion or misplaced confidence about th[e] [opt-out] notice requirement.”⁸ The Commission also noted that the inconsistency between footnote 154 of the *Junk Fax Order* and the rule “caused confusion or misplaced confidence regarding the applicability of [the opt-out notice] requirement to faxes sent to those recipients who provided prior express permission.”⁹ Based on these findings, the Commission concluded that good cause existed to grant waiver to the original petitioners.

Notably, the Commission did not require the parties to demonstrate actual confusion regarding the applicability of the opt-out notice requirements to consensual facsimiles, nor did the Commission engage in any fact-finding on this point. Rather, the Commission based its decision to grant retroactive waivers on the inherent ambiguity created by the inconsistencies and the fact that the underlying “notice

⁷ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petition for Declaratory Ruling, Waiver and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission, CG Docket No. 02-278, 05-338, Order, FCC 14-164, ¶ 30 (rel. Oct. 30, 2014) (“*Fax Order*”).

⁸ *Id.* at ¶ 25.

⁹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd. 3787, fn. 154 (“*Junk Fax Order*”) (2006) (stating that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements” (emphasis added)); *Fax Order* at ¶ 24.

provided did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.”¹⁰

The Stryker Entities’ Petition for Waiver explicitly cites the bases for confusion identified by the Commission.¹¹ As such, the Stryker Entities stand in substantially the same position as the original petitioners, and should therefore be granted the same retroactive waiver.

In its opposition to the Stryker Entities’ Petition for Waiver, Anderson + Wanca have advocated for the Commission to require the Stryker Entities to demonstrate “actual confusion” over the applicability of the opt-out regulations to consensual faxes. This standard would require much more of the Stryker Entities than was required of the original petitioners. Such a requirement would be patently unfair to the Stryker Entities and other subsequent petitioners, as they would be disadvantaged based solely on the timing of their petition. This standard would moreover violate the due process and Constitutional rights of the Stryker Entities and other subsequent petitioners, who are entitled to the same treatment that the Commission afforded to the original petitioners.

PHI also states that the Stryker Entities’ have not stated whether they intend to comply with 47 C.F.R. § 64.1200(a)(iv)(4) going forward. The Commission should rest assured neither Howmedica nor any of the other Stryker Entities has used a fax machine to send information about medical education programs to medical doctors since PHI filed its lawsuit, and they have no intention of potentially running afoul of the TCPA’s rules and regulations in the future. But the chilling of communication resulting from the TCPA’s draconian liability scheme and the predatory conduct of serial litigants is extremely unfortunate, and bodes poorly for patient care. Indeed, in this case, Howmedica provided survey evidence that the vast majority of primary care physicians (the demographic which received the relevant communication) appreciate educational offerings of the

¹⁰ *Fax Order* at ¶ 25.

¹¹ *See* Petition for Waiver at 3.

variety that Howmedica gave in 2009. They do not view the use of fax announcements as intrusive, and, in fact, prefer faxes to other forms of notification such as telephone calls or in person visits. But the costs and liability risks imposed by ridiculous litigation generated by the likes of PHI and Anderson + Wanca results in medical product and service providers restricting the free flow of information.

IV. CONCLUSION

For the reasons stated herein, the Stryker Entities respectfully request that the Commission grant its retroactive waiver request pursuant to the Fax Order.

Respectfully Submitted,

HOWMEDICA OSTEONICS CORP, STRYKER CORPORATION, STRYKER SALES CORPORATION, AND STRYKER BIOTECH, LLC

By: /s/ Anthony J. Anscombe

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