

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

In the Matter of:)	
)	
Petition for Declaratory Ruling to Clarify)	
Statutory Basis for Rule 64.1200(a)(3)(iv))	CG Docket No. 02-278
and/or for Ruling Regarding Substantial)	
Compliance with Section 64.1200(a)(4)(iii))	CG Docket No. 05-338
and (iv) and/or Waiver)	

**DECLARATION OF SCOTT M. VOELZ IS SUPPORT OF
PETITION OF ADVANCED CARE SCRIPTS, INC. FOR WAIVER**

I, Scott M. Voelz, declare and state as follows:

1. I am a partner with the law firm of O’Melveny & Myers LLP and a member in good standing of the State Bar of California. I represent Advanced Care Scripts, Inc. (“ACS”) in the above-captioned matter, and I make this Declaration in support of ACS’s petition for waiver. I have personal knowledge of the facts set forth in this declaration and, if called to testify as a witness, could and would do so under oath.

2. Attached as **Exhibit A** is a true and correct copy of excerpts from the November 18, 2015 deposition of Steve Lynch.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 30th day of December, 2015 at Los Angeles, California.

/s/ Scott M. Voelz
Scott M. Voelz

EXHIBIT A

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JEFFERSON RADIATION ONCOLOGY,
L.L.C.,

Plaintiff,

CIVIL ACTION NO.: 15-1399

vs.

SECTION: C

MAGISTRATE: 3

ADVANCED CARE SCRIPTS, INC.,

Defendant.

_____ /

VIDEO DEPOSITION OF STEVE LYNCH

Taken on Behalf of the Plaintiff

DATE TAKEN: November 18, 2015

TIME: 9:02 a.m. - 3:17 p.m.

PLACE: Sclafani Williams Court Reporters
20 N. Orange Avenue, Suite 1108
Orlando, FL 32801

Stenographically Reported by:
Julie A. Watkins
Court Reporter

1 APPEARANCES:

2 Counsel for the Plaintiff:

3 GEORGE B. RECILE, ESQUIRE
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5 MATTHEW A. SHERMAN, ESQUIRE
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7 Counsel for the Defendant:

8 RANDALL W. EDWARDS, ESQUIRE
9 O'Melveny & Myers, LLP
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11 Los Angeles, CA 90071

11 Counsel for Omnicare:

12 ADAM C. MCNEELY, ESQUIRE
13 Omnicare Center
14 201 East 4TH Street, Suite 900
15 Cincinnati, OH 45202

15 Also Present:

16 Jamie Hollingsworth
17 Videographer
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1 A I'm not aware of any situation where they
2 asked for fax advertising.

3 Q Or that they gave permission to receive fax
4 advertising?

5 A Correct.

6 MR. EDWARDS: Objection.

7 Q Now, I want to, I want to take you to the
8 development of the actual fax blast that is sent out.
9 Traditionally, they include a sheet that pertains to a
10 particular drug, and then there is a referral form.
11 Is that correct?

12 A Typically, there's -- the first page is some
13 sort of information, whether it's a new drug that's
14 available for, for patients, or a new -- any type of
15 change to insurance, or something that's new to the --
16 new in the market. And then a referral form is the
17 second page.

18 Q Who created the format that was to be used
19 for the fax blast program?

20 A I -- trying to recall, it was myself, as
21 well as probably a couple other people that, within
22 marketing, that helped develop and build it, build it
23 out.

24 Q Was there anyone outside of marketing that
25 contributed to the template and the format that was to

1 be used?

2 A No, only, only WestFax, who asked us to add
3 the disclaimer on the bottom.

4 Q Okay. So -- but you said that the first
5 company was eFax?

6 A Correct.

7 Q Did you send out faxes without a disclaimer
8 when eFax was sending out your blast fax program?

9 A Yeah, and that's how we -- WestFax was the
10 one that informed us that we needed to have that on
11 the, on the form.

12 Q Okay. And WestFax started sending out your
13 blast faxes when?

14 A I believe towards the end of 2008.

15 Q Okay. And how is it that WestFax instructed
16 you as to the disclaimer information, as you referred
17 to, and the need for it to be on your form?

18 A So we sent them a template of what we wanted
19 to send out. They responded and said that we had to
20 have a disclaimer on the bottom allowing practices to
21 opt out of, of the fax communication, and they
22 provided us the language that we should put on the, on
23 the bottom of the page.

24 Q Okay. And did they do that in writing?

25 A They emailed -- yes, from what I recall,

1 they emailed us back and sent us what needs to be put
2 out there.

3 Q Do you have a copy of that email?

4 A No, I -- my -- our emails don't go back --
5 my records don't go back that far.

6 Q So I take it that you've searched for it?

7 A Yeah.

8 Q Yes?

9 A Yes.

10 Q Likewise, have you searched for the contract
11 between ACS and WestFax?

12 A We have.

13 Q Have you been able to locate it?

14 A We have not.

15 Q Do you know whether or not the disclosure,
16 or as you referred to it, the disclaimer language was
17 included in the contract body itself?

18 A I do not know.

19 Q Did WestFax, over a period of time, change
20 the language -- and let's refer to it as that opt-out
21 language. That's the language that we're referring to
22 correct?

23 A Correct.

24 Q The opportunity for recipients to opt-out
25 from receiving these faxes, what we claim to be

1 advertisements, okay? Is that correct?

2 MR. EDWARDS: I'm sorry, I just lost the
3 question.

4 MR. RECILE: Well, I will rephrase it.

5 MR. EDWARDS: Thank you.

6 Q My question to you is, let's refer to it as
7 opt-out language instead of disclaimer --

8 A Okay.

9 Q -- or any other context. What WestFax was
10 telling you was that you needed to include on your fax
11 blast opt-out language similar to what you claim they
12 sent you?

13 A Correct.

14 Q And was that early on in the fax campaign?

15 A That was prior t the first fax we sent out
16 through WestFax.

17 Q Okay. And did you comply with the request?

18 A We did.

19 Q Overtime, did they advise you that the
20 language should change?

21 A They did not.

22 Q All right. Overtime, did you change the
23 language?

24 A I don't believe so.

25 Q Do you recall what the language was that you

1 were advised should be placed on the faxes that were
2 being sent out pursuant to the blast in order to
3 qualify -- to have the -- in order to -- strike that.

4 Do you have any recollection of what the
5 opt-out language was that was originally recommended to
6 you by WestFax?

7 A I, I don't recall what, verbatim, what the
8 language was, but I don't believe it's changed.

9 Q Do you recall if the opt-out language
10 required a phone number where recipients could call in
11 to opt-out of the fax program?

12 A The, the language did -- had a phone number
13 and a fax number that they could contact in order to
14 be removed from the list. That much I know.

15 Q Okay. Did, did WestFax advise you that it
16 required both a phone number and a fax number?

17 A Yes.

18 Q And it's your contention that you complied
19 with that request and continued to, throughout your
20 fax blast program, include a phone number and a fax
21 number, as suggested by WestFax?

22 A I believe so. We actually had a -- we
23 actually had one we sent them, and they actually came
24 back to us and said just because of the sizing of the
25 page, it actually had gone off the first page and so

1 they had us adjust it to put it on there.

2 Q But it's your recollection that WestFax had
3 recommended that you have both a telephone number and
4 a fax number?

5 A Yes.

6 Q And your appreciation that ACS has always
7 complied with those two requirements?

8 MR. EDWARDS: Objection.

9 A I believe so.

10 Q All right. And at no time did WestFax tell
11 you that you could alleviate one or the other from the
12 opt-out provisions?

13 A Not that I recall.

14 Q Do you have a compliance department where
15 you send these faxes to see if -- strike that.

16 Did WestFax tell you that the reason why you
17 needed the opt-out language was in order to comply with
18 the TCPA?

19 A I don't recall that that was the -- what
20 they said. I know that there was some legal
21 requirement to have that opt-out language on the
22 bottom of the page.

23 Q Okay. And, and you understood the legal
24 requirement to involve not only having a telephone
25 number, but also a fax number?

1 A That's from what they shared with us.

2 Q Did they likewise advise you that you needed
3 any additional language on the opt-out provision
4 advising the recipients that there's a 30-day period
5 for which -- during which you have to comply with
6 their request to be removed?

7 A They did not.

8 Q They did not?

9 A Not that I recall.

10 Q Did you rely upon WestFax solely in
11 determining whether or not the opt-out language was
12 correct?

13 A Yes.

14 Q Do you have a compliance department that you
15 send faxes to, or templates to, in order to determine
16 whether or not you're in compliance with all laws,
17 and, specifically, the TCPA?

18 A So within our corporation within Omnicare
19 there is a compliance department, we did not provide
20 them with the faxes prior to sending them out.

21 Q All right. And so throughout the entire
22 time of this fax blast program, you did not send any
23 of the fax templates to your compliance department to
24 determine whether or not it complied with the TCPA
25 requirements?