

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

CG Docket No. 02-278

Petition of Advanced Care Scripts, Inc. for  
Waiver

CG Docket No. 05-338

**SUR-REPLY OF JEFFERSON RADIATION ONCOLOGY, LLC ON PETITION OF  
ADVANCED CARE SCRIPTS, INC. FOR WAIVER**

Jefferson Radiation Oncology, LLC (hereinafter “Jefferson Radiation”) respectfully submits this Sur-Reply to address the misstatements of fact set forth in Advanced Care Scripts, Inc.’s (hereinafter “ACS”) Reply filed on December 29, 2015, as well as the new arguments which were not set forth in ACS’s original Petition for Waiver, and thus could not be addressed by Jefferson Radiation in its previous Comment filed on December 17, 2015.

In its Reply, ACS admits that it did not review or consider the TCPA or the regulations set forth by the Federal Communication Commission (hereinafter “the Commission”) in relation to its fax advertising campaign and the opt-out requirements of the TCPA. Confronted with its own deposition testimony which was previously cited by Jefferson Radiation and which affirmatively established ACS’s ignorance of the law, ACS now attempts to lay the blame at the feet of Westfax, Inc. (hereinafter “Westfax”), an independent fax broadcasting company. Specifically, ACS has alleged that it, “relied on a third party – Westfax, Inc, – to broadcast its faxes and ensure that it complied with state and federal law. Although Mr. Lynch and other employees of ACS may not have personally read the TCPA, they reasonably relied on Westfax, which provided the opt-out language, to ensure that language met regulatory requirements.” [emphasis added]. This argument, made in an effort to obtain a waiver, is both factually

inaccurate and irrelevant to the issue of whether there was “confusion” about which recipients should receive the opt-out language (i.e. those recipients who previously gave express permission), as opposed to the actual content of the opt-out language.

**I. WHETHER WESTFAX PROVIDED THE OPT-OUT LANGUAGE TO ACS IS IRRELEVANT TO ACS’S WAIVER REQUEST.**

The Commission has previously granted waivers to petitioners who have been “confused” by a previous Junk Fax Order regarding the applicability of the opt-out language mandated by the TCPA. The “confusion” referenced by the Commission in its previous orders granting waivers is aimed at confusion or misplaced confidence about who is required to receive the TCPA mandated opt-out language on a fax advertisement. In this regard, the Commission stated in the *Anda* Order that the use of the word “unsolicited” contained in a footnote of a Junk Fax Order may have caused some parties to misconstrue the Commission’s intent to apply the opt-out notice to fax advertisements sent with the prior express permission of the recipient.

ACS alleges that Westfax provided it with the opt-out language to ensure that the language met regulatory requirements. Even if this allegation was true (which it is not, as will be discussed below), and ACS relied upon the language provided by Westfax, such misplaced reliance regarding the required contents of the opt-out language would not entitle ACS to a waiver. ACS never even attempted to allege in its original Petition for Waiver or its Reply that Westfax also advised ACS about who is required to receive the TCPA mandated opt-out language on a fax advertisement.

In fact, ACS actually argues in its Reply that Westfax told ACS to place opt-out language on its fax advertisements, apparently without making a distinction or suggesting an exemption for fax advertisements allegedly sent to those with prior express permission from the recipient. ACS has argued that, “ACS has understood since it began contracting with Westfax for fax

services in 2008 that it was required to provide a mechanism for fax recipients to stop receiving faxes, and on that basis, added Westfax's recommended opt-out-language to the faxes." ACS goes on to allege that Westfax provided it with opt-out language that did not comply with the TCPA by arguing that, "like ACS, Magna Chek included an opt-out provision but did not indicate that failure to comply with the removal request within 30 days is unlawful." Thus, ACS's Reply makes it clear that its alleged reliance upon Westfax only relates to the content of the opt-out language, and that in no way did Westfax tell anyone at ACS that the opt-out language is not required on faxes where prior express permission is received from the recipient. The truth of the matter is that ACS placed insufficient opt-out language on every fax advertisement irregardless of the identity of the recipient. Whether ACS relied upon the content of the opt-out language allegedly supplied by Westfax on all of its fax advertisements is irrelevant, and does not meet the special circumstances to receive a waiver as set forth in the *Anda* Order that there be confusion or misplaced confidence about who is required to receive the TCPA mandated opt-out language on a fax advertisement.

ACS, by its own admission, was not confused by or misplaced confidence in the TCPA or the Commission Orders. Moreover, ACS has not alleged that Westfax told it that the opt-out language is not required on faxes where prior express permission is received from the recipient. Nevertheless, in an effort to avoid the obvious consequences of its ignorance of the law, it has attempted to allege that it relied upon Westfax to provide the proper opt-out language. Even if this was true, such reliance regarding the contents of the opt-out language is clearly not the same as confusion or misplaced confidence about who is required to receive the TCPA mandated opt-out language on a fax advertisement which is addressed by the *Anda* Order. As such, ACS's request for a waiver should be denied on this basis alone.

## **II. WESTFAX, HOWEVER, DID NOT EVEN PROVIDE ACS WITH THE OPT-OUT LANGUAGE.**

Although irrelevant to ACS's waiver request, ACS is being disingenuous by asserting that Westfax provided it with the opt-out language for its fax advertisements. In its Reply, ACS states that it "was aware of an opt-out notice requirement in some form - because Westfax told ACS that such a requirement existed and provided certain language to ACS in order to meet it." See Reply, page 4, 5. On this basis, ACS filed a Third Party Demand against Westfax in the litigation pending between Jefferson Radiation and ACS.

ACS's allegations are in complete conflict with Westfax's pleadings made in its "Answer, Affirmative Defenses and Counter Claims of Third-Party Defendant Westfax, Inc. to Defendant's Third-Party Complaint," filed with the United States District Court for the Eastern District of Louisiana, in civil action no.:2:15-cv-1399 (hereinafter referred to as "Westfax's Answer"). Westfax's Answer, a copy of which is attached hereto as Exhibit 1, specifically states in Paragraph 1:

"Westfax denies the allegations asserted in Paragraph 1 of the Third-Party Complaint including in particular any representations and instructions alleged to have been made by Westfax to ACS, and even more particularly, what specific opt-out language ACS should use in ACS's fax transmissions and whether the opt-out language ACS used was deficient. Westfax was not involved in any manner with the content of ACS's facsimiles and the opt-out notice is a part of the content of its facsimiles. The Westfax website ACS refers to in this Paragraph and the context of helping customers "design and implement a successful campaign" does not include or involve Westfax in the content of ACS's facsimiles (including the language of its opt-out notice) or how to comply with the TCPA facsimile advertising rules, all of which is stated in Westfax agreements with ACS and on Westfax's website."

See Westfax's Answer, page 2, paragraph 1.

In Paragraph 2 of Westfax's Answer, it further states that:

“Westfax denies the allegations asserted in Paragraph 2 of the Third-Party Complaint, including it owed a duty to ACS to establish, administer, and maintain its fax transmission services in accordance with all applicable laws. The TCPA, Westfax's agreements with ACS, and Westfax's website all expressly negate any such duty, impose such duty solely on ACS, and repeat what the TCPA provides that the sender (ACS) is solely responsible for its facsimiles and complying with all laws including the TCPA. Westfax asserts its agreement with all of its customers, including ACS, is that Westfax is the fax broadcaster, and is not the sender, advertiser or otherwise involved with the content contained in the customers' facsimiles and the customers agree to fully comply with all laws including the TCPA. Westfax further denies ACS relied, justifiably or otherwise, on Westfax's instructions, representations and expertise and no such instructions or representations were made. Westfax further denies it is anything other than a fax broadcaster and denies it has any responsibility for selecting the opt-out language included in ACS's faxes.”  
[Emphasis added]

See Westfax's Answer, page 3, 4, paragraph 2.

Westfax denied, in federal court pleadings, that it participated in any way with selecting the content of ACS's facsimiles, or that it was responsible for providing any information to ACS regarding proper opt-out language to use in its fax advertisements. In addition to Westfax's Answer, it maintains a Customer Agreement - Terms and Conditions (a copy of which is attached hereto as Exhibit 2) on its website that all customers or users execute prior to using Westfax's services. These terms and conditions memorialize and confirm Westfax's position that it is not creating or contributing to the content of the opt-out language, or any of the content of the facsimile whatsoever. Specifically, there is language in the Customer Agreement as follows:

“You are fully responsible for the form and content of anything received and for your transmissions sent using the Services and agree and acknowledge that you are the creator of all content sent, and that WestFax is not the creator, author or publisher of any

content and WestFax does not review or participate in any manner with respect to your form and content or rent, sell or provide data or lists of any kind. WestFax's Services are a medium for you to send and receive information of your own choosing using the WestFax Services."

Upon information and belief, ACS, just like any other customer or user of Westfax's services, agreed to and executed Westfax's customer agreement acknowledging that it is ACS's sole responsibility for the content of the facsimile and all language contained in the opt-out provision. Therefore, it is disingenuous and misleading of ACS to suggest that it relied upon Westfax to provide it with TCPA compliant opt-out language. Simply, this argument is meritless and unsupported by the facts.

### **III. THE WAIVER GRANTED TO MAGNA CHEK, INC. DOES NOT SUPPORT THE REQUEST FOR WAIVER BY ACS.**

ACS cited the waiver previously granted to Magna Chek as support for its own request for a waiver. ACS argued that Magna Chek, just as it has, relied upon the expertise of Westfax to provide TCPA compliant opt-out language. ACS suggests that there is no difference between itself and Magna Chek, and thus ACS should likewise be granted a waiver. ACS is incorrect on this point.

Magna Chek filed its Petition for Declaratory Ruling and/or Waiver on March 28, 2014. As the Commission is aware, the filing of Magna Chek's petition for waiver predated even the *Anda* Order. Magna Chek also cited "confusion" as to the application of the opt-out requirements to any faxes that are not unsolicited fax advertisements, and further adopted those arguments made by *Anda* and *Purdue Pharma* in support of their waiver requests. The Commission ultimately granted Magna Chek a waiver, along with numerous other petitioners, through the *Anda* Order. However, the Commission did not base its grant of a waiver to Magna

Chek on its alleged reliance upon Westfax for the content of the opt-out language used in its fax advertisements. Magna Chek's waiver, like all others granted through the *Anda* Order, was premised on the alleged confusing language previously cited in this Sur-Reply. Importantly, no Comment was filed in response to Magna Chek's petition for waiver, and certainly no evidence was submitted to show that Magna Chek was not confused, and was only ignorant of the law.

Where ACS was untimely in presenting its waiver request, Magna Chek's waiver request predated the *Anda* Order. Unlike the factual scenario presented by the Magna Chek petition for waiver, there has been ample evidence submitted that ACS was ignorant of the TCPA requirements and the Commission Orders, and had made no attempt to determine if it was in compliance. Certainly, ACS is not entitled to the rebuttable presumption of confusion established by the August 2015 Commission Order. Furthermore, some feigned reliance upon Westfax for the content of ACS's opt-out language is irrelevant, and even if true, would not meet the special circumstances in the *Anda* Order.

#### **IV. CORRECTION OF CLERICAL ERROR IN JEFFERSON RADIATION'S PREVIOUS COMMENT RELATIVE TO ACS'S GROSS PROFITS/REVENUES.**

In Jefferson Radiation's previous Comment filed on December 17, 2015, it stated that, "upon information and belief, ACS generates over one billion in gross profits annually." However, the above-quoted language contained a clerical error, and should have read that, "upon information and belief, ACS generates over one billion in revenue annually." For the purpose of clarity, the source of this information was an online article published by the *New York Times*.<sup>1</sup> The undersigned agrees with counsel for ACS that profits and/or revenues realized by ACS should be irrelevant to the Commission's determination of ACS's waiver request and was only

---

<sup>1</sup> [http://www.nytimes.com/interactive/2015/07/16/business/specialty-pharmacy-top10list.html?\\_r=1](http://www.nytimes.com/interactive/2015/07/16/business/specialty-pharmacy-top10list.html?_r=1)

included in the Comment because the tone of the Petition filed by ACS suggested that its purpose in sending blast faxes was somehow altruistic and not designed to generate revenue.

**CONCLUSION**

For the foregoing reasons, and those contained in Jefferson Radiation's previously filed Comment, ACS's petition for waiver should be denied.

Respectfully submitted:

Chehardy, Sherman, Williams, Murray,  
Recile, Stakelum & Hayes, LLP

/s/ Preston L. Hayes

GEORGE B. RECILE (#11414)

PRESTON L. HAYES (#29898)

RYAN P. MONSOUR (33286)

MATTHEW A. SHERMAN (#32687)

PATRICK R. FOLLETTE (#34547)

One Galleria Blvd., Suite 1100

Metairie, Louisiana 70001

Telephone: 504.833.5600

Facsimile: 504.833.8080

Attorneys for Jefferson Radiation Oncology, LLC

Dated: January 4, 2016