

# Exhibit A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

BALLARD NURSING CENTER, INC.,	)	NO. 2010 CH 17229
	)	
PLAINTIFF,	)	DEPOSITION OF
	)	LAURIE DONDELINGER
VS.	)	TAKEN ON BEHALF OF
	)	PLAINTIFF
KOHL'S PHARMACY & HOMECARE,	)	
INC., AND JOHN DOES 1-10,	)	
	)	
DEFENDANTS.	)	

- - - - -

DEPOSITION OF LAURIE DONDELINGER, taken  
before Lisa DeRocher, Court Reporter, General Notary  
Public within and for the State of Nebraska,  
beginning at 9:49 a.m., on June 8, 2012, at  
Thomas and Thomas Court Reporters & Certified Legal  
Video, L.L.C, 1321 Jones Street, Omaha, Nebraska.



1 the chase.

2 Was there -- was this document part of a  
3 fax campaign back in the first quarter of 2010?

4 A. Yes.

5 Q. Okay. What was your involvement in a fax  
6 campaign involving the facts in Exhibit 2?

7 A. I created this fax, this flier.

8 Q. Okay. And what was the purpose of the  
9 flier?

10 A. To promote wellness.

11 Q. Okay. And -- but specifically with  
12 respect to Kohll's business, what -- what was the  
13 purpose?

14 MR. TAHMASSEBI: Objection: Asked  
15 and answered, but go ahead if your answer's any  
16 different.

17 THE WITNESS: Yeah. Just to promote  
18 wellness to -- for flu shots so that people would  
19 get vaccinated and not get ill.

20 BY MS. COMBS:

21 Q. Okay. Who at Kohll's worked with you on  
22 this fax campaign?

23 MR. TAHMASSEBI: Objection to the  
24 form, but you can answer.

25 THE WITNESS: I don't recall.



1 e-mail -- actually, I believe -- if you look at LD3.

2 A. (Witness complies.)

3 Q. You did send a memo to the customer care  
4 center where areas were divided up into St. Louis,  
5 Omaha, Des Moines, and Chicago, correct?

6 A. On Exhibit 3?

7 Q. Yes. LD3.

8 MR. TAHMASSEBI: She's looking at  
9 Exhibit 1.

10 THE WITNESS: I'm sorry.

11 MS. COMBS: That's okay.

12 MR. TAHMASSEBI: Right here  
13 (indicating).

14 THE WITNESS: Sorry, sorry, sorry.  
15 Yes.

16 BY MS. COMBS:

17 Q. So is it fair to say that in connection  
18 with the faxing of LD2, it was your expectation that  
19 faxes would be sent to St. Louis, Omaha, Des Moines,  
20 and Chicago?

21 MR. TAHMASSEBI: Objection to the  
22 form of the question, foundation.

23 BY MS. COMBS:

24 Q. You can answer.

25 A. According to all of this, it was going to



1 those areas.

2 Q. Okay does it refresh your recollection as  
3 to those -- as to whether those were the areas you  
4 were aiming to send the faxes to?

5 A. No.

6 Q. Does it refresh your recollection as to  
7 whether or not when you purchased the corporate  
8 list, you asked them to produce corporate companies  
9 in those areas?

10 A. No.

11 Q. Okay. If you look at LD102.

12 A. (Witness complies.)

13 Q. And if you look about a quarter of the way  
14 down, it's got Ballard Healthcare.

15 A. Uh-huh, yes.

16 Q. And are you aware that Ballard Healthcare  
17 is the plaintiff in this litigation?

18 A. I am.

19 Q. Are you aware that Ballard Healthcare  
20 received a facsimile from Kohll's Pharmacy?

21 A. No.

22 Q. Are you aware that Ballard Healthcare  
23 alleges in the litigation that it received a fax?

24 A. Yes.

25 Q. If you look at LD360.



# Exhibit B-1

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

BALLARD NURSING CENTER, INC.,                     )  
  Plaintiff,                     )  
  )                     No. 2010 CH 17229  
vs.   )  
  )  
  )  
KOHLL'S PHARMACY & HOMECARE, INC.,            )  
and JOHN DOES 1-10,                                 )  
  Defendants.                    )

DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES

NOW COMES Defendant, KOHLL'S PHARMACY & HOMECARE, INC., by and through counsel, KONICEK & DILLON, P.C., and for their Answers to Plaintiff's Interrogatories states as follows:

INTERROGATORIES

1. Identify each person involved in answering these Interrogatories and the information supplied by each.

RESPONSE: Laurie Dondelinger, Marketing Manager, and David Kohll.

2. Identify each person involved in creating the document attached to the Complaint as Exhibit A.

RESPONSE: Laurie Dondelinger, Pam Chelesvig.

3. Identify the person(s) who sent the document attached to the Complaint as Exhibit A to Plaintiff, the telephone number of the sending machine, the owner of the sending machine, and the owner's telephone number.

RESPONSE: Laurie Dondelinger sent it through WestFax's website.

4. If Defendant contends Plaintiff consented to receive the document attached to the Complaint as Exhibit A, then identify the person(s) involved in obtaining that consent, the date(s) on which that consent was obtained, the person(s) who provided that consent, and each person involved in maintaining a log or other record of Plaintiffs consent.

**RESPONSE:** We don't know if consent was received. We purchased the list from RedDoor Marketing which has since sold to DB101. The owner of RedDoor, Stacey Leslie, started up Trendy Data Management.

5. Identify the telephone numbers of every person other than Plaintiff who received a copy of the document attached to the Complaint as Exhibit A and the dates on which they received the document.

**RESPONSE:** Already supplied.

6. Identify each person involved in creating advertisement Defendant sent or caused to be sent by facsimile to any person from April 20, 2005 to the present.

**RESPONSE:** Laurie Dondelinger and Byron Carpenter.

7. Identify the person(s) who participated in Defendant's decision to send advertisement to facsimile machines from April 20, 2005 to the present.

**RESPONSE:** Laurie Dondelinger, David Kohll, Pam Chelesvig, Allen Kurland.

8. Identify the telephone service provider that provided data transmission service for the machine used to transmit the document attached to the Complaint as Exhibit A.

**RESPONSE:** WestFax.

9. Identify each telephone number used by Defendant in sending any facsimiles during the relevant period.

**RESPONSE:** 402-895-7655.

10. Identify any other manner by which Defendant has delivered facsimiles (including but not limited to computer software and home or personal fax numbers).

**RESPONSE:** 402-895-7655.

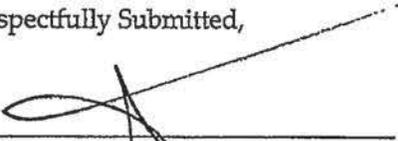
11. Identify each person who has been involved in formulating or establishing Defendant's policies or procedures concerning transmission of advertisement to facsimile machines.

**RESPONSE:** Allen Kurland. Kohl's has no set policies and procedures.

12. Describe in detail how Defendant obtained or developed a list of persons and/or fax numbers to which advertising faxes were sent. Include in your response (1) whether Defendant obtained possession of the list in any form, (2) if so, what happened to it, (3) whether any portion of the list was purchased, and if so, from whom and for how much, and (4) whether automatic dialing equipment was used to generate any list.

**RESPONSE:** RedDoor Marketing was the entity who processed information relating to the advertising faxes that existed. We are unaware of the lists that RedDoor maintains. We believe fees were paid to RedDoor Marketing for advertising services. We are not aware as to whether automatic dialing was used.

Respectfully Submitted,



Attorneys for KOHLL'S PHARMACY  
& HOMECARE, INC.

Daniel F. Konicek  
Amir Tahmassebi  
KONICEK & DILLON, P.C.  
Firm No. 37199  
21 W. State St.  
Geneva, IL 60134  
630.262.9655

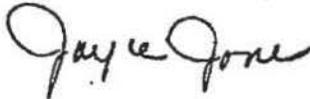
Attestation

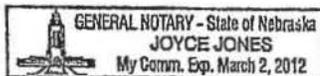
STATE OF ILLINOIS     )  
                                  ) SS.  
COUNTY OF COOK     )

David Kohll, being first duly sworn on oath, deposes and states that he is a defendant in the above-captioned matter; that he has read the foregoing document, and the responses made herein are true, correct and complete to the best of his knowledge and belief.

  
\_\_\_\_\_  
David Kohll

SUBSCRIBED and SWORN to before me  
this 12 day of July, 2011.

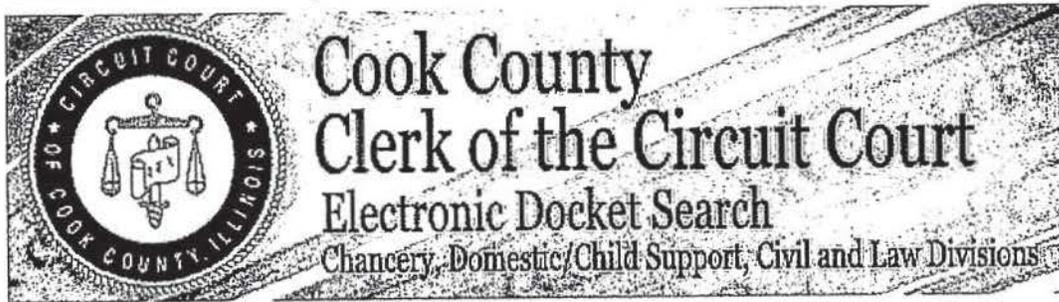




# Exhibit B-2



# Exhibit C-1



*Division: Chancery*

**Click on Case Number for Case Information Summary**

Name Search Results for: BALLARD NURSING CENTER

<u>Case Number</u>	<u>Plaintiff</u>	<u>Defendant</u>	<u>Date Filed</u>
<a href="#">2010-CH-43451</a>	BALLARD NURSING CENTER INC	POLARIS GROUP INC	10/05/2010
<a href="#">2010-CH-43452</a>	BALLARD NURSING CENTER INC	DIALYSIS PURCHASING ALLIAN	10/05/2010
<a href="#">2010-CH-43454</a>	BALLARD NURSING CENTER INC	C P MOTION INC INC	10/05/2010
<a href="#">2010-CH-20912</a>	BALLARD NURSING CENTER INC	CENTRAL HOSPITALITY SUPPLY	05/14/2010
<a href="#">2010-CH-17229</a>	BALLARD NURSING CENTER INC	KOHLLS PHARMACY HOMECARE	04/20/2010
<a href="#">2010-CH-16637</a>	BALLARD NURSING CENTER	CURASPAN HEALTH GROUP INC	04/16/2010
<a href="#">2010-CH-16640</a>	BALLARD NURSING CENTER	MAHARISHI HOSPITALITY INC	04/16/2010
<a href="#">2010-CH-16644</a>	BALLARD NURSING CENTER	FIRST AID CLINIC LLC	04/16/2010
<a href="#">2010-CH-06164</a>	BALLARD NURSING CENTER INC	SCOOP PUBLISHING LLC	02/11/2010
<a href="#">2010-CH-06166</a>	BALLARD NURSING CENTER INC	UNIVERSAL CONNECTIONS INC	02/11/2010
<a href="#">2010-CH-05865</a>	BALLARD NURSING CENTER	ENVIRONMENTAL MARKETING	02/10/2010
<a href="#">2010-CH-05866</a>	BALLARD NURSING CENTER	AMERICAN BLINDS DRAPERS	02/10/2010
<a href="#">2009-CH-44279</a>	BALLARD NURSING CENTER INC	OLDE SCHOOL TEXTILES FURNI	11/09/2009
<a href="#">2009-CH-44280</a>	BALLARD NURSING CENTER INC	IMPERIAL TEXTILE WHOLESALE	11/09/2009

<a href="#">2009-CH-35681</a>	BALLARD NURSING CENTER INC	VALUCARE INC	09/25/2009
<a href="#">2009-CH-15791</a>	BALLARD NURSING CENTER	JACKSON PARK HOSPITAL	04/10/2009
<a href="#">2009-CH-01241</a>	BALLARD NURSING CENTER IN	SOUTHERN LIFE SYSTEMS INC	01/12/2009
<a href="#">2008-CH-48230</a>	BALLARD NURSING CENTER IN	WATER STREET HEALTHCARE	12/29/2008
<a href="#">2008-CH-43382</a>	BALLARD NURSING CENTER	APOLLO HEATH SYSTEMS	11/18/2008
<a href="#">2008-CH-29930</a>	BALLARD NURSING CENTER	UNITHERM INC	08/15/2008
<a href="#">2008-CH-29637</a>	BALLARD NURSING CENTER INC	KINRAY INC	08/13/2008
<a href="#">2008-CH-29058</a>	BALLARD NURSING CENTER	PEORIA SPECIALTY INC	08/08/2008
<a href="#">2008-CH-29062</a>	BALLARD NURSING CENTER	AGGEUS HEALTHCARE P C	08/08/2008
<a href="#">2008-CH-17320</a>	BALLARD NURSING CENTER	MEDICAL EQUIPMENT SALES	05/12/2008
<a href="#">2008-CH-05090</a>	BALLARD NURSING CENTER	KMI SUPPLIES INC	02/08/2008
<a href="#">2008-CH-04130</a>	BALLARD NURSING CENTER INC	STAR SILK WOOLEN CO	01/31/2008
<a href="#">2008-CH-03119</a>	BALLARD NURSING CENTER	MDU ENTERPRISE INC	01/24/2008
<a href="#">2008-CH-02229</a>	BALLARD NURSING CENTER INC	MID AMERICA GROUP INC	01/17/2008
<a href="#">2008-CH-00994</a>	BALLARD NURSING CENTER INC	HEXAGRAM HOME HEALTH CARE	01/09/2008
<a href="#">2007-CH-38630</a>	BALLARD NURSING CENTER INC	ATC HOLDINGS INC	12/28/2007
<a href="#">2007-CH-36133</a>	BALLARD NURSING CENTER	ACCUBUILT INC	12/07/2007
<a href="#">2007-CH-30332</a>	GOLAN PRODUCTIONS, INC	JERRY FORD COMPANY LLC	10/22/2007
<a href="#">2007-CH-30049</a>	BALLARD NURSING CENTER INC	SKIL CARE CORPORATION	10/18/2007
<a href="#">2007-CH-23608</a>	BALLARD NURSING CENTER	KAIGLER COMPANY	08/28/2007
<a href="#">2007-CH-23288</a>	BALLARD NURSING CENTER	QUADEL CONSULTING CORPOR	08/24/2007
<a href="#">2007-CH-</a>	BALLARD NURSING	GENERAL HEALTHCARE	08/23/2007

<u>23115</u>	CENTER INC	RESOURC	
<u>2007-CH-23121</u>	BALLARD NURSING CENTER INC	BES INDUSTRIES INC	08/23/2007
<u>2007-CH-23122</u>	BALLARD NURSING CENTER INC	AMERICAN STRATEGIC MANAGEM	08/23/2007
<u>2007-CH-20470</u>	BALLARD NURSING CENTER	AMERICAN HEALTHSERVICE	08/01/2007
<u>2007-CH-17914</u>	BALLARD NURSING CENTER	D M DOUBLE FORTUNE INC	07/09/2007
<u>2007-CH-17444</u>	BALLARD NURSING CENTER	WOODS EQUIPMENT COMPANY	07/03/2007
<u>2007-CH-16977</u>	BALLARD NURSING CENTER INC	M M SCRUBS DIST INC	06/27/2007
<u>2007-CH-15898</u>	BALLARD NURSING CENTER INC	ALL PRO ELECTRIC INC	06/15/2007
<u>2007-CH-15902</u>	BALLARD NURSING CENTER INC	MEDCO EQUIPMENT INC	06/15/2007
<u>2007-CH-12558</u>	BALLARD NURSING CENTER INC	D W G INC	05/09/2007
<u>2007-CH-01923</u>	BALLARD NURSING CENTER	CARDINAL CARTRIDGE INC	01/19/2007
<u>2006-CH-28661</u>	BALLARD NURSING CENTER	MED SUPPLY TAMPA	12/29/2006
<u>2006-CH-28491</u>	BALLARD NURSING CENTER	TOTAL SANITY SOLUTION	12/28/2006
<u>2006-CH-18542</u>	BALLARD NURSING CENTER INC	CALDERON TEXTILES INC	09/07/2006
<u>2006-CH-15512</u>	BALLARD NURSING CENTER	REDWOOD BIOTECH	08/02/2006
<u>2006-CH-00678</u>	BALLARD NURSING CENTER INC	PERSONAL SAFETY CORPORATIO	01/11/2006
<u>2005-CH-22714</u>	BALLARD NURSING CENTER	G AVERY ENTERPRISES INC	12/30/2005
<u>1994-CH-01691</u>	THE ABINGTON	HSM DEVELOPMENT CORP	02/22/1994

[Start a New Search](#)

# Exhibit C-2

## Select A Case

### Ballard Nursing Center, Inc. is a plaintiff in 14 cases.

<u>1:06-cv-02062</u>	Ballard Nursing Center, Inc. v. G. Avery Enterprises, Inc. et al	filed 04/12/06	closed 06/20/06
<u>1:07-cv-04488</u>	Ballard Nursing Center, Inc v. Gf Health Products, Inc et al	filed 08/09/07	closed 08/22/07
<u>1:07-cv-05698</u>	Ballard Nursing Center, Inc. v. General Healthcare Resources, Inc et al	filed 10/09/07	closed 11/26/07
<u>1:07-cv-05715</u>	Ballard Nursing Center, Inc. v. GF Health Products, Inc. et al	filed 10/09/07	closed 11/14/07
<u>1:08-cv-00260</u>	Ballard Nursing Center, Inc. v. Accubuilt, Inc. et al	filed 01/11/08	closed 12/10/09
<u>1:08-cv-01007</u>	Ballard Nursing Center, Inc. v. Mid American Group, Inc. et al	filed 02/19/08	closed 11/05/08
<u>1:08-cv-02749</u>	Ballard Nursing Center, Inc. v. Care Diagnostic Services, LLC et al	filed 05/12/08	closed 09/23/08
<u>1:08-cv-05310</u>	Ballard Nursing Center, Inc. v. Kinray, Inc. et al	filed 09/18/08	closed 07/29/10
<u>1:09-cv-01000</u>	Ballard Nursing Center, Inc. v. Southern Life Systems, Inc. et al	filed 02/17/09	closed 07/02/09
<u>1:10-cv-02194</u>	Ballard Nursing Center, Inc. v. Environmental Marketing Services, LLC et al	filed 04/09/10	closed 07/20/10
<u>1:10-cv-02950</u>	Ballard Nursing Center, Inc. v. Curaspan Health Group, Inc.	filed 05/13/10	closed 06/15/10
<u>1:10-cv-</u>	Ballard Nursing Center, Inc. v. ASD Specialty	filed 10/07/10	closed 04/12/11



# Exhibit D

Atty. No. 41106

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

FILED-7  
2012 NOV 19 PM 3:49  
CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
CHANCERY DIV.  
DEPUTY CLERK  
DEBORAH BRITTON

BALLARD RN CENTER, INC. f/k/a  
BALLARD NURSING CENTER, INC.,

Plaintiff,

v.

KOHL'S PHARMACY & HOMECARE, INC.,  
and JOHN DOES 1-10,

Defendants.

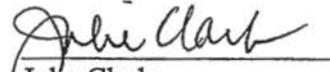
10 CH 17229

Judge Cohen

NOTICE OF MOTION

TO: Please see Certificate of Service.

PLEASE TAKE NOTICE that on Nov 27<sup>th</sup>, 2012 at 10:00 a.m., we shall appear before Judge Cohen in Room 2308 of the Richard J. Daley Center and then there present: **PLAINTIFF'S AMENDED MOTION FOR CLASS CERTIFICATION**, a copy of which is attached and hereby served upon you.

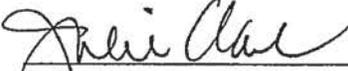
  
Julie Clark

Daniel A. Edelman  
Julie Clark  
Heather A. Kolbus  
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC  
120 S. LaSalle Street, Suite 1800  
Chicago, Illinois 60603  
(312) 739-4200  
(312) 419-0379 (FAX)

**CERTIFICATE OF SERVICE**

I, Julie Clark, certify that I had a copy of the foregoing document sent on November 19, 2012, by United States mail and electronic mail to the parties named below:

Amir R. Tahmassebi  
Konicek & Dillon, P.C.  
21 W. State Street  
Geneva, IL 60134  
amir@konicekdillonlaw.com

  
Julie Clark

Daniel A. Edelman  
Julie Clark  
Heather A. Kolbus  
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC  
120 S. LaSalle Street, Suite 1800  
Chicago, Illinois 60603  
(312) 739-4200  
(312) 419-0379 (FAX)

Atty. No. 41106

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

FILED-1  
2012 NOV 16 3:49  
COURT OF COOK COUNTY ILLINOIS  
CHANCERY DIV.

BALLARD RN CENTER, INC. f/k/a )  
BALLARD NURSING CENTER, INC., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
KOHLL'S PHARMACY & HOMECARE, INC., )  
and JOHN DOES 1-10, )  
 )  
Defendants. )

10 CH 17229

Judge Cohen

**PLAINTIFF'S AMENDED MOTION FOR CLASS CERTIFICATION**

Plaintiff Ballard RN Center, Inc. f/k/a Ballard Nursing Center, Inc. ("Plaintiff") respectfully requests that this Court enter an order determining that this action may proceed on behalf of a class against Defendant Kohll's Pharmacy & Homecare, Inc. ("Kohll's" or "Defendant"). The class consists of (a) all parties (b) who, on or about March 3, 2010, (c) were sent advertising faxes by defendant (d) and with respect to whom defendant cannot provide evidence of consent or a prior business relationship<sup>1</sup>.

In support of this motion, plaintiff states:

**I. NATURE OF THE CASE**

1. Plaintiff brought this action after receiving an unsolicited and unwanted advertising fax (Exhibit A) sent by Kohll's. Plaintiff alleges that Kohll's violated the Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA") (Count I), that Kohll's violated the Illinois Consumer Fraud Act, 815 ILCS 505/2 ("ICFA") (Count II); and committed the tort of conversion

---

<sup>1</sup> Having conducted discovery, Plaintiff has revised and limited the Class Definition from that included in its original motion for Class Certification filed on April 20, 2012.

(Count III).

2. The TCPA and implementing Federal Communications Commission regulations (Count I) make it illegal to send unsolicited advertising faxes without the recipient's "express invitation or permission," 47 U.S.C. §227(a)(4); 47 C.F.R. §64.1200(f)(5). The ability to "opt out" is not sufficient.

3. Plaintiff contends (Count II) that the transmission of unsolicited advertising faxes is also an unfair practice that violates §2 of the ICFA, 815 ILCS 505/2. The prohibitions of "unfair" and "deceptive" practices are distinct. Elder v. Coronet Ins. Co., 201 Ill.App.3d 733, 558 N.E.2d 1312 (1st Dist. 1990). In determining whether a practice is "unfair," both federal and state law consider:

**(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common-law, statutory or other established concept of unfairness;**

**(2) whether it is immoral, unethical, oppressive or unscrupulous;**

**(3) whether it causes substantial injury to consumers (or competitors or other businessmen).**

FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45 n. 5 (1972); Robinson v. Toyota Motor Credit Corp., 201 Ill.2d 403, 775 N.E.2d 951 (2002); Scott v. Association for Childbirth at Home, Int'l, 88 Ill.2d 279, 430 N.E.2d 1012 (1981); Elder v. Coronet Ins. Co., supra.

4. Plaintiff further contends (Count III) that Defendant converted the paper and toner in his fax machine to its own use by using them to print unsolicited and unwanted advertising faxes illegally sent to plaintiffs. The elements of conversion are (1) plaintiffs' right to the property

at issue, (2) plaintiffs' absolute and unconditional right to immediate possession of the property; (3) defendants' assertion of dominion and control over the property; and (4) notice of plaintiffs' rights. The fourth element is satisfied when the taking of the property is wrongful in the first instance, as in the case of theft; otherwise, it can be satisfied by demand. Stathis v. Geldermann, Inc., 258 Ill.App.3d 690, 630 N.E.2d 926 (1<sup>st</sup> Dist. 1994); Jensen v. Western & Indiana R. Co., 94 Ill.App.3d 915, 419 N.E.2d 578 (1<sup>st</sup> Dist. 1981); Bruner v. Dyball, 42 Ill. 34 (1866). Plaintiff clearly owned and had an absolute and unconditional right to the paper and toner; by causing them to be used to print their unsolicited advertisements, Kohll's converted the paper and toner and rendered them unusable by plaintiff; Kohll's knew that it had no right to the paper and toner and was in effect stealing them.

## II. REQUIREMENTS FOR CLASS CERTIFICATION

5. Section 2-801 of the Illinois Code of Civil Procedure states:

### **Prerequisites for the maintenance of a class action.**

**An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:**

- (1) The class is so numerous that joinder of all members is impracticable.**
- (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.**
- (3) The representative parties will fairly and adequately protect the interest of the class.**
- (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.**

6. Class actions are essential to enforce laws protecting consumers. As the

Illinois Appellate Court stated in Eshaghi v. Hanley Dawson Cadillac Co., 214 Ill. App. 3d 995, 574 N.E.2d 760 (1st Dist. 1991):

**In a large and impersonal society, class actions are often the last barricade of consumer protection. . . . To consumerists, the consumer class action is an inviting procedural device to cope with frauds causing small damages to large groups. The slight loss to the individual, when aggregated in the coffers of the wrongdoer, results in gains which are both handsome and tempting. The alternatives to the class action -- private suits or governmental actions -- have been so often found wanting in controlling consumer frauds that not even the ardent critics of class actions seriously contend that they are truly effective. The consumer class action, when brought by those who have no other avenue of legal redress, provides restitution to the injured, and deterrence of the wrongdoer. (574 N.E.2d at 764, 766)**

7. In determining whether a class action will be allowed, the Court should resolve any doubt regarding the propriety of certification "in favor of allowing the class action," so that it will remain an effective vehicle for deterring corporate wrongdoing. Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968); accord, In re Folding Cartons Antitrust Litigation, 75 F.R.D. 727 (N.D. Ill. 1977). Finally, the class action determination is to be made as soon as practicable after the commencement of an action brought as a class action, and before any consideration of the merits (§2-802 of the Code of Civil Procedure).

8. As demonstrated below, each of the requirements for class certification is met.

**A. Numerosity**

9. The numerosity requirement is satisfied if it is reasonable to conclude that the number of members of the proposed class is greater than the minimum number required for class certification, which is about 10-40. Kulins v. Malco, 121 Ill. App. 3d 520, 530, 459 N.E.2d 1038 (1st Dist. 1984) (19 and 47 sufficient); Swanson v. American Consumer Industries, 415 F.2d 1326, 1333 (7th Cir. 1969) (40 class members sufficient); Cypress v. Newport News General &

Nonsectarian Hosp. Ass'n, 375 F.2d 648, 653 (4th Cir. 1967) (18 sufficient); Riordan v. Smith Barney, 113 F.R.D. 60, 62 (N.D. Ill. 1986) (10-29 sufficient); Sala v. National R. Pass. Corp., 120 F.R.D. 494, 497 (E.D. Pa. 1988) (40-50 sufficient); Scholes v. Stone, McGuire & Benjamin, 143 F.R.D. 181, 184 (N.D. Ill. 1992) (72 class members).

10. It is not necessary that the precise number of class members be known: "A class action may proceed upon estimates as to the size of the proposed class." In re Alcoholic Beverages Litigation, 95 F.R.D. 321, 324 (E.D.N.Y. 1982). The court may "make common sense assumptions in order to find support for numerosity." Evans v. United States Pipe & Foundry, 696 F.2d 925, 930 (11th Cir. 1983). "[T]he court may assume sufficient numerosity where reasonable to do so in absence of a contrary showing by defendant, since discovery is not essential in most cases in order to reach a class determination . . . Where the exact size of the class is unknown, but it is general knowledge or common sense that it is large, the court will take judicial notice of this fact and will assume joinder is impracticable." 2 Newberg on Class Actions (3d ed. 1992), §7.22.A.

11. Discovery has revealed that Defendant contracted with Red Door Marketing, list service provider, for the purchase of thousands of fax numbers of businesses located throughout the U.S. (See Exhibit B, Def. Resp to Interrogatory No. 4)

12. Discovery has also shown that defendant utilized the services of Westfax.com in connection with the transmission of numerous fax advertisements and most significantly, the advertisement at issue in the case. Attached as Exhibit C are documents related to and reflecting the agreement between Kohll's and Westfax.com. Additionally, Exhibit D is a printout of the "Fax Order Detail" specifically related to the Corporate Flu Shots fax that occurred on March 3, 2010. Id. As indicated therein, Kohll's, via Ms. Laurie Dondelinger, utilized a file named "Corporate Flu

Shots Blast Fax” and had it transmitted to a list named “Corp List\_DesMoines\_StLouis\_Chicago\_Omaha Cos.csv corp fax list. As indicated in the work order summary, the list consisted of 4,760 total fax numbers (and thus) 4,760 total pages. Id. Additionally, the fax list file name shown on Exhibit D corresponds with the fax list obtained from Ms. Laurie Dondelinger’s computer. Attached as Exhibit E is a representative sample (with portions of phone number, fax number and employee names redacted) of the fax list showing 49 of the 4,760 parties to which Defendant sent its faxes.

13. Laurie Dondelinger also promptly emailed several persons within the office and informed her coworkers and superiors that the transmission had taken place, ensuring that everyone be prepared for the expected influx of calls. Her email restates the information contained in the “Fax Order Detail and invoice, “4,760 faxes just went out (estimated at \$150 if ALL go through - we pay \$0.04 per fax that goes through)... (Exhibit F).

14. The target audience for receipt of Exhibit A included corporate entities located in several large midwestern cities as reflected in the fax list file name designation on Exhibit D. The invoice related to the faxing in fact shows that 4,142 of the 4,160 faxes were successfully transmitted and Kohl’s was charged \$165.68 (\$0.04 per fax) for the fax services (Exhibit G). Id. In addition to the invoice, Kohl’s received a detailed report which indicates exactly which 4,160 numbers it sent the advertisement to and what the status was as to each transmission. *See* sample of transmission report, Exhibit H. Attached as Exhibit H is a representative sample (with portions of each fax number redacted) of transmission report).

This plainly satisfies the numerosity requirement.

15. Defendant has also failed to present any evidence that any of the faxes were

\$ 2,071,000

No 2933 x 500  
\$ 1,466,500

sent because the recipient had consented or because of any prior relationship with the recipient. In contrast, due to the fact that defendant purchased the list from a third party, it is clear that the existence of a relationship between the defendant and any party on the list would have been entirely coincidental.

**B. Common Questions**

16. The commonality requirement is satisfied if there are common questions linking the class members that are substantially related to the outcome of the litigation. Blackie v. Barrack, 524 F.2d 891, 910 (9th Cir. 1975). Common questions predominate if classwide adjudication of the common issues will significantly advance the adjudication of the merits of all class members' claims. McClendon v. Continental Group, Inc., 113 F.R.D. 39, 43-44 (D.N.J. 1986); Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 114 F.R.D. 48, 52 (S.D.N.Y. 1987); Spicer v. Chicago Board Options Exchange, CCH Fed.Sec.L.Rptr. [1989-90 Transfer Binder] ¶94,943, at p. 95,254 (N.D. Ill. 1990); Alexander Grant & Co. v. McAlister, 116 F.R.D. 583, 590 (S.D. Ohio 1987). The "common questions" may be the existence and legality of a standard business practice. Haywood v. Superior Bank, 244 Ill. App. 3d 326, 614 N.E.2d 461, 464 (1st Dist. 1993); Heastie v. Community Bank of Greater Peoria, 125 F.R.D. 669, 774 (N.D. Ill. 1989). Where a case involves "standardized conduct of the defendants toward members of the proposed class, a common nucleus of operative facts is typically presented, and the commonality requirement . . . is usually met." Franklin v. City of Chicago, 102 F.R.D. 944, 949 (N.D. Ill. 1984); Patrykus v. Gomilla, 121 F.R.D. 357, 361 (N.D. Ill. 1988).

17. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

- a. Whether defendant engaged in a pattern of sending unsolicited fax advertisements;
- b. Whether defendant thereby violated the TCPA;
- c. Whether defendant thereby converted plaintiffs' toner and paper;
- d. Whether defendant thereby engaged in unfair and deceptive acts and practices, in violation of the ICFA.

18. The class is defined in terms of Illinois residents who were sent advertising faxes by defendant and with respect to whom defendant cannot provide evidence of express consent or a prior relationship. Here, defendant obtained the list by purchase (Exhibits B, D). The possibility that any single person or entity who received one of defendant's advertisements may have been an existing customer would be largely coincidental and does not give rise to an existing business relationship defense, even assuming there is such a defense, because the FCC treats the EBR defense as a species of consent, which means that in order for such an argument to apply, the fax must have been sent because of the relationship.

19. Further, the fact that defendant conducted a "blast fax" ad gives rise to the conclusion that consent was lacking and that the faxes were not sent *because of* an existing relationship. Whiting Corporation v. Sungard Corbel, Inc., 03 CH 21135 (Cir. Ct. Cook Cty.) (Exhibit I). Jaynes v. Commonwealth of Virginia, No. 062388 slip. op. at 28 (S.C. Va., Feb. 29, 2008) (Exhibit J).

20. As explained, the testimony has shown that the class sought to be certified in this case is very similar to that which this Court certified in the cases of Rawson v. Comfort Inn O'Hare, No. 03 CH 15165 (Cir. Ct. Cook Co., Sept. 30, 2005) (Exhibit K); Travel 100 Group Inc.

v. Empire Cooler Service, Inc., 2004 WL 3105679 (Ill. Cir.). Neither defendant claimed to have asked permission to send the faxes. Both the defendant here and that in the Travel 100 Group case utilized third party services in connection with their fax campaigns. As this Circuit explained in the Travel 100 Group case, “The manner in which the Defendant identified these recipients will not require individualized inquiry. Indeed, the Defendant’s conduct may create a presumption that the facsimiles were not legal.” Id. at 4.

21. Numerous courts have certified class actions under the TCPA: Sadowski v Med1Online, LLC, 2008 U.S. Dist. LEXIS 12372 (N.D. Ill. May 27, 2008) Hinman v. M & M Rental Ctr., 521 F. Supp.2d 739 (N.D. Ill. Apr. 7, 2008) (for litigation purposes); Display South, Inc. Express Computer Supply, Inc., 961 So.2d 451 (La. App. 2007); Lampkin v. GGH, Inc., 146 P.3d 847 (Ok. App., 2006); Rawson v. C.P. Partners d/b/a Comfort Inn-O’Hare, 03 CH 15165 (Cook Co. Cir. Ct.); Telecommunications Design Network v. McLeodUSA, Inc., 03 CH 8477 (Cook Co. Cir. Ct.); CE Design v. Trade Show Network Marketing Group, Inc., No. 03 CH K 964 (Cir. Ct. Kane Co., Dec. 2, 2004); Travel 100 Group, Inc. v. Empire Cooler Service, Inc., 03 CH14510 (Cook Co. Cir. Ct.); Bogot v. Olympic Funding Chicago, No. 03 CH 11887 (Cook Co. Cir. Ct.); Stonecrafters, Inc. v. Wholesale Life Ins. Brokerage, Inc., 03 CH 435 (McHenry Co. Cir. Ct.); Rawson v. Robin Levin d/b/a The Ridgewood Organization, 03 CH 10844 (Cook Co. Cir. Ct.) (for settlement purposes); Kerschner v. Answer Illinois, Inc., 03 CH 21621 (Cook Co. Cir. Ct.) (for settlement purposes); Kerschner v. Murray and Trettel, Inc., 03 CH 21621 (Cook Co. Cir. Ct.) (for settlement purposes); Prints of Peace, Inc., d/b/a Printers, Inc. v. Enovation Graphic System, Inc., 03 CH 15167 (Cook Co. Cir. Ct.) (for settlement purposes); Law Office of Martha J. White, P.C. v. Morrissey Agency Inc., 03 CH 13549 (Cook Co. Cir. Ct.) (for settlement purposes); Kerschner v. Fitness

Image, Inc., 04 CH 00331 (Cook Co. Cir. Ct.) (for settlement purposes); INSPE Associates, Ltd. v. Charter One Bank, 03 CH 10965 (Cook Co. Cir. Ct.) (for settlement purposes); Bernstein v. New Century Mortgage Corp., 02 CH 06907 (Cook Co. Cir. Ct.) (for settlement purposes); Gans v Seventeen Motors, Inc., 01-L-478 (Madison Co. Cir. Ct.) (for settlement purposes); Telecommunications Network Design, Inc. v. Paradise Distributing, Inc., 03 CH 8483 (Cir. Ct. Cook Co., Feb. 1, 2006); Nicholson v. Hooters of Augusta, Inc., 245 Ga.App. 363, 537 S.E.2d 468 (2000); ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc., 203 Ariz. (App.) 94, 50 P.3d 844 (2002); Core Funding Group, LLC v. Young, 792 N.E.2d 547 (Ind.App. 2003); General Repair Services of Central Indiana, Inc. v. Soff-Cut International, Inc., 49D03-0109-CP-1464 (Marion Co., Ind. Super. Ct., Feb. 22, 2002); Gold Seal v. PrimeTV, No. 49C01-0112-CP-3010 (Marion County, Indiana, August 29, 2002); Kenro, Inc. v. APO Health, Inc., No. 49D12-0101-CP-000016 (Ind. Nov. 3, 2001) (same); Biggerstaff v. Ramada Inn and Coliseum, 98-CP-10-004722, (S.C. C.P., Feb. 3, 2000); Biggerstaff v. Marriott International, Inc., 99-CP-10-001366 (C.P. S.C., Feb 20, 2000); WPS, Inc. v. Lobel Financial, Inc., No 01CP402029 (C.P. S.C., Oct. 15, 2001) (same); Syrett v. Allstate Ins. Co., No. CP-02-32-0751 (S.C.C.P. Aug. 12, 2003) (same); Lipscomb v Wal-Mart Stores, Inc., No. 01-CP-20-263 (S.C.C.P. June 26, 2003) (same); Battery, Inc. v. United Parcel Service, Inc., No. 01-CP-10-2862 July 26, 2002) (same); Jemiola v. XYZ Corp., No. 411237 (C.P. Ohio, Dec. 21, 2001)(same); Salpietro v. Resort Exchange International, No. GD00-9071 (Allegheny Co. C.P.)(same); Chaturvedi v. JTH Tax, Inc., No. CD-01-008851 (Pa. C.P. Oct 1, 2001) (same); Dubsky v Advanced Cellular Communications, Inc., No. 2004 WL 503757 (Ohio C.P. Feb. 24, 2004) (same); Inhance Corp. v. Discount Vacation Rentals, No. LALA 004377 (Iowa Dist. Jan. 5, 2001) (same); Inhance Corp. v. Special T Travel Services, Inc., No. LALA 004362 (Iowa Dist. Dec. 8, 2000)

(same). Several others were certified in a Louisiana federal court, against Kappa Publishing Group, Monroe Systems, and Satellink Paging (The Advocate, Capital City Press, Dec. 28, 2005, p. 1).

**C. Adequacy of Representation**

22. The adequacy of representation requirement involves two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation; and (b) the plaintiffs must not have interests antagonistic to those of the class. Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992).

23. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Counsel's qualifications are set forth in Exhibit L. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

**D. Appropriateness of Class Action**

24. A class action is an appropriate method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims is small because generally the class members are unaware of their rights and have damages such that it is not feasible for them to bring individual actions. "[O]ne of the primary functions of the class suit is to provide a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group." Brady v. LAC, Inc., 72 F.R.D. 22, 28 (S.D.N.Y. 1976).

25. The special efficacy of the consumer class action has been noted by the courts and is applicable to this case:

**A class action permits a large group of claimants to have their claims**

adjudicated in a single lawsuit. This is particularly important where, as here, a large number of small and medium sized claimants may be involved. In light of the awesome costs of discovery and trial, many of them would not be able to secure relief if class certification were denied . . . .

In re Folding Carton Antitrust Litigation, 75 F.R.D. 727, 732 (N.D. Ill. 1977) (citations omitted).

Another court has noted:

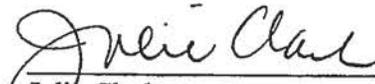
Given the relatively small amount recoverable by each potential litigant, it is unlikely that, absent the class action mechanism, any one individual would pursue his claim, or even be able to retain an attorney willing to bring the action. As Professors Wright, Miller, and Kane have discussed in analyzing consumer protection class actions such as the instant one, 'typically the individual claims are for small amounts, which means that the injured parties would not be able to bear the significant litigation expenses involved in suing a large corporation on an individual basis. These financial barriers may be overcome by permitting the suit to be brought by one or more consumers on behalf of others who are similarly situated.' 7B Wright et al., §1778, at 59; see, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ('Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.'). The public interest in seeing that the rights of consumers are vindicated favors the disposition of the instant claims in a class action form.

Lake v. First Nationwide Bank, 156 F.R.D. 615, 625 (E.D. Pa. 1994).

26. Management of this class action is likely to present significantly fewer difficulties than those presented in many class actions, e.g., for securities fraud.

WHEREFORE, plaintiffs request that the Court certify a class as requested.

Respectfully submitted,

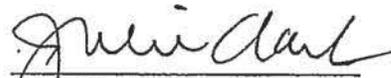
  
Julie Clark

Daniel A. Edelman  
Julie Clark  
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC  
120 S. LaSalle Street, 18th floor  
Chicago, Illinois 60603  
(312) 739-4200  
(312) 419-0379 (FAX)  
Atty. No. 41106

CERTIFICATE OF SERVICE

I, Julie Clark, certify that I had a copy of the foregoing document sent on November 19, 2012, by United States mail and electronic mail to the parties named below:

Amir R. Tahmassebi  
Konicek & Dillon, P.C.  
21 W. State Street  
Geneva, IL 60134  
amir@konicekdillonlaw.com

  
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Chicago, Illinois 60603  
(312) 739-4200  
(312) 419-0379 (FAX)

# Exhibit E

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

BALLARD NURSING CENTER, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	10 CH 17229
	)	
KOHL'S PHARMACY & HOMECARE,	)	
INC.,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Plaintiff Ballard Nursing Center, Inc. has filed an Amended Motion for Class Certification.

I. Background

On April 20, 2010, Plaintiff Ballard Nursing Center, Inc. filed a class action Complaint against Defendant Kohl's Pharmacy & Homecare, Inc. The Complaint alleges violations of the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C.S. §227, the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/1 *et seq.*, and a claim for common law conversion. Plaintiff's claims are based on the alleged sending of an unsolicited fax advertisement to Plaintiff.

II. Amended Motion for Class Certification

Plaintiff filed an Amended Motion for Class Certification. The proposed class definition is as follows:

- (a) all parties (b) who, on or about March 3, 2010, (c) were sent advertising faxes by defendant (d) and with respect to whom defendant cannot provide evidence of consent or a prior business relationship.

*A. Section 2-801*

The certification of class actions is governed by section 2-801 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-801. To certify a class action, the Court must find:

- (1) The class is so numerous that joinder of all members is impracticable.

- (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
- (3) The representative parties will fairly and adequately protect the interest of the class.
- (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

735 ILCS 5/2-801. Because of the relationship between section 2-801 and Federal Rule of Civil Procedure 23 ("Rule 23"), federal decisions interpreting Rule 23 are considered persuasive authority in interpreting and applying section 2-801. Avery v. State Farm Mut. Auto. Ins. Co., 216 Ill. 2d 100, 125 (2005). A party seeking class certification has the burden of establishing all the prerequisites of section 2-801 before a class can be certified. Aguilar v. Safeway Ins. Co., 221 Ill. App. 3d 1095, 1102 (1<sup>st</sup> Dist. 1991).

### **B. Numerosity**

If a class has more than forty individuals, numerosity is satisfied. Wood River Area Development Corp. v. Germania Federal Savings & Loan Ass'n, 198 Ill. App. 3d 445, 450 (5<sup>th</sup> Dist. 1990)(citation omitted). Discovery in this case has established that Defendant purchased a list of fax numbers from Red Door Marketing. (Motion, Ex. B, Answer to Interrogatory No. 4). Defendant then utilized the services of WestFax to transmit the fax advertisement at issue. (Id. at Answer to Interrogatory Nos. 3, 8; Motion, Exs. C and D). WestFax successfully sent the advertisement to 4,142 separate fax numbers. (Motion, Exs. D through G). Numerosity is satisfied.

### **C. Predominance of Common Issues of Fact and Law**

"The purpose of the predominance requirement is to ensure that the proposed class is sufficiently cohesive to warrant adjudication by representation, and it is a far more demanding requirement than the commonality requirement of Rule 23(a)(2)." Smith v. Illinois Central R.R., 223 Ill. 2d 441, 448 (2006). "The test for predominance is not whether the common issues outnumber the individual ones, but whether common or individual issues will be the object of most of the efforts of the litigants and the court." Id. at 448-49. In determining whether common issues will predominate over individual issues, the court must identify the substantive issues of the case and "look beyond the pleadings to understand the claims, defenses, relevant facts and, applicable substantive law." Id. at 449. "Satisfaction of Section 2-801's predominance requirement necessitates a showing that 'successful adjudication of the purported class representatives' individual claims will establish a right of recovery or resolve a central issue on behalf of the class members.'" Id., quoting Avery, 216 Ill. 2d at 128. "The fact that the class members' recovery may be in varying amounts which must be determined separately does not necessarily mean that there is no predominate common question." McCarthy v. LaSalle Nat'l Bank & Tr. Co., 230 Ill. App. 3d 628, 634 (1<sup>st</sup> Dist. 1992).

## 1. Consent/Established Business Relationship

Defendant asserts that consent or the existence of an established business relationship are individual questions precluding class certification. Numerous courts, including this court, have rejected this assertion.

Defendant has the burden of showing consent or an established business relationship. E.g., 47 C.F.R. 64.1200(a)(3); 21 FCC Rcd 3787, 2006 FCC LEXIS 1713, ¶12 (an entity which sends a fax advertisement on the basis of an established business relationship has the burden of demonstrating the existence of such relationship). Courts have also held that the plaintiff has the burden of showing that a faxed advertisement was unsolicited. E.g., Saf-T-Gard Int'l, Inc. v. Wagener Equities, Inc., 251 F.R.D. 312, 314 (N.D. Ill. 2008); Hinman v. M & M Rental Ctr., 545 F. Supp. 2d 802, 805 (N.D. Ill. 2008). However, even if the class members have the burden of proving that the fax sent by Defendant was unsolicited, this does not prevent class certification.

In Hinman v. M & M Rental Ctr., 545 F. Supp. 2d 802, 806 (N.D. Ill. 2008), the complaint alleged that the defendants had engaged a third party to send more than 3,000 faxes to targeted businesses. Id. The Hinman court found that this standardized conduct toward all the potential class members allowed the issue of consent to "rightly be understood as a common question" and the fact that some individuals on the list might have consented to receiving the transmissions at issue was an insufficient basis for denying class certification. Id. at 807. The Hinman court further rejected the defendants' argument that defining the class to include only individuals who did not consent did not circumvent the commonality requirement and reach into the merits of the case. Id.

In Kavu, Inc. v. Omnipak Corp., 246 F.R.D. 642, 647 (W.D. Wash. 2007), the court rejected the defendant's contention that a key issue not common to the class members was whether they gave permission to receive the faxes at issue. The Kavu court found that the class was not defined in such a way as to require inquiry into the merits. Id. The Kavu court further found that given the fact that the defendant obtained all the recipients' fax numbers from the same database whether the recipients' inclusion in the database constituted express permission to receive faxed advertisements was a common issue amenable to class certification and there would be no need for individual inquiry. Id.

In Saf-T-Gard International, Inc. v. Wagener Equities, Inc., 251 F.R.D. 312, 315 (N.D. Ill. 2008), it was undisputed that some number of faxes had been sent on the defendants' behalf to potentially tens of thousands of individuals unknown to the defendants. The Saf-T-Gard court found that this type of organized program of fax advertising lends itself to common adjudication of the fax issue. Id.

Based on the sound reasoning of Hinman, Kavu and Saf-T-Gard which involved mass-faxing by a third-party on behalf of the defendants, as in this case, consent and the existence of an established business relationship are issues which can be commonly adjudicated. It will not be necessary for each individual class member to show lack of consent. Where a defendant has acted wrongly in the same basic way to all the members of a class, common class questions

predominate. Martin v. Heindl Commodities, Inc., 139 Ill. App. 3d 1049, 1060 (1<sup>st</sup> Dist. 1985). Defendant's speculation that it may have had an established business relationship with some of the putative class members or that some of the putative class members may have consented to receive the faxes will not prevent class certification. Miner v. Gillette Co., 87 Ill. 2d 7, 19 (1981)(hypothetical individual issues will not prevent class certification).

Finally, Defendant argues that the conversion claim should not be certified because some recipients may have received the fax by computer, and not lost any toner or paper. Defendant, however, offers nothing but speculation. Hypothetical issues will not prevent class certification.

#### ***D. Adequacy of Representation***

"The test applied to determine adequacy of representation is whether the interests of those who are parties are the same as those who are not joined and whether the litigating parties will fairly represent those interests." Miner, 87 Ill. 2d at 14. "The attorney for the representative party 'must be qualified, experienced and generally able to conduct the proposed litigation.'" Id. "Additionally, plaintiff's interest must not appear collusive." Id.

Defendant argues that Plaintiff is not an adequate class representative because it has no independent knowledge of the fax sent by Defendant. This claim is belied by the deposition testimony of Eli Pick, the executive director of Ballard Nursing Center on the date the fax was received. (Pick's Dep. at 8-9; 15-16).

Defendant also asserts that Plaintiff will not represent the interests of the class because it is a professional plaintiff routinely bringing TCPA claims. Defendant fails to explain how the fact that Plaintiff has filed other TCPA class actions prevents it from adequately representing the interests of the putative class members. In fact, it is clear that Defendant's real issue is Plaintiff's protection of the absent putative class members interests by refusing Defendant's tender offer after Plaintiff has filed its motion for class certification. Plaintiff has demonstrated that it will adequately represent the class members.

#### ***E. Appropriate Method for Resolution of Claims***

In deciding whether a class action is an appropriate method for the fair and efficient adjudication of the controversy, "a court considers whether a class action: (1) can best secure the economies of time, effort and expense, and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain." Gordon v. Boden, 224 Ill. App. 3d 195, 203 (1<sup>st</sup> Dist. 1991). Given the large number of putative class members, the relatively small amount of damages involved as to each class member, and the common issues, class certification is an appropriate method of adjudication.

III. Conclusion

Plaintiff's Amended Motion for Class Certification is granted. The status scheduled for April 22, 2013 at 9:30 a.m. is stricken.

Enter: \_\_\_\_\_

\_\_\_\_\_  
Judge Neil H. Cohen

**ENTERED**  
Judge Neil H. Cohen-2021  
APR 15 2013  
DOROTHY BROWN  
CLERK OF THE CIRCUIT COURT  
OF COOK COUNTY, IL  
DEPUTY CLERK

# Exhibit F

**NOTICE**

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (1st) 131543-U

FOURTH DIVISION  
September 30, 2014

No. 1-13-1543

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

BALLARD RN CENTER, INC., f/k/a	)	
Ballard Nursing Center, Inc.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 10 CH 17229
	)	
KOHL'S PHARMACY AND HOMECARE,	)	Honorable
INC.,	)	Neil Cohen,
	)	Judge Presiding.
Defendant-Appellant.	)	

---

JUSTICE BILL TAYLOR delivered the judgment of the court.  
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

HELD: Plaintiff brought class action suit against sender of unsolicited fax advertisements, seeking statutory damages under the Telephone Consumer Protection Act and also damages for consumer fraud and conversion of ink and paper. Trial court granted class certification, and defendant filed interlocutory appeal. We held that (1) common questions of fact and law predominated over individual issues; (2) plaintiff was not merely a "pawn" of class counsel, as would render it unable to adequately represent the class; but (3) defendant's tender of \$2,500 in settlement was sufficient to moot plaintiff's claim under the TCPA, so class certification with regard to plaintiff's TCPA claim had to be reversed.

¶ 1 In this interlocutory appeal, defendant Kohll's Pharmacy & Homecare, Inc. (Kohll's) appeals the trial court's decision to grant class certification to plaintiffs.

¶ 2 On March 3, 2010, plaintiff Ballard RN Center, Inc. (Ballard) allegedly received an unsolicited one-page fax from Kohll's which advertised corporate flu shot services. Ballard filed suit against Kohll's, seeking statutory damages under the Telephone Consumer Protection Act (47 U.S.C. § 227 (2006)) (TCPA) and the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/2 (West 2010)), and also damages for conversion of ink and paper. Ballard additionally filed a motion for class certification, requesting that the court certify a class of all parties who, on or about March 3, 2010, were sent unsolicited advertising faxes by Kohll's. Discovery showed that on March 3, 2010, Kohll's sent the fax at issue to a total of 4,760 fax numbers and successfully transmitted it to 4,142 of them.

¶ 3 The trial court granted Ballard's motion and certified the class on April 15, 2013. Kohll's appeals this certification order. For the reasons that follow, we affirm in part and reverse in part.

¶ 4 I. BACKGROUND

¶ 5 On April 20, 2010, Ballard filed its complaint, which was styled "Complaint – Class Action." The complaint alleges that on March 3, 2010, Ballard received an unsolicited fax from Kohll's, although Ballard had no prior relationship with Kohll's and had not authorized the sending of fax advertisements from Kohll's. It alleges that the fax did not provide an "opt out notice" as required by the TCPA even when faxes are sent with consent or pursuant to an established business relationship. It further asserts, on information and belief, that the fax from Kohll's was part of a mass broadcasting of faxes and Kohll's had transmitted similar unsolicited fax advertisements to at least 40 other persons in Illinois.

¶ 6 A copy of the fax is attached to the complaint. The fax is a one-page document advertising “Corporate Flu Shots.” At the bottom of the page, under the heading “Removal From List Request,” the fax states, “If you have received this information in error or if you are requesting that transmissions cease in the future, please notify the sender to be removed as the recipient of future transmissions.” It then provides contact information by fax, phone, and email.

¶ 7 Ballard’s complaint seeks relief in three counts. Count I seeks relief under the TCPA, which prohibits the use of any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine (47 U.S.C. § 227(b)(1)(c) (2006)) and provides that a private plaintiff can bring suit for violation of the TCPA for \$500 in statutory damages, with treble damages for willful or knowing violations. Count II seeks relief under the Consumer Fraud Act (815 ILCS 505/2 (West 2010)), alleging that Kohll’s unsolicited fax advertising constituted “unfair acts and practices” in the course of trade and commerce. Finally, count III, for conversion, alleges that by sending unsolicited faxes, Kohll’s converted to its own use ink and paper that belonged to Ballard and the class members.

¶ 8 On the same day that Ballard filed its complaint, it also filed a “Motion for Class Certification.” In that motion, Ballard requested that the court certify the following classes:

“All persons and entities with facsimile numbers (1) who, on or after April 20, 2006, or such shorter period during which faxes were sent by or on behalf of defendant Kohll’s Pharmacy & HomeCare, Inc., (2) were sent faxes by or on behalf of defendant Kohll’s Pharmacy & HomeCare, Inc., promoting its goods or services for sale (3) and who were not provided an ‘opt out’ notice that complies with federal law. (*Count I*)

All persons and entities with Illinois fax numbers (1) who, on or after April 20, 2007, or such shorter period during which faxes were sent by or on behalf of defendant

Kohl's Pharmacy & HomeCare, Inc., (2) were sent faxes by or on behalf of defendant Kohl's Pharmacy & HomeCare, Inc., promoting its goods or services for sale (3) and who were not provided an 'opt out' notice that complies with federal law. (*Count II*)

All persons and entities with Illinois fax numbers (1) who, on or after April 20, 2005, or such shorter period during which faxes were sent by or on behalf of defendant Kohl's Pharmacy & HomeCare, Inc., (2) were sent faxes by or on behalf of defendant Kohl's Pharmacy & HomeCare, Inc., promoting its goods or services for sale (3) and who were not provided an 'opt out' notice that complies with federal law. (*Count III*)"

The motion contains no factual allegations in support of class certification. It states that "[p]laintiff will file a supporting Memorandum of Law in due course"; however, it appears that no such memorandum was ever filed.

¶ 9 On June 28, 2012, Kohl's filed for partial summary judgment on count I of Ballard's complaint. In its motion, Kohl's alleged that, on three separate occasions, Kohl's tendered an unconditional offer of payment consisting of a sum that covered all damages Ballard might be entitled to under the TCPA. According to Kohl's, Ballard's counsel summarily rejected this tender while giving no legal basis as to why additional damages were due under the TCPA. Kohl's further asserted that Ballard had not yet filed a motion for class certification. Based upon these allegations, Kohl's argued that Ballard's TCPA claim was moot under *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450, 455 (2011), which holds that a named representative's claim is moot in a class action when the defendant tenders the amount of damages the plaintiff seeks before the representative files a motion for class certification.

¶ 10 Attached to Kohl's motion are three letters sent by Kohl's to Ballard. The first, dated June 29, 2011, includes a check for \$1,600; the second, dated June 5, 2012, includes a check for

\$1,500; the third, dated June 28, 2012, includes a check for \$2,500. All three of these offers were rejected by Ballard and the checks returned to Kohll's.

¶ 11 Ballard filed a response to Kohll's motion for summary judgment in which it acknowledged that Kohll's had correctly stated the holding of *Barber* but denied that *Barber* applied to its case, since Ballard had filed a motion for class certification concurrently with the filing of its complaint on April 20, 2010.

¶ 12 Kohll's filed a reply in which it argued that the April 20, 2010, motion was an incomplete "shell" motion that was legally insufficient to satisfy *Barber*. In this regard, Kohll's pointed out that Ballard had never presented that motion to the court or set a hearing date. Kohll's also stated that Ballard filed the April 20, 2010, motion before discovery had been conducted and therefore had no knowledge of the class.

¶ 13 On November 29, 2012, the trial court denied Kohll's motion for partial summary judgment, stating that Kohll's did not make its tender prior to the filing of Ballard's class certification motion. It reasoned that "*Barber* requires only that a motion for class certification be filed. It does not require that it meet any certain standard."

¶ 14 Ballard then filed an amended motion for class certification, stating, "Having conducted discovery, Plaintiff has revised and limited the Class Definition from that included in its original motion for Class Certification \*\*\*." According to Ballard, discovery showed that Kohll's had contracted with a list service provider known as Red Door Marketing to purchase thousands of fax numbers of businesses located throughout the United States. Discovery also showed that Kohll's sent its "Corporate Flu Shots Blast Fax" to 4,760 fax numbers on the list, and 4,142 of those fax transmissions were successful. A Westfax invoice for services performed on March 3, 2010, indicates exactly which transmissions were successful. Based upon these facts, Ballard

submitted the following proposed class definition: “(a) all parties (b) who, on or about March 3, 2010, (c) were sent advertising faxes by Defendant (d) and with respect to whom Defendant cannot provide evidence of consent or a prior business relationship.”

¶ 15 On April 15, 2013, the trial court granted Ballard’s motion and certified the above class. Kohll’s now appeals this certification order. See Ill. S. Ct. R. 306(a)(8) (eff. Feb. 16, 2011) (allowing permissive interlocutory appeals from orders granting class certification).

¶ 16

## II. ANALYSIS

¶ 17 On appeal, Kohll’s argues that class certification was improper under section 2-801 of the Code of Civil Procedure (735 ILCS 5/2-801 (West 2010)), which sets forth the prerequisites for the maintenance of a class action. Under section 2-801, an action may only be maintained as a class action if the following conditions are met: (1) numerosity (the class is so numerous that the joinder of all members is impracticable); (2) commonality (there are common questions of law and fact among the members of the class that predominate over individual issues); (3) adequacy of representation (the representative party will fairly and adequately protect the interest of the class); and (4) appropriateness (a class action is a fair and efficient way to adjudicate the controversy). *Id.* The plaintiff bears the burden of establishing these prerequisites, and the court must find them present before it sanctions the maintenance of an action as a class action.

*McCabe v. Burgess*, 75 Ill. 2d 457, 463-64 (1979). We review the trial court’s decision to certify a class for an abuse of discretion. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 125-26 (2005); *Walczak v. Onyx Acceptance Corp.*, 365 Ill. App. 3d 664, 673 (2006).

¶ 18 In this appeal, Kohll’s does not challenge the element of numerosity, but it does challenge the elements of commonality, adequacy of representation, and appropriateness. We consider Kohll’s arguments in turn.

¶ 19

A. Commonality

¶ 20 Kohll's first contention is that the trial court abused its discretion in finding that common questions of law and fact predominate over individual issues. Kohll's identifies two issues of fact which, it argues, are not common to all class members but must be determined on an individual basis. First, Kohll's argues that it has not been demonstrated that all class members did not consent to the fax in question. Second, Kohll's speculates that some of the unsolicited fax transmissions may have been diverted to computers and never physically printed. If that were the case, according to Kohll's, the sending of the faxes would not be a TCPA violation, and it also would not constitute conversion, insofar as no paper and ink would have been used.

¶ 21 "The test for predominance is not whether the common issues outnumber the individual ones, but whether common or individual issues will be the object of most of the efforts of the litigants and the court." *Smith v. Illinois Central R.R. Co.*, 223 Ill. 2d 441, 448-49 (2006). As long as common questions predominate, the existence of individual issues will not defeat class certification. *Miner v. Gillette Co.*, 87 Ill. 2d 7, 19 (1981) (citing *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 340-41 (1977) ("No doubt there will be situations where there may be questions peculiar to certain members of the class. However, once there is a determination that there exists a question of fact or law common to the class and that this predominates the question affecting only individual members, the statute is satisfied.")). For this reason, "commonality and typicality are generally met where, as here, a defendant engages in a standardized course of conduct vis-a-vis the class members, and plaintiffs' alleged injury arises out of that conduct." *Hinman v. M&M Rental Center, Inc.*, 545 F. Supp. 2d 802, 807 (N.D. Ill. 2008) (in fax blast case, holding that "[t]he possibility that some of the individuals on the list may separately have

consented to the transmissions at issue is an insufficient basis for denying certification”).<sup>1</sup> Moreover, “ ‘the hypothetical existence of individual issues is not a sufficient reason to deny the right to bring a class action.’ ” *Miner*, 87 Ill. 2d at 20 (where plaintiff’s claim was predicated upon a series of essentially identical transactions by thousands of class members, and the individual questions postulated by defendant were “mere hypotheticals,” such hypotheticals did not bar the action) (quoting *Harrison Sheet Steel Co. v. Lyons*, 15 Ill. 2d 532, 538 (1959)).

¶ 22 In this case, there are significant common issues of fact and law pertaining to all class members. The record shows that Kohll’s contracted with a list service provider known as Red Door Marketing to purchase thousands-of fax numbers of businesses, and it then engaged a third party to send the fax at issue to over 4,000 numbers on this list. Thus, the manner in which Kohll’s identified these recipients will not require individualized inquiry. It is apparent that Kohll’s “engage[d] in a standardized course of conduct vis-a-vis the class members, and plaintiffs’ alleged injury arises out of that conduct” (*Hinman*, 545 F. Supp. 2d at 806). See *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 647 (W.D. Wash. 2007) (commonality requirement was satisfied where defendant “engaged in a common course of conduct” by purchasing recipients’ fax numbers from a database and then sending the same fax transmission to all recipients within a short period of time). Common questions include whether the fax was an “advertisement” under the TCPA and whether Kohll’s acts were willful or knowing. See *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013) (“Class certification is normal in litigation under § 227,

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<sup>1</sup> *Hinman* dealt with class certification under Rule 23 of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 23). Section 2-801 is patterned after Rule 23, and federal decisions interpreting Rule 23 are persuasive authority with regard to the question of class certification in Illinois. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 125 (2005).

because the main questions, such as whether a given fax is an advertisement, are common to all recipients.”).

¶ 23 Notwithstanding the foregoing, Kohll’s contends that outstanding issues of consent should prevent class certification, since it is possible that some of the class members either consented to receive advertisements from Kohll’s or had an existing business relationship with Kohll’s. If that were the case, according to Kohll’s, there would be no TCPA violation with respect to those class members. Ballard disagrees, arguing that consent and existing business relationship are not defenses in this case because Kohll’s failed to provide an opt-out notice that fully complies with section 227(b)(2)(D) of the TCPA.

¶ 24 To resolve this issue, we need to take a closer look at the statutory language in question. The TCPA prohibits the sending of an “unsolicited advertisement” to a “telephone facsimile machine” unless the sender has consent or an established business relationship with the recipient and the advertisement contains an opt-out notice “meeting the requirements under paragraph (2)(D).” 47 U.S.C. § 227(b)(1)(C)(iii) (2006). The statute itself does not expressly require that an opt-out notice be included in solicited or consented-to fax advertisements. However, the most pertinent regulation in this case extends the opt-out notice requirement to solicited fax advertisements, stating: “A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.” 47 C.F.R. § 64.1200(a)(4)(iv) (2013). Under this regulation, courts have held that, even where the TCPA permits fax advertisements because of consent or an established business relationship, such faxes must still contain opt-out information that complies with federal regulations. *Ira Holtzman*, 728 F.3d at 683 (stating that “[defendant’s] faxes did not contain opt-out information, so if they are properly

understood as advertising then they violate the Act whether or not the recipients were among [defendant's] clients"); *Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir. 2013) ("the regulation as written requires the senders of fax advertisements to employ the above-described opt-out language even if the sender received prior express permission to send the fax").

¶ 25 The requirements for a valid opt-out notice are as follows:

"A notice contained in an advertisement complies with the requirements under this paragraph only if—

(A) The notice is clear and conspicuous and on the first page of the advertisement;

(B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines *and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(4)(v) of this section is unlawful;*

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(4)(v) of this section;

(D) The notice includes—

(1) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and

(2) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free

mechanism including a Web site address or email address \*\*\*.”

(Emphasis added.) 47 C.F.R. § 64.1200(a)(4)(iii) (2013).

See also 47 U.S.C. § 227(b)(2)(D)(ii) (2006) (an opt-out notice is only valid if the notice states that it is unlawful not to comply with a list removal request “within the shortest reasonable time, as determined by the Commission”).

¶ 26 In the present case, Kohll’s provided an opt-out notice on its fax, but that opt-out notice did not fully comply with the requirements listed above. Kohll’s opt-out notice stated, “If you have received this information in error or if you are requesting that transmissions cease in the future, please notify the sender to be removed as the recipient of future transmissions.” It also provided contact information by fax, phone, and email. However, it did not state that failure to comply with a list removal request within 30 days was unlawful, as required by subsection (B) quoted above. Thus, we agree with Ballard that the opt-out notice provided by Kohll’s did not strictly comply with federal law, and, as such, the fax would appear to be a TCPA violation even if Kohll’s had consent or a prior business relationship with some of the class members. See 47 C.F.R. § 64.1200(a)(4)(iv) (2013).

¶ 27 Moreover, in any event, we note that Kohll’s does not positively assert that it had consent or an established business relationship with any of the parties to whom it sent the fax; it only speculates that such factors might potentially exist. Nothing in the record indicates that either Kohll’s or anyone acting on its behalf obtained consent from, or had an established business relationship with, any of the recipients of its fax blast. On the contrary, when asked in interrogatories about the issue of consent, Kohll’s stated: “We don’t know if consent was received. We purchased the list [of fax numbers] from Red Door Marketing \*\*\*. Red Door Marketing was the entity who processed information relating to the advertising faxes that

existed. We are unaware of the lists that Red Door maintains.” Based upon this statement, it would appear that Kohll’s arguments with regard to consent are merely speculative and not grounded in facts. “[T]he hypothetical existence of individual issues is not a sufficient reason to deny the right to bring a class action.” *Miner*, 87 Ill. 2d at 20 (quoting *Harrison Sheet Steel*, 15 Ill. 2d at 538); see *Hinman*, 545 F. Supp. 2d at 806 (requirement of commonality is typically met where a defendant engages in a standardized course of conduct toward all class members and the alleged injury arises from that conduct). Thus, we cannot say that the trial court abused its discretion in finding that the merely hypothetical issues of consent raised by Kohll’s were insufficient to preclude class certification. See *id.* at 807 (in “fax blast” case, hypothetical possibility that some recipients might have consented to the transmissions at issue was insufficient to prevent class certification); see also *Display South, Inc. v. Express Computer Supply, Inc.*, 2006-1137, at 10 (La. App. 1 Cir. 5/4/07); 961 So. 2d 451, 457 (in TCPA case, rejecting defendant’s argument that possibility of existing business relationship with fax recipients should preclude class certification, since “the fact that some plaintiffs may offer a defense does not prohibit certification of a class”).

¶ 28 Kohll’s second contention with regard to commonality is that some of the class members may have received the fax transmission in the form of an email instead of physically printing it out. Kohll’s argues that any such class members would not have a valid claim under the TCPA, since a computer is not a “telephone facsimile machine” within the meaning of the TCPA. Kohll’s additionally argues that such class members would not have a valid claim for conversion of ink and paper.

¶ 29 With regard to the TCPA, the relevant statutory language is as follows:

“(b) Restrictions on the use of automated telephone equipment.

(1) Prohibitions.

It shall be unlawful for any person within the United States \*\*\*

\* \* \*

(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement *to a telephone facsimile machine.*” (Emphasis added.) 47 U.S.C. § 227 (2006).

The TCPA defines a “telephone facsimile machine” as

“equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.” 47 U.S.C. § 227(a)(3) (2006).

As Ballard points out, the statute does not make physical printing an element of the offense; it only requires that an unsolicited advertisement be sent to a “telephone facsimile machine.” As for whether a computer constitutes a “telephone facsimile machine” within the meaning of the TCPA, we note that, in the hypothetical scenario envisioned by Kohll’s, the computers at issue must have been set up in order to receive electronic signals over a telephone line, so that they could convert Kohll’s fax into an email. We also note that, in the context of the modern office, most computers are connected to printers which can transcribe text or images received via email onto paper. A strong argument could be made that a computer that is used to receive fax transmissions is a telephone facsimile machine for TCPA purposes, at least with regard to any fax transmissions that it actually receives.

¶ 30 In support of its argument that a computer is not a telephone facsimile machine, Kohll’s relies primarily on *Aronson v. Bright-Teeth Now, LLC*, 2003 PA Super 187, in which the court

held that the sending of unsolicited commercial emails was not a violation of the TCPA. However, *Aronson* is distinguishable from the instant case because it did not involve fax transmissions in any form. The *Aronson* plaintiff received six “spam” emails from the defendant and brought suit under the TCPA, seeking \$9,000 in statutory damages. *Id.* ¶ 2. Under these facts, the court held that plaintiff’s computer was not a telephone facsimile machine and plaintiff did not have a valid TCPA claim. *Id.* The *Aronson* court did not purport to address the scenario proposed by Kohll’s in this case, where a computer is set up to receive fax transmissions in lieu of a traditional fax machine and, in fact, does receive those transmissions.

¶ 31 More persuasive is the Seventh Circuit decision in *Ira Holtzman*, 728 F.3d 682. In that case, defendant was sued under the TCPA for sending over 8000 unsolicited advertising faxes. *Id.* at 683. The trial court certified a class of the faxes’ recipients and subsequently granted summary judgment for plaintiffs. *Id.* at 684. On appeal, the court rejected defendant’s argument that each recipient would have to prove that he actually printed the fax in question or otherwise suffered monetary loss. The court explained:

“[Defendant] is wrong on the law. The statute provides a \$500 penalty for the annoyance. [Citation.] Even a recipient who gets the fax on a computer and deletes it without printing suffers *some* loss: the value of the time necessary to realize that the inbox has been cluttered by junk.” (Emphasis in original.) *Id.* (citing 47 U.S.C. § 227(b)(3)(B) (2006)).

Likewise, in the instant case, class members who received Kohll’s fax by email would not automatically be barred from recovery under the TCPA.

¶ 32 Moreover, even if we were to agree with Kohll’s that a computer used to receive faxes is not a telephone facsimile machine, the mere unsupported possibility that some class members *might* have received Kohll’s fax by email is an insufficient basis for denying class certification.

As discussed earlier, as long as common issues predominate over individual ones, class certification is proper notwithstanding the hypothetical existence of individual issues. *Miner*, 87 Ill. 2d at 20 (where plaintiff's claim was predicated upon a series of essentially identical transactions by thousands of class members; and the individual questions postulated by defendant were "mere hypotheticals," such hypotheticals did not bar the action); *Harrison Sheet Steel Co.*, 15 Ill. 2d at 538 ("Where it appears that the common issue is dominant and pervasive, something more than the assertion of hypothetical variations of a minor character should be required to bar the action."). In this case, where Kohll's contracted with a third party to send a "fax blast" to over 4,000 numbers on a purchased list, we cannot say that the trial court abused its discretion in finding that the requirement of commonality has been met. See *Ira Holtzman*, 728 F.3d at 684 (class certification is "normal" in TCPA actions because "the main questions \*\*\* are common to all recipients"); *Hinman*, 545 F. Supp. 2d at 806 (element of commonality was met in TCPA case because defendant "engage[d] in a standardized course of conduct vis-a-vis the class members").

¶ 33

#### B. Appropriateness

¶ 34 Kohll's next contends that the trial court abused its discretion in finding that a class action lawsuit is a fair and efficient way to adjudicate this controversy, where the putative class consists of parties who received a one-page fax over three years ago. Kohll's additionally argues that class certification is inappropriate for TCPA actions generally because Congress, in enacting the TCPA, did not intend for class action lawsuits to be used as a means of enforcement.

¶ 35 In deciding whether a class action lawsuit is an appropriate way to adjudicate a controversy, courts consider whether it (1) serves the economies of time, effort, and expense, (2) prevents possible inconsistent results, and (3) otherwise accomplishes the ends of equity and

justice. *Gordon v. Boden*, 224 Ill. App. 3d 195, 203 (1991); *Society of St. Francis v. Dulman*, 98 Ill. App. 3d 16, 19 (1981). Courts' consideration of these factors often mirrors the analysis of the other section 2-801 elements, particularly the elements of numerosity and commonality. *Clark v. TAP Pharmaceutical Products, Inc.*, 343 Ill. App. 3d 538, 552 (2003) (citing *Steinberg*, 69 Ill. 2d at 339); *Gordon*, 224 Ill. App. 3d at 203. Where a class is numerous and common questions of fact and law predominate, it is more efficient to address the common issues in a single action instead of litigating each individual case separately. *Clark*, 343 Ill. App. 3d at 552; see *Fakhoury v. Pappas*, 395 Ill. App. 3d 302, 316 (2009) ("Certainly having one common complaint rather than thousands of separate complaints considering the same issue promotes the economics of time, effort, expense and uniformity over requiring thousands of complaints.").

¶ 36 In this case, as discussed above, Kohll's sent a "fax blast" to over 4,000 fax numbers on a purchased list. Courts have regularly recognized that class action lawsuits are an appropriate way of resolving TCPA cases involving blast faxing using purchased lists, because it serves the ends of judicial economy and uniformity. For instance, in *Hinman*, 545 F. Supp. 2d at 804, the defendant sent one-page fax "flyers" en masse to companies whose fax numbers were on a purchased list. The *Hinman* court certified a class of the fax recipients, explaining that class certification was appropriate because "resolution of the issues on a classwide basis, rather than in thousands of individual lawsuits (which in fact may never be brought because of their relatively small individual value), would be an efficient use of both judicial and party resources." *Id.* at 807; see also *CE Design Ltd. v. Cy's Crabhouse North, Inc.*, 259 F.R.D. 135 (N.D. Ill. 2009) (certifying class in TCPA suit where defendant contracted with a third party to send a fax broadcast to several thousand fax numbers); *Targin Sign Systems, Inc. v. Preferred Chiropractic Center, Ltd.*, 679 F. Supp. 2d 894 (N.D. Ill. 2010) (same); *Lampkin v. GGH, Inc.*, 2006 OK CIV

APP 131, ¶ 33, 146 P.3d 847, 855 (trial court abused its discretion in denying class certification in TCPA case; class action was superior method of adjudicating controversy because, if the class members pursued their claims individually, it would “unduly and unnecessarily clog the judicial system of this state” (internal quotation marks omitted)); *Kavu*, 246 F.R.D. 642; *Display South, Inc.*, 961 So. 2d 451.

¶ 37 Kohll’s nevertheless argues that certification is inappropriate under the facts of this case, where the putative class consists of parties who received a one-page fax over three years ago. Kohll’s argues that this is problematic for three reasons. First, potential plaintiffs may not recall whether or not they received such a fax. Second, and relatedly, it is possible that parties who did not actually receive a fax but were on the fax blast list will lie about receipt in order to recover monetary damages. Third, according to Kohll’s, the only way to include potential plaintiffs in the class will be to send out unsolicited faxes to the numbers listed on the alleged “fax blast” list to notify them of the existence of the litigation. Kohll’s acknowledges that such faxes would not violate the TCPA, since they are not advertisements, but it argues that the irony of sending such faxes is “inescapable.”

¶ 38 With regard to Kohll’s first two objections, we find that the problems of proof are not nearly as dire as Kohll’s suggests. On the contrary, the record reflects that, after Kohll’s hired Westfax to send the fax transmissions at issue, Westfax sent Kohll’s an invoice for services and a detailed report indicating exactly which 4,760 numbers the fax was sent to and which of those transmissions were successful. Because the 4,142 successful transmissions are specifically identified, Kohll’s concerns about proof would seem to be misplaced. See *Ira Holtzman*, 728 F.3d at 684 (“To the extent [defendant] contends that each recipient must prove that his fax

machine or computer received the fax, he is right on the law but wrong on the facts. The record establishes which transmissions were received and which were not.”).

¶ 39 As for Kohll’s concern about having to send unsolicited faxes to class members to notify them that they are part of the class, although the irony of the situation is not lost on us, we do not find this to be a sufficient reason to deny class certification. This same problem would tend to arise in all TCPA class action lawsuits involving fax blasts sent to purchased lists, and, as noted, courts routinely certify classes in such cases. See, *e.g.*, *Hinman*, 545 F. Supp. 2d at 807. We also note that Ballard asserts that it has the ability to determine a name and address associated with the “vast majority” of the class members’ fax numbers, which, if true, would presumably remove the need to contact them via unsolicited faxes.

¶ 40 Kohll’s final argument is that class certification is inappropriate for TCPA actions in general because Congress, in enacting the TCPA, did not intend for class action lawsuits to be used as a means of enforcement. As noted, the TCPA provides for statutory damages of \$500 per violation, with treble damages for willful or knowing violations. 47 U.S.C. § 227(b)(3) (2006). Kohll’s argues that, under this statutory scheme, its potential liability in a class action lawsuit would be a crippling sum that would dwarf the actual harm incurred by the class members, a result that Congress surely did not intend.

¶ 41 However, the legislative history of the TCPA belies the assertion that class action lawsuits in TCPA cases are against congressional intent. The TCPA was first enacted in 1991. In 2005, Congress amended the TCPA by enacting the Junk Fax Prevention Act of 2005 (JFPA) (47 U.S.C. § 609 (2006)). At the time the JFPA was enacted, there had been numerous class action lawsuits certified under the TCPA. See, *e.g.*, *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 50 P.3d 844 (Ariz. Ct. App. 2002); *Core Funding Group, LLC v.*

*Young*, 792 N.E.2d 547 (Ind. Ct. App. 2003). Nevertheless, Congress did not take any action to prohibit or narrow the scope of class action lawsuits under the TCPA.<sup>2</sup> It is therefore apparent that the legislature has acquiesced in courts' construction of the statute allowing for class action lawsuits. See *Charles v. Seigfried*, 165 Ill. 2d 482, 492 (1995) (where legislature acquiesces in judicial interpretation of statute, that interpretation "become[s] part of the fabric" of the statute and departure from that interpretation is tantamount to an amendment of the statute itself).

¶ 42 Moreover, we note that "[a]n award that would be unconstitutionally excessive may be reduced [citation], but constitutional limits are best applied after a class has been certified."

*Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) (citing *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003) (reversing excessively high damages award as a violation of due process)). Whether a reduction in damages to comply with due process is required, and how much, is in itself a classwide issue that should be resolved identically as to each class member. It is not a reason to deny class certification in the first instance. *Murray*, 434 F.3d at 954.

¶ 43 Therefore, for the foregoing reasons, we do not find that the trial court abused its discretion in finding a class action lawsuit to be a fair and efficient way to adjudicate this controversy.

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<sup>2</sup> Many laws that authorize statutory damages also limit the aggregate award to any class. For example, the Fair Debt Collection Practices Act says that total recovery may not exceed "the lesser of \$500,000 or 1 per centum of the net worth of the debt collector." 15 U.S.C. § 1692k(a)(2)(B)(ii) (2006). The Truth in Lending Act has an identical cap. 15 U.S.C. § 1640(a)(2)(B) (2006) (substituting "creditor" for "debt collector"). However, Congress has chosen not to implement such a limit on actions under the TCPA.

¶ 44 C. Adequacy of Representation: Whether Ballard is a “Pawn” of Its Counsel

¶ 45 Kohll’s next contends that Ballard is not an adequate class representative because it is merely a “pawn” of its counsel, the law firm Edelman and Combs. In support, Kohll’s argues that the deposition of Eli Pick, the former owner of Ballard and its corporate representative, shows that were it not for Ballard’s attorneys, Ballard would have settled the litigation or accepted Kohll’s tender. Ballard states that Kohll’s allegations in this regard are “wholly unsupported, offensive and inappropriate” and further argues that there is no real evidence of impropriety which would disqualify Ballard as representative.

¶ 46 The purpose of the adequate representation requirement is to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the proceedings. *Cruz v. Unilock Chicago, Inc.*, 383 Ill. App. 3d 752, 778 (2008) (quoting *P.J.’s Concrete Pumping Service, Inc. v. Nextel West Corp.*, 345 Ill. App. 3d 992, 1004 (2004)); see also *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 810 (2007). To be an adequate class representative, the putative class action plaintiff must be a member of the class. *Id.* The plaintiff must not be seeking relief that is potentially antagonistic to nonrepresented members of the class (*Client Follow-Up Co. v. Hynes*, 105 Ill. App. 3d 619, 625 (1982)), and it must have the desire and ability to prosecute the claim vigorously on behalf of itself and the other class members (*Hall v. Sprint Spectrum L.P.*, 376 Ill. App. 3d 822, 833 (2007)). It is this last requirement which Kohll’s contends is missing in the instant case. Kohll’s argues that the testimony of Pick shows that Ballard lacks any true interest in prosecuting the claim aside from the desire of its counsel. We turn now to examine this testimony.

¶ 47 In his deposition, Pick testified that he worked for Ballard from 1978 until his retirement in May 2011, and he was the executive director of Ballard from 1991 onward. He stated that he

recalled seeing Kohll's fax on his company fax machine. He picked it up and forwarded it to his law firm, Edelman and Combs, because it was an unsolicited fax and he had previously had discussions with Edelman and Combs about what to do with unsolicited faxes.

¶ 48 Pick stated that in his capacity as executive director of Ballard, he had filed "more than six" lawsuits alleging violations of the TCPA, although he could not remember the exact number. He stated that the decision to file these lawsuits was his "in conjunction with the review with counsel." He additionally stated that the ultimate decision belonged to him.

¶ 49 Pick testified that his goal in taking such action was twofold. First, he said, "I forwarded unsolicited faxes [to Edelman and Combs] so that I would stop receiving unsolicited faxes." He explained that he noticed a pattern that when Edelman and Combs contacted the companies that sent him unsolicited faxes, he never received additional faxes from those companies. Second, he said, "I wanted to recover the expenses that I had lost as a result of an unsolicited fax."

¶ 50 Counsel for Kohll's asked Pick what expenses Ballard incurred as a result of an unsolicited fax. Pick stated that the expenses consisted of paper, ink, and staff time to pick up the fax. He estimated that the expense incurred from Kohll's unsolicited fax amounted to "A few dollars." Counsel for Kohll's then asked, "I understand there's class allegations, but you would agree with me that \$2,500 would more than adequately cover any damage done to Ballard Nursing Center itself?" Pick replied, "I would agree that \$2,500 exceeded the cost that I incurred, yes." However, he went on to state, "Ballard was named as part of a class, so I don't know about the costs of everybody else who is involved in this."

¶ 51 Kohll's contends that this deposition testimony shows that Pick's only interest in the litigation was to recover expenses in receiving unwanted faxes, and, if not for his lawyers, he would have accepted Kohll's \$2,500 settlement offer. We disagree. Initially, we note that,

contrary to Kohll's contention, Pick did not say that he only sought to recover expenses; he also said that he wanted to deter companies from sending additional unwanted faxes to Ballard. More importantly, although Pick admitted that \$2,500 would cover Ballard's own costs in receiving the unsolicited fax, he also expressed concern regarding the costs of the other class members who also received faxes from Kohll's. Pick also stated unequivocally that he was the one who made the ultimate decision to pursue litigation, though he made his decision after consultation with counsel. Based upon this testimony, we cannot say that Ballard is a mere "pawn" of its lawyers or that it lacks the desire and ability to prosecute the claim vigorously on behalf of itself and the other class members.

¶ 52 The sole authority that Kohll's cites on this point is the unpublished federal district court decision of *In re AEP ARISA Litigation*, No. C2-03-67, 2008 WL 4210352, at \*2 (S.D. Ohio Sept. 8, 2008), where the court found the named plaintiff not to be an adequate representative because he was "merely a pawn of the class lawyers." See Fed. R. App. P. 32.1(a) (unpublished federal judicial decisions that were issued on or after January 1, 2007, may be cited in federal court). This case is readily distinguishable on its facts. The plaintiff in that case brought a class action lawsuit against his employer, alleging mismanagement of its employee retirement savings plan. *AEP ARISA*, 2008 WL 4210352, at \*1. At a deposition, he revealed that he had not spoken with his lawyers since he initially contacted them three years earlier; he had never received a copy of the complaint and was largely ignorant of its contents; he had never received any status updates about the progress of the case; and he apparently did not even realize that he had agreed to serve as a class representative, based upon his statement that "I'm just a member of a class." *Id.* at \*3-4. On these facts, the court found that he was not an adequate class representative. *Id.* at \*5. However, the court also stressed that "the burden on a named plaintiff to establish that he

or she is an adequate class representative is not high” and that “[w]ith even a minimal amount of consultation with his lawyer, [plaintiff] likely would have passed muster.” *Id.* In the present case, Pick did not display any such ignorance as to the nature of his case or his role in it.

Additionally, as noted, Pick stated that he, not his lawyers, made the ultimate decision to pursue litigation, and the rest of his deposition gives no reason for us to doubt that assertion. Thus, we cannot say that the trial court abused its discretion in rejecting Kohll’s argument that Pick’s deposition shows Ballard to be an inadequate class representative.

¶ 53 . D. Adequacy of Representation: Whether Ballard’s Claim is Moot

¶ 54 Kohll’s finally contends that Ballard’s claim has been mooted by Kohll’s tender of damages, such that Ballard is no longer an adequate class representative. As noted previously, on June 29, 2011, Kohll’s tendered a check for the sum of \$1,600 to Ballard. Ballard refused to accept that check. Kohll’s subsequently tendered a check for \$1,500 on June 5, 2012, and a check for \$2,500 on June 28, 2012; both checks were similarly refused. Based upon these facts, Kohll’s argues that Ballard’s claim is now moot under *Barber*, 241 Ill. 2d at 456-57, which held that a named representative’s claim is moot when the defendant tenders the relief requested prior to the filing of a motion for class certification. See also *Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481, 484-86 (1984) (holding same). Kohll’s acknowledges that Ballard filed a “Motion for Class Certification” contemporaneously with its complaint on April 20, 2010, before any tender was made. Kohll’s nevertheless contends, as it did before the trial court, that this was an incomplete “shell” motion that is insufficient to satisfy *Barber*. In response, Ballard makes three arguments: first, that *any* motion for class certification, regardless of its content or lack thereof, is sufficient to satisfy *Barber*; second, that Ballard’s claims should not be considered moot where Ballard pursued certification with “sufficient

diligence”; and third, that Kohll’s tenders were insufficient to cover the full amount sought by Ballard in this action.

¶ 55 An issue is moot where no actual controversy exists between the parties or where circumstances render the court unable to grant effectual relief. *West Side Organization Health Services Corp. v. Thompson*, 79 Ill. 2d 503, 506-07 (1980). Because Kohll’s mootness argument relies principally on our supreme court’s decision in *Barber*, we begin with a discussion of that case.

¶ 56 In *Barber*, a passenger brought a class action lawsuit against an airline for charging her a baggage fee for a flight that had been canceled. *Barber*, 241 Ill. 2d at 452-53. Before the plaintiff had filed any class certification motion, the defendant refunded the baggage fee to her. *Id.* at 453. The trial court dismissed plaintiff’s claim as moot, and the *Barber* court affirmed. *Id.* at 454, 460. The court stated the rule with regard to class certifications as follows:

“[T]he important consideration in determining whether a named representative’s claim is moot is whether that representative filed a motion for class certification prior to the time when the defendant made its tender. [Citations.] Where the named representative has done so, and the motion is thus pending at the time the tender is made, the case is not moot, and the circuit court should hear and decide the motion for class certification before deciding whether the case is mooted by the tender.” *Id.* at 456-57.

The court explained that the reason for this rule is that “a motion for class certification, while pending, sufficiently brings the interests of the other class members before the court ‘so that the apparent conflict between their interests and those of the defendant will avoid a mootness artificially created by the defendant by making the named plaintiff whole.’ ” *Id.* at 457 (quoting *Susman v. Lincoln American Corp.*, 587 F.2d 866, 870 (7th Cir. 1978)).

¶ 57 Although *Barber* does not explicitly set forth requirements for a valid motion for class certification, such requirements are implicit in the reasoning behind its holding. If the purpose of a motion for class certification is to “sufficiently bring[] the interests of the other class members before the court” (*Barber*, 241 Ill. 2d at 457), then, in order to satisfy *Barber*, a motion must contain sufficient factual allegations so that it does, in fact, bring the interests of the other class members before the court. Otherwise, the court has no basis upon which to determine whether an actual controversy exists between the other class members and the defendant, as would avoid mooting the issue. See *West Side*, 79 Ill. 2d at 506-07.

¶ 58 This reading of *Barber* is consistent with our supreme court’s general approach to class certification motions. In *Weiss v. Waterhouse Securities, Inc.*, 208 Ill. 2d 439, 453 (2004), the court stated that a class certification motion “is typically brought by a putative class action plaintiff, who asks the court, *based on evidentiary materials adduced through discovery*, to find that the case can proceed as a class action.” (Emphasis added.) See also *P.J.’s Concrete Pumping Service*, 345 Ill. App. 3d at 1001 (“Class certification issues are typically factual and should be decided with the benefit of discovery.”). Because of this, the showing that a plaintiff must make in a class certification motion is higher than the showing that he must make to withstand a motion to strike class allegations under section 2-615 (750 ILCS 5/2-615 (West 2012)). *Weiss*, 208 Ill. 2d at 453. It would appear from this distinction that the *Weiss* court did not contemplate a class certification motion filed contemporaneously with the complaint and with no factual allegations in support of certification. Rather, it seems that the *Weiss* court anticipated that the parties would be allowed some time for discovery before the filing of any class certification motion.

¶ 59 Moreover, if a putative class action plaintiff could circumvent the holding of *Barber* merely by filing a contentless “shell” motion for class certification contemporaneously with its complaint, then it would effectively eviscerate the *Barber* decision. See *Toothman v. Hardee’s Food Systems, Inc.*, 304 Ill. App. 3d 521, 534 (1999) (“We will not interpret supreme court precedent in such a way that any portion of the decision becomes meaningless.”). Accordingly, based upon the foregoing, we reject Ballard’s contention that any motion for class certification, regardless of its contents or lack thereof, is sufficient to satisfy *Barber*.

¶ 60 Turning now to the facts of the present case, we find that Ballard’s April 20, 2010, “Motion for Class Certification” was insufficient to “bring[] the interests of the other class members before the court” under *Barber*. *Barber*, 241 Ill. 2d at 457. That motion was filed contemporaneously with the complaint, before any discovery had taken place and before Ballard had any knowledge of the class. Indeed, at that point in the litigation, Ballard had no evidence that other class members even existed, other than speculation based on the nature of the one-page fax it received. Its motion was entirely devoid of any factual allegations in support of class certification. Although it stated that “[p]laintiff will file a supporting Memorandum of Law in due course,” Ballard never filed any such motion. It additionally never presented its motion to the court or set a hearing date on that motion, and, in fact, the court did not rule upon the issue of certification until nearly three years later. Under these facts, we find that, at the time Kohll’s made its tender of \$2,500, Ballard had not yet filed a motion for class certification within the meaning of *Barber*.

¶ 61 Ballard’s second contention is that its claims should not be considered moot because it pursued class certification with “sufficient diligence.” It asserts that, despite repeated delay and refusal to cooperate on the part of Kohll’s, Ballard diligently pursued and obtained the discovery

necessary to present the court with a proper motion for class certification in November 2012. However, the *Barber* court explicitly rejected the notion that a plaintiff's diligence in pursuing class certification will prevent its claim from being mooted if a valid tender is made prior to a motion for class certification. *Barber*, 241 Ill. 2d at 459. In that case, the plaintiff alleged that defendant's tender was an unfair attempt to "pick off" her claim in order to avoid a class action. *Id.* at 455. She argued that the court should apply a "pick off" exception, under which a plaintiff who fails to move for class certification prior to a defendant's tender may nevertheless pursue class certification if the plaintiff has exercised reasonable diligence in that regard. *Id.* The *Barber* court disagreed, stating that the "pick off" exception "has no basis in the law" and instructing that language in prior appellate decisions relying on the "pick off" exception not be cited. (Internal quotation marks omitted.) *Id.* at 458; see *Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶ 21 (reiterating *Barber's* rejection of the "pick off" rule). Accordingly, we must reject Ballard's contention that its alleged diligence prevents its claim from being mooted by Kohll's tender.

¶ 62 Ballard's final contention is that the sums tendered by Kohll's were insufficient to cover the full relief requested by Ballard in its complaint. In its three-count complaint, Ballard sought statutory damages under the TCPA (count I), actual damages and attorney fees as permitted for violation of the Consumer Fraud Act (count II), and damages for conversion (count III). Ballard does not contest that the \$2,500 tendered by Kohll's is sufficient to satisfy count I, but it argues that the amount does not satisfy counts II and III, particularly the Consumer Fraud Act's provision of attorney fees for prevailing plaintiffs. See *Clayton v. Planet Travel Holdings, Inc.*, 2013 IL App (4th) 120717, ¶ 26 (award of attorney fees is allowable under Consumer Fraud Act).

¶ 63 Kohll's does not challenge this assertion. Indeed, at oral argument before this court, counsel for Kohll's conceded that its tender only pertained to count I of the complaint and did not cover counts II and III. This is consistent with Kohll's stance before the trial court, since, after tendering payment to Ballard, Kohll's moved for partial summary judgment on count I of the complaint but did not seek summary judgment on the other two counts.

¶ 64 Based upon the foregoing, we agree with Ballard that Kohll's tender only mooted Ballard's claims with respect to count I of its complaint, which leaves Ballard as an adequate class representative with regard to counts II and III. We therefore reverse the trial court's class certification insofar as it pertains to count I, but we affirm in all other respects. Upon remand, ∴ we direct the trial court to revisit the issue of class certification in light of the fact that only counts II and III remain.

¶ 65 Affirmed in part and reversed in part; cause remanded with directions.

# Exhibit G

2015 IL 118644

IN THE  
SUPREME COURT  
OF  
THE STATE OF ILLINOIS

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(Docket No. 118644)

BALLARD RN CENTER, INC., Appellant, v. KOHLL'S PHARMACY AND  
HOMECARE, INC., Appellee.

*Opinion filed October 22, 2015.*

JUSTICE KILBRIDE delivered the judgment of the court, with opinion.

Chief Justice Garman and Justices Freeman, Thomas, Karmeier, Burke, and  
Theis concurred in the judgment and opinion.

OPINION

¶ 1 This appeal involves our decision in *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450 (2011), holding that a class action may be dismissed as moot when the defendant tenders relief to the named plaintiff prior to the filing of a motion for class certification. Specifically, we are asked to decide whether *Barber* requires any sort of threshold evidentiary or factual basis for the motion for class certification, and whether *Barber* permits a “partial” tender on a single count of a multicount class action complaint to render that single count moot.

¶ 2 In this case, plaintiff concurrently filed a three-count “junk fax” class action complaint and a motion for class certification prior to defendant’s tender of relief

on one of the counts. Rejecting defendant's interpretation of *Barber* on the sufficiency of plaintiff's class certification motion, the circuit court certified the class on all three counts of plaintiff's complaint. On interlocutory appeal, the appellate court affirmed class certification on two of the counts but reversed certification on the single count that defendant tendered relief. 2014 IL App (1st) 131543, ¶ 64.

¶ 3 For the following reasons, we reverse in part and affirm in part the appellate court's judgment.

¶ 4 BACKGROUND

¶ 5 On April 20, 2010, plaintiff, Ballard RN Center, Inc., filed a three-count class action complaint in the circuit court of Cook County, alleging that on March 3, 2010, defendant, Kohll's Pharmacy & Homecare, Inc., sent plaintiff an unsolicited fax advertisement. The complaint alleged that defendant's conduct: (1) violated the Telephone Consumer Protection Act of 1991 (Protection Act) (47 U.S.C. § 227 (2006)) (count I); (2) violated the Consumer Fraud and Deceptive Business Practices Act (Fraud Act) (815 ILCS 505/2 (West 2010)) (count II); and (3) constituted common-law conversion of plaintiff's ink or toner and paper (count III). Each of the three counts included class allegations indicating that plaintiff was filing the action on behalf of a class estimated at over 40 individuals. The complaint sought actual damages, statutory damages, injunctive relief, and attorney fees.

¶ 6 The complaint specifically alleged that plaintiff did not have a prior business relationship with defendant and plaintiff did not authorize defendant to send fax advertisements to plaintiff. The complaint further alleged that defendant's fax advertisement did not provide the requisite "opt out notice" required by the Protection Act when faxes are sent with consent or pursuant to an established business relationship. The complaint asserted, on information and belief, that the fax was part of a "mass broadcasting of faxes" and defendant transmitted similar unsolicited fax advertisements to at least 40 other persons in Illinois.

¶ 7 Plaintiff attached a copy of the one-page fax advertisement to its complaint. The fax advertises defendant's "Corporate Flu Shots" and provides estimates of the costs associated with employees missing work because of illness. It also provides a toll-free contact number for a "free quote" and an associated website. At the bottom

of the fax, under the heading “Removal From List Request,” it advises that “[i]f you have received this information in error or if you are requesting that transmissions cease in the future, please notify the sender to be removed as the recipient of future transmissions.” The instructions provide two contact telephone numbers and an email address for removal requests.

¶ 8 Concurrent with its filing of the complaint on April 20, 2010, plaintiff also filed a motion for class certification pursuant to section 2-801 of the Code of Civil Procedure (Code) (735 ILCS 5/2-801 *et seq.* (West 2010)). Referencing the description in plaintiff’s class action complaint, the motion sought certification of the following classes:

“All persons and entities with facsimile numbers (1) who, on or after April 20, 2006, or such shorter period during which faxes were sent by or on behalf of defendant Kohll’s Pharmacy & HomeCare, Inc., (2) were sent faxes by or on behalf of defendant Kohll’s Pharmacy & HomeCare, Inc., promoting its goods or services for sale (3) and who were not provided an ‘opt out’ notice that complies with federal law. (Count I)

All persons and entities with Illinois fax numbers (1) who, on or after April 20, 2007, or such shorter period during which faxes were sent by or on behalf of defendant Kohll’s Pharmacy & HomeCare, Inc., (2) were sent faxes by or on behalf of defendant Kohll’s Pharmacy & HomeCare, Inc., promoting its goods or services for sale (3) and who were not provided an ‘opt out’ notice that complies with federal law. (Count II)

All persons and entities with Illinois fax numbers (1) who, on or after April 20, 2005, or such shorter period during which faxes were sent by or on behalf of defendant Kohll’s Pharmacy & HomeCare, Inc., (2) were sent faxes by or on behalf of defendant Kohll’s Pharmacy & HomeCare, Inc., promoting its goods or services for sale (3) and who were not provided an ‘opt out’ notice that complies with federal law. (Count III).”

¶ 9 Plaintiff’s class certification motion further asserted that “[s]everal courts have certified class actions under the [Protection Act],” and cited as examples a number of decisions from state and federal courts in Illinois and other states. The motion provided that plaintiff would file a supporting memorandum of law “in due course.”

¶ 10 On June 28, 2012, defendant filed a motion seeking summary judgment solely on count I of plaintiff's complaint that sought recovery under the federal Protection Act. In its motion, defendant alleged that on three separate occasions defendant tendered plaintiff an unconditional offer of payment exceeding the total recoverable Protection Act damages. Plaintiff, however, rejected all three tenders. Defendant further alleged that plaintiff did not file a motion for class certification despite the case being open for "over two years." Citing this court's decision in *Barber*, defendant argued that plaintiff's Protection Act claim in count I of its complaint was rendered moot by the three tenders because this court held that a class action is moot when a defendant offers tender before the plaintiff files a motion for class certification.

¶ 11 Defendant attached to its motion for summary judgment three letters that it mailed to plaintiff offering tender of relief. The first, dated June 29, 2011, included a check for \$1,600; the second, dated June 5, 2012, included a check for \$1,500; the third, dated June 28, 2012, included a check for \$2,500. Plaintiff rejected all three offers and returned the checks.

¶ 12 On September 7, 2012, plaintiff filed a response to defendant's motion for summary judgment. Contrary to defendant's contention, plaintiff argued that its action was not moot under *Barber* because plaintiff timely filed a motion for class certification concurrently with its class action complaint on April 20, 2010. Plaintiff further argued that defendant tendered relief only on count I of plaintiff's three-count complaint and, thus, did not offer the complete relief required to moot the action.

¶ 13 Regarding defendant's observation that plaintiff's action was pending for over two years, plaintiff contended that it "diligently pursued the discovery necessary to present the Court with briefing on the class certification issue," and that "[a]ny delay in proceeding on class certification is a direct result of [d]efendant's obfuscation of discovery in this case." Plaintiff noted that it filed two motions to compel discovery, a motion to compel inspection to identify relevant third parties and potential class members, and also propounded discovery on third parties. Plaintiff indicated that it engaged in efforts to enforce discovery through March 2012.

¶ 14 On October 9, 2012, defendant filed a reply in support of its motion for summary judgment. Citing *Barber*, defendant argued that summary judgment in its

favor on count I was proper because defendant tendered full damages on the Protection Act claims in count I and “no appropriate or even complete motion for class certification is pending.” Defendant contended that “the linchpin of [plaintiff’s] entire argument is an incomplete motion that has not been pursued for over two years.” Alternatively, defendant asserted that plaintiff’s motion for class certification should be denied as insufficient under section 2-801 of the Code (735 ILCS 5/2-801 *et seq.* (West 2010)).

¶ 15 On November 19, 2012, plaintiff filed an amended motion for class certification, seeking to certify a class of “(a) all parties (b) who, on or about March 3, 2010, (c) were sent advertising faxes by defendant and (d) with respect to whom defendant cannot provide evidence of consent or a prior business relationship.” Plaintiff asserted that its action satisfied the prerequisites for a class action under section 2-801 of the Code. Specifically, plaintiff contended that its action satisfied the numerosity requirement because discovery revealed that defendant contracted with third parties to purchase over 4,700 fax numbers and send blast fax advertisements to those numbers. Ultimately, 4,142 faxes were successfully transmitted by a third party on defendant’s behalf. Plaintiff noted that defendant did not present any evidence that any of the faxes were sent to recipients that consented to receipt of advertisements or otherwise had a prior business relationship with defendant.

¶ 16 Plaintiff further asserted that questions of law and fact common to the class predominated over any questions affecting only individual members, including: (1) whether defendant engaged in a pattern of sending unsolicited fax advertisements; (2) whether defendant thereby violated the federal Protection Act; (3) whether defendant thereby converted plaintiffs’ toner and paper; and (4) whether defendant thereby engaged in unfair and deceptive acts and practices in violation of the Fraud Act. Plaintiff also asserted that it would fairly and adequately protect the interests of the class and that a class action is an appropriate method for the fair and efficient adjudication of the controversy.

¶ 17 On November 29, 2012, the circuit court denied defendant’s motion for summary judgment on count I of plaintiff’s complaint. The court reasoned that defendant did not offer tender on count I before plaintiff filed its motion for class certification and, therefore, the claim was not moot under *Barber*. Disagreeing with defendant’s argument that plaintiff’s motion for class certification was merely a

“shell” motion, the circuit court concluded that “*Barber* requires only that a motion for class certification be filed. It does not require that it meet any certain standard.”

¶ 18 On March 14, 2013, defendant filed a response in opposition to plaintiff’s motion for class certification, arguing that plaintiff’s motion should be denied because plaintiff failed to establish that a class action should proceed under section 2-801 of the Code. Specifically, defendant argued that unresolved questions of fact existed that were unique to each potential class member, including whether: (1) defendant had existing business relationships with any of the unnamed plaintiffs; (2) defendant performed acts rising to the standards of conversion regarding the ink and toner paper; and (3) plaintiff adequately represented the class. Defendant further argued that class certification was inappropriate on the Protection Act claims when only one plaintiff had come forward and over three years had elapsed since the alleged transmission of the fax advertisement.

¶ 19 On April 15, 2013, the circuit court granted plaintiff’s amended motion for class certification. The court found that numerosity was satisfied because over 4,000 fax advertisements were sent and that common class questions predominated because defendant was alleged to have acted wrongly in the same general way to all class members. The court also found that plaintiff was an adequate class representative and that a class action was an appropriate method for resolution of the claims. Defendant appealed.

¶ 20 On interlocutory appeal, the appellate court affirmed the circuit court’s order certifying the class on counts II and III but reversed the court’s class certification on count I. 2014 IL App (1st) 131543, ¶ 64. The appellate court agreed with defendant’s contention that plaintiff’s initial motion for class certification, filed concurrently with its class action complaint, was a “shell” motion that was insufficient under our decision in *Barber*. 2014 IL App (1st) 131543, ¶ 60.

¶ 21 While acknowledging that *Barber* did not expressly set forth requirements for a valid motion for class certification, the appellate court nonetheless concluded that “implicit” in *Barber* was a requirement that “a motion must contain sufficient factual allegations so that it does, in fact, bring the interests of the other class members before the court.” 2014 IL App (1st) 131543, ¶ 57. Explaining its interpretation of *Barber*, the appellate court stated that “[o]therwise, the court has no basis upon which to determine whether an actual controversy exists between the other class members and the defendant, as would avoid mootng the issue.” 2014 IL

App (1st) 131543, ¶ 57. Reviewing plaintiff’s initial motion for class certification, the court concluded that because the motion lacked factual allegations in support of class certification, plaintiff “had not yet filed a motion for class certification within the meaning of *Barber*” to avoid a finding of mootness. 2014 IL App (1st) 131543, ¶ 60.

¶ 22 On the adequacy of defendant’s tender of relief on Count I, the appellate court noted that plaintiff did not contest defendant’s assertion that the \$2,500 tendered by defendant was sufficient to satisfy count I and that defendant conceded at oral argument that its tender only pertained to count I. 2014 IL App (1st) 131543, ¶¶ 62-63. Consequently, the court concluded that defendant’s tender operated to moot only count I of plaintiff’s complaint but not counts II and III. The court then reversed the trial court’s class certification on count I but affirmed its certification on counts II and III. 2014 IL App (1st) 131543, ¶ 64.

¶ 23 We allowed plaintiff’s petition for leave to appeal. Ill. S. Ct. R. 315 (eff. July 1, 2013). We also allowed G.M. Sign, Inc. and the Illinois Association of Defense Trial Counsel to file *amicus curiae* briefs. Ill. S. Ct. R. 345 (eff. Sept. 20, 2010).

¶ 24 ANALYSIS

¶ 25 On appeal, plaintiff argues that the appellate court erroneously construed *Barber* to require the motion for class certification filed with its class action complaint to contain sufficient factual allegations and “evidentiary materials adduced through discovery” to avoid mootness when a defendant tenders relief to the named class representative. Plaintiff urges this court to reject that interpretation and, instead, adopt the procedure employed by the federal courts. Specifically, plaintiff maintains that “[w]hile federal courts in Illinois also require the filing of a class certification motion with the complaint, they expressly recognized that information about the size of the class and nature of defendant’s practices will have to be obtained during discovery and supplied later.” Plaintiff further argues that the appellate court improperly construed *Barber* to permit a class action defendant to moot selectively a single count of a multicount complaint by making “partial” tender on that count.

¶ 26 Defendant responds that the appellate court correctly concluded that plaintiff’s initial motion for class certification was a “shell” or “placeholder” motion with

insufficient factual allegations to bring the interests of the class before the trial court for purposes of *Barber*. Thus, defendant asserts that plaintiff's motion could not operate to preclude a finding of mootness under *Barber*. Defendant further argues that permitting a named plaintiff in a class action to file an unsubstantiated motion for class certification concurrently with the class action complaint to avoid mootness would "eviscerate" this court's holding in *Barber*. Accordingly, defendant contends that the appellate court properly reversed the circuit court's class certification on count I in this case because defendant tendered relief on that count before plaintiff filed a proper motion for class certification. Defendant, however, does not respond to plaintiff's argument that a "partial tender" of relief is improper under *Barber*.

¶ 27 Defendant also devotes a significant portion of its brief to arguing that the appellate court's decision should be "affirmed on other grounds." Specifically, defendant argues that the appellate court erroneously found that class certification was an appropriate method of resolution of this case, erroneously concluded that common issues of fact and law predominated over individual defenses, and erroneously determined that plaintiff was an adequate representative.

¶ 28 To resolve the issues presented in this appeal, we must determine whether the appellate court properly interpreted our decision in *Barber*. Because the contested issues present questions of law, our review is *de novo*. *Center Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 27.

¶ 29 We first consider whether the appellate court properly interpreted *Barber* to require the motion for class certification filed with a class action complaint to contain sufficient factual allegations and "evidentiary materials adduced through discovery" to avoid mootness when a defendant tenders relief to the named plaintiff. To answer this question, we must review our decision in *Barber*.

¶ 30 In *Barber*, the plaintiff filed a class action complaint against the defendant airline company based on the defendant's alleged refusal to refund a prepaid \$40 baggage fee after her scheduled flight was cancelled. The plaintiff's two-count complaint alleged a single count of breach of contract and a single class action count seeking recovery on behalf of similarly situated persons. The plaintiff, however, did not file a motion for class certification. *Barber*, 241 Ill. 2d at 452-53.

¶ 31 Less than a month after the plaintiff's complaint was filed, the defendant in *Barber* offered to refund the \$40 baggage fee, but the plaintiff refused to accept the

refund. Ultimately, the defendant refunded the \$40 fee to the plaintiff's credit card, the original form of payment. Thereafter, the defendant filed a motion to dismiss the plaintiff's complaint, arguing, in relevant part, that the class action complaint was moot because the defendant had refunded the contested \$40 fee to the plaintiff. Following a hearing, the circuit court granted the defendant's motion to dismiss on mootness grounds. A majority of the appellate court reversed and remanded, concluding that the plaintiff's claim was not moot. *Barber*, 241 Ill. 2d at 453-54.

¶ 32 On appeal to this court, the defendant in *Barber* argued that the appellate court majority erred in reversing the trial court's dismissal of the plaintiff's complaint. The defendant argued that the underlying cause of action must be dismissed as moot when a class action defendant tenders the named plaintiff the relief requested before a motion for class certification is filed. Because the defendant tendered the contested \$40 baggage fee to the plaintiff and refunded that amount to her credit card, the defendant argued that the trial court properly dismissed the plaintiff's class action complaint as moot. *Barber*, 241 Ill. 2d at 454-55.

¶ 33 In response, the *Barber* plaintiff argued that defendant's tender was an unfair attempt to "pick off" her claim as class representative to defeat the proposed class action. The plaintiff argued that the appellate court properly rejected the defendant's attempt to defeat the class action under the so-called "'pick off' exception" that had developed in the Illinois appellate court. *Barber*, 241 Ill. 2d at 455.

¶ 34 Turning to the merits of the parties' arguments in *Barber*, this court focused on mootness principles applicable to class actions. *Barber*, 241 Ill. 2d at 456 (citing *Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481 (1984)). Specifically, this court explained that:

"[T]he important consideration in determining whether a named representative's claim is moot is whether that representative filed a motion for class certification prior to the time when the defendant made its tender. [Citations.] Where the named representative has done so, and the motion is thus pending at the time the tender is made, the case is not moot, and the circuit court should hear and decide the motion for class certification before deciding whether the case is mooted by the tender. [Citation.] The reason is that a motion for class certification, while pending, sufficiently brings the interests of the other class members before the court 'so that the apparent conflict between

their interests and those of the defendant will avoid a mootness artificially created by the defendant by making the named plaintiff whole.’ ” *Barber*, 241 Ill. 2d at 456-57 (quoting *Susman v. Lincoln American Corp.*, 587 F.2d 866, 869 (7th Cir. 1978)).

We further explained in *Barber*, however, that the situation is different when the tender is made before the filing of a motion for class certification. In that situation, the interests of the other class members are not before the court, and the case may properly be dismissed. *Barber*, 241 Ill. 2d at 457. Thus, this court concluded that dismissal of the plaintiff’s class action was proper in *Barber* because there was no motion for class certification pending when the defendant refunded the contested \$40 baggage fee to the named plaintiff, thereby mooting her claim. *Barber*, 241 Ill. 2d at 457.

¶ 35 Lastly, this court in *Barber* rejected the so-called “pick off” exception that had developed in the Illinois appellate court. We concluded that the “pick off” exception lacked a valid legal basis and also contradicted applicable mootness principles when the named plaintiff in a class action is granted the requested relief. *Barber*, 241 Ill. 2d at 460.

¶ 36 Having carefully reviewed *Barber*, it is clear that *Barber* contains no explicit requirement for the class certification motion, other than the timing of its filing. In other words, *Barber* does not impose any sort of threshold evidentiary or factual basis for the class certification motion.

¶ 37 Nevertheless, the appellate court here discerned an “implicit” requirement for the class certification motion, concluding that *Barber* required the motion for class certification to “contain sufficient factual allegations so that it does, in fact, bring the interests of the other class members before the court.” 2014 IL App (1st) 131543, ¶ 57. The appellate court also concluded that the motion should contain “evidentiary materials adduced through discovery.” (Emphasis omitted.) 2014 IL App (1st) 131543, ¶ 58. The appellate court expressed concern that “if a putative class action plaintiff could circumvent the holding of *Barber* merely by filing a contentless ‘shell’ motion for class certification contemporaneously with its complaint, then it would effectively eviscerate the *Barber* decision.” 2014 IL App (1st) 131543, ¶ 59.

¶ 38 While we agree in principle with the appellate court’s suggestion that a “contentless ‘shell’ motion,” or otherwise frivolous pleading, would be insufficient

to preclude a mootness finding under *Barber*, we disagree with the court’s determination that plaintiff’s motion for class certification here was a “shell” motion that lacked content. To the contrary, plaintiff’s motion for class certification identified defendant, the applicable date or dates, and the general outline of plaintiff’s class action allegations. More specifically, plaintiff’s motion sought certification of three separate classes of individuals with fax numbers who received fax advertisements from defendant during a specific time period and were not provided the requisite “opt out” notice. The motion also referenced the description of the classes in plaintiff’s concurrently-filed class action complaint, a pleading that provided additional factual allegations. Thus, it is simply inaccurate to characterize plaintiff’s motion as a frivolous “shell” motion when it contains a general outline of plaintiff’s class membership, class action allegations, and effectively communicates the fundamental nature of the putative class action.

¶ 39 Even assuming that plaintiff’s motion for class certification was insufficient for purposes of class certification under section 2-801 of the Code (735 ILCS 5/2-801 *et seq.* (West 2010)), our decision in *Barber* did not hold that the motion for class certification must be meritorious. To the contrary, the focus of *Barber* is on the timing of the plaintiff’s filing a motion for class certification—there is no mention of the ultimate merits of that motion. As this court explained in *Barber*, “a motion for class certification, while *pending*, sufficiently brings the interests of the other class members before the court ‘so that the apparent conflict between their interests and those of the defendant will avoid a mootness artificially created by the defendant by making the named plaintiff whole.’ ” (Emphasis added.) *Barber*, 241 Ill. 2d at 457 (quoting *Susman*, 587 F.2d at 869); see also *Barber*, 241 Ill. 2d at 461 (Kilbride, C.J., specially concurring) (emphasizing that *Barber* “hinges its analysis on the filing of a motion for certification”).

¶ 40 Focusing on the timing of the filing of the motion for class certification rather than on its ultimate merit is also consistent with the approach taken in the Seventh Circuit Court of Appeals. It is settled that we may consider federal case law for guidance on class action issues because the Illinois class action statute is patterned on Rule 23 of the Federal Rules of Civil Procedure. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 24 (citing *Smith v. Illinois Central R.R. Co.*, 223 Ill. 2d 441, 447-48 (2006)). Here, plaintiff directs our attention to the Seventh Circuit’s

decision in *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011)<sup>1</sup>. The Seventh Circuit’s approach also addresses defendant’s concern with the potential delay in litigation resulting from discovery efforts while the motion for class certification is pending.

¶ 41 Consistent with *Barber*, the Seventh Circuit holds that tender of relief to the named plaintiff before a motion for class certification is filed renders the action moot but a tender made after a certification motion is filed does not. *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 874 (7th Cir. 2012); see also *Damasco*, 662 F.3d at 896 (citing *Barber* and recognizing that this court’s approach on the issue is the same as the Seventh Circuit). More specifically, the court has explained “ ‘the mootness of the named plaintiff’s claim in a class action by the defendant’s satisfying the claim does not moot the action so long as the case has been certified as a class action, or ... so long as a motion for class certification has been made and not ruled on, unless ... the movant has been dilatory.’ ” *Espenscheid*, 688 F.3d at 874 (quoting *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 546-47 (7th Cir. 2003)).

¶ 42 Relevant to the controversy here, the Seventh Circuit has also thoroughly addressed the competing interests of the defendant and the named plaintiff on the issue of tender mootness of the class action. Rejecting the class action defendant’s concern that a plaintiff may have an incentive to move for class certification prematurely without the fully developed facts or discovery required to obtain certification, the court explained that:

“If the parties have yet to fully develop the facts needed for certification, then they can also ask the district court to delay its ruling to provide time for additional discovery or investigation. In a variety of other contexts, we have allowed plaintiffs to request stays after filing suit in order to allow them to complete essential activities. [Citations.] \*\*\* We remind district courts that they must engage in a ‘rigorous analysis’—sometimes probing behind the pleadings—before ruling on certification. [Citation.] Although discovery may in some cases be unnecessary to resolve class issues [citation], in other cases a

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<sup>1</sup>After the parties filed their briefs and this court heard oral argument in this appeal, the Seventh Circuit overruled *Damasco* and a number of other decisions from that court “to the extent they hold that a defendant’s offer of full compensation moots the litigation or otherwise ends the Article III case or controversy.” (Emphasis added.) *Chapman v. First Index, Inc.*, 796 F.3d 783, 787 (7th Cir. 2015). Here, plaintiff does not rely on *Damasco* for that legal issue and we do not consider *Damasco* on that question.

court may abuse its discretion by not allowing for appropriate discovery before deciding whether to certify a class [citations].” *Damasco*, 662 F.3d at 896-97.

We believe this approach is entirely consistent with our decision in *Barber* and correctly affords the trial court discretion to manage the development of the putative class action on a case-by-case basis. See *Smith*, 223 Ill. 2d at 447 (citing *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 125-26 (2005) (noting that “[d]ecisions regarding class certification are within the discretion of the trial court”). In addition, it also properly balances the competing interests of the named plaintiff and defendant in class actions.

¶ 43 Accordingly, because *Barber* did not impose any explicit requirements on the motion for class certification, let alone a heightened evidentiary or factual basis for the motion, we conclude that plaintiff’s motion for class certification in this case was sufficient for purposes of *Barber*. In cases when additional discovery or further development of the factual basis is necessary, as occurred here, those matters will be left to the discretion of the trial court.

¶ 44 Here, plaintiff undisputedly filed its motion for class certification before defendant’s purported tender of relief on count I. As we explained in *Barber*, “the important consideration in determining whether a named representative’s claim is moot is whether that representative filed a motion for class certification prior to the time when the defendant made its tender.” *Barber*, 241 Ill. 2d at 456. Simply put, defendant’s tender of relief, “partial” or otherwise,<sup>2</sup> after plaintiff filed its class certification motion could not render moot any part of plaintiff’s pending action under *Barber*. See *Barber*, 241 Ill. 2d at 456-47 (explaining why mootness does not apply when a motion for class certification is pending when the defendant tenders relief to the named representative). The appellate court erred in reaching the opposite conclusion, and we reverse that part of its decision.

¶ 45 Lastly, defendant, as the appellee, argues that “[t]he decision of the appellate court to deny class certification should be affirmed on other grounds.” We note, however, that the circuit court ruled in favor of plaintiff on all three counts and

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<sup>2</sup>Because plaintiff filed its motion for class certification before defendant tendered relief, the adequacy of defendant’s “partial” tender of relief under *Barber* is immaterial to our disposition. Thus, we do not address plaintiff’s argument on the adequacy of defendant’s “partial” tender here. See *In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009) (generally, Illinois courts do not render advisory opinions or consider issues that have no impact on the outcome regardless of how the issue is decided).

certified the class on all counts. The appellate court affirmed the circuit court's judgment on counts II and III of plaintiff's complaint. 2014 IL App (1st) 131543, ¶ 64. Based on its understanding of *Barber*, the appellate court reversed the trial court's class certification only on count I of plaintiff's complaint. See 2014 IL App (1st) 131543, ¶ 64 (appellate court concluding "[w]e therefore reverse the trial court's class certification insofar as it pertains to count I, but we affirm in all other respects").

¶ 46 While the appellate court reversed the trial court's order certifying the class on count I on the basis of its interpretation of *Barber*, we have already resolved that issue in plaintiff's favor. See *supra* ¶¶ 31-48. Nonetheless, defendant argues in its alternative argument to affirm the appellate court's judgment that the court "erred" when it found that class certification was an appropriate method of resolution. Defendant further argues that the appellate court "erred" in determining that common issues of fact and law predominate over individual defenses regarding the Protection Act claim (count I) and conversion claim (count III). Contrary to the appellate court's conclusion, defendant also argues that class certification should have been denied because plaintiff is an unacceptable "tainted" class representative.

¶ 47 Notably, like the circuit court, the appellate court found in favor of plaintiff on all of these class certification issues. 2014 IL App (1st) 131543, ¶¶ 20-32, 43, 52. In other words, defendant's contentions in its alternative argument to affirm the appellate court's judgment have been considered, and rejected, by both the circuit court and appellate court. More to the point, as plaintiff correctly observes in its reply brief, "[a]lthough no other issues related to the appellate court's ruling were raised in the petition for leave to appeal, [defendant] asks the court to hold that class certification was improper for other reasons." As plaintiff's observation demonstrates, defendant, as the appellee, effectively seeks reversal of the circuit court's judgment on these class certification issues despite both the trial court and appellate court having considered those certification issues on their merits and resolving them in plaintiff's favor.

¶ 48 Defendant, however, fails to advance clearly its argument that the appellate court's judgment "should be affirmed on other grounds." Moreover, defendant's alternative argument omits citation to the record for a number of its claims, in contravention of Illinois Supreme Court Rule 341 (Ill. S. Ct. R. 341(h)(7), (i) (eff. Feb. 6, 2013)), and relies significantly on nonprecedential unpublished decisions

from the federal courts or the Illinois circuit court. Under these circumstances, we decline to consider the merits of defendant's alternative argument. See, e.g., *People ex rel. Illinois Department of Labor v. E.R.H. Enterprises, Inc.*, 2013 IL 115106, ¶¶ 56-57 (observing that a reviewing court is entitled to clear presentation of the issues and citation to pertinent authority, and concluding that an issue was forfeited for failure to comply with Rule 341(h)(7), (i)).

¶ 49

#### CONCLUSION

¶ 50

For these reasons, we reverse the part of the appellate court's judgment that reversed the circuit court's order certifying the class on count I and affirm the remaining parts of its judgment. We affirm the circuit court's judgment and remand the matter to the circuit court for further proceedings.

¶ 51

Appellate court judgment reversed in part and affirmed in part.

¶ 52

Circuit court judgment affirmed.

¶ 53

Cause remanded.

# Exhibit H

STATE OF ILLINOIS )  
 ) SS:  
COUNTY OF C O O K )

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT - CHANCERY DIVISION

BALLARD NURSING CENTER, )  
INC., )  
 )  
Plaintiff, )  
 )  
-vs- )  
 )  
KOHLL'S PHARMACY & HOMECARE, )  
INC., and JOHN DOES 1-10, )  
 )  
Defendants. )

No. 2010 CH 17229

THE DISCOVERY DEPOSITION OF ELI PICK, taken  
in the above-entitled case, before SHARON A. DORENCZ,  
Certified Shorthand Reporter within and for the County  
of Cook and State of Illinois, on the 11th day of  
February, A.D., 2013, at the hour of 2:00 o'clock p.m.  
at 70 West Madison Street, Suite 2060, Chicago,  
Illinois, pursuant to notice.

**EXHIBIT**  
**10**

18

1 Q. You mailed it to them? Were you in charge  
2 of the one -- were you the one that purchased the ink  
3 for the fax machine?  
4 A. No. I mean, ultimately I was responsible  
5 for it, but no, there was an individual in the office  
6 who was responsible for ordering supplies and other  
7 items that we used in the building.  
8 Q. That would also be the person that was in  
9 charge of the paper and things like that?  
10 A. That's correct.  
11 Q. All right. Who does it?  
12 A. It was a he, and his name was -- I'm trying  
13 to remember, it's been a couple years -- Carlos. I  
14 don't remember his last name.  
15 Q. Is he still an employee of Ballard?  
16 A. I don't know. I'm not there.  
17 Q. Was he when you left?  
18 A. Yes.  
19 Q. You said you no longer have any affiliation  
20 with Ballard Nursing Center?  
21 A. That's correct.  
22 Q. All right. Do you have any financial  
23 interest in this lawsuit today, sir?  
24 A. What do you mean by financial interest?

19

1 Q. I mean, if Ballard were to make a recovery,  
2 would you or anybody in your family be entitled to any  
3 of those monies?  
4 A. Only thing would be the claim that was  
5 related to this particular action.  
6 Q. Well, that's what I'm asking, sir. So  
7 Ballard Nursing Center, Inc. has since been purchased  
8 I think you said by Resurrection?  
9 A. That's correct.  
10 Q. Is it still called Ballard Nursing Center,  
11 Inc.?  
12 A. It is.  
13 Q. All right. And you have no interest in  
14 Ballard Nursing Center, Inc. today, right?  
15 A. That's correct.  
16 Q. So if Ballard Nursing Center, Inc. were to  
17 recover on this lawsuit that you filed against  
18 Kohll's, would you have any claim to monies that were  
19 recovered?  
20 A. Yes. We would get the proceeds from this  
21 case because the purchase that Resurrection made was  
22 an asset purchase only. So all activities leading up  
23 to the date of closing they did not -- they would not  
24 moving forward have any benefits from any items that

20

1 preceded that date of closing.  
2 Q. Are you still an owner of Ballard Nursing  
3 Center, Inc?  
4 A. No, I'm not.  
5 Q. All right. Do you have an agreement with  
6 Resurrection that you will receive any proceeds from  
7 these lawsuits?  
8 A. The contract stipulated that any activity or  
9 any -- any proceeds from activity that predated May  
10 31st of 2011 belongs to the Ballard Nursing Center  
11 that predated that date.  
12 Q. Okay. So, in other words, any lawsuits that  
13 were filed prior to that date or any other monies that  
14 would be due, receiveables or whatever --  
15 A. That's correct.  
16 Q. -- would come to you?  
17 A. Yeah, my family.  
18 Q. Okay. And that's in some type of an  
19 agreement with Resurrection?  
20 A. Yes. It's part of the contract.  
21 Q. So as we stand today, you don't own, control  
22 anything to do with Ballard Nursing Center, Inc., is  
23 that correct?  
24 A. That is correct.

21

1 Q. Okay. But if Ballard Nursing Center, Inc.  
2 recovers in this lawsuit --  
3 MS. CLARK: I'm gonna object to this. It's  
4 not relevant. You're not looking at the current  
5 complaint.  
6 MR. TAHMASSEBI: I'm looking right at the  
7 complaint.  
8 MS. CLARK: That's not the current  
9 complaint. The complaint has been amended, and  
10 Ballard Nursing Center, Inc. is not currently the  
11 plaintiff.  
12 MR. TAHMASSEBI: Give me a second. I'll be  
13 right back.  
14 (Whereupon a short  
15 recess was taken.)  
16 MR. TAHMASSEBI: There was no amended  
17 complaint.  
18 MS. CLARK: The notice of name change or  
19 something to that effect was filed.  
20 MR. TAHMASSEBI: I'm check and see if I  
21 received that or not because I don't have it, but I do  
22 see the new caption that you have on this motion for  
23 class certification. All right.  
24 BY MR. TAHMASSEBI:

14

1 Pharmacy, and I received an unsolicited fax.  
2 BY MR. TAHMASSEBI:  
3 Q. Mr. Pick, I'm going to show you what I  
4 marked as Exhibit No. 1.  
5 (Pick Deposition  
6 Exhibit No. 1 marked for  
7 identification, 3-11-13.)  
8 BY MR. TAHMASSEBI:  
9 Q. Is this the complaint that was filed in this  
10 case, and among other things, it alleges violation of  
11 the Telephone Consumer Protection Act?  
12 This is not the only complaint that  
13 Ballard's filed like this, is that correct?  
14 A. That is correct.  
15 Q. All right. How many other complaints has  
16 Ballard filed against other people or entities  
17 alleging violation of the TCPA?  
18 A. I don't remember the exact number. It was  
19 more than six.  
20 Q. Whose decision was it to file those  
21 complaints?  
22 A. Mine in conjunction with the review with  
23 counsel.  
24 Q. All right. Tell me what you know about the

15

1 other complaints that have been filed? In other  
2 words, do you know the parties involved in the other  
3 complaints?  
4 A. What do you mean, do I know the parties?  
5 Q. Do you know who Ballard was suing in the  
6 other complaints that were filed?  
7 A. I knew the name of the entities that were  
8 named in the actions, yes.  
9 Q. Okay. Who were they in those other cases?  
10 A. I can't remember them all. I remember this  
11 one, and I think we were just looking at another case  
12 against a company called Vessel.  
13 What I can tell you is what I remember  
14 more of what they did as opposed to their names. So  
15 they were companies that provided things like vacation  
16 packages or mortgages, medical supplies, staffing,  
17 those kinds of things.  
18 Q. Go to the last page of Exhibit 1?  
19 A. Okay.  
20 Q. One more page back. The page titled  
21 Corporation -- it's an exhibit. It says corporate flu  
22 shots?  
23 A. Yes.  
24 Q. Okay. Have you ever see this document

16

1 before that said corporate flu shots?  
2 A. Yes, I have.  
3 Q. When did you first see it?  
4 A. When I took it off the fax machine.  
5 Q. When was that?  
6 A. Oh, several years ago. I don't remember the  
7 exact date. There was a date on here. It says March  
8 3rd of 2010.  
9 Q. Do you recall removing this from the fax  
10 machine?  
11 A. Yes, I do actually.  
12 Q. What did you do with it after you received  
13 it?  
14 A. I put it on my desk.  
15 Q. Okay. You did. Then what?  
16 A. Well, I sent it off to Edelman and Combs.  
17 Q. Why?  
18 A. Because it was an unsolicited fax, and I had  
19 had discussions with them before about what to do with  
20 unsolicited faxes.  
21 Q. And forward it onto us, and we'll take it  
22 from there?  
23 A. Yes. Take a look at it and see what the  
24 next steps are.

17

1 Q. Did it cost Ballard Nursing Center any money  
2 to receive this fax?  
3 A. Yeah, the paper and the ink, the whatever on  
4 the equipment, you know, each time it was used.  
5 Q. Anything else besides the paper and the ink?  
6 A. And just the staff time to, you know,  
7 whoever picked it up, like me.  
8 Q. Do you know who picked this -- was it you  
9 who picked this one up?  
10 A. Yes.  
11 Q. How long did it take you to pick this off  
12 the fax machine?  
13 A. How long?  
14 Q. Yeah.  
15 A. I don't know. Not that long.  
16 Q. Five seconds?  
17 A. Yeah, if that, five, ten seconds.  
18 Q. And you took it and you put it on your desk?  
19 A. Yes.  
20 Q. Made a phone call to Edelman, Combs?  
21 A. Correct.  
22 Q. And then you faxed it over to them?  
23 A. No. We put it in an envelope and mailed it  
24 over.

26

1 MS. CLARK: You can answer.  
2 THE WITNESS: They weren't interested in  
3 pursuing.  
4 BY MR. TAHMASSEBI:  
5 Q. I think you said, Mr. Pick, that you filed  
6 approximately six lawsuits?  
7 A. I said at least six.  
8 Q. At least six?  
9 MS. CLARK: I think he said at least that  
10 around six were pending.  
11 BY MR. TAHMASSEBI:  
12 Q. What did you say? I'm sorry?  
13 A. I thought it was I remember at least six.  
14 Q. Okay. Have you recovered on any of those  
15 claims?  
16 A. Have we recovered? I know we received some  
17 payments on earlier claims, yes.  
18 Q. Okay. How much were those payments --  
19 MS. CLARK: I'm gonna object to that.  
20 MR. TAHMASSEBI: You can answer.  
21 MS. CLARK: I'm instructing him not to  
22 answer it. There are cases that have been resolved on  
23 individual bases, which are potentially subject to  
24 confidentiality agreements and --

27

1 BY MR. TAHMASSEBI:  
2 Q. All right. Let me ask it this way: With  
3 the exception of those cases that were subject to any  
4 type of confidentiality, did you settle some other  
5 cases that there isn't a confidentiality agreement?  
6 MS. CLARK: If you remember some cases that  
7 have been resolved and are not subject to  
8 confidentiality --  
9 MR. TAHMASSEBI: Just let him testify.  
10 MS. CLARK: This is --  
11 MR. TAHMASSEBI: I'm not -- I just -- if he  
12 doesn't understand the question, he can ask me.  
13 BY MR. TAHMASSEBI:  
14 Q. You said there were settlements made by  
15 Ballard Nursing Center, Inc. on some of the TCPA  
16 lawsuits filed, correct?  
17 A. That's correct.  
18 Q. And counsel has represented that some of  
19 those are subject to confidentiality, so I don't want  
20 to know about those. Okay?  
21 A. I don't remember which ones were and which  
22 ones weren't.  
23 Q. Okay. Are there any settlements that you  
24 recall that you know were not subject to

28

1 confidentiality agreement?  
2 A. I don't -- I can't recall. I know that  
3 confidentiality was a stipulation in many of the cases  
4 that we settled.  
5 Q. How many cases have you settled today up to  
6 today approximately?  
7 A. As I said, I remember at least six. I  
8 can't -- I can't recall.  
9 Q. Well, I think we're a little confused. Six  
10 that are pending or six that you settled?  
11 A. Six that we settled.  
12 Q. Okay. Were all the lawsuits filed around  
13 the same time?  
14 A. No.  
15 Q. When did you file the first lawsuit for  
16 violation of the TCPA?  
17 A. I don't remember exactly. Somewhere around  
18 2008.  
19 Q. And you continued to collect unsolicited  
20 faxes that you received and sent them onto Edelman  
21 Combs so that more lawsuits could be filed, correct?  
22 A. I forwarded unsolicited faxes so that I  
23 would stop receiving unsolicited faxes. That's why I  
24 forwarded them to Edelman and Combs.

29

1 Q. Well, how does sending the fax that you  
2 received to Edelman and Combs assist you in not  
3 receiving those faxes again in the future?  
4 A. Well, I did perceive a pattern that when  
5 Edelman and Combs contacted the companies that sent me  
6 faxes, I never received another fax from those  
7 companies.  
8 Q. All right. Go back to your Exhibit 1, the  
9 last page?  
10 A. Okay.  
11 Q. The corporate flu shot page?  
12 A. Yes.  
13 Q. See at the bottom, their removal from list  
14 request?  
15 A. Uh-huh.  
16 Q. Yes?  
17 A. Yes. Sorry.  
18 Q. If you -- would you agree with me that if  
19 you did not want to receive any additional faxes from  
20 Kohl's Pharmacy, you could have called or emailed,  
21 called the number or emailed this name that's listed  
22 as the removal from list request, yes?  
23 A. No. Because I had -- well, let's go back.  
24 Q. Sure.