

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 Kohll's was charged \$165.68 (\$0.04 per fax) for the fax services (Exhibit G). Id. In addition to the invoice, Kohll'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

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:

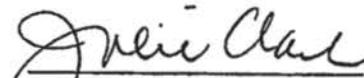
Given the relatively small amount recoverable by each potential litigant, it is unlikely that, absent the class action mechanism, any one individual would pursue his claim, or even be able to retain an attorney willing to bring the action. As Professors Wright, Miller, and Kane have discussed in analyzing 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

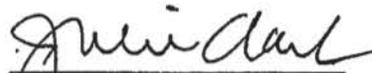
Image, Inc., 04 CH 00331 (Cook Co. Cir. Ct.) (for settlement purposes); INSPE Associates, Ltd. v. Charter One Bank, 03 CH 10965 (Cook Co. Cir. Ct.) (for settlement purposes); Bernstein v. New Century Mortgage Corp., 02 CH 06907 (Cook Co. Cir. Ct.) (for settlement purposes); Gans v Seventeen Motors, Inc., 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)

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(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

  
Julie Clark

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

# Exhibit E

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

BALLARD NURSING CENTER, INC., )  
 )  
 Plaintiff, )  
 )  
 v. ) 10 CH 17229  
 )  
 KOHLL'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 Kohll'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. Heinold 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.	)	

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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.