

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Petition of KOHLL’S PHARMACY) CG Docket No. 02-278
& HOMECARE, INC. for Declaratory Ruling)
and Retroactive Waiver)

**COMMENT OF BALLARD RN CENTER, INC, IN OPPOSITION
TO PETITION OF KOHLL’S PHARMACY & HOMECARE, INC.**

The petition for declaratory ruling and/or retroactive waiver filed by Kohll’s Pharmacy & Homecare, Inc. (“Kohll’s”) should be rejected. As set forth below, Kohll’s request for declaratory ruling and its request for a retroactive waiver are frivolous, abusive and represent a bad-faith attempt to forum-shop. They should be denied.

I. Background

Kohll’s acknowledges that it is has been the subject of a class action lawsuit related to its faxing practices, pointing in its petition to the lawsuit filed against by Ballard RN Center, Inc. f/k/a Ballard Nursing Center, Inc. (“Ballard”) (Cpt., Exhibit. A) In fact, the lawsuit, filed over six years ago, involves a certified class of 4,142 persons and entities each of which received an advertisement from Kohll’s related to its “Corporate Flu Vaccine Program.” Class Certification was recently affirmed by the Illinois Supreme Court, (Exhibit B) and the matter is now poised for briefing and ruling on summary judgment within the next several months. The Petition filed by Kohll’s is merely the most recent of numerous delay tactics utilized by Kohll’s throughout the litigation it faces.

Ballard filed its complaint and initial motion for class certification on April 20, 2010 after receiving Kohll's unsolicited and unwanted advertising fax touting its "Corporate Flu Vaccines." In its complaint, Ballard asserts that it had no prior relationship with Kohll's; that it had not authorized the sending of fax advertisements to it and that the faxes in question were sent as part of a mass broadcasting of faxes. (Cpt., Exhibit A, ¶¶1-3) Ballard further asserted that the "opt out notice" required by the Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA") and the implementing Federal Communications Commission ("FCC") Regulations, even when advertising faxes are sent with consent or pursuant to an established business relationship ("EBR"), was not provided in the faxes at issue. (Cpt., Exhibit A, ¶3) Kohll's has engaged in a strategy of delay, requiring numerous motions to compel, a motion to inspect and other discovery tools. Ultimately, discovery revealed that the fax received by Ballard was sent on March 3, 2010 to a total of 4,760 fax numbers which Kohll's purchased from one or more third parties and successfully transmitted to 4,142 of them. (Amd Class Mtn., Exhibit C) Kohll's plainly had no consent, written or otherwise, to fax the advertisements as it had no prior contact with the parties on the purchased list. Based on the information secured by Ballard throughout discovery, it later presented the Circuit Court with an amended motion for class certification and supporting memorandum. (Amd Class Mtn., Exhibit C) After briefing, the Circuit Court granted Ballard's motion and certified the following class on April 15, 2013. (Memorandum Opinion and Order of April 15, 2013, Exhibit D)

"(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."

The matter was appealed to the Illinois Appellate Court and Illinois Supreme Court on issues related to class certification and tender. Each reviewing court upheld certification of the class.

(Exhibits B, E)

II. The Petition by Kohll's is Impermissible Forum Shopping

Kohll's request for a ruling by the Commission at this time is inappropriate. This matter has been pending in the Circuit Court of County for over six years and is ripe for ruling on summary judgment. Kohll's eleventh hour attempt to seek adjudication from the FCC as to whether the fax it sent is an advertisement because it is displeased with the manner in which the state court litigation is impermissible forum shopping and should not be encouraged. The Illinois Supreme Court has repeatedly recognized last minute attempts to change venues such as this as forum shopping. In *Peile v. Skelgas, Inc.*, 645 N.E.2d 184 (1994); *Bruce v. Atadero*, 939 N.E.2d 110, 122 (2010).

III. The Faxes Sent by Kohll's Are Advertisements

There can be no dispute that the faxes attached hereto as Exhibit F and sent by Kohll's are advertisements. The caselaw it cites, does not support Kohll's contention that fax at issue is an advertisement.

A. Kohll's Has Not Disputed and the Court has Recognized that Fax is an Advertisement

At no point in the litigation has Kohll's disputed the fact that the fax is an advertisement. Moreover, the class is certified as those who received Kohll's "advertising faxes," making it clear that the trial court, the Appellate Court and the Illinois Supreme Court recognized that the fax at issue is an advertisement.

In fact, no other conclusion is reasonable. While Kohll's cites the deposition testimony

of Laurie Dondelinger for the proposition that the fax it sent was intended to promote corporate wellness, it neglects to point out that Ms. Dondelinger's deposition was taken because she was the *Marketing Director* of Kohll's, whose responsibilities include traditional advertising, nontraditional advertising, social media, internal and external communication, and public relations. She drafted the fax, purchased the list and arranged for the sending of the faxes to thousands of businesses in the Midwest. In any event, an employee's legal conclusions as to the characterization of the fax is hardly relevant.

The TCPA makes unlawful 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). The TCPA defines an "unsolicited advertisement" as: "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5). The Corporate Flu faxes sent by Kohll's plainly qualify. Kohll's argues that the "pricing component," is "incidental" and should be disregarded. In fact, as shown in Exhibit F, the pricing component is the most prominent component of the faxes and the sale of vaccines is the clear purpose of the Kohll's Corporate Flu Faxes. It offers "Corporate Flu Shots" at "Only \$16-\$20 per vaccination" and informs the corporate recipient of the benefits of purchasing vaccines for their employees: "...Protect your assets! Vaccinate your employees. Call for a free quote today..." The fax was clearly sent to promote the commercial enterprise of Kohll's and is not merely an informational message as Kohll's suggests.

B. Neither Medco Nor Janssen Pharmaceuticals Support Kohl's Position

In *Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.*, the Sixth Circuit found that faxes sent by Medco, a pharmacy benefit manager, were not advertisements because they did not solicit the purchase of a commercially available product. 788 F.3d 218 (6th Cir. 2015) Rather, the faxes simply informed the provider about drugs its patients might prefer in a pre-established business relationship with the manager's clients.

The Sixth Circuit noted that Medco provides services to plan sponsors that enable the plans to offer more informed and less expensive prescription drug benefits to their members (generally employees). *Id.* Those services include keeping and updating a list of medicines (known as the "formulary") that are available through a healthcare plan. Medco sends that list to the plan sponsors so they can offer the most attractive prescription drug plans to their members. *Id.* In addition to sending the formulary to its clients, Medco sends it to healthcare providers that prescribe medications to its clients' members. Medco faxed part of its formulary, the "Formulary Notification," attached hereto as Exhibit G, to Sandusky and others informing that "[t]he health plans of many of your patients have adopted" Medco's formulary. *Id.* The fax asked Sandusky to "consider prescribing plan-preferred drugs" to "help lower medication costs for [Sandusky's] patients," and it listed some of those drugs. *Id.* It also told Sandusky where it could find a complete list of the formulary. Other than listing Medco's name and number, the fax did not promote Medco's services and did not solicit business from Sandusky. Three months later, Medco sent another fax to Sandusky, attached hereto as Exhibit H, entitled "Formulary Update." informing Sandusky that a certain respiratory drug brand was preferred over another brand, and that using the preferred brand could save patients money. *Id.*

As the Circuit Court noted, “neither fax contained pricing, ordering, or other sales information and neither fax asked directly or indirectly, for the recipient to consider purchasing Medco's services. The undisputed facts in the record instead showed that each merely informed Sandusky which drugs its patients might prefer, irrespective of Medco's financial considerations.” *Id.* at 222.

The Medco Court recognized, however that “when a law firm buys space in a newspaper for its logo, slogan, areas of expertise, and contact information: Readers understand that the firm is soliciting the public to pay for its services (which are available for sale) with making money in mind. And probably so too when an orthopedic-implant manufacturer sends potential buyers a fax containing a picture of its product on an invitation to a free seminar: It is drawing the relevant market's attention to its product to promote its sale (albeit indirectly). *Cf. Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12–CV–0729, 2014 WL 7109630, at *5–*6 (W.D.Mich. Dec. 12, 2014); *see In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14097 (2003).

While the faxes at issue in *Medco* may not have been considered advertisements, this does not support a finding tht the fax sent by Kohll’s is not an advertisement. The Kohll’s fax *does* contain pricing information, ordering information and *directly* asks the recipient to consider purchasing Kohll’s services. Most critically, the Kohll’s faxes unlike the *Medco* faxes, were not sent out pursuant to any sort of previous relationship. The fact that the faxes in *Medco* were held not to be advertisements does not call for the same result here, In fact, the Circuit Court’s reasoning in *Medco* supports a finding that Kohll’s fax is an advertisement.

Likewise, *Physicians Healthsource v. Janssen Pharmaceuticals, Inc.*, No. CIV.A. 12-2132 FLW, 2013 WL 486207 (D.N.J. Feb. 6, 2013), supports a finding that Kohll's faxes are advertisements. The *Janssen* court also recognized that in some situations, publications may be part of an overall marketing campaign to promote the commercial availability and quality of a sender's goods or services, such as free seminars, free magazine subscriptions, surveys, catalogues, and consultations. *Janssen*, 2013 WL 486207, at *6, citing FCC Rules and Regulations, at *25,973; *N.B. Indus.*, 2010 U.S. Dist. LEXIS 126432 at *17, 2009 WL 2515594. The court explained that "[i]n these examples, while the message is informational to the extent that it is notifying the recipient of free events or services, the message can also be construed as advertisement because it contains statements promoting the availability and quality of certain goods or services." *Id.*, Citing *Sadowski v. OCO Biomedical, Inc.*, 2008 WL 5082992, *1, *2 (N.D.Ill. July 23, 2008) (holding fax advertising a training seminar and containing statements about its quality was an advertisement); *Sadowski v. Med1 Online, LLC.*, 2008 WL 489360 at *7 n. 5; (finding the language of the fax was geared toward obtaining new customers and thus may have a commercial purpose); compare *Phillip Long Dang, D.C. v. XLHeath Corp.*, 2011 WL 553826, *1, *4 (N.D.Ga. Feb.7, 2011) (finding that because the message lacked any commercial statement regarding a particular product or service, a commercial purpose does not exist); *Phillips Randolph Enters., LLC v. Adler-Weiner Research Chicago, Inc.*, 526 F.Supp.2d 851, 853 (N.D.Ill.2007) (same).

Here the fax not only "promotes the commercial availability" of Kohll's goods or services (flu vaccines), it explicitly sets forth a price and encourages the recipient to call for a

more precise quote. This can hardly be characterized as anything but promoting the commercial availability and quality of Kohll's goods or services.

The Petition by Kohll's for a declaration that the fax at issue is not an advertisement under the TCPA is frivolous and should be denied.

IV. The HIPPA Exemption is Inapplicable in this Context

The HIPPA Exemption sought by Kohll's simply does not apply to the facts of this matter. First, the exemption has never been intended to apply to facsimile messages. Second, even in the context of phone calls, such messages are only permissible where the calls are placed to persons who voluntarily provided their contact information. This did not occur here, where Kohll's utilized a purchased list to send its fax to a group of strangers. Finally, the "healthcare message" when properly sent may not include advertising content, which the Kohll's fax plainly does. (Exhibit F) As set forth in more detail below, there are *no* set of circumstances under which a HIPAA exemption should apply to the Kohll's faxes.

In October 2013, the FCC carved out some narrow exceptions specifically for the healthcare industry, allowing healthcare providers to send artificial/prerecorded voice messages to land lines, without prior written consent, for "healthcare messages" as defined by HIPAA. The FCC reasoned that such calls serve an important public interest purpose—continued consumer access to healthcare-related information.

On July 10, 2015, the FCC issued a new Declaratory Ruling/ Order which clarified and expanded the healthcare exemptions to cover wireless/ cellphones, permitting healthcare providers to place artificial/ prerecorded voice and text messages to cellphones, without the consumers' prior express consent, written or otherwise, in order to convey important "healthcare

messages” as defined and covered by HIPAA. In issuing this Order, the FCC acknowledged that increasing numbers of people do not have land lines.

These exemptions include healthcare messages relating to: appointments and exams; confirmations and reminders; wellness checkups; hospital pre-registration instructions; pre-operative instructions; lab results; post-discharge follow-up intended to prevent readmission; prescription notifications; and home healthcare instructions. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, FCC 15-72, CG Docket No. 02-278, WC Docket No. 07-135, (rel. July 10, 2015)

At no time was the exemption ever applied to faxes. Moreover, even as applied to telephone calls, the exemption was not unlimited. The FCC adopted certain enumerated conditions for each exempted call made by or on behalf of a healthcare provider:

- 1) voice calls and text messages must be sent, if at all, only to the wireless telephone number *provided by the patient*;
- 2) voice calls and text messages must state the name and contact information of the healthcare provider (for voice calls, these disclosures would need to be made at the beginning of the call);
- 3) voice calls and text messages are strictly limited to the purposes permitted in para. 146 above; *must not include any telemarketing, solicitation, or advertising*; may not include accounting, billing, debt-collection, or other financial content; and must comply with HIPAA privacy rules ;
- 4) voice calls and text messages must be concise, generally one minute or less in length for voice calls and 160 characters or less in length for text messages;
- 5) a healthcare provider may initiate only one message (whether by voice call or text message) per day, up to a maximum of three voice calls or text messages combined per week from a specific healthcare provider.

Id. (Emphasis Added).

There are no circumstances under which the FCC is required to or should consider viewing the *faxes* sent by Kohll’s as “healthcare communications” such that these regulation

should even apply. In any event, should the FCC be inclined to undertake such an assessment, it is once clear that Kohll's fax, for numerous reasons fails to meet these conditions for exemption. While Kohll's may be considered a "healthcare provider," this is the only qualification met. The faxes at issue were not sent to patients or to persons who provided their numbers to Kohll's. Rather, the faxes were sent to strangers on a list purchased by Kohll's likely determined by revenue, number of employees and geography. No prior contact exists between Kohll's and the recipients of its faxes. The recipients of Kohll's fax, which clearly has the primary purpose of advertising, plainly incurred costs in receiving the unwanted fax from Kohll's.

Even if the Commission were to consider the "healthcare exemption" applicable to a fax, the exemption it seeks plainly does not apply. The Commission should deny Kohll's request to apply a "healthcare exemption" to the faxes sent.

V. There Is No Factual or Legal Basis to Kohll's Other Assertions

The additional arguments raised by Kohll's are irrelevant and should not be considered by the Commission.

A. The Number of Cases Filed by Ballard is Irrelevant

The fact that Ballard has filed other TCPA cases has no bearing on Kohll's liability here. In fact, in the context of the litigation, it was held that Ballard is an adequate representative who has shown diligent representation of the now certified class. (Memorandum Opinion and Order of April 15, 2013, Exhibit C) Kohll's does not assert that Ballard, or any of the class members provided their fax numbers or had a prior relationship with it. Rather, it complains that Ballard has gone one too far in enforcement of its statutory rights by filing a claim against it.

B. Kohll's Claims of Financial Crisis Should Not be Considered

Kohll's also requests that the Commission issue a waiver because of the potential liability it faces. This is improper. Kohll's ability to pay a potential judgment is irrelevant as to whether it has violated the TCPA. Moreover, Kohll's cannot argue, in good-faith, that a judgment of liability entered against it in the litigation would result in bankruptcy where, as here, the vast majority of any potential judgment would likely be covered by insurance.

C. Kohll's Constitutional Arguments are Frivolous

Since the enactment of the TCPA, nearly all courts that analyzed the constitutionality of this provision found it constitutional, including the U.S. Court of Appeals for the Ninth Circuit and federal district courts in Texas and Indiana. See *Destination Ventures Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995); *Texas v. American Blast Fax, Inc.*, 121 F. Supp. 2d 1085 (W.D. Tex. 2000); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162 (S.D. Ind. 1997). While two courts in 2002 ruled that the TCPA anti-fax provisions were unconstitutional -- a federal appeals court decision in March 2003 reversed the more important of these two opinions. The federal appeals court panel determined that the government had shown a substantial governmental interest in the junk-fax ban.

The Eighth Circuit noted that there was testimony in Congress and before the district court concerning the harms of unsolicited fax advertising, including the shifting of costs to fax recipients, "[t]he record ... indicates that the costs and amounts of interference resulting from unsolicited fax advertising continue to be significant." The panel also determined that the restriction on commercial faxes survived the third prong of *Central Hudson*. It rejected the contention that the law was unconstitutional because it only banned unsolicited commercial faxes, while allowing unsolicited noncommercial faxes. The court also rejected the argument that under *Rubin*, the statute

contained inherent inconsistencies in treating faxes differently from live telemarketing calls. “Because of the cost shifting of fax advertising, it was consistent for Congress to treat unsolicited fax advertisements differently than live telemarketing calls,” the panel wrote. Finally, the panel determined that the statute did not violate the fourth prong of *Central Hudson*. The fax company had argued that a less speech-restrictive alternative was an opt-out scheme, allowing fax recipients to declare their intention not to receive the faxes. “The Supreme Court has made it clear that ‘the least restrictive means’ test has no role in the commercial speech context,” the panel wrote. “We conclude that the TCPA restriction on unsolicited commercial fax advertisements achieves a reasonable fit between the means it adopts and the ends it seeks to serve.”

At present, all federal appeals courts have upheld the TCPA from First Amendment challenges.

Likewise, the FCC has denied petitions seeking to repeal the Solicited Fax Rule entirely. In doing so, the FCC defended the Solicited Fax Rule under the First Amendment, concluding that the requirement to include an opt-out notice of fax advertisements “is not only necessary but essential to further the governmental interest in protecting consumers from unwanted fax ads.” Because “Congress has expressed a strong governmental interest in protecting consumers from the costs and annoyance of unwanted fax ads,” the FCC reasoned that an “opt-out notice provides consumers who have given prior express permission to be sent faxes the ability to revoke that permission and have them halted, should they decide they no longer wish to receive them.” *Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, Docket No. 05-338, FCC 14-164.

Kohl's First Amendment argument is contrary to the well settled law on this area and should be rejected.

VI. Conclusion

On this record, no action by the Commission is warranted. There are no special circumstances to warrant a deviation from the general rule and a waiver would not serve the public interest. Rather, a declaratory ruling or waiver, if permitted under these circumstances would serve only to allow Kohl's to escape liability for thousands of unsolicited fax advertisements. Kohl's petition should be stricken and/or denied. The petition is nothing more than a baseless attempt to delay and complicate an enforcement action by the recipients of unsolicited advertising faxes.

Respectfully submitted,

s/ Daniel A. Edelman
Daniel A. Edelman

Daniel A. Edelman
Julie Clark
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC
20 South Clark Street, Suite 1500
Chicago, Illinois 60603
(312) 739-4200
(312) 419-0379 (FAX)
Counsel for Plaintiff Ballard RN Center, Inc.