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August 8, 2014

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Public Notice DA 14-507, dated July 25, 2014, entitled “Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule On Opt-Out Notices On Fax Advertisements”CG Docket Nos. 02-278 & 05-338

On behalf of Bais Yaakov of Spring Valley, Roger H. Kaye, Roger H. Kaye, MD PC, Menachem Raitport and Crown Kosher Meat Market Inc. (hereinafter “the Parties”), Bellin & Associates LLC is submitting these comments in response to the Commission’s Public Notice dated July 25, 2014, CG Docket Nos. 02-278 & 05-338, entitled “Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commissions Rule On Opt-Out Notice On Fax Advertisements.” The Parties have already submitted comments on previous petitions about this issue via ECFS, *see* Comments Submitted February 13, 2014 and posted on February 14, 2014; Comments Submitted Dated April 11, 2014 and Posted on April 14, 2014 (collectively “Comments”), that opposed other pending Petitions. Rather than repeat all of the arguments contained therein, those arguments, which are equally applicable to the petitions listed in Public Notice 14-507 (the “Petitions”), those arguments are incorporated herein by reference

and should be deemed made again herein by the Parties. The remainder of the present comments will deal with two additional issues.

A. The Commission Had Sound and Practical Reasons for Requiring Strict Compliance with Both the Opt-out Notice Requirements and the Opt-Out Request Requirements. Accordingly, the Commission Should Reject Requests that Substantial Compliance be Deemed Sufficient

Besides being contrary to the TCPA statute and the regulations promulgated thereunder, the argument that substantial compliance should be deemed sufficient to comply with the opt-out notice requirements on permission-based faxes is also impractical. If the FCC were to require that senders only substantially comply with the opt-out notice requirements for permission-based faxes, then for the FCC to require that the recipients of said fax advertisements comply with all of the requirements listed in the statute and regulations for effective requests to opt-out would be unfair and unworkable. After all, how would the recipients know what those requirements were without seeing them on the very faxes they no longer wished to receive? If in response to that contention, the FCC were to permit the recipients of permission-based fax advertisements to substantially comply with the requirements for effective opt-out requests, then the senders will complain that they do not have certainty about when they are required to honor an opt-out request. In fact, back in 2005-2006, it was the senders themselves who demanded that Congress and the Commission mandate that recipients absolutely and completely comply with all of the requirements of opt-out requests so that the senders would be absolutely sure of when they were legally required to honor those requests. There is no reason to believe that the senders would advocate otherwise here. In fact, there is every reason to believe that they would oppose such a substantial compliance rule for opt-out requests.

Another practical problem with adopting a substantial compliance rule for opt-out notices and opt-out requests is that senders of unsolicited fax advertisements supposedly have systems

set up to only honor opt-out requests that completely satisfy all of the requirements of the TCPA and the regulations promulgated thereunder. If the senders are now faced with the requirement to honor substantially compliant opt-out requests from persons who received permission-based fax advertisements, these systems will be thrown into disarray. Senders will not know whether a substantially compliant opt-out request is from a recipient of an unsolicited fax or a recipient of a permission-based fax, and therefore will not be certain as to whether they need to abide by that request.

Moreover, senders would be required to honor opt-out requests that the senders would deem problematic, to say the least. For example, an opt-out request made to the sender's maintenance department, motor pool or secretarial pool, but that otherwise complied with the all of other requirements for opting out, would arguably be substantially compliant. Similarly, opt-out requests that contained everything required other than the recipients' fax numbers, would also arguably be substantially compliant. It is virtually certain that senders would not want to be held liable for failing to honor such opt-out requests. Yet that would be the result of a regime that permitted senders to substantially comply with the opt-out-notice requirements and recipients to substantially comply with opt-out-request requirements.

As is apparent, the Commission had sound and practical reasons for requiring strict compliance with the opt-out notice requirements and with requests to opt-out. Changing that regime will only lead to confusion and the sending of millions of fax advertisements to people who do not wish to receive them.

B. Merck & Co., Inc.'s Faxes Were Fax Advertisements

Although they do not ask the Commission to explicitly rule on whether the faxes they sent were “advertisements” within the meaning of the TCPA, Merck appears to suggest that they were not. Out of an abundance of caution, the Parties wish to briefly address that issue, although it was brought before the District Court four years ago in the litigation against Merck, which is now for all intents and purposes stayed, and is not the issue about which the Commission requested comments.

The fax is attached hereto as Exhibit A.

The fax advertises a free seminar organized by Medlearning and for which Merck paid Medlearning to organize and advertise. As the fax itself indicates the seminar was “*provided and sponsored by Merck, [t]he presenter [was] speaking on behalf of Merck, [t]he content of th[e] speaker program [was] consistent with FDA labeling and advertising regulations, [and] [t]h[e] program [was] not a continuing medical education (CME) program or any other independent medical education (IME) program.*” The fax described the program as concerning “Important Clinical Information about Schizophrenia and Bipolar Disorder.” *Id.*

The Commission has made clear that “facsimile messages that promote goods or services even at no cost, such as *free. . . seminars*” are advertisements within the meaning of the TCPA. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 21 F.C.C.R. 3787, 3814 ¶ 52 (April 6, 2006)(emphasis added). As is apparent, the fax advertises a good and/or service — a free seminar — whose speaker is speaking on behalf of Merck. Accordingly, the fax attached as Exhibit A is an “advertisement” within the meaning of the TCPA.

While it is not necessary for a plaintiff to prove that a fax for a free seminar is a pretext to

advertise the commercial availability or quality of any property, goods or services of in order for the fax to be considered a fax advertisement, the Amended Complaint in the underlying litigation alleges that the fax was such a pretext. Moreover, as noted above, the fax advertisement specifically states that “The Speaker program is *provided and sponsored by Merck*. The presenter is speaking *on behalf of Merck*. The content of this speaker program is consistent with FDA labeling and *advertising regulations*. This program *is not* a continuing medical education (CME) program or any other independent medical education (IME) program.” It is apparent from the language quoted above that the free seminar advertised was a pretext to advertise the commercial availability or quality of any property, goods or services of Merck. At the very least, at this juncture, while the case in Court is stayed, there is no basis for the Commission to rule otherwise.

Conclusion

Accordingly, for all of the reasons stated above, and for all of the reasons stated in the Parties’ previous submissions to the Commission in these proceedings, all of the Petitions should be denied.

Dated: White Plains, New York
August 8, 2014

Respectfully submitted,

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EXHIBIT A

To: Roger Kaye

From: MedLearning, Inc.

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To: Dr. Roger Kave @ 2038663660

INTERACTIVE TELESYMPOSIA

Important Clinical Information about Schizophrenia and Bipolar I Disorder

You are invited!



Physicians are invited to participate in this telesymposium on important clinical information about schizophrenia and bipolar I disorder. At the conclusion of the program, there will be an opportunity for participants to interact with an expert in the field of psychiatry during a question and answer session.

Call 877-963-3532 For Additional Dates

Monday,
May 3, 2010
8 PM ET
Speaker:
Prakash Masand, MD

Tuesday,
May 4, 2010
10 PM ET
Speaker:
John Docherty, MD

All participants are eligible for an educational item valued up to \$75.

TELESYMPOSIA AGENDA:

- 5-minute Introduction
- 40-minute scientific presentation delivered by an expert in the field of psychiatry
- 15-minute Q&A session

HOW TO REGISTER:

- COMPLETE THE FORM BELOW AND FAX BACK TO (201) 288-2307
- CALL THE PROGRAM REGISTRATION LINE AT (877) 963-3532
- The information collected on this form will only be used to register you for the telesymposia

This speaker program is sponsored and provided by Merck

The presenter is speaking on behalf of Merck

The content of this speaker program is consistent with FDA labeling and advertising regulations

This program is not a continuing medical education (CME) program or any other independent medical education (IME) program

(PLEASE PRINT)

Last Name First Name M.I. Degree/Specialty

Address (No PO Boxes) City/State/ZIP

Phone Number You Will Be Calling From Office Phone Number Fax Number

Choice of Meeting Date (see calendar above) Time (see available times above)

Eligible healthcare professionals may receive an educational item consistent with PhRMA Code and not otherwise restricted or prohibited by law. An item selection sheet will be provided in the mail with your participant workbook 1 to 2 days prior to your scheduled program.

To be removed from the fax list for this program, please initial here _____ and fax this form back to (201) 288-2307 or call (877) 963-3532.