

EXHIBIT 5

CAUSE NO. 00-08709-H

CAROL KONDOS, <i>et al.</i> ,	§	IN THE DISTRICT COURT
	§	
Plaintiffs,	§	
	§	
v.	§	DALLAS COUNTY, TEXAS
	§	
LINCOLN PROPERTY CO., <i>et al.</i> ,	§	
	§	
Defendants.	§	160TH JUDICIAL DISTRICT

CLASS CERTIFICATION ORDER

Before the Court is Plaintiffs' motion for class certification. The issue has been extensively briefed, and counsel for all parties appeared for hearing on June 1, 2001. Based on the argument of counsel and the record before the Court, the Court finds that certain of the claims and putative classes should be certified, for the reasons discussed below. The class and claims that the Court finds should be certified are: the TCPA claims of the holders of telephone numbers that were confirmed to have received faxes from ABF on behalf of LPC. This Order constitutes the Court's findings of fact and conclusions of law in connection with class certification.

I. FACTUAL BACKGROUND

Defendant American Blast Fax, Inc. ("ABF") was in the business of sending mass facsimile ("fax") advertisements on behalf of its customers to a large number of fax machines. ABF maintained a computer database of fax numbers that could be geographically grouped. Customers would identify the geographic areas they desired to target with their advertisements and enter into a contract with ABF at a price determined

by the quantity of fax numbers in that area. ABF would then transmit mass fax advertisements to the specified numbers. The telephone numbers were identified on a mass basis by automated equipment and the transmissions were sent on a mass basis by automated equipment. ABF did not engage in any recipient-specific process to determine who would receive its advertisements, but rather treated numbers in its database on a collective basis as a group.

Some receiving fax equipment has the ability to confirm for the sender that the facsimile has been successfully received; ABF's practice was to maintain records of those numbers for which transmission was confirmed. Absence of a confirmation does not necessarily indicate that the transmission was not received, as the receiving equipment may not be able or may not be configured to reply with confirmation, or some vagary of telephones may have permitted the transmission to go through but not the confirmation. The presence of a confirmation, however, is highly suggestive that the transmission was successful.

Defendant Lincoln Property Co. ("LPC") is proprietor of numerous apartment complexes in the Dallas area and elsewhere; LPC operates through a sophisticated structure, which does not presently appear to be material to the class certification issues before the Court. The Court will refer to LPC and its affiliates simply as "LPC." In order to market its apartments to prospective tenants, LPC entered into a series of contracts with ABF for mass fax advertising. For some of those contracts, receipt logs exist; for some they do not exist. There is no indication that the missing logs were intentionally

destroyed or misplaced, or that LPC had anything whatsoever to do with the retention or destruction of any logs.

LPC is a significant commercial presence in the Dallas area. Its apartments house thousands of people, and have in the past housed thousands more. It is a large employer with numerous present and former employees and has commercial relations with numerous suppliers in the Dallas area, who likewise have numerous employees. It markets its apartments extensively in the Dallas area and has had contact with numerous prospective tenants. Some of those prospective tenants filled out written forms indicating their interest in leasing an apartment from LPC, and some of those prospective tenants included fax numbers on those forms so LPC to provide them with information by fax.

II. LEGAL BACKGROUND

In 1991, Congress passed the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. The TCPA makes it unlawful for any person to "use any telephone facsimile machine, computer, or any other device to send an unsolicited advertisement to a telephone facsimile machine." 42 U.S.C. § 227(b)(1)(C). An unsolicited advertisement is "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." 42 U.S.C. § 227(a)(4). The TCPA provides a private right of action against a sender of an unsolicited advertisement, *id.* § 227(b)(3), with damages of \$500 or actual damages, whichever is greater, for each violation, *id.* § 227(c)(5), which

are subject to trebling by the Court if the violations were willful or knowing. *Id.* § 227(b)(3).

The Court has put off deciding the so-called "EBR" issue as long as it practically could do so, but it can do so no longer. The Federal Communications Commission ("FCC") has reviewed the provisions of the TCPA above and suggested that when there is an established business relationship ("EBR") between the sender and the recipient, such a relation can give rise to an inference that permission to send a fax is implied from the relationship. *In re Rules and Regulation Implementing the TCPA*, Docket No. 92-90 (F.C.C. October 16, 1992), at ¶ 54 n.87. The Court gives great deference to the construction of a statute creating a regulatory scheme by the agency charged with administering such regulation, e.g., *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); however, "no deference is due to agency interpretations at odds with the plain language of the statute itself." *Public Employee Retirement System v. Betts*, 492 U.S. 158, 171 (1989). Here, the FCC's interpretation of the EBR defense would act to amend the TCPA's definition of unsolicited advertisement from a fax sent without the recipient's "prior express invitation or permission," to a fax sent without the recipient's prior express or *implied* invitation or permission. That interpretation conflicts with the plain language of the statute.

Moreover, Congress did expressly provide an established business relationship exclusion in the provisions of the TCPA, dealing with telephone solicitations, *see* 47 U.S.C. § 227(a)(3). "Where Congress includes particular language in one section of a

statute and but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (citations omitted). With respect to faxes, then, in contrast to telephone solicitations, Congress intended to limit the effect of prior invitation only to *express* invitations; the FCC's interpretation would effectively delete that limitation from the statute. The Court cannot support an interpretation that reverses the effect of the words chosen by Congress. Accordingly, the Court holds that there is no "EBR" or "implied permission" exception to the definition of unsolicited advertisement for faxes.

III. CLASS CERTIFICATION REQUIREMENTS

A. Prerequisites

Rule 42 of the Texas Rules of Civil Procedure governs the requirements for class certification. Rule 42(a) provides for four prerequisites for class certification: numerosity, commonality, typicality, and representativeness. The putative class here numbers in the thousands and is, therefore, sufficiently numerous. The questions of law and fact, as set forth in more detail below, are common among the class members. The claims of the putative class representatives are typical of those of the class. The representative parties will fairly and adequately protect the interests of the class.

B. Specific Type of Class Action

The Court notes preliminarily that it finds only Rule 42(b)(4) certification is appropriate. Under the facts of this case, the prosecution of individual actions would not

create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for the party opposing the class; indeed, there is very little chance that independent actions would be prosecuted at all if this class is not certified. Accordingly, certification under Rule 42(b)(1)(A) is not proper. Similarly, adjudication by individuals would not as a practical matter impair or impede the ability of other members to protect their interests; unlike typical limited fund classes, there is not a limited pot of money available to satisfy class members that is being depleted inequitably absent a class action. As mentioned, absent a class action there appears to be no individual litigation by putative class members, and certainly not to a degree that threatens LPC's ability to respond to \$500 claims. Accordingly, certification under Rule 42(b)(1)(B) is not proper. Thirdly, although the defendants have acted on grounds generally applicable to the class, this action is primarily for monetary damages and attorneys' fees and does not appear to be appropriate for final injunctive relief with respect to the class as a whole; indeed, it appears that ABF may have been driven out of business, one presumes by claims such as these, and there is no need for prospective injunctive relief. Accordingly, certification under Rule 42(b)(2) is not proper.

The Court now turns to Rule 42(b)(4). That provision requires the court to consider whether common issues predominate and whether a class action is superior to other methods of resolving the dispute. Common issues here include: the manner in which the faxes were sent; whether intrastate transmissions are within the scope of the TCPA; whether a principal is liable under the TCPA for the acts of an independent

contractor; which party bears the burden of showing the absence of prior express permission; and statutory damages. LPC argued that the EBR issues were individualized and extensive, considering its relationships with large numbers of past and present employees, vendors, tenants and prospective tenants; determining whether such prior established business relationships were sufficient to give rise to an inference of implied permission would surely be an extensive individualized undertaking. However, as the Court has indicated, the statute does not encompass implied permission. Accordingly, the nature of LPC's prior dealings with all those individuals is irrelevant to the causes of action before the Court and does not cause individualized issues to predominate over common issues. Although the question of express permission is individualized, it should be relatively easy to ascertain whether any class member did give prior express permission to LPC or ABF; moreover, the record suggests that the number of such persons is relatively small. Accordingly, the Court finds that common questions predominate over individual questions.

Rule 42(b)(4) also directs the court to consider whether the class action vehicle is superior, and in that context, to consider: (a) the interest of members in controlling separate actions, (b) pending litigation, (c) desirability of the forum; and (d) management. Here, there is no indication that anyone other than class counsel has any desire to control the prosecution of this action; absent a class action it appears unlikely that any individual claims would be asserted. There is not any other pending litigation regarding the subject matter of this lawsuit. Although this forum is not especially better than any other forum,

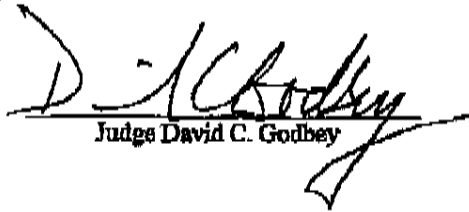
it does seem desirable for all this litigation to be in a single forum rather than scattered about various courtrooms throughout Dallas County and North Texas.

Finally, the Court considers management of the case and how it would proceed if certified. It seems likely that most issues would be resolved by summary judgment. The underlying facts regarding how the faxes were sent are not in dispute and are common to all potential class members; individualized proof need not be presented by plaintiffs. Damages are set by statute and need not be individually proved. Although the existence of express permission is an individualized question, applying the statute as written to consider only express prior permission limits the scope of that inquiry considerably and it can probably be resolved by summary judgment. Likewise, LPC has indicated it will proceed with a motion for summary judgment on some of its legal defenses, and it is certainly possible that motion may resolve plaintiffs' claims against LPC on a wholesale basis. In short, the case appears manageable if certified and a trial, if necessary at all, would not involve any extensive individualized proof. The court finds, based on consideration of all of these factors, that common issues predominate and that the class action vehicle is superior, and therefore certifies as a class action the TCPA claims brought on behalf of confirmed recipients of LPC faxes.

With regard to the proposed sub-classes involving individuals for whom receipt confirmation does not exist and all the claims of negligence, the Court further finds that the individualized questions raised by those persons and claims predominate over

common questions and tip the balance against class certification. Plaintiffs' request for certification of those sub-classes and claims is therefore denied.

SIGNED this 12th day of July, 2001.



Judge David C. Godbey