Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Petition of	)	
	)	
iHire, LLC	)	CG Docket
	)	No. 02-278
	)	
for Declaratory Ruling Stating that Resumes	)	
Sent in Response to Online Job Posting	)	
Requesting Faxed Resumes are Not Fax	)	
Advertisements Subject to the	)	
Telephone Consumer Protection Act	)	

PETITION FOR DECLARATORY RULING

OF

iHire, LLC

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June 20, 2011

PETITION FOR DECLARATORY RULING

iHire, LLC petitions the Commission to terminate the apparent controversy and remove any ambiguity that the practice of a third party faxing resumes of individual job applicants in response to an help wanted Craigslist postings requesting faxed resumes from applicants does not violate the Telephone Consumer Protection Act ("TCPA")[1]. The Commission should declare that such faxes are not advertisements under the TCPA[2] and as such do not require an opt-out provision[3].

I. Facts.

Baltimore Podiatry Group Drs. Scheffler & Shietel, P.A. (hereinafter "Baltimore Podiatry") filed suit against iHire in the Circuit Court for Baltimore County, Maryland for three alleged violations of the TCPA. Baltimore Podiatry also filed an action against iHire in the District Court of Maryland for Baltimore County alleging three other faxes sent by iHire to Baltimore Podiatry in response to the same violated the TCPA.[4]

The facts of this case are straight forward. Baltimore Podiatry placed an advertisement on the internet website Craigslist seeking a medical assistant for its front office. Through the advertisement, Baltimore Podiatry requested resumes

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[1] 47 U.S.C. § 227
[2] 47 U.S.C. § 227(a)(5)
[3] 47 U.S.C. §227(b)(1)(C)
[4] Case No. 080400006642010

be sent via facsimile to Baltimore Podiatry. The advertisement contained Baltimore Podiatry's facsimile number.

In response, iHire faxed summary resumes of three different qualified candidates to Baltimore Podiatry on August 31, 2009, September 21, 2009, and November 19, 2009. The first three faxes are subject to the District Court action. iHire faxed additional summary resumes on December 23, 2009, December 31, 2009 and January 15, 2010 for three different candidates whom Baltimore Podiatry. Each of the faxes encouraged Baltimore Podiatry to contact the individual applicants directly. All the facsimiles are substantially identical in form and contain information regarding how to view a full resume for the candidate on iHire's website, as well as a notice containing a telephone number, "automatic removal" website, and an email address where Baltimore Podiatry could contact iHire if it did not wish to receive resumes from iHire in the future.

iHire is an employment service. The facsimiles provided Baltimore Podiatry information regarding six potential candidates for a position sought to be filled by Baltimore Podiatry. The facsimiles did not provide information regarding iHire other than the address for the iHire website where the candidate's full resume could be viewed, iHire's membership with the Better Business Bureau and information on how to contact iHire if Baltimore Podiatry no longer wished to receive resumes.

In fact, Baltimore Podiatry was encouraged to contact the candidates directly, rather than through iHire. iHire received no compensation for sending the resumes for the applicants and Baltimore Podiatry did not owe iHire anything if Balitmore Podiatry hired any of the applicants. In no way would iHire receive any compensation for providing the service to the applicants.

II. Argument.

A. The facsimile communications sent by iHire are not unsolicited advertisements under the TCPA as the TCPA only applies to property, goods, or services.

The TCPA does not prohibit all "unsolicited information or communications".[5] Instead, the TCPA prohibits "unsolicited advertisements." 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."[6]

An advertisement has further been defined as an indiscriminate invitation.[7] Communications regarding employment

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[5] Lutz v. Curry, et al., 859 F. Supp. 180, 182 (E.D. Pa. 1994)
[6] 47 U.S.C.S. § 227(a)(5)
[7] Phillips Randolph Enterprises, LLC v. Adler-Weiner Research Chicago, Inc., 526 F. Supp. 2d 851, 853 (N.D. Ill. 2007)

opportunities are not unsolicited advertisements under the TCPA.[8] The TCPA only protects against unsolicited advertisements for property, goods, or services and an advertisement for employment is none of the three.

It is important to distinguish commercial activity from personal activity. Here, the resumes submitted for employment are for personal services, not commercial services. The TCPA does not define commercial availability and in the absence of a stated definition in the statute, courts should discern the plain meaning of the language. The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the statute beginning and ending with the plain meaning, if the statute is clear and unambiguous. The TCPA plainly states that to qualify as an unsolicited advertisement a fax must advertise the commercial availability of property, goods or services.[9]

Oxford Dictionary defines "commercial" as being concerned with commerce (the activity of buying and selling) and making or intending to make a profit.[10] The summary resumes that iHire faxed to Baltimore Podiatry did not contain any advertising for commercial services, the summary resumes only contained information about applicants for a job opening, which could at

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[8] 859 F. Supp. at 181
[9] 47 U.S.C. § 227(a)(5)
[10] http://oxforddictionaries.com/view/entry/m_en_us1234743#m_en_us1234743

best be defined as offers of personal services. The job applicants were not intending to make a profit and therefore the resumes are not commercial.

An advertisement has further been defined as an indiscriminate invitation.[11] Baltimore Podiatry advertised for faxed responses and bore the risk that not all respondents would be suitable candidates for the job. Communications regarding employment opportunities are not unsolicited advertisements under the TCPA.[12] Further, employment is not property, goods, or services.[13] iHire asserts that responses to employment opportunities are not advertisements either, but instead simply informational notices.

Ultimately, the intent of the TCPA was to prevent companies from placing the financial burdens of advertising on the recipients of the advertisements.[14] Therefore, communications that merely contain information do not violate the TCPA.[15] Even when that same communication contains an incidental advertisement, that incidental advertisement does not convert the entire communication into an advertisement.[16]

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[11] Phillips Randolph Enterprises, LLC v. Adler-Weiner Research Chicago, Inc., 526 F. Supp. 2d 851, 853 (N.D. Ill. 2007)
[12] Lutz v. Curry, et al., 859 F. Supp. 180, 182
[13] Id.
[14] Destination Ventures, 46 F.3d at 56.
[15] Stern v. Bluestone, 12 N.Y.3d 873, 875 (N.Y. 2009)
[16] Id. at 875-876.

Baltimore Podiatry chose to advertise on "Craigslist," a widely known directory and Internet site for those seeking employment. Listing on "Craigslist," is an invitation to the general public to respond without limitation. Baltimore Podiatry posted an advertisement seeking employees and iHire provided summary resumes in response. The summary resumes did not advertise the commercial availability of any property, goods or services. iHire merely provided information regarding candidates seeking positions at Baltimore Podiatry. iHire even encouraged Baltimore Podiatry to contact the candidates directly. As noted in the faxes, iHire does not charge the recipient of the fax any fee if they contact or hire the candidate. In addition, iHire did not charge the candidates for the faxes sent to Baltimore Podiatry.

The faxes sent by iHire to Baltimore Podiatry did not advertise the commercial availability or quality of any property, goods or services. The faxes contained individual resumes of applicants for a job opening. Resumes are not advertisements of commercially available property, goods or services.

It is clear that the faxes sent by iHire to Baltimore Podiatry do not qualify as advertisements, as they did not contain an advertisement for property, goods or services. Therefore, iHire requests that the FCC find that the faxes sent by iHire to

Baltimore Podiatry are not advertisements and are not required by the TCPA to contain the compulsory opt-out notice.

B. Ruling that resumes are advertisements within the meaning of the TCPA would require everyone responding to a help wanted posting to include an opt-out notice.

Ruling that resumes are advertisements under the meaning of the TCPA would create unseen and incredibly burdensome implications never intended by Congress. The purpose of the TCPA is to prevent the shifting of advertising costs to fax recipients.[17] By ruling that resumes are advertisements, the FCC would place the onus on all potential job seekers to include the statutorily mandated opt-out notice in all resumes faxed to potential employers. Such an outcome does not further the TCPA.

The TCPA includes a provision allowing the FCC to exempt certain classes of small business senders from the opt-out requirements if the FCC determines that the costs of compliance are unduly burdensome given the revenues generated by such small businesses.[18] However, individuals are even less capable than small businesses of absorbing the costs associated with TCPA compliance, particularly those individuals who are seeking employment because they are unemployed or underemployed. Most individuals lack the knowledge of the TCPA and the opt-out

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[17] Destination Ventures, Ltd. v. FCC, 46 F.3d 54, 56

[18] 47 U.S.C. § 227(b)(D)(iv)(II)

requirements because most individuals are not aware of the TCPA and its accompanying FCC regulations. Additionally, most individuals are not capable of drafting opt-out language to include in their faxed resumes.

The myriad requirements of the opt-out provision of the TCPA and FCC regulations make compliance for an individual job seeker unrealistic and impractical. For example, individual job seekers are not likely to have the resources necessary to provide a cost free mechanism for fax recipients to make an opt-out request 24 hours a day, 7 days a week.[19]

IF the FCC ruled that faxed resumes were advertisements under the TCPA, it would require individual, job seekers, to now comply with the TCPA. This is exactly what iHire has been sued for. Such a ruling would stifle economic and employment growth by discouraging individuals from applying for jobs via fax. Individuals will not fax resumes to potential employers out of fear of liability for failure to comply properly with the TCPA, which as stated above would be particularly difficult for individual job seekers. This unforeseen consequence is certainly not the intent of Congress, which is again evidenced by their inclusion of the exemption for certain classes of small businesses.[20] Individual job seekers should not bear the burden of

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[19] 47 C.F.R. § 64.1200 (a)(iii)(E)
[20] Id.

regulation that was originally intended to protect fax recipients from the financial burdens of advertisers.[21]

III. Conclusion.

The plain language of the TCPA and several judicial opinions all support the position of iHire that faxed resumes sent in response to online job postings requesting faxed resumes, even if submitted by a third party on the individual job seeker's behalf, are not advertisements under the meaning of the TCPA and do not require opt-out provisions. To find otherwise would broaden the scope of liability under the TCPA past what was originally intended. For the reasons stated above, iHire requests that the FCC enter a declaratory ruling that faxed resumes sent in response to an online posting, even if submitted by a third party on the individual's behalf, do not constitute advertisements under the meaning of the TCPA and do not require an opt-out provision.

Respectfully Submitted,

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[21] 46 F.3d 54, 56