

**BEFORE THE
FEDERAL COMMUNICATION COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338

WESTFAX, INC. PETITION FOR CONSIDERATION AND CLARIFICATION

Attachment 1

As a part of Westfax, Inc.’s Petition the FCC should be aware of a certain judicial decision reached in J2 Global Communications, Inc. v. Protus IP Solutions, et al. Case No. CV 0600566 DDP (AJWx), the United States District Court Central District of California (the “J2 v. Protus CA Case”).

Westfax does not seek the FCC’s intervention into this case. The J2 v. Protus CA Case has very limited applicability and precedent. Instead, Westfax provides notice of the case so the FCC may review, clarify and consider its facsimile advertising rules in light of the J2 v. Protus CA Case.

In one of its many patent infringement cases, J2 Global Communications, Inc. v. Protus IP Solutions, et al. Case No. CV 0600566 DDP (AJWx), District Judge Dean D. Pregeron of the United States District Court Central District of California held on January 14, 2008:

“Consistent with the TCPA’s private right of action provision, the Court finds that J2’s receipt of Protus’ faxes on its fax servers establishes its standing to bring a TCPA claim. The TCPA confers standing on any person or entity injured by unsolicited fax advertisements.”

The January 14, 2008 Order in J2 v. Protus CA Case should be reviewed.

The J2 v. Protus CA case is massive patent infringement litigation that J2 Global Communications, Inc. (NASDAQGS:JCOM) (“J2”) initiated against many of the other large telecommunication carriers that offer fax broadcasting, fax to email conversions and other similar services. The J2 litigation is extremely complex but essentially J2’s position is its system that provides such services is patented and every other system that its

competitors use to provide the same or similar telecommunication services is an infringement of its patents.

J2 proclaims its patents allow it to monopolize the modern fax broadcast industry methodology of services and particularly the space that is witnessing the transition of traditional fax broadcasting services (fax machine to fax machine) to fax machines to servers that convert the facsimiles to emails for the hundreds of thousands of subscribers who subscribe for a modest monthly fee to J2's, Protus IP Solutions, ("Protus"), Venali, Inc. ("Venali") and other companies fax to email services.

J2's aggressively litigious and expansive view of the nature and scope of its patents will ultimately be resolved by the various courts where the cases are being litigated and by their appellate branches. This long, complex and expensive patent infringement litigation is not the issue the FCC needs to review.

J2 v. Protus CA Case

Protus and the other defendants immediately counter sued J2 for the same TCPA claim the J2 v. Protus CA Case held fax broadcasters have. J2 sends facsimiles for its subscribers to recipients who use Protus, Venali and the other carriers' fax to email conversion services. Protus also added several other unrelated counterclaims against J2 for unfair business practices, defamation, etc. The litigation is protracted and contentious.

Obviously, this finding that J2 (and the other companies that receive facsimiles and convert them to emails on behalf of their subscribers) has standing to bring a TCPA claim is unprecedented.

In the J2 v. Protus CA Case, J2 brings a lawsuit against Protus alleging (besides patent infringement) violations of the TCPA. J2 and Protus both offer fax related services to subscribers, including outbound broadcast transmissions of faxes and inbound conversion of faxes to files that can be accessed by subscribers on their e-mail.

J2 alleges it received on its computer fax servers 8000 unsolicited advertisements from Protus that were converted to emails and sent to J2's subscribers. It is unknown how J2 determined the messages were unsolicited or advertisements. J2 argues that only J2 has standing to pursue TCPA claims, as opposed to its customers, which do not receive faxes, but rather emails that contain images of fax transmissions received by J2. Protus claims that the TCPA allows only "the recipient" of an unsolicited fax to bring a claim against the sender. 47 U.S.C. 227(b)(1) (2005). J2 (and the other fax to email converters) admits it is a "passive conduit" for faxes to be directed to J2's customers.

The Court stated "the private right of action provision itself does not expressly limit TCPA claims to the recipient of unsolicited faxes. Nevertheless, a person or entity that is the recipient of an unsolicited fax may bring such claims subject to the Article III requirements of standing. To establish standing to bring a claim, a plaintiff must show three elements: (1) an injury in fact, which is "(a) concrete and particularized, and (b)

actual or imminent, not conjectural or hypothetical;" (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable decision, i.e., that the prospect of obtaining relief is ""not too speculative." *Bras v. Cal. Pub. Util. Comm.*, 59 F.3d 869, 872 (9th Cir. 1995) (citing *Lujan v. Defenders of Wildlife*, [504 U.S. 555, 559 \(1992\)](#)). "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. at 560 (Kennedy, J. concurring))."

The Court stated "consistent with the TCPA's private right of action provision, that J2's receipt of Protus' faxes on its fax servers establishes its standing to bring a TCPA claim. The TCPA confers standing on "any person or entity" injured by unsolicited fax advertisements. J2 alleges Protus' unsolicited faxes required J2 to purchase additional telephone lines to receive faxes, server space to store faxes, Internet bandwidth to email images to customers, and other equipment; to suffer delays in receipt of legitimate faxes; to lose customers due to the receipt of junk faxes, to receive numerous customer complaints, and to expend employee time and energy responding to complaints. J2's allegations indicate an injury resulting from Protus' junk-faxing activities. A TCPA claim redresses this injury by allowing J2 to pursue relief from its injuries."

The Court stated "Where Protus is alleged to have sent unsolicited faxes that were received on J2's fax servers, J2 has a TCPA claim. It is irrelevant that J2 subsequently converts those faxes to e-mails for customers, or that Protus did not know it was sending a fax to J2's fax servers. The TCPA applies to the act of sending unsolicited faxes, and does not relieve an alleged "junk faxer" (emphasis added) from a claim when it was unknown that the fax would land on a fax server. Accordingly, J2 establishes that it has standing to bring its TCPA claim."

The CA Court confuses what the Regulations state and instead holds "The TCPA's prohibition on unsolicited faxes applies to "any person . . . to use a telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement . . ." 47 U.S.C. § 227 (b)(1)(C). A person of ordinary intelligence should know that this prohibition will apply if that person engages in the act of sending."

The CA Court again confuses what the Regulations state and instead holds "The TCPA's prohibition on unsolicited faxes applies to "any person . . . to use a telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement . . ." 47 U.S.C. § 227 (b)(1)(C). A person of ordinary intelligence should know that this prohibition will apply if that person engages in the act of sending."

"Given the statutory language and the FCC regulations, the Court finds that fax broadcasters, and other possible defendants, had fair notice of the actions qualifying as sending unsolicited fax advertisements."

The Court states much of the law, including a fax broadcaster must have a “high degree of involvement” and “actual notice of the unlawful activity” but then does not apply it.