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March 9, 2021

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Via ECF

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the secretary
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Notice of Plaintiff's Motion to Lift Stay Despite Pending FCC Proceeding, *Inovalon, Inc. Petition for Declaratory Ruling Clarifying Unsolicited Advertisement Provision of Telephone Consumer Protection Act and Junk Fax Prevention Act,* CG Docket No. 02-278 (filed Feb. 19, 2018)

Dear Secretary Dortsch:

Inovalon, Inc. ("Inovalon"), by its counsel, submits this notification pursuant to the Commission's *ex parte* rules, 47 C.F.R. §1.1206. This notification serves to inform the Commission that, on February 5, 2021, the plaintiff in *Eric B. Fromer Chiropractic, Inc. v. Inovalon Holdings, Inc., et al*, No. 17-cv-03801-GJH, filed a motion seeking to lift a stay that has been entered in that putative junk fax class action against Inovalon brought under the Telephone Consumer Protection Act ("TCPA").[1] That litigation has been stayed since September 2018 pending a decision from the Commission on Inovalon's February 19, 2018 Petition for an expedited declaratory ruling that, among other things, the fax at issue in the litigation is not an "advertisement" under the TCPA and Junk Fax Prevention Act ("JFPA")

The *Inovalon* court stayed the litigation because it needs guidance from the FCC:

> [I]t is not patently obvious whether, under existing FCC and [then-existing but subsequently vacated] Fourth Circuit precedent [*Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459 (4th Cir. 2018) ("*Carlton & Harris I*")],[2]

[1] A copy of the plaintiff's Motion to Lift Stay is enclosed herewith as Exhibit "1."

[2] In June 2019, the Supreme Court vacated and remanded *Carlton & Harris I*. *See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc*., 139 S. Ct. 2051 (2019). On remand, the Fourth Circuit held that the 2006 FCC Junk Fax Order, *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25,967, was interpretative only and further remanded the case to the district court to determine the level of deference that should be given to that Order. *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 982 F.3d 258, 264, 266 (4th Cir. 2020). On March 1, 2021, the *Carlton & Harris* parties finished briefing the plaintiff's motion for leave to file an amended complaint to the district court. The defendant intends to

> the Fax was a permissible information-only transmission rather than an "unsolicited advertisement" . . . [Inovalon] ha[s] petitioned the FCC to determine whether the Fax at issue herein is a prohibited advertisement. Furthermore, as [Inovalon] note[s], the U.S. District Court for the Southern District of Florida recently stayed a Junk Fax action pending FCC's resolution of similar questions [*i.e.*, Petition of M3 USA Corporation for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Mar. 20, 2017)], and the Court's interpretation herein could be inconsistent with either of the agency's forthcoming determinations.

Eric B. Fromer Chiropractic, Inc. v. Inovalon Holdings, Inc., 329 F.Supp.3d 146, 155 (D. Md. 2018) (internal citations omitted). In short, the court, like the parties, is seeking the Commission's clarification on what constitutes a facsimile "advertisement" under the TCPA and JFPA.

The *Inovalon* plaintiff's argument in support of lifting the stay is that it is simply taking the FCC too long to rule on Inovalon's Petition, that FCC proceedings are "notoriously slow," that the Commission "is effectively deadlocked" right now, and that it may never rule on Inovalon's petition. *See* Exh. 1 at 3, 4 & 6. Inovalon filed its opposition to the plaintiff's motion on March 5, 2021.[3]

Inovalon wishes to ensure that the Commission is aware of the above-described court proceedings because they further support the need for the Commission to promptly grant Inovalon's non-controversial Petition and declare, among other things, that faxes with no direct commercial purpose, and offering no commercially available products or services to the recipients, are not "advertisements" under the TCPA and JFPA.

Respectfully Submitted,

INOVALON, INC.

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seek dismissal. *See Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, No. 3:15-cv-14887, Rep't of the Parties' Planning Mtg. (ECF No. 71), at 5 (S.D. W.Va. Jan. 19, 2021).

[3] A copy of Inovalon's opposition brief is enclosed herewith as Exhibit "2."

(202) 344-4000

Counsel to Inovalon, Inc.

cc: Acting Chairwoman Jessica Rosenworcel
Commissioner Brendan Carr
Commissioner Geoffrey Starks
Commissioner Nathan Simington
Kurt Schroeder, Division Chief, Consumer & Governmental Affairs Bureau
Kristi Thornton, Deputy Division Chief, Consumer & Governmental Affairs Bureau
Karen Schroeder, Associate Division Chief, Consumer & Governmental Affairs Bureau

EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
SOUTHERN DIVISION

ERIC B. FROMER CHIROPRACTIC, INC., individually and as the representative of a class of similarly-situated persons,	)	
Plaintiff,	)	No. 8:17-cv-03801-GJH
v.	)	
INOVALON HOLDINGS, INC., INOVALON, INC., and INOVALON SME, LLC,	)	
Defendants.	)	

PLAINTIFF'S MOTION TO LIFT STAY

Plaintiff, Eric B. Fromer Chiropractic, Inc., respectfully requests that the Court lift the stay entered in this case on September 4, 2018. (*See* Order, Doc. 31). As argued in the attached memorandum, this case has already been stayed nearly 2.5 years awaiting a decision from the Federal Communications Commission ("FCC") on Defendant's petition for declaratory ruling regarding the interpretation of the term "advertisement" under the Telephone Consumer Protection Act of 1991 ("TCPA"), and there is no reason to delay the case any further following the Fourth Circuit's decision in *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 982 F.3d 258, 264 (4th Cir. Dec. 7, 2020), holding that the FCC's interpretations of the TCPA are non-binding and relevant only to the extent the Court finds they have the "power to persuade."

Respectfully submitted,

ERIC B. FROMER CHIROPRACTIC, INC., individually and as the representative of a class of similarly-situated persons

By: /s/ Ryan M. Kelly
One of Its Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent to counsel of record at the email addresses registered by them with the Court by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Ryan M. Kelly

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
SOUTHERN DIVISION

ERIC B. FROMER CHIROPRACTIC, INC., individually and as the representative of a class of similarly-situated persons,	)	
Plaintiff,	)	No. 8:17-cv-03801-GJH
v.	)	
INOVALON HOLDINGS, INC., INOVALON, INC., and INOVALON SME, LLC,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION TO LIFT STAY

Plaintiff, Eric B. Fromer Chiropractic, Inc., hereby moves the Court to lift the stay entered in this case on September 4, 2018. (*See* Order, Doc. 31). As argued below, this case has been stayed for 29 months pending a ruling on Defendants' petition to the FCC, with no indication that a decision is forthcoming, and the matter should not be delayed any further following the Fourth Circuit's decision in *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 982 F.3d 258, 264 (4th Cir. Dec. 7, 2020) (hereinafter "*PDR Network III*"), holding that the FCC's interpretations are not binding in district courts.

Background

On December 27, 2017, Plaintiff filed its Complaint challenging Defendants' alleged practice of sending "unsolicited advertisements" by facsimile in violation of the TCPA, as amended by the Junk Fax Prevention Act of 2005 ("JFPA"), 47 U.S.C. § 227(b)(1)(C). (Doc. 1, Compl. ¶ 2). The Complaint alleges Defendants sent Plaintiff and a class of others unsolicited fax advertisements, "including, but not limited to," a fax on or about November 14, 2017, which is attached to the Complaint as Exhibit A. (*Id.*)

Exhibit A is a one-page fax with a header stating "To: Provider (13239626832)," and from "Inovalon," and bearing a time-stamp of "14-Nov-2017 19:02." (Doc. 1-1). Exhibit A states that "INOVALON'S EHR INTEROPERABILITY IS EASY, HASSLE-FREE AND RELIABLE" and that Inovalon can "extract patient records from your EHR system at **no cost**!" (*Id.*) Exhibit A states, "Inovalon saves you time by doing the work electronically" and at "[n]o cost to your practice." (*Id.*) Exhibit A asks recipients to "Call 844-560-0717 or email enfsupport@inovalon.com today to find out how our EHR interoperability is Easy, Hassle-free, and Reliable!" (*Id.*) Exhibit A contains no "opt-out notice" of any kind informing the recipient how to request that Defendants stop sending similar faxes. (*Id.*)

On February 19, 2018, Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(1), asserting that Plaintiff lacked Article III standing, and Rule 12(b)(6), asserting Plaintiff failed to allege Exhibit A is an "advertisement." (Doc. 22-1, Defs.' Mem. Supp. Mot. Dismiss at 6–16). In the alternative, Defendants asked the Court to stay the case pending a decision by the FCC on a petition for declaratory ruling Defendants filed after this suit was initiated, asking the FCC to interpret the TCPA's definition of "unsolicited advertisement" to exclude faxes offering free EHR services, such as Exhibit A to the Complaint. (*Id.* at 17).

On March 5, 2018, Plaintiff filed its opposition to the motion to dismiss, arguing that federal courts had overwhelmingly found "concrete" injury in fact in TCPA fax cases and that the Complaint adequately alleged the fax was an "advertisement." (Doc. 23). Plaintiff opposed Defendants' alternative request for a stay on several grounds, including that the requested stay would be "immoderate in extent," and not "spent within reasonable limits," in violation of *Muhammad v. Warden, Baltimore City Jail*, 849 F.2d 107, 113 (4th Cir. 1988). (*Id.* at 19). Plaintiff explained that FCC proceedings are "notoriously slow." (*Id.* (citing *In re Core*

Commc'ns, Inc., 531 F.3d 849, 859 (D.C. Cir. 2008) (FCC took six years to rule); *Telecommc'ns Research & Action Ctr. v. FCC*, 750 F.2d 70, 80–81 (D.C. Cir. 1984) (five- and two-year FCC delays); *Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 101 (N.D. Ill. 2013) (denying stay where FCC would likely take over two years to rule)).

On April 12, 2018, Defendants filed their Reply in support of their motion. (Doc. 27). In response to Plaintiff's argument that a stay would cause undue delay because FCC proceedings are "notoriously slow," Defendants argued that "the FCC called for comments just four days after Inovalon filed its petition, and set an aggressive timetable for comments and reply comments." (*Id.* at 11). Defendants predicted that "there is every reason to believe that the FCC will act quickly upon Inovalon's petition, particularly in light of FCC Chairman Pai's view[s]" about supposedly "abus[ive]" TCPA litigation. (*Id.* at 11). Defendants conceded, however, that "if the FCC's ruling is not forthcoming within a reasonable period of time, there is nothing preventing the Court from lifting the stay and resuming the litigation." (*Id.* at 12).

On September 4, 2018, the Court ruled on Defendants' motion to dismiss or stay. (Doc. 30, Mem. Op.). The Court denied Defendants' motion to dismiss, holding (1) that Plaintiff alleged a concrete injury in fact; and (2) that Plaintiff adequately alleged the fax was an "advertisement" under the TCPA. (*Id.* at 8–11). However, the Court granted Defendants' request to stay the case pending the FCC's ruling on its petition. (*Id.* at 12–13). The Court recognized that, under the then-current state of the law, district courts were "bound by the FCC's interpretation of the TCPA" under *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459, 464 (4th Cir. 2018) (hereinafter "*PDR Network I*"). (*Id.* at 12).

On December 7, 2020, following remand from the Supreme Court in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019) (hereinafter "*PDR Network II*"),

the Fourth Circuit issued its decision in *PDR Network III*, holding that the FCC's interpretations of the TCPA merely "advise the public of the agency's construction of the statutes and rules which it administers," and constitute non-binding "guidance" that a district court "doesn't have to accept . . . ." 982 F.3d at 264. The Fourth Circuit held that "the weight" given an FCC interpretation "will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

On January 20, 2021, FCC Chairman Pai resigned following President Biden's inauguration. *See* Chairman Pai Statement Upon Departing the FCC, *available at* https://docs.fcc.gov/public/attachments/DOC-369408A1.pdf (Jan. 20, 2021). The FCC currently has four commissioners, two Republican appointees and two Democratic appointees, and is effectively deadlocked until the Senate confirms a new chairman nominated by President Biden. *See* https://www.vox.com/recode/21557495/biden-fcc-digital-divide-net-neutrality-section-230.

Argument

I. Standards governing a stay.

Although a district court has discretion to stay a case, the party advocating for a stay "bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997). "[T]he burden of making out the justice and wisdom" of the stay rests "heavily" on the movant. *Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936). If there is even a "fair possibility" that the non-movant will be prejudiced by the stay, then the movant "must make out a clear case of hardship or inequity in being required to go forward" with the case. *Id.* A stay should not be of "indefinite duration in the absence of a pressing need." *Id.*

A stay may not be "immoderate in extent," and a stay is "immoderate and hence unlawful unless so framed in its inception that its force will be spent within reasonable limits, so far at least as they are susceptible to prevision and description." *Muhammad v. Warden, Baltimore City Jail*, 849 F.2d 107, 113 (4th Cir. 1988) (quoting *Landis*, 299 U.S. at 256); *see also Applegate v. Devitt*, 509 F.2d 106, 109 (8th Cir. 1975) (court must consider length of "probable delay" resulting from stay and weigh "[f]airness" concerns); *Ohio Envtl. Council v. U.S. Dist. Court, S. Dist. of Ohio, E. Div.*, 565 F.2d 393, 396 (6th Cir. 1977) (plaintiff "has a right to a determination of its rights and liabilities without undue delay").

II. The nearly 2.5-year delay in the case thus far warrants lifting the stay.

This case has been stayed for 29 months, preventing Plaintiff from conducting the discovery necessary to move to certify a class in this putative class action, including, among other things, to obtain documents surrounding the faxing activity giving rise to this case, to depose witnesses with relevant knowledge of the faxing, and to identify any necessary third parties, such as any "fax broadcasters" or list providers with relevant knowledge. This delay alone justifies lifting the stay to allow Plaintiff to obtain a "speedy" determination in this case, as required by Fed. R. Civ. P. 1, and to obtain a decision on whether a class will be certified in this putative class action "[a]t an early practicable time," as required by Fed. R. Civ. P. 23(c)(1)(A).

For example, in *Adams v. Nationstar Mortg. LLC*, No. CV 15-9912-DMG (KSX), 2018 WL 702848, at *1 (C.D. Cal. Feb. 2, 2018), the district court stayed a TCPA action in June 2016 pending a decision from the D.C. Circuit on review of an FCC order interpreting the term "automated telephone dialing system." The D.C. Circuit held oral argument in October 2016. *Id.* When the D.C. Circuit had still failed to issue a decision 15 months later, the plaintiff moved to lift the stay, and the district court granted the motion, holding "the length of the stay has accentuated the danger that witnesses' memories will fade and that other key evidence will be

lost," and that "[u]nnecessary delay inherently increases the risk that witnesses' memories will fade and evidence will become stale." *Id.* (quoting *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002)). The court concluded that "the prejudice resulting from this substantial delay weighs heavily toward granting Plaintiff's motion." *Id.*

The same is true here. The concerns about judicial efficiency that the Court found weighed in favor of a stay in September 2018 are now outweighed by the prejudice Plaintiff has already suffered from the 29 months of inactivity that have already elapsed. This is especially so because, even if the FCC does eventually rule on Defendants' petition—and there is no statute or regulation requiring that it do so—one or more parties will seek judicial review in the court of appeals. *See Lee v. LoanDepot.com, LLC*, No. 14-1084-MLB, 2015 WL 5032175, at *3 (D. Kan. Aug. 25, 2015) (granting motion to lift stay in TCPA case following FCC ruling, although appeal from FCC order was pending in D.C. Circuit, finding "no prejudice to defendant in this case proceeding, at least with scheduling and discovery, despite the pending appeal").

In sum, the prejudice Plaintiff has already suffered by the 29-month delay in this case outweighs any benefit that may have reasonably been expected to come from an FCC decision on Defendants' petition in September 2018, and the stay should be lifted.

II. The Fourth Circuit's decision in *PDR Network III* warrants lifting the stay.

The Court's initial stay order was based on the then-current state of the law under *PDR Network I*, which held that the FCC's interpretations of the TCPA are binding in district courts hearing private TCPA enforcement actions like this one. *PDR Network I*, 883 F.3d at 464. Thus, at the time the Court entered the stay, it was operating under the understanding that it would have been required to follow a ruling from the FCC on Defendants' petition for declaratory ruling regarding the meaning of the term "advertisement." *Id.*

Following the Supreme Court's remand in *PDR Network II*, however, the Fourth Circuit has now held that the FCC's interpretations are not binding, or even subject to *Chevron* deference, and are instead subject to *Skidmore* deference, meaning this Court may follow them (or not) to the extent it finds the interpretation has the "power to persuade." *PDR Network III*, 982 F.3d at 264. Thus, any FCC ruling on Defendants' petition with respect to the meaning of the term "advertisement" will not be binding on this Court at summary judgment or trial. Instead, assuming the FCC issues a ruling on Defendants' petition by the time the Court is called on to answer the "advertisement" issue on the merits, the Court will simply apply the statute and give appropriate deference to the FCC ruling to the extent it finds the agency's interpretation persuasive under *Skidmore*.

In sum, the Fourth Circuit's ruling that FCC's interpretations of the TCPA are not binding significantly weakens the argument for a further stay in this case to await a decision from the FCC, and the stay should be lifted.

Conclusion

For the foregoing reasons, the Court should lift the stay entered September 4, 2018, set a Rule 16(b) scheduling conference with the parties, and grant any other relief the Court deems appropriate.

Respectfully submitted,

ERIC B. FROMER CHIROPRACTIC, INC., individually and as the representative of a class of similarly-situated persons

By: /s/ Ryan M. Kelly
One of Its Attorneys

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(a), I hereby certify that on February 5, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Ryan M. Kelly

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

ERIC B. FROMER CHIROPRACTIC, INC., a California corporation, individually and as the representative of a class of similarly-situated persons, Plaintiff, vs. INOVALON HOLDINGS, INC., et al. Defendants.	No. 8:17-cv-03801-GJH

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO LIFT STAY

Plaintiff's Motion to Lift Stay (ECF No. 38) makes one argument: that the simple passage of time requires this Court to lift the stay that it entered in September 2018 to allow the FCC to render its decision on Inovalon's Petition. Plaintiff does not argue that any single one of the reasons that justified the stay has changed, nor could it. In fact, just two months ago, the FCC made clear that Inovalon's Petition "is still under active consideration." The mere passage of time is not a justification to lift the stay.

Further, as detailed below, Plaintiff's counsel have taken different positions on the propriety of stays pending FCC rulings when expedient to do so. Specifically, a week after Plaintiff moved to the lift the stay in this case, its attorneys moved to reinstitute a stay originally entered in June 2018 (three months earlier than the stay entered here) in another TCPA Junk Fax Prevention Act ("JFPA") case to allow for full Commission review of an FCC Consumer and Governmental Affairs Bureau decision on a petition, which was unfavorable to that plaintiff. Not surprisingly, there was no claim of agency gridlock in Plaintiff's counsel's motion in that case as

there is in Plaintiff's Motion here, nor did Plaintiff's counsel mention the longer passage of time since FCC proceedings had been started in that case. Rather, they correctly noted that "nothing has changed" and that the "same reasoning that justified the stay in 2018 [in that case] applies equally today."

So too in this case—nothing has changed since this Court's stay order and the same reasoning that supported the stay decision applies today. In fact, there is even more reason to keep the stay intact pending the FCC's forthcoming ruling on Inovalon's Petition given that the Fourth Circuit precedent that existed at the time, *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459 (4th Cir. 2018), has been vacated by the Supreme Court. Thus, the need for FCC guidance is even more important now than it was in 2018. A rush to judgment is no proxy for reaching a correct decision on the merits. The Court should deny Plaintiff's Motion and maintain the stay in this case to allow the FCC's determination of Inovalon's Petition.

I. BACKGROUND

A. This Court's Order Staying the Litigation to Allow the FCC to Rule on Inovalon's Petition and Subsequent Developments

On February 19, 2018, Inovalon filed its FCC Petition requesting that the Commission declare that:

> 1. Faxes sent by a health insurance plan's designee to a patient's medical provider, pursuant to an established business relationship between the health plan and provider, requesting patient medical records are not advertisements under the TCPA; and
>
> 2. Faxes that offer the free collection and/or digitization of patient medical records, and which do not offer any commercially available product or service to the recipients are not advertisements under the TCPA.

Exh. 3 to Mot. to Dismiss (ECF No. 22-4) at ii & 11.

On Sept. 4, 2018, this Court stayed this litigation, under the primary jurisdiction doctrine, pending the FCC's resolution of Inovalon's Petition. *See* Mem. Op. (ECF No. 30) at 12-13. In its decision, the Court recognized that, at the time, the Fourth Circuit had recently held in *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459 (4th Cir. 2018) ("*Carlton & Harris I*"), *vacated and remanded*, 139 S. Ct. 2051 (2019) ("*Carlton & Harris II*"),[1] that a fax offering a free physician's desk reference book was an unsolicited advertisement under the TCPA. Mem. Op. at 10-11. In granting Inovalon's motion to stay, the Court noted that "it is not patently obvious whether, under [then-]existing FCC and Fourth Circuit precedent, the Fax was a permissible information-only transmission rather than an 'unsolicited advertisement[,]'" and that Inovalon had petitioned the FCC to determine that precise issue (among others). *Id*. at 12-13. The Court pragmatically held that a stay is appropriate in this case to avoid a ruling inconsistent with the Commission's forthcoming determination on Inovalon's Petition and a related petition filed by M3 USA Corporation. *Id*. at 13.

Since then, Inovalon has met in-person with the FCC Chairman and every Commissioner under the previous administration as well as the FCC's Consumer and Governmental Affairs Bureau (the "Bureau"). *See* Jt. Status Rep't (ECF No. 34) ¶ 5. Inovalon also met telephonically with the Bureau again in early 2020 regarding the status of its Petition. *Id*. ¶ 6. Most recently, in response to status inquiries from undersigned counsel, on January 5, 2021, a Bureau representative advised that Inovalon's Petition "is still under active consideration" at the Commission. Mar. 5, 2021 Decl. of Daniel S. Blynn ("Blynn Decl.") ¶ 2.

[1] On remand, the Fourth Circuit held that the at-issue 2006 FCC Junk Fax Order was interpretative only and further remanded the case to the district court to determine the level of deference that should be given to the 2006 FCC Junk Fax Order upon which that and this case is largely based. *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 982 F.3d 258, 264, 266 (4th Cir. 2020) ("*Carlton & Harris III*").

B. Plaintiff's Counsel's Motion to Stay in *Scoma Chiropractic, P.A. v. Mastercard Int'l Inc*., No. 2:16-cv-00041 (M.D. Fla. filed Feb. 12, 2021)

Plaintiff filed its Motion to Lift Stay in this case on February 5, 2021, arguing nearly exclusively that the stay that this Court entered on September 4, 2018 should be lifted simply because it is taking the FCC too long to issue a ruling on Inovalon's Petition. However, just seven days later, the same attorneys representing Plaintiff in this case filed a motion in *Scoma Chiropractic, P.A. v. Mastercard Int'l Inc*. requesting that that court stay that case pending a final decision from the FCC in another TCPA JFPA proceeding that has been pending since January 8, 2020. No. 2:16-cv-00041, Pl.s' Mot. to Stay Pending Final FCC Decision on Amerifactors Pet. (M.D. Fla. filed Feb. 12, 2021) ("*Scoma* Motion").[2] The very premise underlying Plaintiff's Motion in this case is belied by Plaintiff's counsel positions set forth in the *Scoma* Motion.

More specifically, in *Scoma*, the plaintiffs, represented by Plaintiff's counsel in this case, alleged that the defendants sent unsolicited facsimile advertisements to them in violation of the JFPA. *Scoma Chiropractic, P.A. v. Dental Equities, LLC*, No. 2:16-cv-00041, 2018 WL 2455301, at *1 (M.D. Fla. June 1, 2018). Over the plaintiffs' objections, on June 1, 2018, the *Scoma* court granted the defendants' motion to stay pending a decision by the FCC on a petition for expedited declaratory ruling filed by Amerifactors Financial Group, LLC ("Amerifactors") as to whether online fax services[3] fit within the definition of "telephone facsimile machines" under the TCPA. *Id*. The court held that a stay was appropriate "because the specialized knowledge of the FCC is needed to answer the question before the Court and deferral is necessary for a uniform

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[2] A copy of the *Scoma* Motion is attached hereto as Exhibit "1."

[3] An "online fax service" allows users to "access 'faxes" the same way that they do email: by logging into a server over the Internet or by receiving a pdf attachment [as] an email." *Scoma Chiropractic, P.A. v. Mastercard Int'l, Inc*., No. 2:16-cv-00041, 2021 WL 720347, at *4 n.4 (M.D. Fla. Jan. 29, 2021) ("*Scoma II*") (quoting *In re Amerifactors Fin. Grp., LLC Pet. for Expedited Declaratory Ruling*, No. 05-338, 2019 WL 6712128 (FCC Dec. 9, 2019)), *R. & R. vacated*, 2021 WL 719655 (M.D. Fla. Feb. 24, 2021) ("*Scoma III*") (ordering the parties to re-brief class certification in light of intervening change in Eleventh Circuit law).

interpretation of the statutory questions at issue," and "there is a risk that the Court could reach a determination that is inconsistent with the FCC's ultimate decision on the AmeriFactor's Petition[.]" *Id*. at *3 (also noting that, "[i]f the FCC statutorily exonerates online fax services from the TCPA, this could be a different case and at a minimum would affect the issues raised in the class certification briefing").

That stay remained in place for eighteen months until January 3, 2020, when the court lifted the stay following the FCC's decision on Amerifactor's petition.[4] *See Scoma* Mot. at 2. Thereafter, on January 29, 2021, the Magistrate Judge in *Scoma* denied the plaintiffs' motion for class certification on grounds that the plaintiff (and any putative class members) who received the fax at issue via an online fax service rather than a traditional stand-alone ink-and-paper fax machine lacked standing to sue under the JFPA in light of the FCC's Amerifactors order. *Scoma II*, 2021 WL 6712128, at *13-15. The court also found that it would be "administratively infeasible" to ascertain which recipients of the complained-of fax received it via an online fax service as opposed to a traditional fax machine without individualized inquiries, and that such individualized inquiries predominated over the common ones. *Id*. at *19, *22-23.[5]

Given that the *Scoma* court denied class certification, the plaintiffs, through Plaintiff's counsel here, recognized that, at the time, their best hope of salvaging their case was for the full

[4] The ruling on the Amerifactors petition was issued by the FCC's Consumer and Governmental Affairs Bureau acting on delegated authority from the full Commission. *Scoma II* at 9. It took the Bureau 2.5 years to issue its Amerifactors order.

[5] The *Scoma* court vacated the Report & Recommendation on grounds that, two weeks after the Magistrate Judge issued his decision, the Eleventh Circuit held in a different decision that "administrative feasibility" is not a requirement under Rule 23. *Scoma III*, 2021 WL 719655, at *3. In contrast, administrative feasibility ***is*** a requirement within the Fourth Circuit. *See Krakauer v. Dish Network, LLC*, 925 F.3d 643, 658 (4th Cir. 2019); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014); *Spotswood v. Hertz Corp*., No. RDB-16-1200, 2019 WL 498822, at *6-8 (D. Md. Feb. 7, 2019); *Piotrowski v. Wells Fargo Bank, NA*, No. DKC 11–3758, 2015 WL 4602591, at *3-18 (D. Md. July 29, 2015). Thus, *Scoma III* and the change of law in the Eleventh Circuit have no impact on this case. Nonetheless, administrative feasibility surely is an issue that the parties will address later at the class certification stage.

FCC to reverse the Bureau's Amerifactors order, and moved to stay the litigation again pending the full Commission's review of that order. *See Scoma* Mot. *generally*. Not surprisingly, there is no mention of the purported FCC gridlock that Plaintiff claims in its Motion here, *see* Mot. at 4, nor any argument that the stay sought in *Scoma* could be indefinite even though the "full FCC had not decided the Application for Review of the Amerifactors Bureau Order" in the year since that application for review was filed. *Scoma* Mot. at 3. Plaintiff's counsel argued instead that, "if the fate of class certification in [*Scoma*] . . . is to depend on the validity of the Amerifactors Bureau Order, then the prudent course is to stay the case until the full FCC issues a 'final order' . . ." *Id*. at 4. Plaintiff's counsel further noted that the would-be class members would be prejudiced if the *Scoma* court permitted the litigation to continue only for the Amerifactors order to be rejected by the full Commission. *Id*. at 7. Finally, throughout the *Scoma* Motion, Plaintiff's counsel argued that nothing has changed since that court stayed the case initially in June 2018 to await the FCC's ruling on Amerifactors' petition:

> The Court found in staying the case in 2018 that "a stay will simplify and streamline the issues raised in this case" . . . ***The same is true today***. . . . This Court found in staying the case in 2018 that a stay . . . would "reduce the burden of litigation on the parties and on the Court" . . . ***Again, nothing has changed***. . . . In staying the case in 2018, the Court ruled that "[d]eferring to the FCC would advance the basic purpose of the [primary jurisdiction] doctrine because the specialized knowledge of the FCC is needed to answer the questions before the Court" regarding the scope of the definition of "telephone facsimile machine" in [the TCPA]. ***The same holds true today***. . . . In staying the case in 2018, this Court ruled that "uniformity of administration" justified a stay because "if this case proceeds, there is a risk that the Court could reach a determination that is inconsistent with the FCC's ultimate decision on the AmeriFactors Petition, and this Court is ultimately bound to adhere to the FCC's interpretations of the TCPA" . . . ***The same reasoning that justified the stay in 2018 applies equally today***.

Scoma Mot. at 8-10 (emphasis added and internal citations omitted).

The *Scoma* court easily recognized the plaintiffs' motion for what it was: "Plaintiff have moved for a stay apparently on the theory that what is good for the goose is also good for the

gander—Defendant argued successfully for a stay when FCC law was unsettled in Plaintiff's favor, and now Plaintiffs seek a stay when FCC law is unsettled in Defendant's favor." *Scoma III*, 2021 WL 719655, at *4. The court, however, denied the motion to stay simply on grounds that "the FCC's final ruling may or may not be binding on this Court depending on what the controlling law is on that question at the time of that FCC ruling." *Id*. (underling in original). Notably, however, there was no discussion of the argument that Plaintiff makes here, namely, whether the possible (additional) length of the stay undermines the propriety of a stay under the primary jurisdiction doctrine.

II. LEGAL ARGUMENT

A. Plaintiff Offers Nothing New to Support Lifting the Stay, and Relies Nearly Exclusively on Non-Primary Jurisdiction and Other Non-Applicable Authority

In granting Inovalon's motion to stay, this Court explained that "it is not patently obvious whether, under [then-]existing FCC and Fourth Circuit precedent, the [Inovalon] Fax was a permissible information-only transmission rather than an 'unsolicited advertisement,'" and "the Court's interpretation herein could be inconsistent with either of the agency's forthcoming determinations" on Inovalon's Petition (and a similar petition filed by M3 USA Corporation). Mem. Op., at 12-13. To quote Plaintiff's own counsel: "[n]othing has changed" since the Court stayed this case and "[t]he same reasoning that justified the stay in 2018 applies equally today." *Scoma* Mot. at 8-10.

Once courts invoke the primary jurisdiction doctrine and stay matters pending agency action, as the Court has in this case, they rarely lift the stay unless the reasons for which the courts deferred to the agency and stayed the litigation in the first instance no longer apply. *See, e.g.*, *Comprehensive Health Care Sys. of the Palm Beaches, Inc. v. M3 USA Corp*., No. 9:16-cv-80967,

Order on Mot. to Lift Stay, ECF No. 120 (S.D. Fla. Nov. 9, 2018) ("*M3 USA* Order"); *Physicians Healthsource, Inc. v. Anda, Inc.*, No. 12-60798, Order, ECF No. 126 (S.D. Fla. July 18, 2017) (denying defendant's motion to restore litigation to active docket three years after staying case as "the Court sees no reason for a reopening of the [putative TCPA class action] case or the expenditure of the parties' or judicial resources");[6] *Glauser v. Twilio, Inc.*, No. 4:11-cv-02584, Order Denying Mot. to Lift Stay, ECF No. 88 (N.D. Cal. Dec. 4, 2013) (denying motion to lift stay in putative TCPA class action to allow FCC to issue ruling on ATDS issue);[7] *Union Elec. Co. v. Cable One, Inc.*, No. 4:11–CV–299, 2013 WL 2286055, at *2 (E.D. Mo. May 23, 2013) ("The plaintiff has presented no information that causes the Court to reconsider its previously-expressed reasons for deferring to the primary jurisdiction of the FCC. The Court acknowledges plaintiff's concern that this referral will cause a delay in proceedings. . . . Nevertheless, the Court finds that this detriment is outweighed by the FCC's expertise in classifying services along with the need for uniformity and consistency.");[8] *AT&T Corp. v. Superior Tel. Coop.*, No. 4:07-cv-00043, 2008 WL 11335158, at *5 (S.D. Iowa Nov. 13, 2008) (denying motion to lift stay, holding "the Court remains convinced that, with the exception of the unanticipated and inordinate passage of time, nothing material has changed since the Court" stayed the litigation pending resolution of one of plaintiff's

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[6] Plaintiff's counsel in this case also represented the plaintiff in *Physicians Healthsource* and objected to lifting the stay in that case. *Id.*

[7] In *Glauser*, the court denied two motions to lift the stay filed by that plaintiff, *see Glauser*, Order Denying Mot. to Lift Stay (ECF No. 88) (N.D. Cal. Dec. 4, 2013); *Glauser*, Order (ECF No. 76) (N.D. Cal. Mar 5, 2012), and only lifted the stay a little over two years later when the defendant advised the court that the FCC had ruled on its petition. *See Glauser*, Def. Groupme, Inc.'s Not. of FCC Declaratory Ruling on Groupme's Pet. (ECF No. 94) (N.D. Cal. May 28, 2014).

[8] In *Union Electric*, the court entered the stay 1.5 years earlier, on September 27, 2011, and maintained the stay until April 14, 2016, approximately 4.5 years, when, after recent developments at the FCC, the Court found that "[i]t is no longer clear that the parties' dispute involves any remaining issues for the Court to refer to the FCC under the primary jurisdiction doctrine." *Union Elec. Co. v. Cable One, Inc.*, No. 4:11–CV–299, 2016 WL 10804241, at *3 (E.D. Mo. Apr. 14, 2016). Notably, the court's decision to lift the stay rested solely upon that basis, even though the plaintiff had argued that the passage of time while the FCC was considering the underlying petition suggested that the FCC may never rule on the petition. *See Union Elec.*, Pl.'s Mem. of Law in Supp. of Its Mot. to Re-Open and Return to Active Docket (ECF No. 40), at 5 (E.D. Mo. filed Mar. 10, 2016).

FCC proceeding, and explaining that it would be "premature to take action prior to the FCC's issuance of its . . . order" and that "[t]he parties have not presented the Court with any information that constitutes new or significantly changed circumstances that would support restarting the pending matters");[9] *Sw. Bell Tel., LP v. Vartec Telecom, Inc.*, No. 4:04-CV-1303, 2008 WL 4948475, at *2 (E.D. Mo. Nov. 10, 2008) (denying motion to lift stay where "all of the reasons for deferring to the primary jurisdiction of the FCC remain in place at this time"); *Cox Okla. Telecom, LLC v. Corp. Comm'n of Okla.*, No. CIV-04-1282-M, 2007 WL 895227, at *1-3 (W.D. Okla. Mar. 22, 2007) (denying motion to vacate stay pending FCC decision on petition for declaratory ruling);[10] *Combined Cos., Inc. v. AT&T Corp.*, No. Civ. 95–908, 2006 WL 1540917, at *7 (D.N.J. June 1, 2006) (denying motion to lift stay to allow FCC to issue its ruling and concluding that "[t]he language of the Third Circuit in its opinion of May 31, 1996 is as applicable today as it was then: 'Application of the doctrine of primary jurisdiction rests on considerations of policy in the important communications field and a substantial public interest in securing an agency ruling on the matter in dispute.'").

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[9] The *Superior Telephone Cooperative* stay remained intact for two years and three months (over plaintiff's objection) and was only lifted after the defendant advised the court that the Commission had issued the ruling for which the court was waiting. *See Superior Tel. Coop.*, Order (ECF No. 140) (S.D. Iowa May 4, 2010).

[10] In *Cox Okla. Telcom*, the court criticized the plaintiff for basing its motion to vacate the stay "on case law regarding stays in general rather than stays entered on the basis of primary jurisdiction." 2007 WL 895227, at *2. Plaintiff's Motion in this case suffers the same infirmity as it is based almost entirely on decisions involving stays pending the resolution of other cases (not FCC proceedings) based on those courts' inherent powers to control their dockets, rather than the primary jurisdiction doctrine applicable here. *See Ohio Envt'l Council v. Utd. States Dist. Ct., So. Dist. Of Ohio, E. Div.*, 565 F.2d 393, 395-96 (6th Cir. 1977) (reversing stay in non-TCPA case pending separate action challenging EPA approval of state implementation plan relating to emission standards in large part because of concerns "for the health of the public") (Pl.'s Mot. at 5); *Applegate v. Devitt*, 509 F.2d 106, 107 (8th Cir. 1975) (remanding non-TCPA case to district court to allow plaintiff to move for reconsideration of stay entered pending final disposition of related state court action involving same parties) (Pl.'s Mot. at 5). And, in *Muhammad v. Warden, Baltimore City Jail* (Pl.'s Mot. at 5), the Fourth Circuit vacated and remanded the district court's decision in 1985 to *sua sponte* stay a prisoner action challenging the conditions of plaintiff's confinement under 42 U.S.C. § 1983 pending the plaintiff's release from a federal penitentiary located in Indiana, which would occur at the earliest in 1991, and subsequent return to Maryland. 849 F.2d 107, 110-14 (4th Cir. 1988). The Fourth Circuit agreed that the plaintiff would "find it difficult if not impossible to locate witnesses and conduct fresh discovery after his release . . . effectively end[ing] his lawsuit." *Id.* at 110 (noting further that plaintiff's claim was initiated in 1981).

Indeed, in *M3 USA*, the court denied the plaintiffs' motion to lift a stay that was entered in 2017 in a putative TCPA class action and refused to apply an outer limit to the stay given the importance of the FCC's decision on what constitutes an unsolicited advertisement under the JFPA. Specifically, the Court explained:

> The Court previously granted Defendant M3 USA Corporation's ("Defendant") request to stay this matter pending a ruling from the Federal Communications Commission ("FCC") on its Petition for Expedited Declaratory Ruling, finding that a stay is warranted pursuant to the "primary jurisdiction doctrine." In the instant Motion, Plaintiffs request that the Court lift the stay because more than a year has passed since Defendant estimated the FCC would issue a ruling. Plaintiffs argue that Defendant's prediction about a prompt ruling from the FCC has proven to be false, and upon this basis alone, the Court may lift the stay.
>
> The Court disagrees. ***Plaintiffs do not point to any compelling reason for the Court to alter its determination that a stay continues to be warranted under the "primary jurisdiction doctrine."*** Furthermore, upon review, the authorities relied upon by Plaintiffs do not alter the Court's conclusion. In the alternative, Plaintiffs request that the Court impose an outer limit upon the duration of the stay. At this time, the Court declines to do so, and will continue to review the parties' status reports to determine the ongoing propriety of the stay in this case.

M3 USA Order, at 1-2 (emphasis added and internal citation omitted).[11] The M3 USA stay remains intact nearly 3.5 years after it was entered given that the FCC has not yet issued a ruling on the defendant's petition.

The same holds true with respect to stays of TCPA litigation entered pursuant to courts' inherent powers to control their dockets – where the same reasons that justified the stay in the first place have not changed, the stay should not be lifted. *See, e.g., St. Louis Heart Ctr., Inc. v. The Forest Pharms., Inc*., No. 4:12-cv-02224, Text Order, ECF No. 79 (E.D. Mo. Sept. 16, 2013) (denying plaintiff's motion to reconsider order staying putative JFPA class action pending

[11] This Court specifically relied upon the *M3 USA* litigation in its stay decision here, noting that the "U.S. District Court for the Southern District of Florida [in *M3 USA*] recently stayed a Junk Fax action pending FCC's resolution of similar questions, and the Court's interpretation herein could be inconsistent with either of the agency's forthcoming determinations." Mem. Op. at 13.

resolution of defendant's FCC petition).[12] Mere passage of time is not a sufficient reason to lift a stay, especially one granted under the primary jurisdiction doctrine, and courts have continued stays years longer than the one entered in this case. *See, e.g.*, *M3 USA*, No. 9:16-cv-80967 (maintaining for 3.5 years a stay in JFPA litigation pending FCC decision regarding what constitutes an unsolicited advertisement); *Iowa Network Servs., Inc. v. AT&T Corp.*, No. 3:14-cv-3439, 2019 WL 4861438, at *5-7 (D.N.J. Oct. 2, 2019) (granting defendant's motion to maintain a stay pending FCC proceedings entered four years earlier and noting that "'mere' delay does not, without more, necessitate a finding of undue prejudice and clear tactical disadvantage" to plaintiff) (internal quotations and citation omitted); *Anda*, *supra* at 8 (denying motion to lift stay in JFPA litigation filed three years after entry of stay); *Union Elec.*, 2016 WL 1084241, at *3 (stay lasted for 4.5 years to await FCC ruling); *see also Freeman v. United States*, 83 Fed. Cl. 530, 533-35 (Fed. Cl. 2008) (denying motion to lift stay even though "neither party—nor the Court—expected" the agency proceeding to last seven years, but establishing seven-month time-frame for agency decision before plaintiff could file a renewed motion to lift the stay).

Nothing has changed here that justifies lifting the stay. In fact, given that the Fourth Circuit's decision in *Carlton & Harris I*, which this Court cited as part of the basis for its stay decision, Mem. Op. at 12 ("it is not patently obvious whether, under existing FCC and Fourth Circuit precedent, the Fax was a permissible information-only transmission rather than an 'unsolicited advertisement'"), has been vacated by the Supreme Court,[13] the need for a stay to

[12] Plaintiff's counsel in this case also represented the plaintiff in *Forest Pharmaceuticals*.

[13] As noted above, on remand, the Fourth Circuit found that the 2006 FCC Junk Fax Order was merely interpretative and not binding on the district court, but remanded the case back to the district court for it to determine "what level of deference the court should afford the 2006 FCC [Junk Fax Order] and what the proper meaning of 'unsolicited advertisement' is in light of that deference." *Carlton & Harris III*, 982 F.3d at 266. Four days ago, the *Carlton & Harris* parties finished briefing the plaintiff's motion for leave to file an amended complaint to the district court. The defendant intends to seek dismissal. *See Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, No. 3:15-cv-14887, Rep't of the Parties' Planning Mtg. (ECF No. 71), at 5 (S.D. W.Va. Jan. 19, 2021).

await the FCC's decision on Inovalon's Petition is even more acute. Inovalon has a litigation hold in place and has been preserving potentially relevant documents within its possession, custody, or control since the outset of the litigation; presumably Plaintiff is doing the same with its documents. There is no risk of evidence loss from the parties. Further, the third-party vendor that transmitted the fax at issue was sent a document preservation notice at the outset of the litigation and a reminder notice more recently.[14] Thus, all potentially relevant documents have been and are being preserved.

"[W]hile a stay will slow the plaintiff's pursuit of a possible recovery, it will not pose a substantial risk of loss of evidence (since [defendant] is . . . presumably well aware of its preservation obligations) . . . ." *Creasy v. Charter Commc'ns, Inc.*, -- F. Supp. 3d --, 2020 WL 5761117, at *8 (E.D. La. Sept. 28, 2020) (staying TCPA case and rejecting plaintiff's argument that documents and other evidence will be lost); *see also, e.g.*, *Frantz v. Force Factor, LLC*, No. 20-cv-1012, 2020 WL 8666386, at *3 (S.D. Cal. Nov. 16, 2020) (same); *Trim v. Mayvenn, Inc.*, No. 6460543, 2020 WL 6460543, at *3 (N.D. Cal. Nov. 3, 2020) (granting stay in TCPA litigation and explaining that "[plaintiff's] concern that the requested stay will result in a loss of evidence is, in the absence of supporting facts, no more than speculation"). Further, any concern about fading witness memories (Pl.'s Mot. at 5) similarly falls flat as such evidence is generally is irrelevant in TCPA litigation; documentary evidence is what is key. *O'Hanlon v. 24 Hour Fitness USA, Inc.*, 2016 WL 815357, at *4 (N.D. Cal. Mar. 2, 2016) ("[TCPA l]iability will be established through documentary evidence . . . Such evidence can be preserved . . ."). Here, the parties will largely rely on logs documenting the faxes sent and received, the recipients of such faxes, the fax itself,

[14] Although Plaintiff's counsel never asked, on January 13, 2021, Inovalon's attorney advised him of the identity of the third-party that transmitted the fax at issue. Blynn Decl. ¶ 3. Remarkably, in the seven weeks since, Plaintiff has not even attempted to serve a preservation subpoena on that entity, belying Plaintiff's unfounded claim that the sky is falling and evidence may be lost.

Inovalon's relationships with the recipients, and Plaintiff's contracts with the health plans on whose behalf Inovalon was collecting patient health records. Further, Inovalon has and is preserving a telephone recording of Plaintiff inviting Inovalon to send the complained-of fax. In short, Plaintiff's speculation about potential lost evidence is nothing more than a red herring.

As noted above, Plaintiff cites nearly exclusively non-TCPA cases involving the propriety of stays pending the resolution of other cases—rather than the FCC's determination of a litigant's petition—based on those courts' inherent powers to control their dockets, instead of the primary jurisdiction doctrine applicable in this case. *See supra* n.10. And, those few cases Plaintiff does cite, which involve the TCPA are easily distinguishable. For example, in *Adams v. Nationstar Mortg. LLC* (Pl.'s Mot. at 5-6), the court lifted the stay that it had previously entered in a TCPA autodialer and prerecorded message case, which also involved unrelated claims brought under California debt collection and credit reporting statutes, pending D.C. Circuit TCPA proceedings. No. 15-9912, 2018 WL 702848, at *1-2 (C.D. Cal. Feb. 2, 2018). The court's primary justification for lifting the stay was because "Plaintiff has been unable to prosecute not only his TCPA claim, but also certain aspects of his state law claims that are independent of that cause of action," and those other claims relied, in part, upon oral misrepresentations about the plaintiff's credit that the defendant allegedly made to third parties; the *Adams* plaintiff "'continues to suffer prejudice every single month' in which these misstatements remain on his credit report." *Id*. Unlike the plaintiff in *Adams*, Plaintiff here is not suffering any ongoing harm. Nor, as explained above, is witness testimony much needed in a TCPA JFPA case such as this one. To the contrary, in *Adams*, the plaintiff's non-TCPA claims were based upon oral statements that the defendant allegedly made about the plaintiff's credit. Thus, witness testimony was crucial as to those claims.

Plaintiff's other TCPA authority, *Lee v. LoanDepot.com, LLC*, No. 14-01084, 2015 WL

5032175 (D. Kan. Aug. 25, 2015), actually supports maintaining the stay in this case. There, the court stayed the litigation under the primary jurisdiction doctrine in August 2014 pending an FCC order interpreting the statutory definition of "capacity." *Id*. at *1. It lifted the stay only ***after*** the FCC issued the awaited ruling. *Id*. at *1, *3 ("because the FCC has now ruled on the specific issue of 'capacity,' the first purpose of the stay has been satisfied"). The defendant argued that the stay should remain in place, pursuant to the court's inherent power to control it docket (rather than under the primary jurisdiction doctrine), because the FCC's decision had been appealed to the D.C. Circuit. Although the court rejected the defendant's request and lifted the stay, it made clear that "[i]f the Circuit has not ruled before the case is prepared for dispositive motions or trial, the court could entertain another motion for stay at the time. The court would then avoid a potentially conflicting decision, satisfying the second purpose of the stay." *Id*. at *3. This Court, like the *Lee* court, should wait until the FCC issues its decision on Inovalon's Petition before lifting the stay.

The factors the Court analyzed before applying the primary jurisdiction support continuing the stay in this case. Today, as much as in September 2018, "it is not patently obvious whether . . . [Inovalon's] Fax was a permissible information-only transmission rather than an 'unsolicited advertisement'" "under existing FCC and Fourth Circuit precedent[.]" Mem. Op. at 12. The FCC has advised that that Inovalon's Petition "***is still under active consideration***." Blynn Decl. ¶ 2 (emphasis added). Lifting the stay to permit the case to move forward on the merits without first obtaining a determination from the FCC on what constitutes an "advertisement" would put the Court in precisely the situation it sought to avoid by awaiting a decision from the Commission under the primary jurisdiction doctrine. All of the reasons for deferring to the primary jurisdiction of the Commission remain in place. The Court should deny Plaintiff's Motion and leave the stay intact until the FCC resolves Inovalon's Petition.

B. The Fourth Circuit's *Carlton & Harris III* Decision Supports Maintaining the Stay in This Case

One of the bases this Court cited for staying this case was that "it is not patently obvious whether, under existing FCC and Fourth Circuit precedent [*Carlton & Harris I*], the Fax was a permissible information-only transmission rather than an 'unsolicited advertisement." Mem. Op. at 12. The current state of Fourth Circuit law is even less clear now that *Carlton & Harris I* has been vacated; there is no longer "Fourth Circuit precedent."

Plaintiff argues that the Fourth Circuit's decision in *Carlton & Harris III* counsels against obtaining the FCC's determination on Inovalon's Petition because, according to Plaintiff, the determination would not be binding on this Court. See Pl.'s Mot. at 1, 7. This argument assumes too much and mischaracterizes the holding in *Carlton & Harris III*.

First, at no time did the Court in *Carlton & Harris III* hold that the FCC's determination of Inovalon's Petition would not be binding on this Court, nor did it prophylactically hold that no FCC decisions would be binding. Rather, in *Carlton & Harris III*, the parties ***agreed*** only that the FCC's 2006 Junk Fax Order was merely interpretative, and thus non-binding. 928 F.3d at 263-64. There is no indication that the FCC's forthcoming decision on Inovalon's Petition will not be binding. Nor could Plaintiff seriously take a contrary position given that its attorneys argued just last month that final full Commission orders, in fact, are binding on district courts. *See Scoma* Mot. at 5 (arguing that a "'final order' of the FCC . . . would be binding on this Court under the [Hobbs Act]"); *id*. at 7 (arguing that a final FCC order would have the "'force of law' in this Court").

Second, even if the resolution of Inovalon's Petition is a non-binding, interpretive agency rule, it may still be entitled to this Court's deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See Carlton & Harris III*, 928 F.3d at 264. This is precisely why the Court in *Carlton*

& Harris III remanded to the district court to consider whether the 2006 FCC Junk Fax Order was entitled to deference in the first instance and what amount. *Id.* ("While the district court disagreed (in dicta) with Carlton & Harris's reading of the 2006 FCC Rule, the court didn't examine the Rule's persuasiveness under *Skidmore* or the extent to which that persuasiveness requires deference. Rather than guess as to how much deference (if any) the district court is inclined to give the Rule, we think the better course is to allow that court to analyze that issue in the first instance."). Plaintiff effectively urges this Court to bypass *Skidmore* and dismiss the Commission's forthcoming determination before it is even made, but that is the opposite conclusion that the Fourth Circuit reached in *Carlton & Harris III.*

The Court should maintain the stay in this action.

C. Alternatively, Rather Than Lifting the Stay, the Court Should Request that the FCC Provide It With a Status Update and Timetable For Its Decision on Inovalon's Petition

Shortly before the January 2021 conference with the Court, the FCC's Consumer & Governmental Affairs Bureau advised Inovalon that Inovalon's Petition is "still under active consideration." Blynn Decl. ¶ 2. If the Court is inclined to lift the stay, rather than disrupt the FCC's "active consideration" and resulting determination, this Court, first, should request that the FCC's Office of General Counsel provide a timetable for its forthcoming decision. *See, e.g.*, *Heinrichs v. Wells Fargo Bank NA,* 3:13-cv-05434, Req. to the Office of Gen. Counsel of the Fed. Commc'ns Commission, ECF No. 57 (N.D. Cal. Sept. 3, 2014). This will allow the Court to hear directly from the agency on the issue.

III. CONCLUSION

For the foregoing reasons, Inovalon respectfully requests that the Court deny Plaintiff's Motion and leave the stay that it entered previously intact. In the alternative, before lifting the

stay, the Court should directly request that the FCC's Office of General Counsel advise whether the Commission anticipates issuing a decision on Inovalon's Petition in the near term and, if not, to state the timetable for such determination.

Dated: March 5, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February 2021, a copy of the foregoing Defendants' Opposition to Plaintiff's Motion to Lift Stay was served on all counsel of record via the Court ECF System.

/s/ Daniel S. Blynn

An Attorney for Defendants

EXHIBIT 1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MEYERS DIVISION

SCOMA CHIROPRACTIC, P.A., WILLIAM P. GRESS, and FLORENCE MUSSAT M.D., S.C., individually and as the representatives of a class of similarly-situated persons,	)	No. 2:16-cv-41-FtM-66MRM
Plaintiffs,	)	
v.	)	
MASTERCARD INTERNATIONAL INC.,	)	
Defendant.	)	

PLAINTIFFS' MOTION TO STAY PENDING FINAL FCC DECISION ON AMERIFACTORS PETITION

Plaintiffs, Scoma Chiropractic, P.A. ("Scoma"), Florence Mussat, M.D., S.C. ("Mussat"), and Dr. William P. Gress ("Gress") (collectively, "Plaintiffs"), respectfully request that this Court stay this action pending a final decision by the Federal Communications Commission ("FCC") on the Application for Review filed from the order of the FCC's Consumer & Governmental Affairs Bureau in *In re Amerifactors Fin. Group, LLC Pet. for Expedited Declaratory Ruling*, CG Docket Nos. 02-278, 05-338, Declaratory Ruling, 2019 WL 6712128 (CGAB Dec. 9, 2019) ("Amerifactors Bureau Order"). In support, Plaintiffs state as follows:

1. From June 1, 2018, to January 3, 2020, this action was stayed at the request of Defendant Mastercard Incorporated Inc. ("Mastercard"), and over Plaintiffs' objection, pending a decision on a petition filed with the FCC by a non-party to this action named Amerifactors Financial Group, LLC ("Amerifactors"). (Doc. 152, Order Granting Stay).

2. After the FCC's Consumer & Governmental Affairs Bureau issued the Amerifactors Bureau Order on December 9, 2019, the Court lifted the stay and set a schedule for Plaintiffs' Amended Motion for Class Certification. (Doc. 156, Order Lifting Stay; Doc. 158, Class Certification Briefing Schedule).

3. On January 8, 2020, the plaintiff in the private TCPA action pending against Amerifactors in the United States District Court for the District of South Carolina filed an "Application for Review" of the Amerifactors Bureau Order with the full Federal Communications Commission pursuant to 47 C.F.R. § 1.115, which is a "condition precedent to judicial review" under 47 U.S.C. § 155(c)(7). (*See* Ex. 1, *In re Amerifactors Fin. Group, LLC Pet. for Expedited Declaratory Ruling*, CG Docket Nos. 02-278, 05-338, Application for Review of Career Counseling, Inc. (Jan. 8, 2020)).

4. On January 23, 2020, Amerifactors filed its Opposition to the Application for Review. (*See* Ex. 2, *In re Amerifactors Fin. Group, LLC Pet. for*

Expedited Declaratory Ruling, CG Docket Nos. 02-278, 05-338, Amerifactors Opp. to Application for Review (Jan. 23, 2020)).

5. Also on January 23, 2020, Mastercard, the Defendant in this case, filed an Opposition to the Application for Review. (*See* Ex. 3, *In re Amerifactors Fin. Group, LLC Pet. for Expedited Declaratory Ruling*, CG Docket Nos. 02-278, 05-338, Mastercard Int'l Inc.'s Opp. to Application for Review of Career Counseling (Jan. 23, 2020)).

6. On January 20, 2021, FCC Chairman Pai resigned following President Biden's inauguration. *See* Chairman Pai Statement Upon Departing the FCC, *available at* https://docs.fcc.gov/public/attachments/DOC-369408A1.pdf (Jan. 20, 2021). The full FCC had not decided the Application for Review of the Amerifactors Bureau Order as of January 20, 2021.

7. On January 21, 2021, President Biden designated FCC Commissioner Jessica Rosenworcel as Acting Chairwoman of the Commission. *See* Statement of Jessica Rosenworcel on Being Designated Acting Chairwoman, *available at* https://docs.fcc.gov/public/attachments/DOC-369420A1.pdf.

8. On January 29, 2021, Magistrate Judge McCoy issued a Report & Recommendation on Plaintiffs' Amended Motion for Class Certification, recommending that this Court conclude that, under the reasoning of the Amerifactors Bureau Order, users of "online fax services," like Plaintiff Mussat,

lack Article III standing and have no TCPA claim because an unsolicited advertisement is not sent "to a telephone facsimile machine," when it is received by a fax server used by an "online fax service" and then forwarded to the end-user via email. (Doc. 172, Report at 35).

9. On February 12, 2021, Plaintiffs filed their Objections to the Report, arguing that the Report's "administrative feasibility" rationale is erroneous under the Eleventh Circuit's decision (issued four days after the Report) in *Cherry v. Dometic Corp.*, --- F.3d ---, No. 19-13242, 2021 WL 346121, at *5 (11th Cir. Feb. 2, 2021), and arguing that the Report erroneously recommends that this Court defer to the Amerifactors Bureau Order.

9. Plaintiffs now submit that, if the fate of class certification in this case (as well as the fate of Plaintiff's Mussat's individual claim) is to depend on the validity of the Amerifactors Bureau Order, then the prudent course is to stay the case until the full FCC issues a "final order" on the Application for Review of the Amerifactors Bureau Order.

Precise Relief Requested

10. Plaintiffs request the entry of an Order staying this case pending the issuance of a "final order" of the FCC on Career Counseling, Inc.'s Application for Review of the Amerifactors Bureau Order, 2019 WL 6712128, filed January 8,

2020, in the FCC proceeding entitled, *In re Amerifactors Fin. Group, LLC Pet. for Expedited Declaratory Ruling*, CG Docket Nos. 02-278, 05-338.

Basis for Relief Requested

11. A stay is appropriate under the Court's inherent powers under *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936), because awaiting a "final order" on the "online fax services" issue from the FCC will not unduly prejudice Mastercard, it will simplify the issue of whether users of "online fax services" are protected by the TCPA, and it will reduce the burden of litigation on the parties and on the court.

12. A stay is also warranted under the "primary jurisdiction" doctrine. This Court found in its initial stay order that "there is a risk that the Court could reach a determination that is inconsistent with the FCC's *ultimate decision* on the AmeriFactors Petition, and this Court is ultimately bound to adhere to the FCC's interpretations of the TCPA." *Scoma Chiropractic, P.A. v. Dental Equities, LLC*, No. 2:16-CV-41-FTM-99MRM, 2018 WL 2455301, at *3 (M.D. Fla. June 1, 2018). There has been no "ultimate decision" on the Amerifactors Petition because, although the Bureau has issued a decision on delegated authority, there has been no "final order" of the FCC that would be binding on this Court under the Administrative Orders Review Act (the "Hobbs Act"), 28 U.S.C. 2342(1).

MEMORANDUM OF LAW

I. Legal Standards

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In determining whether to grant a stay, courts generally examine three factors: (1) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (2) whether a stay will simplify the issues and streamline the trial; and (3) whether a stay will reduce the burden of litigation on the parties and on the court. *Freedom Scientific, Inc. v. GW Micro, Inc.*, No. 8:05-cv-1365-T-33TBM, 2009 WL 2423095, *1 (M.D. Fla. July 29, 2009).

Under the primary-jurisdiction doctrine, the Court may stay a case pending an agency decision where (1) the expertise of the agency is called for and (2) there is a need for uniform interpretation of a statute or regulation. *Scoma Chiropractic*, 2018 WL 2455301, at *3 (citing *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000)). "The United States Supreme Court has made clear that there is no 'fixed formula . . . for applying the doctrine of primary jurisdiction.'" *Id.* (quoting *United States v. Western P.R. Co.*, 352 U.S. 59, 64 (1956)).

II. Argument

A. A stay is warranted under the Court's inherent powers.

1. A stay will not unduly prejudice or tactically disadvantage Mastercard.

The Court found in staying this case in 2018 that "[a]ny delay plaintiffs will experience in this case is outweighed by the potential prejudice that could inure to MasterCard and its liability to class members that might very well not fit within the proposed class following the FCC's decision." *Scoma Chiropractic*, 2018 WL 2455301, at *4. The converse is also true today: any delay to Mastercard from reinstating the stay pending a "final order" of the FCC is outweighed by the potential prejudice to the members of the Online Fax Services Class, if their claims are found to have been eliminated by the Amerifactors Bureau Order, but that order is rejected by the full Commission on the Application for Review.

In staying the case, the Court will simply be awaiting a "Final Order" of the FCC, which the Court noted in previously staying the case would "[have] the force of law" in this Court under Eleventh Circuit authority, unlike the Amerifactors Bureau Order. *Scoma Chiropractic*, 2018 WL 2455301, at *4 (citing *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1121 (11th Cir. 2014)). Mastercard is actively litigating the Application for Review before the full Commission, filing an opposition to the Application for Review on January 23, 2020. (*See* Ex. 3, *In re Amerifactors Fin. Group, LLC Pet. for Expedited Declaratory Ruling*, CG Docket

Nos. 02-278, 05-338, Mastercard Int'l Inc.'s Opp. to Application for Review of Career Counseling (Jan. 23, 2020)).

Awaiting a binding "final order" of the FCC on the "online fax services" issue would not prejudice Mastercard, and the stay is warranted under the Court's inherent powers.

2. A stay will simplify the issues and streamline the trial.

The Court found in staying the case in 2018 that "a stay will simplify and streamline the issues raised in this case" because the FCC's "final order" would be "binding" under *Mais*, 768 F.3d at 1121. *Scoma Chiropractic*, 2018 WL 2455301, at *4. The same is true today. There has been no "final order" of the FCC on the Amerifactors Petition, and it remains the case that Eleventh Circuit authority holds that district courts are bound by the FCC's interpretations of the TCPA.[1] A stay would serve judicial economy, and is warranted under the Court's inherent powers.

3. A stay will reduce the burden of litigation on the parties and on the Court.

This Court found in staying the case in 2018 that a stay pending a "final order" of the FCC would "reduce the burden of litigation on the parties and on the Court" because the FCC's "final order" would be "binding" under *Mais*, 768 F.3d

[1] The concurring opinion in *Gorss Motels, Inc. v. Safemark Sys., LP*, 931 F.3d 1094, 1109 (11th Cir. 2019) (Pryor, J., concurring), urged the Eleventh Circuit to overrule this authority in an appropriate case and hold the FCC's interpretations of the TCPA in a "final order" are not binding, following the concurring opinion in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2057 (2019) (Kavanaugh, J., concurring).

at 1121. *Scoma Chiropractic*, 2018 WL 2455301, at *4. Again, nothing has changed. A stay pending a "final order" of the FCC on the Amerifactors Petition would reduce the burden of litigation, and the requested stay is warranted under the Court's inherent powers.

B. A stay is warranted under the primary-jurisdiction doctrine.

1. The full FCC's expertise is relevant, and a "final order" will be binding.

In staying the case in 2018, the Court ruled that "[d]eferring to the FCC would advance the basic purpose of the [primary-jurisdiction] doctrine because the specialized knowledge of the FCC is needed to answer the questions before the Court" regarding the scope of the definition of "telephone facsimile machine" in 47 U.S.C. § 227(a)(3). *Scoma Chiropractic*, 2018 WL 2455301, at *3. The same holds true today. "The FCC" has not addressed the Amerifactors Petition, but the Application for Review of the Bureau's ruling on that petition is now pending before a newly-constituted FCC. A stay is justified under the primary-jurisdiction doctrine.

2. There is a need for uniform interpretation of a statute or regulation.

In staying the case in 2018, this Court ruled that "uniformity of administration" justified a stay because "if this case proceeds, there is a risk that the Court could reach a determination that is inconsistent with the FCC's ultimate decision on the AmeriFactors Petition, and this Court is ultimately bound to adhere

to the FCC's interpretations of the TCPA" in a "Final Order." *Scoma Chiropractic*, 2018 WL 2455301, at *3. There has been no "ultimate decision" or "Final Order" of the FCC, but the matter is now before the full FCC on the Application for Review. The same reasoning that justified the stay in 2018 applies equally today.

Rule 3.01(g) Certification

On February 12, 2021, Plaintiff's counsel conferred with counsel for Mastercard International concerning the relief sought in Plaintiff's motion. Counsel for Mastercard International opposes the relief sought in Plaintiff's motion.

Conclusion

For the foregoing reasons, the Court should stay this action pending a "final order" of the FCC on the Application for Review from the Amerifactors Bureau Order and grant any other relief the Court deems appropriate.

Respectfully submitted,

SCOMA CHIROPRACTIC, P.A., FLORENCE MUSSAT, M.D., S.C, and DR. WILLIAM P. GRESS, individually, and as the representative for a class of similarly-situated persons

By: /s/ Ryan M. Kelly
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CERTIFICATE OF SERVICE

I declare under penalty of perjury that on February 12, 2021, a copy of the foregoing Plaintiffs' Motion to Stay Pending Final FCC Decision on Amerifactors Petition was filed with the CM/ECF system, which will serve copies on all parties of record.

/s/ Ryan M. Kelly

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

ERIC B. FROMER CHIROPRACTIC, INC., a California corporation, individually and as the representative of a class of similarly-situated persons, Plaintiff, vs. INOVALON HOLDINGS, INC., et al. Defendants.	No. 8:17-cv-03801-GJH

DECLARATION OF DANIEL S. BLYNN IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO LIFT STAY

I, Daniel S. Blynn, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that:

1. I am a Partner with the law firm of Venable LLP, with offices at 600 Massachusetts Avenue, NW, Washington, DC 20001. I am over the age of eighteen and am competent to execute this declaration, which is based on my personal knowledge and information.

2. In response to my inquiry regarding the status of the Federal Communications Commission's ("FCC") determination of Inovalon's Petition for Expedited Declaratory Ruling Clarifying Unsolicited Advertisement Provision of Telephone Consumer Protection Act and Junk Fax Prevention Act ("Inovalon's Petition"), on January 5, 2021, a representative from the FCC's Consumer and Governmental Affairs Bureau called and told me that Inovalon's Petition "is still under active consideration."

3. On January 13, 2021, one of Plaintiff's counsel, Ryan Kelly, and I had a telephone conversation regarding this case. During that call, I provided Mr. Kelly with informal discovery,

including, among other things, the number of faxes at issue that were sent and received, and the identity of the third-party vendor that sent them.

I hereby affirm, under penalty of perjury, that the foregoing is true and correct on this 5th day of March, 2021.

Daniel S. Blynn