

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

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	CG Docket No. 05-338
Amerifactors Financial Group, LLC, Petition for)	
Expedited Declaratory Ruling)	

**Career Counseling, Inc.’s Comments on Amerifactors Financial Group, LLC’s
Petition for Expedited Declaratory Ruling**

Career Counseling, Inc. (“Career Counseling”), respectfully submits these comments on the Petition for Expedited Declaratory Ruling filed by Amerifactors Financial Group, LLC (“Amerifactors” or “Petitioner”).¹ Career Counseling is the plaintiff in a private action against Amerifactors brought under the Telephone Consumer Protection Act of 1991 (“TCPA”), pending in the United States District Court for the District of South Carolina.² The Consumer & Governmental Affairs Bureau sought comments on the Amerifactors Petition on July 18, 2017.³ As argued below, the Commission should deny the Petition.

I. The Petition presents no “controversy” or “uncertainty” to be resolved.

A. The Commission has rejected every attempt by fax advertisers and fax broadcasters to circumvent the TCPA by arguing that faxes viewed by the recipient on a computer are not sent to a “telephone facsimile machine.”

The Amerifactors Petition raises no “controversy” or “uncertainty” for the Commission to resolve, as required by Commission Rule 1.2.⁴ As the Public Notice observes, the Petition

¹ *Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, 05-338 (July 13, 2017) (“Pet.”).

² *Career Counseling, Inc. v. Amerifactors Fin. Group, LLC*, No. 16-cv-0313-JMC (D.S.C.).

³ *Consumer & Governmental Affairs Bureau Seeks Comment on Amerifactors Financial Group, LLC’s Petition for Expedited Declaratory Ruling under the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 05-338 (July 18, 2017).

⁴ 47 C.F.R. § 1.2.

seeks “a declaratory ruling that the TCPA does not apply to fax advertisements that the recipient receives through online fax services or on a device other than a telephone facsimile machine.”⁵ The Commission has rejected this argument repeatedly over its 20-plus years of enforcing and interpreting the TCPA.

Congress passed the faxing provisions of the TCPA⁶ for the express “purpose” of “facilitat[ing] interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers.”⁷ The statute makes it unlawful to “use any telephone facsimile machine, computer, or other device *to send*, to a telephone facsimile machine, an unsolicited advertisement,” unless certain exceptions are met.⁸ The statute defines “telephone facsimile machine” as any “equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.”⁹ Congress authorized the Commission to “implement” this prohibition.¹⁰

In 1995, the Commission ruled that the statutory definition of “telephone facsimile machine” includes “computer fax modem boards,” which “enable personal computers to transmit messages to or receive messages from conventional telephone facsimile machines *or other computer fax modem boards*,” holding such devices are “telephone facsimile machines” under

⁵ Pub. Notice at 1.

⁶ Pub. L. No. 102-243, § 3(a), 105 Stat. 2394.

⁷ S. Rep. 102-178, 1, 1991 U.S.C.C.A.N. 1968, 1968.

⁸ 47 U.S.C. § 227(b)(1)(C) (emphasis added).

⁹ *Id.* § 227(a)(3).

¹⁰ *Id.* § 227(b)(2).

the TCPA.¹¹ No party sought reconsideration, and no “aggrieved party” filed an appeal of this aspect of the 1995 Order under the Administrative Orders Review Act (the “Hobbs Act”).¹²

In 2002, the Commission initiated a rulemaking proceeding to update its regulations, seeking public comment on, among other issues, the “effectiveness of these regulations and on any developing technologies, such as *computerized fax servers*, that might warrant revisiting the rules on unsolicited faxes.”¹³ The Commission noted that “[i]n considering any possible rule changes, we will take into account both the record developed during this proceeding, as well as the Commission’s extensive enforcement experience regarding the rules on unsolicited fax advertisements.”¹⁴

Following notice and comment, the Commission issued its order, noting that “[t]he marketplace for telemarketing has changed significantly in the last decade,” including the rise of “fax broadcasters,” who “enable sellers to send advertisements to multiple destinations at relatively little cost” through the use of computers.¹⁵ The Commission reiterated that “unsolicited faxes impose costs on consumers, result in substantial inconvenience and disruption, and also may have serious implications for public safety.”¹⁶

¹¹ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 FCC Rcd. 12391, 12405, ¶ 28 (rel. Aug. 7, 1995) (“1995 Order”) (emphasis added)

¹² 28 U.S.C. § 2342(1).

¹³ *In re Rules & Regulations Implementing Tel. Consumer Prot. Act of 1991*, 17 FCC Rcd. 17459, 17482 (Pub. Notice Sept. 18, 2002) (emphasis added).

¹⁴ *Id.*

¹⁵ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14021–22, ¶ 8 (rel. July 3, 2003) (“2003 Order”).

¹⁶ *Id.*

The Commission concluded that when a fax is sent from a computer to a “computerized fax server,” the “computerized fax server” is a “telephone facsimile machine.”¹⁷ The Commission reasoned that the TCPA “broadly applies to any equipment that has the *capacity* to send or receive text or images,” and that the focus on the “capacity to transcribe text or images” is designed to “ensure that the prohibition on unsolicited faxing not be circumvented.”¹⁸ No party sought reconsideration of this portion of the 2003 Order, and no “aggrieved party” filed a judicial appeal of this aspect of the 2003 Order.

On September 29, 2009, WestFax, Inc., one of the largest fax broadcasters in the country, filed a petition asking the Commission to “clarify” the 2003 Order to rule that an “efax” is not sent to a “telephone facsimile machine” and thus not covered by the TCPA.¹⁹ WestFax argued that the evils Congress sought to remedy in the TCPA do not “make[] any sense” when applied to efaxes, and that “the House Report findings above are terribly dated.”²⁰ WestFax argued that Congress’s findings regarding lost paper, toner, as well as its findings regarding time wasted “monitoring” unwanted faxes by employees, and “inability to process actual business communications or lines or printers tied up,” were “not accurate with respect to faxes sent to fax servers.”²¹ WestFax argued, “[t]his is the 21st century,” and asked the FCC to update its rules to account for “fax servers.”²²

¹⁷ *Id.* ¶ 200.

¹⁸ *Id.* ¶ 201 (emphasis added).

¹⁹ *WestFax, Inc. Petition for Consideration & Clarification*, CG Docket Nos. 02-278, 05-338 (Sept. 24, 2009).

²⁰ *Id.* at 4.

²¹ *Id.*

²² *Id.*

On August 28, 2015, the Consumer & Governmental Affairs Bureau denied the WestFax Petition, ruling that the definition of “telephone facsimile machine” includes “the fax server and modem, along with the computer that receives the efax because together they by necessity have the *capacity* to ‘transcribe text or images (or both) from an electronic signal received over a telephone line onto paper.’”²³ The Bureau rejected “the contention that efaxes do not implicate the TCPA’s consumer protection concerns” because they “may shift the advertising costs of paper and toner to the recipient if they are printed” and can cause “interference, interruptions, and expense” the same as any junk fax.²⁴ The Bureau ruled that efaxes “just like paper faxes, can increase labor costs for businesses, whose employees must monitor faxes to separate unwanted from desired faxes.”²⁵ The Bureau relied on the 2003 Order, ruling that “it would make little sense to apply a different set of rules (or, in this case, no rule at all) to faxes sent to one type of device (a standalone fax machine) versus another (a computer and its attachments) when the sender generally does not know what device will receive the fax.”²⁶

No party sought reconsideration of the WestFax Order with the Bureau, and no “aggrieved party” filed an application for review of the WestFax Order to the full Commission. Because it was not appealed, the Bureau’s WestFax Order carries “the FCC’s imprimatur,” as if it was issued by the full Commission itself.²⁷

²³ *In re WestFax, Inc. Petition for Consideration & Clarification*, 30 FCC Rcd. 8620, 8623, ¶ 9 (rel. Aug. 28, 2015) (“WestFax Order”) (emphasis added).

²⁴ *Id.* ¶ 11.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Ind. Bell Tel. Co., Inc. v. McCarty*, 362 F.3d 378, 387 (7th Cir. 2004) (holding that “[a]lthough we recognize that actions decided by delegation of authority are subject to review by the FCC,” a bureau order that is not overruled by the Commission nevertheless carries “the FCC’s imprimatur” and “is entitled to our deference”) (citing 47 C.F.R. § 1.102(b)).

In sum, the Commission has consistently rejected the argument that a fax is not “sent to” a “telephone facsimile machine” when it is received by the end user on a computer. All of the equipment involved has the *capacity* to transcribe text or images from an electronic signal over a telephone line to paper, and that focus on *capacity*—as in the autodialer context²⁸—is designed to prevent fax advertisers from circumventing the law and to protect consumers. The Commission has never wavered on this approach, and there is no “controversy” or “uncertainty” to resolve, requiring dismissal of the Petition.

B. There is no controversy or uncertainty among the courts applying the Commission’s rulings.

The courts have consistently applied the Commission’s rulings on this subject in private TCPA enforcement actions. The Seventh Circuit Court of Appeals held in *Holtzman v. Turza* that “[e]ven a recipient who gets the fax on a computer and deletes it without printing suffers *some* loss: the value of the time necessary to realize that the inbox has been cluttered by junk,” and “[t]hat loss, and the statutory remedy, are the same for all recipients.”²⁹

The Sixth Circuit recognized in *American Copper & Brass, Inc. v. Lake City Indus. Prods.*, that “Congress was generally concerned with the costs associated with unsolicited fax advertisements. But unsolicited fax advertisements impose costs on all recipients, irrespective of ownership and the cost of paper and ink, because such advertisements waste the recipients’ time and impede the free flow of commerce.”³⁰ The Eighth Circuit held in *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.* that “unsolicited fax advertising interferes with company switchboard

²⁸ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7975–76, ¶¶ 19–20 (rel. July 10, 2015).

²⁹ 728 F.3d 682, 684 (7th Cir. 2013); *see also Imhoff Inv., LLC v. Alfocchino, Inc.*, 792 F.3d 627, 632 (6th Cir. 2015) (quoting *Turza* with approval).

³⁰ 757 F.3d 540, 544 (6th Cir. 2014) (emphasis added).

operations and burdens the computer networks of those recipients who route incoming faxes into their electronic mail systems.”³¹

In at *J2 Glob. Commc’ns, Inc. v. Protus IP Sols.*, two fax broadcasters who provided online fax services through which they received subscribers’ faxes and converted them to emails argued that, by intercepting and converting these faxes to emails, the broadcasters were the “recipients” and had standing to assert TCPA claims.³² The district court rejected this argument, holding that “[g]iven the plain language, purpose, and statutory scheme of the TCPA, the Court concludes that ‘the recipient’ of an unsolicited fax is the person to whom the fax is directed and not an unknown intermediary, like j2 [or Protus], who intercepts the transmission.”³³ The district court held that under the Commission’s rules, persons who receive faxes on a computer as opposed to a stand-alone fax machine have no less right to sue for TCPA violations:

[T]he FCC has concluded that faxes sent to personal computers equipped with, or attached to, modems and to computerized fax servers are subject to the TCPA’s prohibition on unsolicited faxes. However, a facsimile machine does not have standing under the TCPA; rather, “the recipient” has standing, “the recipient” being the person to whom the . . . unsolicited fax advertisement is directed.³⁴

More recently, in *Whiteamire Clinic, P.A., Inc. v. Cartridge World N. Am., LLC*, the plaintiff received the subject fax via an online fax service like the hypothetical service described in the Amerifactors Petition, which then converted it to email.³⁵ The defendant argued that the plaintiff lacked standing to sue, and the district court rejected the argument, holding that, despite the lack of wasted paper or ink toner, the fax nevertheless “wasted [plaintiff’s] time reviewing

³¹ 323 F.3d 649, 655 (8th Cir. 2003).

³² 2010 WL 9446806, at *8 (C.D. Cal. Oct. 1, 2010).

³³ *Id.*

³⁴ *Id.* at *7 (citing 2003 Order).

³⁵ 2017 WL 561832, at *3 (N.D. Ohio Feb. 13, 2017).

the junk emails that could have been spent on other business activities,” and “impede[d] Plaintiff’s ability to engage in the free flow of commerce,” and that “Plaintiff suffered damages to his business in lost time and in diversion of resources and can be made whole by injunctive and monetary relief through this Court.”³⁶ There is no controversy or uncertainty among the courts for the Commission to resolve, and the Petition should be dismissed.

C. Amerifactors provides no evidence that any person received its fax advertisements via an online fax service.

Amerifactors does not claim that Career Counseling, the plaintiff in the underlying TCPA litigation, received an Amerifactors fax via an “online fax service” or in any manner other than a traditional stand-alone fax machine.³⁷ Amerifactors does not claim that *any* person received its faxes in this manner, much less provide any evidence to support such a claim.³⁸

In the private TCPA action, Amerifactors moved for a stay of proceedings (which Plaintiff opposed and which the court has not yet ruled upon), on the basis that it “believes that many, if not the majority of the alleged faxes at issue in this case” were received by an “online fax service,” but it provides no evidence for this “belief.”³⁹ For this independent reason, Amerifactors fails to show there is any real “controversy” to be decided, as is its burden on its Petition for Declaratory Ruling.

II. Amerifactors’s constitutional challenge fails.

Amerifactors concedes that the standard for its First Amendment challenge is not “strict scrutiny,” but the lower standard for regulating “commercial speech” under *Central Hudson Gas*

³⁶ *Id.*; see also *Hoffman v. One Techs., LLC*, 2017 WL 176222, at *2 (W.D. Wash. Jan. 17, 2017) (*Spokeo* satisfied in action for violation of state statute prohibiting “phishing” emails).

³⁷ Pet. at 1–32.

³⁸ *Id.*

³⁹ Ex. A, Amerifactors Mem. Supp. Mot. Stay at 2.

& Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980).⁴⁰ The *Central Hudson* Court recognized the “distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech,” holding the Constitution “accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”⁴¹ Under *Central Hudson*, commercial-speech regulations need only be justified by a substantial government interest, directly advance that interest, and be narrowly drawn to serve that interest.⁴² The standard does not require “the least restrictive means” necessary to accomplish the interest or a perfect fit between means and ends.⁴³ It requires only a “reasonable fit” in “proportion to the interest served.”⁴⁴

Two federal circuit courts of appeal, the Eighth and Ninth, have squarely addressed First Amendment challenges to the TCPA’s fax-advertising regime, both upholding the statute.⁴⁵ Amerifactors argues that these decisions are distinguishable, and that the government has no substantial interest in preventing unsolicited fax advertising where an “online fax service” is involved, because paper and ink are not automatically used. This argument ignores “the value of the time necessary to realize that the inbox has been cluttered by junk,” for which “[t]hat loss,

⁴⁰ Amerifactors Pet. at 29.

⁴¹ *Id.* at 562–63; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (where statute “regulates commercial messages to protect consumers from . . . aggressive sales practices . . . the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review”).

⁴² *Id.* at 566.

⁴³ *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

⁴⁴ *Id.*

⁴⁵ *Missouri v. Am. Blast Fax, Inc.*, 323 F.3d 649, 660 (8th Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004); *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 57 (9th Cir. 1995); *see also Texas v. Am. Blast Fax, Inc.*, 159 F. Supp. 2d 936, 939 (W.D. Tex. 2001) (TCPA “applies exclusively to commercial speech, and is not a ‘content-based’ regulation for purposes of the First Amendment”).

EXHIBIT A

any stay requests to allow the parties to pursue their administrative remedies under the Hobbs Act). If the FCC grants AmeriFactors' petition, the Hobbs Act would preclude Plaintiff from challenging that order in this Court. *See Nack*, 715 F.3d at 685 (Hobbs Act requires challenges of FCC orders to be brought first with the agency itself and, if denied, appealed directly to the Court of Appeals).

This case should, therefore, be stayed consistent with the Primary Jurisdiction Doctrine and the Hobbs Act because the relief sought must first be requested from the FCC and if granted may be dispositive of Plaintiff's putative class action claims.

INTRODUCTION

On July 13, 2017, AmeriFactors filed a Petition For Expedited Declaratory Ruling with the FCC (Exhibit 1) seeking a clarification that the TCPA does not apply to fax transmissions that the recipient receives through online fax services or on a device other than a telephone facsimile machine. If the FCC makes the requested clarification, an individual case by case analysis will be required to determine whether the putative class members received the complained of facsimiles on a telephone facsimile machine over a regular telephone line or on a computer or some other device over the internet. Individual issues will, therefore, predominate over the common issues and preclude class certification.

AmeriFactors requests a stay of this case to provide the FCC the opportunity to consider and rule on its pending Petition. The ruling should clarify the FCC's position on whether the TCPA applies to fax transmissions that the recipient receives through online fax services or on a device other than a telephone facsimile machine. AmeriFactors believes that many, if not the majority of the alleged faxes at issue in this case were received through such an online service

and/or on a device other than a telephone facsimile machine. Staying this case pending the ruling will conserve party and judicial resources, narrow the issues in dispute and promote efficiency. Such stays have routinely been granted in other cases involving parties awaiting action on TCPA Petitions pending before the FCC. *See e.g., Barron's Outfitters Inc. v. Big Hairy Dog Information Systems and Retail Pro International, LLC*, No. 14-04335 (D.S.C. June 19, 2015, ECF No. 30) (Exhibit 2); *Jones v. American Credit Acceptance Corp. et al.*, No. 14-04130 (D.S.C. February 25, 2015, ECF No. 18) (Exhibit 3); *Beck Simmons LLC v. Francotyp-Postalia, Inc.*, No. 14-1161 (E.D. Mo., February 17, 2015, ECF No. 31) (Exhibit 4); *Physicians Healthsource, Inc. v. Endo, Inc.*, 14-02289 (E.D. Pa., January 5, 2015, ECF No. 27) (Exhibit 5); *Physicians Healthsource, Inc. v. Anda, Inc.*, No 12-60798 (S.D. Fla., May 23, 2014, ECF No. 105) (Exhibit 6); *Physicians Healthsource, Inc. v. Masimo Corp., et al.*, No. 14-00001 (C.D. Cal., May 22, 2014, ECF No. 47) (Exhibit 7); *Physicians Healthsource, Inc. v. Purdue Pharma, L.P.*, No. 12-001208 (D. Conn., Feb. 3, 2014, ECF No. 101) (Exhibit 8); *Raitport v. Harbour Capital Corp.*, 09-156 (D.N.H., Sept. 12, 2013, ECF No. 85) (Exhibit 9).

FACTUAL AND REGULATORY BACKGROUND FOR AMERIFACTORS' PETITION

Plaintiff alleges that AmeriFactors violated the Telephone Consumer Protection Act, as amended by the Junk Facsimile Prevention Act of 2005, 47 U.S.C. § 227, *et seq.* ("TCPA") by sending it, and other similarly situated individuals, without their consent, a facsimile advertisement on June 28, 2016. Compl. at ¶¶ 13-15. Plaintiff also alleges that the opt-out notice in the facsimile was not properly worded and therefore is also a TCPA violation. *Id.* at ¶ 18. Plaintiff seeks statutory damages on behalf of itself and the members of the putative class. *Id.* at ¶¶ 26(e)(iii), 33. The case has been stayed by the Court pending a ruling on AmeriFactors' pending Motion to Dismiss. (Dkt. #48).

The TCPA provides (among other things) that “[i]t shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States ... to use any telephone facsimile machine, computer, or other device to send, **to a telephone facsimile machine**, an unsolicited advertisement” unless certain conditions apply.¹

The plain language of the statute makes clear that Congress did not intend the TCPA to cover faxes received on devices other than a **telephone facsimile machine**. The statute further defines “telephone facsimile machine” as “equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.”²

Critical to understanding the definition above is the distinction between the statutory prohibition’s applicability to the *sending* of faxes and to the *receipt* of faxes. With respect to the sending of faxes, the statute prohibits unsolicited faxes that are originated on one of three types of equipment: a “telephone facsimile machine,” a “computer,” or an “other device.” With respect to the receipt of faxes, by contrast, the statute prohibits the sending of faxes only to a “telephone facsimile machine.” **The statute does not reference receipt of a fax by a computer or “other device.”**

This difference in language is critical. Plainly, a prohibited fax can only be sent to a “telephone facsimile machine.” Faxes sent to other types of equipment – including computers – are not prohibited. If Congress had intended for the TCPA to apply to fax transmissions received on computers or any other device except a telephone facsimile machine, it would not have

¹ 47 U.S.C. § 227(b)(1)(C) (emphasis added).

² 47 U.S.C. § 227(a)(3).

limited the list of receiving devices to only a “telephone facsimile machine.” Indeed, “because statutory language represents the clearest indication of Congressional intent,”³ “where Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”⁴ This basic axiom of statutory construction compels the conclusion that if the fax is received by a device other than a telephone facsimile machine, as defined by the TCPA, the Act does not cover that transmission.

The full Commission’s most recent discussion of telephone facsimile machines came in 2003. In that order, the FCC concluded that “computerized fax servers” and personal computers “equipped with, or attached to, modems” are subject to the TCPA’s prohibition on unsolicited faxes.⁵ The Commission did not define a “computerized fax server,” except to describe it as equipment which “enable[s] multiple desktops to send and receive faxes from the same or shared telephony lines.”⁶

³ *Nat’l Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001) (internal citations omitted).

⁴ *Clark v. Absolute Collection Service, Inc.*, 741 F.3d 487, 490-491 (4th Cir. 2014); *see also Independent Insurance Agents of America, Inc. v. Hawke*, 211 F.3d 638, 644 (D.C. Cir. 2000) (doctrine of “expression unius est exclusion,” precluded application of otherwise reasonable agency interpretation of statute). *See also Bais Yaakov of Spring Valley v. FCC*, No. 104-1234 (D.C. Cir. 2017) (commenting that with respect to the opt-out notice requirement for fax advertisements “Congress drew a line in the text of the statute between unsolicited fax advertisements and solicited fax advertisements. Unsolicited fax advertisements must include an opt-out notice. But the Act does not require (or give the FCC authority to require) opt-out notices on solicited fax advertisements. It is the Judiciary’s job to respect the line drawn by Congress, not to redraw it as we might think best.”).

⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14133 (¶ 200) (2003) (*2003 TCPA Report and Order*).

⁶ *Id.* This description appears to have been referencing equipment located on a customer’s premises and that connects computers on a single LAN. *See Newton’s Telecom Dictionary*, 16th Edition (2000) (“Fax server: A fax server sits on a local area network and literally serves faxes to those people using it. Those people may be on the LAN physically, i.e., joined by wires to the

The Commission clarified, however, that “[the TCPA’s prohibition on unsolicited faxes] **does not** extend to facsimile messages sent as email over the Internet.”⁷ No further explanation of “facsimile messages sent as email over the Internet” was provided.

In August 2015, the FCC’s Consumer and Governmental Affairs Bureau (Bureau) issued a declaratory ruling concluding that an “e-fax” “is covered by the consumer protections in the [TCPA] and Junk Fax Prevention Act.”⁸ However, the *Westfax Order* was based on a bare-bones petition that was filed more than five years before the decision was issued. The record leading up to the decision was minimal – just seven parties commented on the question presented. Thus, the Bureau did not have the opportunity to fully consider online fax technology when the *Westfax Order* was released. Further, there was no serious effort to address the paramount technical changes in the industry.

As a result of this limited record, the *Westfax Order* does not address online fax services. The Bureau’s discussion of “e-faxes” oversimplified the term and conflated several possible services into one. It defined the term as “a document sent as a conventional fax then converted to and delivered to a consumer as an electronic mail attachment.”⁹ This description implies that an ordinary fax transmission occurred, and that the user alters the transmission only after receipt

server. Or they may be outside, reaching the LAN over phone lines.”).

⁷ *Id.* (emphasis added).

⁸ *Westfax, Inc. Petition for Consideration and Clarification, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Protection Act of 2005*, CG Docket Nos. 02-278, 05-338, Declaratory Ruling, DA 15-977 (rel. Aug. 28, 2015) (*Westfax Order*).

⁹ *Westfax Order*, ¶ 1. The Bureau also relied on Westfax’s explanation that “a document sent as a fax over a telephone line to the recipient’s fax number becomes an efax when a fax server on the receiving end converts the fax transmission into a digital image file or PDF that is in turn sent to the recipient as an attachment to an email message.” *Id.*, ¶ 4. However, online faxes do not necessarily need a “telephone line” to initiate the transmission – rather, online faxes can be transmitted using either traditional TDM technology or fax over IP technologies.

of the fax. This may be true of some fax transmissions (though AmeriFactors is not sure exactly what services may be covered), but it is not true of online fax services. Online fax services do not receive documents as “conventional faxes” and no telephone facsimile machine is involved. Instead, online fax services receive transmissions – from whatever type of device – as digital files over computer servers that process and manage multiple documents simultaneously. While the user may choose to print files if he or she wishes, this choice does not render the document a “conventional fax.”

More importantly, both the *Westfax Order* and the *2003 TCPA Report and Order* (which the *Westfax Order* purports to apply) offer three unpersuasive justifications for extending the TCPA to e-faxes: (1) faxes “sent to a computer or fax server may shift the advertising costs of paper and toner to the recipient, if they are printed”; (2) e-faxes can cause “interference, interruptions, and expense”; and (3) e-faxes “may increase labor costs for businesses, whose employees must monitor faxes to determine which ones are junk faxes and which are related to their company’s business.”¹⁰ On the issue of shifting advertising costs, the key phrase in *Westfax Order* and the *2003 TCPA Report and Order* is “if they are printed.”¹¹ As explained above, when Congress enacted the TCPA, it sought to address the harms associated with fax transmissions that *automatically* triggered printed transmissions on a physical fax machine. With online fax services, including e-faxes (whatever their scope), however, it cannot be said that the recipient suffers the monetary harm discussed in the House Report if he or she *chooses* to print the electronic transmission. If the user chooses to delete a file rather than print it, no expense is incurred and no harm flows to the user.

¹⁰ *Westfax Order*, ¶¶ 10-11; *see also 2003 TCPA Report and Order*, ¶ 202.

¹¹ *Westfax Order*, ¶ 11; *2003 TCPA Report and Order*, ¶ 202.

On the second issue of interference, interruptions, and expense, online fax services do not occupy the recipient's facsimile machine so that it is unavailable for other messages. Indeed, the recipient does not even need a fax machine to receive an online fax transmission.¹²

The third justification for applying the TCPA to "e-faxes" is that such transmissions "may increase labor costs for businesses, whose employees must monitor faxes to determine which ones are junk faxes and which are related to their company's business."¹³ However, this concern is not a cognizable injury under the TCPA. It is not one of the two specific types of harm that the TCPA was intended to avoid. Rather, this appears to be the same caliber of "harm" that Congress deemed inconsequential for direct mail advertisements.¹⁴ Thus, the *Westfax Order* appears to be aimed at a different service and different harms than the online fax services that are the subject of AmeriFactors' petition. Further, with an online fax service whether the receipt of a document actually causes harm is clearly dependent on a myriad of circumstances such as whether the spam filter collects the messages and on whether the "email" was ever opened. Such fax services are functionally identical to an email, not a traditional facsimile. Therefore, the "efaxes" addressed in *Westfax* are different than the online fax services addressed in this petition.

¹² See Max Eddy, "The Best Online Fax Services of 2017," PCMag.com (May 3, 2017) available at <http://www.pcmag.com/article2/0,2817,2385681,00.asp> (noting that "there are many services that let you send and receive faxes from your computer—no modem screech or paper printouts required," and explaining that such services "either assign you a new fax number or let you port over your existing fax number").

¹³ *Westfax Order*, ¶ 11; *2003 TCPA Report and Order*, ¶ 202.

¹⁴ See H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991) ("The Committee found that when an advertiser sends marketing material to a potential customer through regular mail, the recipient pays nothing to receive the letter."). See also *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (holding that the "journey from mail box to trash can" is insufficient to allow the government to "shut off the flow of mailings to protect those recipients who might potentially be offended.") (internal citations omitted).

But even if an “e-fax” could encompass some types of online fax services, the Commission should not follow the *Westfax Order*. As a Bureau decision, the *Westfax Order* is not binding upon the full Commission. Indeed, were the *Westfax Order* to conflict with prior FCC precedent, the Bureau’s action would exceed the authority delegated to the Bureau by the Commission.¹⁵ Further, for the reasons explained previously, a fax received via an online fax service does not fall within the statutory prohibition on unsolicited faxes sent to a “telephone facsimile machine.” To the extent the *Westfax Order* would treat a fax received via an online server as within the statutory definition, the conflict with the statute would be enough to overturn the Bureau’s decision.¹⁶ Therefore, to the extent that the Commission determines the *Westfax Order* applied to online fax services, the decision should be overturned.

There is reason to believe that AmeriFactors’ Petition will find a receptive FCC. The composition of the FCC has changed dramatically and two of the three acting Commissioners have expressed substantial concern regarding the FCC’s expansion of TCPA liability beyond that expressly provided by Congress. For example, FCC Chairman Ajit Pai released the following statement regarding the D.C. Circuit’s reversal of the FCC’s *Anda* Order requiring opt-out language on solicited faxes:

Today’s decision by the D.C. Circuit highlights the importance of the FCC adhering to the rule of law. I dissented from the FCC decision that the court has now overturned because, as I stated at the time, the agency’s approach to interpreting the law reflected ‘convoluted gymnastics.’ The court has now agreed that the FCC acted unlawfully. Going forward, the Commission will strive to follow the law and exercise only the authority that has been granted to us by Congress.

¹⁵ See 47 C.F.R. § 0.361 (authority delegated to the Chief, Consumer and Governmental Affairs Bureau).

¹⁶ See 47 C.F.R. § 1.115 (applications for review of actions taken on delegated authority).

https://apps.fcc.gov/edocs_public/attachmatch/DOC-344186A1.pdf

Similarly, Commissioner Michael O’Rielly has stated:

The FCC also needs to take a hard look at its own precedent. Some of these prior interpretations of the TCPA, while well-meaning, may have contributed to the complexity by enlarging the scope of potential violations. For example, the FCC expanded certain TCPA requirements to encompass solicited fax advertisements even though the statute is limited to unsolicited fax advertisements. Specifically, the TCPA makes it unlawful “to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement” unless certain conditions are met. And, even if those conditions are met, the TCPA specifies that the “unsolicited advertisement” must “contain[] a notice” so that consumers are able to opt-out of receiving future faxes. The FCC’s rules, however, require the notice to be provided on all fax advertisements, whether solicited or unsolicited.

The TCPA is supposed to protect consumers from unwanted commercial robocalls, texts, or faxes. The FCC must hold bad actors accountable when they violate this law. But the FCC should also follow through on the pending TCPA petitions to make sure that good actors and innovators are not needlessly subjected to enforcement actions or lawsuits, which could discourage them from offering new consumer-friendly communications services.

<https://www.fcc.gov/news-events/blog/2014/03/25/tcpa-it-time-provide-clarity>

AmeriFactors has good reason to believe that the current FCC Commissioners will want to take a hard look at *Westfax* and other Commission decisions expanding the reach of the TCPA and the Junk Fax Protection Act beyond that intended by Congress.

ARGUMENT

I. THIS MATTER SHOULD BE STAYED PURSUANT TO THE PRIMARY JURISDICTION DOCTRINE.

Relying upon Supreme Court precedent, the Fourth Circuit has explained when a stay of proceedings is warranted under the Primary Jurisdiction Doctrine:

The doctrine of primary jurisdiction 'is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.' The doctrine has been deemed to apply in circumstances in which federal litigation raises a difficult, technical question that falls within the expertise of a particular agency.

Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., MD, 268 F.3d 255, 262 n7 (4th Cir. 2001) (quoting *Reiter v. Cooper*, 507 U.S. 258, 268, 113 S.Ct. 1213 (1993)) (emphasis added).

Where, as here, a claim pending before a court “requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body,” the doctrine of primary jurisdiction mandates suspension of judicial proceedings “pending referral of such issues to the administrative body for its views.” *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63–64, 77 S.Ct. 161 (1956). The purpose of this doctrine is to “coordinate administrative and judicial decision-making by taking advantage of agency expertise and referring issues of fact not within the conventional expertise of judges or cases which require the exercise of administrative discretion.” *Environmental Tech. Council v. Sierra Club*, 98 F.3d 774, 789 (4th Cir. 1996). By dividing decision-making authority, the doctrine promotes “proper relationships between the courts and administrative agencies charged with particular regulatory duties.” *Western Pac.*, 352 U.S. at 63, 77 S.Ct. 161. It also serves judicial economy because the dispute may be decided by the administrative agency and obviate the need for court intervention. *See Ryan v. Chemlawn Corp.*, 935 F.2d 129, 131 (7th Cir.1991).

While “[n]o fixed formula exists for applying the doctrine of primary jurisdiction,” *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64, 77 S. Ct. 161 (1956), in every case, “the question is whether the reasons for the existence of the doctrine are present and whether the

purposes it serves will be aided by its application in the particular litigation.” *Id.* To aid in this determination, courts have adopted the following four-factor test:

1. Whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;
2. Whether the question at issue is particularly within the agency's discretion;
3. Whether there exists a substantial danger of inconsistent rulings; and
4. Whether a prior application has been made to the agency.

AT & T Communications of Va., Inc. v. Bell Atlantic–Virginia, Inc., 35 F.Supp.2d 493, 498 (E.D. Va. 1999).

Invocation of the primary jurisdiction doctrine is particularly appropriate here. Congress has afforded the FCC quasi-legislative powers to promulgate regulations implementing the TCPA, and the FCC possesses interpretive authority over the TCPA. *See* 47 U.S.C. § 227(b)(2) (“The Commission shall prescribe regulations to implement the requirements of this subsection.”). The FCC has used these powers to regulate the TCPA, *see* 47 C.F.R. § 64.1200, and to issue declaratory rulings clarifying the TCPA and its regulations.

Invocation of the primary jurisdiction doctrine is also appropriate in this case because “the issue is already before the agency.” *Mississippi Power & Light Co. v. United Gas Pipeline Co.*, 532 F.2d 412, 420 (5th Cir. 1976).

Invocation of the primary jurisdiction doctrine is also warranted to ensure the consistent and uniform application of the TCPA:

Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by

preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Far East Conference v. U.S., 342 U.S. 570, 574-75, 72 S.Ct. 492 (1952).

The FCC implements the TCPA and, therefore, obviously “has comparative expertise on the matter.” *Charva v. EchoStar Satellite, LLC* 630 F.3d 459, 467 (6th Cir. 2010). Thus, it is best suited to determine core legal issues relating to the applicability of the TCPA. AmeriFactors’ Petition presents an opportunity for the Commission to address the prevalence of the new online fax services, and to clarify its 2003 statement that “faxes sent as email over the Internet” are not subject to the TCPA.”¹⁷ As the Sixth Circuit explained, “[o]nly the FCC can disambiguate the words [of the TCPA]; all we could do would be to make an educated guess.” *Id.* (emphasis added).

Finally, the fact the AmeriFactors Petition involves technical issues intertwined with policy considerations also weighs in favor of invoking the primary jurisdiction doctrine. *See, e.g., U.S. v. Yellow Freight Sys., Inc.*, 762 F.2d 737, 741 (9th Cir. 1985) (“difficult issues of fact and policy [are] inextricably intertwined with the law are best left to the regulating agency”); *Allnet Comm’n Serv., Inc. v. Nat’l Exch. Carrier Ass’n, Inc.*, 965 F.2d 1118, 1121 (D.C. Cir. 1992) (primary jurisdiction doctrine is appropriate where judicial resolution of the claim would improperly preempt an agency “from implementing what amount to policy decisions”); *Brown v. MCI WorldCom Network Servs.*, 277 F.3d 1166, 1172 (9th Cir. 2002) (primary jurisdiction

¹⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14133 (¶ 200) (2003) (2003 TCPA Report and Order).

doctrine is appropriate where matter “requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency”).

As the foregoing makes clear, the primary jurisdiction doctrine should be invoked to allow for the resolution of AmeriFactors’ petitions with the FCC and the exhaustion of any related appeals before this case proceeds. Such a stay would clearly be appropriate under the primary jurisdiction doctrine. *See, e.g., Reiter*, 507 U.S. at 268 (primary jurisdiction can be used to either stay or dismiss an action); *Far East Conference*, 342 U.S. at 570 (same).

II. THIS MATTER SHOULD BE STAYED TO ALLOW AGENCY ACTION TO PROCEED CONSISTENT WITH THE REQUIREMENTS OF THE HOBBS ACT

The requirements of the Hobbs Act, 28 U.S.C. § 2342, also weigh in favor of granting a stay in this case in contemplation of agency action. The Hobbs Act provides that challenges to an FCC regulation or order must first be brought with the agency itself and, if denied, appealed to the Court of Appeals. *FCC v. ITT World Commc’ns, Inc.*, 466 U.S. 463, 468, 104 S. Ct. 1936 (1984).

By filing its petition with the FCC, AmeriFactors has exercised its right under the Hobbs Act to pursue administrative remedies. The Hobbs Act generally precludes this Court from deciding the issues raised in those petitions and any objections Plaintiff might have thereto. *See, e.g., Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir. 2013) (suggesting the District Court consider any stay requests to allow the parties to pursue their administrative remedies under the Hobbs Act). If the FCC grants AmeriFactors’ petition, the Hobbs Act would preclude Plaintiff from challenging that order here. *See Nack*, 715 F.3d at 685 (Hobbs Act requires challenges of FCC orders to be brought first with the agency itself and, if denied, appealed directly to the Court of Appeals).

A defendant who wants to challenge an FCC rule, or order, is subject to some daunting practical problems. First, the district court cannot decide in the defendant's favor if the consequences of the opinion is to invalidate an FCC rule or order unless it is on constitutional grounds.¹⁸ The scope of the FCC's position statements included under the Hobbs Act are expansive. *Nack*, 715 F.3d at 685 ("We generally extend this deference to the agency even if the interpretation of its own regulation is expressed merely in a brief to the court, rather than through such other means."). Because of these obstacles, a stay should be granted to allow AmeriFactors to challenge the critical "orders" "rules," or policy statements of the "agency" that affect this case.

There exists a substantial probability that the Fourth Circuit Court of Appeals may follow the decisions of the Seventh, Eighth and Eleventh Circuits in determining that only the D.C. Circuit can decide the validity of any challenge to an FCC rule or order after a defendant files a petition. The Hobbs Act, 28 U.S.C. §2342 divests the district courts with any authority to invalidate an order or rule of the FCC, but expressly authorizes all of the federal circuits, (except the federal circuit court) to rule on such matters. Yet, at least three Circuit Courts have adopted the position that the Circuit Courts of Appeal have no authority to consider such challenges as well, unless a petition has been filed with the FCC by the defendant in private litigation. In *Nack*, defendant Walburg was set up by plaintiff Nack to be the subject of a massive TCPA case.

... Nack bases his claims upon the receipt of one fax advertisement from Defendant Douglas Walburg, which Nack's agent undisputedly consented to receive. The one fax Nack received did not contain opt-out language that he argues was mandated by federal regulation. 47 C.F.R. § 64.1200(a)(3)(iv). He asserts class-action claims on behalf of persons similarly situated and does not base claims upon any party's receipt of an unsolicited fax advertisement. The parties offered competing interpretations of the regulation, and

¹⁸ Constitutional challenges are of course permitted. *U.S. v. Any and All Radio Station Transmission Equipment*, 204 F.3d 658, 667 (6th Cir. 2000).

the district court held the regulation did not apply in the current circumstances.

* * *

Although this interpretation is consistent with the plain language of the regulation, it is questionable whether the regulation at issue (thus interpreted) properly could have been promulgated under the statutory section that authorizes a private cause of action

* * *

Nevertheless, based upon the FCC's interpretation, and for the reasons discussed below, we must reverse the grant of summary judgment.

* * *

Without addressing such challenges, we may not reject the FCC's plain-language interpretation of its own unambiguous regulation. Our reversal today, therefore, places the parties back before the district court where Walburg faces a class-action complaint seeking millions of dollars even though there is no allegation that he sent a fax to any recipient without the recipient's prior express consent.

715 F.3d at 682.

On remand, the district court granted the stay requested by Walburg. *See Walburg v. Nack*, No. 4:10CV00478 AGF, 2013 WL 4860104 (W.D. Mo. Sept. 12, 2013).

The core problem presented by *Nack* and its progeny is that it *precludes* the Circuit Courts of Appeal from deciding whether an FCC order or rule is beyond the FCC's statutory authority, unless the defendant files an administrative petition. The *Nack* court reasoned:

The Hobbs Act provides that the courts of appeals have exclusive jurisdiction to determine the validity of FCC orders. 28 U.S.C. § 2342 (2006) ...A party challenging an FCC regulation as ultra vires must first petition the agency itself and, if denied, appeal the agency's disposition directly to the Court of Appeals as provided by the statute.... "[T]he procedural path designed by Congress serves a number of valid goals: It promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency review, and allows 'uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress' to enforce the TCPA."

* * *

Here, there was no administrative proceeding because the plaintiff filed a private action. In response, the defendant pursued summary judgment and has not yet elected to seek a stay of litigation to pursue administrative remedies through the FCC. However, “[w]here the practical effect of a successful attack on the enforcement of an order involves a determination of its validity,” such as a defense that a private enforcement action is based upon an invalid agency order, “the statutory procedure for review provided by Congress remains applicable.” ...To hold otherwise merely because the issue has arisen in private litigation would permit an end-run around the administrative review mandated by the Hobbs Act. Such an end run could result in a judicial determination of a regulation's invalidity without participation by the agency and upon a record not developed by the agency. (emphasis added)

715 F.3d at 685-86 (emphasis added).

Nack essentially compels the defendant to seek a stay and file an administrative petition with the FCC. The Eighth Circuit in *Nack* followed the Seventh Circuit opinion in *C.E. Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010), which has been followed by the Eleventh Circuit in *Mais v. GulfCoast Collection Bureau*, 768 F.3d 1110, 1119-20 (11th Cir. 2014).

Consistent with the Seventh, Eighth, and Eleventh Circuits, the Sixth Circuit has recently held that the validity of FCC regulations should be decided by the D.C. Circuit. In *Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, No. 16-3741, 2017 WL 2953039 (6th Cir. July 11, 2017), the court affirmed the decision of a district court that held individual issues of consent precluded class certification. Plaintiff's counsel in *Sandusky* argued that the FCC opt-in rule was still applicable because the *Bais Yaakov* decision only applied to an order effecting “specific petitioners.” The Sixth Circuit rejected that argument reasoning that the D.C. Circuit held that the solicited-fax rule was unlawful. *Id.* at *5 (citing *Bais Yaakov*, 852 F.3d at 1083). The

Sixth Circuit also rejected the argument that it was not bound by the opinion of the D.C. Circuit, at least when a multi-district litigation petition assigns a matter to the D.C. Circuit.

Once the Multidistrict Litigation Panel assigned petitions challenging the Solicited Fax Rule to the D.C. Circuit, that court became “the sole forum for addressing ... the validity of the FCC’s rule[].” *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008) (quoting *MCI Telecomms. Corp. v. U.S. West Comms.*, 204 F.3d 1262, 1267 (9th Cir. 2000)). And consequently, its decision striking down the Solicited Fax Rule became “binding outside of the [D.C. Circuit].” *Id.* This result makes sense in light of the procedural mechanism Congress has provided for challenging agency rules. See 28 U.S.C. §§ 2112, 2342–43. By requiring petitioners to first bring a direct challenge before the FCC, the statute allows this expert agency to weigh in on its own rules, and by consolidating petitions into a single circuit court, the statute promotes judicial efficiency and ensures uniformity nationwide. See *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010). Thus, since the Solicited Fax Rule is no longer valid, the district court would reach the same conclusion as it did initially: that questions of consent present individualized issues counseling against class certification.

Id. at * 5.

Under these circumstances, it appears likely that several key defenses in this case will turn on the validity of the FCC’s orders and regulations, including their consistency with the statutory language of the TCPA.

These cases imply that the obligation to challenge FCC rules and orders is on the party who wishes to raise affirmative defenses after they are sued in class actions. AmeriFactors had no relationship with the telecommunication industry, much less the “fax litigation complex” where the same fax broadcasters, marketers, and plaintiff’s counsel dwell. AmeriFactors had a one-time experiment with sending faxes (June 28 and June 30, 2016) that was never repeated, and appeared inconsequential until its service of process on September 8, 2016. AmeriFactors has a due process right to challenge the FCC’s interpretation to the extent it affects its rights in this case. Plaintiff

has not suffered any substantial injury that requires immediate resolution, but instead complains from a single fax, “loss of use of the fax machine, paper, ink/toner, and waste of the recipient’s valuable time that would have been spent on something else.” *See* (Doc. 1, ¶ 3). The complaint double counts its purported injury asserting privacy business rights and as to its additional attempt to discern the source and purpose of the fax. *Id.* But, the suggestion that there was injury caused by the time it took to identify the advertiser is absurd considering the fact that Plaintiff contends it had to investigate the party who was allegedly advertising. *See* (Doc. 1, Exhibit A). The name of the alleged advertiser and its contact information on the facsimile is described. *Id.*

In another junk fax case, the corporate representative of Career Counseling testified she would take “just a few seconds, but it also could be handled between two or three people.” (Trans. Trenbeath p. 23 in *Career Counseling, Inc. v Amsterdam Printing & Litho, Inc.*) (Exhibit 10). In fact, the “handling” cost was not the result of the inconvenience of receiving an unsolicited fax. Instead, it is part of their side employment as a professional fax recipient plaintiff. Plaintiff’s corporate representative in *Amsterdam* also testified that faxes were organized in a cubbyhole system, including a junk fax box, so she could discuss these faxes with her fax lawyer, Ryan Kelly as part of her monthly review. (Trans. Trenbeath, pp. 19-20).

AmeriFactors does not contend that Plaintiff does not have an interest in a prompt resolution of its claim, but AmeriFactors has a much greater due process interest in avoiding potentially millions of dollars in liability.

Therefore, as a practical matter and in the interest of justice and the efficient resolution this case, a stay should be granted until such time as the potentially case dispositive matters pending before the FCC are resolved.

III. THIS MATTER CAN BE STAYED UNDER THE INHERENT POWER OF THE DISTRICT COURT TO CONTROL ITS DOCKET

A stay is also justified under the Court's broad powers to control its docket. "District courts ordinarily have authority to issue stays, where such a stay would be a proper exercise of discretion." *Ryan v. Gonzales*, 133 S. Ct. 696, 707-08 (2013) (internal punctuation omitted). "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254, 57 S. Ct. 163 (1936).

Neither the Court nor the parties should be forced to expend the considerable resources required to address Plaintiff's class action claim, when the claim may be rendered moot by the FCC. On prejudice, AmeriFactors will suffer significant prejudice if a stay is not granted and it must litigate Plaintiff's claims. Absent a stay, AmeriFactors would be forced to litigate a claim that may be moot and assert an array of constitutional objections to enforcement of a regulation that may not reflect statutory authority or that may not provide clear direction. However, if the FCC, as the expert agency to whom deference is warranted, grants AmeriFactors' petition as expected, the complex litigation that would otherwise take place would be superfluous and unnecessary.

Like AmeriFactors, Plaintiff will benefit from a stay since its claim cannot be fully adjudicated until the FCC determines whether AmeriFactors can be held liable on a class wide basis for the alleged conduct and attorney resources will not be wasted in the interim. Further, since this case is in its infancy and there is no indication that any alleged damage to Plaintiff is ongoing, there is nothing pending that cannot be resolved after a stay is lifted.

It is anticipated that Plaintiff may argue that it may take a long period of time for the FCC to resolve this petition. While that is possible, the FCC has expeditiously handled a number of recently filed petitions, for example:

- *Petition for Waiver of Rules Requiring Support of TTY Technology Iowa Independent Telephone Companies*, GN Docket No. 15-178, Order, DA 17-65 (Jan. 13, 2017) (granting multiple requests for waiver of the FCC's TTY rules approximately **five to eight months** after the requests were filed).
- *Corvex Master Fund LP Petition for Declaratory Ruling Under Section 310(b)(4) of the Communications Act of 1934, as Amended*, MB Docket No. 16-253, Declaratory Ruling, DA 17-166 (Feb. 14, 2017) (granting an exception to the broadcast foreign ownership rules approximately **seven months** after the request was submitted).
- *Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets, Southern Communications Services, Inc. d/b/a Southern Linc Petition for Limited Waiver*, WT Docket No. 07-250, Order, DA 17-665 (July 11, 2017) (granting a limited waiver of the FCC's hearing aid compatibility requirements approximately **seven months** after the request was submitted).
- *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Structure and Practices of the Video Relay Service Program*, CG Docket Nos. 03-123, 10-51, Order and Declaratory Ruling, DA 17-86 (Jan. 18, 2017) (granting a waiver and declaratory ruling approximately **six months** after the request was filed).
- *Rural Health Care Universal Service Support Mechanism*, WC Docket No. 02-60, Order, DA 17-164 (rel. Feb. 10, 2017) (granting a request in **one week** for a waiver of the Commission's rules to allow a health care provider to seek a replacement service provider in order to avoid a service outage).
- *Rules and Policies Regarding Calling Number Identification Service – Caller ID, Waiver of Federal Communications Commission Regulations at 47 C.F.R. § 64.1601(b) on Behalf of Jewish Community Centers*, CC Docket No. 91-281, Temporary Waiver Order, DA 17-223 (granting an emergency waiver of the FCC's caller ID rules within **five days** of a request from Senator Chuck Schumer).

To address any concerns about undue delay, AmeriFactors proposes that a status

conference be scheduled for 6 months after the stay is imposed to assess the progress made by the FCC in addressing the Petition and to consider whether in light of that progress the stay should continue in place.

CONCLUSION

For the foregoing reasons, AmeriFactors respectfully requests this Court stay all further proceedings pending the resolution of AmeriFactors' petitions with the FCC and the exhaustion of any related appeals.

Respectfully submitted,

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July 14, 2017

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by CM/ECF on July 14, 2017 on all counsel or parties of record.

/s/ William H. Latham

William H. Latham (FBN 5745)

Service List

and the statutory remedy, are the same for all recipients.”⁴⁶ It also ignores that Congress passed the TCPA to prevent fax advertisers from “imped[ing] the free flow of commerce,”⁴⁷ and to “facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers.”⁴⁸ The statute gives effect to this intent by focusing on whether the equipment has “the capacity” to transcribe text or images from a telephone line onto paper, and the Commission has consistently ruled that such equipment does have such a capacity.⁴⁹ That is the end of the inquiry, and the Amerifactors Petition should be denied.

Conclusion

For the foregoing reasons, the Commission should deny the Amerifactors Petition for Declaratory Ruling.

Dated: August 17, 2017

Respectfully submitted,

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⁴⁶ *Turza*, 728 F.3d at 684; *see also Imhoff Inv.*, 792 F.3d at 632 (quoting *Turza* with approval).

⁴⁷ *Am. Copper*, 757 F.3d at 544.

⁴⁸ S. Rep. 102-178, 1, 1991 U.S.C.C.A.N. 1968, 1968.

⁴⁹ Westfax Order ¶ 9.