

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

In the Matter of)	CG Docket No. 02-278
)	
Petition for Declaratory Ruling and/or Waiver of Unique Vacations, Inc.)	CD Docket No. 05-338
)	

**MOTION TO ACCEPT LATE-FILED REPLY COMMENTS
OF UNIQUE VACATIONS, INC.**

Unique Vacations, Inc. (“UVI”), by its attorneys and pursuant to Section 1.3 of the Commission’s rules, hereby respectfully requests that the Commission accept the attached late-filed “Reply Comments of Unique Vacations, Inc.” in the above-captioned proceedings.

On August 20, 2014, UVI filed a petition seeking a declaratory ruling and/or waiver concerning Sections 64.1200(a)(4)(iii) and (iv) of the Commission’s rules.¹ On August 29, 2014, the Commission issued a Public Notice seeking comment on the Petition.² Pursuant to the Public Notice, comments were due on September 12, 2014, and a reply to comments were due on September 19, 2014.

On September 12, no comments appeared in the Commission’s Electronic Comment Filing System (“ECFS”). Nevertheless, because UVI was aware that filings do not always post immediately to ECFS after they are submitted, UVI continued to check ECFS daily on each of

¹ Petition for Declaratory Ruling and/or Waiver of Unique Vacations, Inc., CG Docket Nos. 02-278 & 05-338 (filed Aug. 20, 2014) (“Petition”).

² Consumer & Government Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-out Notices for Fax Advertisements, CG Docket Nos. 02-278 & 05-338 (Aug. 29, 2014) (“Public Notice”).

September 13, 14 and 15. Again, no comments appeared in ECFS on those days. Because UVI also understood that ECFS could have been backed up due to the volume of comments filed around the same time in the Commission's Open Internet docket, counsel for UVI contacted Commission staff on September 15 to determine whether staff was aware of any comments that were filed in response to the Public Notice. Commission staff indicated that it was not. Still, UVI continued to check ECFS daily, and on September 18, one day before reply comments were due, comments filed by Anderson + Wanca on behalf of certain of its clients appeared.³ UVI was not served with these comments.

Upon seeing these comments, UVI immediately contacted Commission staff to request additional time to file reply comments. Commission staff instructed UVI to request permission to late file its reply comments together with its submission of actual reply comments. This Motion filing makes that request and is accompanied by UVI's reply comments.

UVI respectfully requests that the Commission grant this Motion. No party would be prejudiced by its grant, and its grant would afford UVI the same general period of time to prepare and file reply comments as the one specified in the Public Notice: about one week from the date comments appeared in the docket. Should the Commission be unwilling to grant this request, UVI respectfully asks that its reply comments receive due consideration under the Commission's *ex parte* rules.

³ See Exhibit 1, which demonstrates that the comments filed by Anderson + Wanca posted to ECFS only on September 18.

Respectfully submitted,

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Dated: September 26, 2014

EXHIBIT 1



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Subject: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, June Fax Prevention Act of 2005
Date Created: 12/05/2005
Status: Open
Total Filings: 421
Filings in last 30 days: 7

Daily Filings

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7	8	9	10	11	12	13
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Filed on Behalf Of	Date Posted
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Magna Check, Inc.	09/16/2014
Richard A. Golden	09/10/2014
Glenn L. Hara	09/05/2014
Glenn L. Hara	08/28/2014
Unique Vacations, Inc.	08/21/2014
Cohen, Diggall and Everett, P.C.	08/11/2014
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Consumer and Governmental Affairs Bureau - PUBLIC NOTICE	04/25/2014
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Consumer Policy Division - ORDER	01/24/2006
Consumer and Governmental Affairs Bureau - NOTICE OF PROPOSED RULEMAKING	12/09/2005

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

In the Matter of)	
)	CG Docket No. 02-278
Petition for Declaratory Ruling and/or Waiver)	
of Unique Vacations, Inc.)	CG Docket No. 05-338
)	

REPLY COMMENTS OF UNIQUE VACATIONS, INC.

Unique Vacations, Inc. (“UVI” or “Petitioner”) offers these reply comments in response to the comments filed by Anderson + Wanca on behalf of Around the World, Inc. (“Plaintiff”),¹ which is suing UVI over alleged violations of the Telephone Consumer Protection Act of 1991 (“TCPA”).

Plaintiffs’ Comments attempt to litigate the alleged facts of the underlying suit against UVI as a means of obscuring the legal questions presented in UVI’s Petition.² UVI will address Plaintiff’s factual allegations in the appropriate venue — the District Court — but the Commission need not and should not be drawn into such factual disputes, which are irrelevant to the relief sought by Petitioner. Plaintiff’s legal arguments opposing the relief requested in UVI’s Petition similarly are unavailing, as they rely on misinterpretations of the TCPA and an

¹ TCPA Plaintiffs’ Comments on Unique Vacations, Inc.’s Petition Concerning the Commission’s Rule Requiring Opt-Out Notices on Fax Advertisements, CG Docket Nos. 02-278 & 05-338 (filed Sept. 12, 2014) (“Plaintiffs’ Comments”). Plaintiffs’ Comments were filed on behalf of Plaintiff and other plaintiffs pursuing similar lawsuits against a dozen other petitioners in these dockets. *See* Plaintiffs’ Comments at 1. As indicated in the Motion to Accept Late-Filed Reply Comments preceding these Reply Comments, Plaintiffs’ Comments were not posted on the Commission’s Electronic Comment Filing System until September 18, 2014, one day before the deadline for Reply Comments, nor were Plaintiffs’ Comments served directly on Petitioner. Accordingly, as set forth in the preceding Motion, Petitioner respectfully requests that the Commission waive the deadline for reply comments and accept this submission as timely.

² Petition for Declaratory Ruling and/or Waiver of Unique Vacations, Inc., CG Docket Nos. 02-278 & 05-338 (filed Aug. 20, 2014) (“Petition”).

inapposite case analyzing a different agency's authority under a completely different statutory scheme. Accordingly, for the reasons set forth herein and in UVI's Petition, the Commission should grant the relief requested in the Petition.

I. THE PETITION DOES NOT CALL FOR THE COMMISSION TO RESOLVE THE FACTUAL DISPUTES RAISED BY PLAINTIFF.

As Plaintiff acknowledges, Plaintiff filed its lawsuit against UVI less than two months ago, and thus the underlying facts regarding Plaintiff's interactions with UVI have not yet been addressed in full, or even in part.³ As a consequence, the allegations in Plaintiff's complaint are just that: allegations, which will be tested in the District Court through the appropriate litigation process. Plaintiff alleges, for instance, that it never consented to receive any faxes from UVI,⁴ but UVI intends to show that it sent faxes only to recipients who provided their fax numbers and expressly agreed to receive facsimile communications, e-mails and direct mail, including material advertising the commercial availability or quality of property, goods or services.⁵

Contrary to Plaintiffs' characterization,⁶ UVI's Petition does not ask the Commission to resolve these factual questions. The Commission need not, and should not, attempt to determine whether any particular fax sent to Plaintiff or any other specific recipient was consensual. Indeed, Plaintiff's Complaint alleges that an individual recipient's consent is *irrelevant* — and that UVI is precluded from relying on any recipient's actual consent — if

³ See Plaintiff's Comments at 2.

⁴ See *id.* at 4.

⁵ See *Around the World Travel, Inc. v. Unique Vacations, Inc.*, Brief Reply Mem. in Support of Defendant's Motion to Stay, No. 2:14-cv-12589-GCS-MJH, at 4 (E.D. Mich. filed Sept. 24, 2014) (attached hereto as Exhibit A).

⁶ See Plaintiffs' Comments at 6.

UVI's opt-out notices were not letter-perfect.⁷ That is the allegation — a purely *legal* assertion — that UVI's Petition asks the Commission to address.

Specifically, the Petition asks the Commission to issue a declaratory ruling that a fax does not violate the TCPA or the Commission's implementing rules if the fax meets the following criteria: (1) the fax is transmitted pursuant to the prior express invitation or permission of a fax recipient (*i.e.*, the fax is not "unsolicited" but rather "solicited"); and (2) the fax includes an opt out notice on the first page of the fax that complies substantially with Section 64.1200(a)(4)(iii) of the Commission's Rules.⁸ Alternatively, the Petition asks the Commission to waive compliance with Section 64.1200(a)(4)(iv) of its Rules with respect to such faxes. Finally, if the Commission declines to grant the other relief requested in the Petition, UVI asks the Commission to declare that the rule requiring opt-out notices on solicited faxes was not — and given the relevant statutory language, could not have been — promulgated pursuant to Section 227(b) of the Communications Act.⁹

None of the relief requested in UVI's Petition requires the Commission to determine the facts underlying UVI's communications with Plaintiff. A ruling that Section 227(b) does not authorize requiring opt-out notices on solicited faxes would not require any factual determinations in any venue. And if the Commission instead rules that faxes meeting the criteria specified in the Petition comply with the TCPA, or that any noncompliance with respect to such faxes should be waived, then it will be for the District Court to decide whether UVI's

⁷ See *Around the World Travel, Inc. v. Unique Vacations, Inc.*, Complaint, No. 2:14-cv-12589, at ¶ 35 (E.D. Mich. filed July 1, 2014) ("Complaint").

⁸ Petition at ii, 1, 8, 9, 18.

⁹ Petition at 1, 9-11, 18.

faxes to Plaintiff — or to other recipients, if even relevant — in fact satisfied the prescribed criteria.

Plaintiff makes much of its allegation that UVI sent faxes to Plaintiff after Plaintiff attempted to opt out¹⁰ and implies that the Commission therefore cannot grant UVI relief because UVI’s opt-out notices were not “effective.”¹¹ But this argument confuses the effectiveness of the opt-out *notice* — the content of which is not in dispute — with the operation of UVI’s opt-out *mechanism* in particular cases. There is no question that UVI’s opt-out notice effectively informed Plaintiff how to send an opt-out request to UVI, as Plaintiff itself has made much of the fact that it followed the instructions on the faxes to submit such a request.¹² Plaintiff’s claim is not that the *notice* was ineffective but that UVI *failed to honor* Plaintiff’s opt-out. Even if an isolated failure of UVI’s opt-out mechanisms did result in Plaintiff mistakenly receiving faxes after it opted out, that failure is irrelevant to UVI’s Petition. The Petition does not seek a ruling that would affect a fax sender’s liability for failing to honor a valid opt-out request or for sending faxes to recipients who have otherwise withdrawn their consent. UVI asks only that the Commission rule that alleged technical deficiencies in the *language* of opt-out notices on *solicited* faxes do not, standing alone, amount to violations of the TCPA or the Commission’s implementing regulations.

¹⁰ Plaintiffs’ Comments at 2-3, 5.

¹¹ *Id.* at 5.

¹² *Id.* at 2-3.

II. THE COMMISSION HAS THE AUTHORITY TO GRANT THE RELIEF UVI AND OTHER PETITIONERS SEEK.

The Commission has broad authority to “issue a declaratory ruling terminating a controversy or removing uncertainty,”¹³ or alternatively to “suspend[], revok[e], amend[], or waive[]” its regulations “for good cause shown.”¹⁴ The declaratory rulings or waivers requested by UVI and similarly situated petitioners fall well within this authority.

The opt-out notice rule, as applied to solicited faxes, has been the source of substantial uncertainty. This uncertainty stems from the Commission’s failure to provide proper notice that it was considering such a requirement,¹⁵ the adopting order’s internally contradictory language about whether opt-out notices are required for solicited faxes,¹⁶ and the rule’s confusing codification within a rule otherwise applying only to *unsolicited* faxes. The adopting order sowed additional confusion regarding the permissible bases for private TCPA suits by citing 11 separate statutory authorities, including Section 227 in general, without specifying which rules were being prescribed under Section 227(b).¹⁷ Plaintiff argues that this general string citation was sufficient under the Administrative Procedure Act (“APA”) to establish that all of the opt-out notice rules were being prescribed under Section 227(b).¹⁸ But while a general statement establishing that some authority exists for each rule might satisfy the APA in most cases, the TCPA attaches *private* liability to violations of rules promulgated under only certain

¹³ 47 C.F.R. § 1.2(a).

¹⁴ 47 C.F.R. § 1.3.

¹⁵ Comments of Anda, Inc., CG Docket Nos. 02-278 & 05-338, at 7 (filed Feb. 14, 2014).

¹⁶ See Petition at 13.

¹⁷ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3788 at ¶ 64 (2006)

¹⁸ Plaintiffs’ Comments at 10.

statutory subsections. Where, as here, it is questionable whether those provisions authorized a particular rule, the Commission has an obligation to, at a minimum, articulate specifically whether the rule was promulgated under the relevant provision, and if so how the provision provided the necessary authority for the rule. The Commission did not do this.

Given this uncertainty, and the harsh consequences UVI and other petitioners would face based on immaterial technical deficiencies under Plaintiff's interpretation of the Commission's requirements, there is ample justification for the Commission to declare that substantially compliant opt-out notices satisfy the Commission's requirements for *solicited* faxes, or alternatively that any noncompliance with respect to such faxes should be waived.

Such a ruling would not require the Commission to “direct[]” any order to the federal district courts¹⁹ nor to intervene in any private civil actions.²⁰ To the contrary, the Commission would be exercising its ordinary authority to interpret its own rules and to waive compliance with those rules as appropriate. Nothing in Section 227(b)(3) of the Communications Act — which creates the private right of action for violations of Section 227(b) “or the regulations prescribed under this subsection” — limits the Commission's well-established authority to interpret or waive any regulations so prescribed.

Plaintiff attempts to challenge the Commission's authority to interpret or waive its TCPA rules based on an appellate court's interpretation of the scope of the Environmental Protection Agency's (“EPA's”) authority to administer the private right of action created by the Clean Air Act.²¹ This attempt by Plaintiff to draw comparisons between two wildly disparate

¹⁹ *See id.* at 5.

²⁰ *See id.* at 7.

²¹ *Id.* at 6-8.

statutory schemes is misguided. As is evident even from Plaintiffs' Comments, the ruling against the EPA's creation of a new defense to a private right of action was based on the court's analysis of the specific Clean Air Act provisions at issue.²² As other petitioners in this docket have explained, the EPA neither asserted nor relied upon any authority as broad or well-established as the Commission's waiver authority.²³ Accordingly, the D.C. Circuit's ruling against the EPA has no bearing on the Commission's authority to administer any rules it prescribed under the TCPA.

Finally, Plaintiff's argument that the TCPA allows the Commission to mandate opt-out notices even for solicited faxes rests on Plaintiff's misinterpretation of the TCPA provisions allowing certain *unsolicited* faxes — those transmitted pursuant to an Established Business Relationship ("EBR"). Specifically, Plaintiff suggests that because it believes all fax recipients must use sender-designated opt-out mechanisms in order to revoke their consent, all faxes — even solicited faxes — must contain opt-out instructions.²⁴ Plaintiff misunderstands the statute. Section 227(b)(1)(C) provides that it generally is unlawful to fax an unsolicited advertisement. The statute provides a narrow exception for unsolicited advertisements faxed pursuant to an EBR between the sender and recipient.²⁵ However, to qualify for this exception, the statute provides that, among other things, "the *unsolicited advertisement* [must] contain[] a

²² Plaintiffs' Comments at 6-7 (citing *Natural Res. Def. Council v. E.P.A.*, 749 F.3d 1055, 1062-64 (D.C. Cir. 2014)).

²³ See Letter of Helgi C. Walker, Counsel for Staples, Inc., and Quill Corp., to Marlene H. Dortch, FCC Secretary, CG Docket Nos. 02-278 & 05-338, at 2 (May 21, 2014) (citing *National Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009), and *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).

²⁴ Plaintiffs' Comments at 8.

²⁵ § 227(b)(1)(C).

notice meeting the requirements under” Section 227(b)(2)(D),²⁶ and recipients must follow the requirements in Section 227(b)(2)(E) to opt out.

As UVI’s Petition explained, faxes sent pursuant to prior express permission — that is, *solicited* faxes — fall outside of this closely defined framework. Nothing in Section 227(b) regulates the transmission of *solicited* faxes or confers that authority on the Commission. Rather, the statutory structure makes clear — by defining opt-out requirements only with respect to *unsolicited* faxes — that recipients of solicited faxes may revoke their prior express consent by any reasonable means. By definition, recipients who have provided express consent *prior* to receiving a fax have at least one other channel of communication with the sender, if not several such channels, and recipients are free to use those channels to revoke their consent to receive faxes. Thus, there was no reason for Congress to empower the Commission to regulate solicited faxes, and the TCPA provides the Commission with no such authority.

Plaintiff also relies on the assertion by the Consumer and Governmental Affairs Bureau, in its order denying Anda, Inc.’s (“Anda’s”) petition for declaratory ruling, that the Commission could require solicited faxes to bear opt-out notices based on the Commission’s authority to interpret the meaning of “prior express invitation or permission.”²⁷ This argument is similarly unavailing. In the first place, the Bureau did not address the merits of the arguments

²⁶ § 227(b)(1)(C)(iii) (emphasis added).

²⁷ Plaintiffs’ Comments at 9. Plaintiff cites similar arguments presented by the Commission in its *amicus* brief to the U.S. Court of Appeals for the Eighth Circuit. Plaintiffs’ Comments at 9 (citing Comm’n Amicus Br., *Nack v. Walburg*, No. 11-1460 (8th Cir) (Feb. 24, 2012)). It bears noting, however, that despite the Commission’s brief, the Eighth Circuit concluded that it is “questionable whether the regulation at issue [as interpreted by the FCC] properly could have been promulgated under the statutory section that authorizes a private cause of action.” *Nack v. Walburg*, 715 F.3d 680, 682 (8th Cir. 2013).

raised by Anda, and subsequently by UVI and other petitioners, except in nonbinding *dicta*.²⁸ Moreover, although an agency may “fill gaps” within a statute, it may not venture outside the lines of the authority Congress has granted.²⁹ Whatever authority the Commission might have to further define “prior express invitation or permission,” it may not impose a definition “manifestly contrary to the statute” where the intent of Congress is clear.³⁰ In the TCPA context, Congress made clear through plain statutory language that where the recipient expressly consents to receive a fax prior to the fax being sent, the TCPA’s restrictions — including the opt-out-notice requirement — do not apply.

CONCLUSION

The TCPA draws a clear distinction between fax advertisements sent with prior express invitation or permission (which are lawful) and unsolicited fax advertisements (which are lawful only when sent pursuant to procedures defined by the statute). Congress intended to create private liability only for entities that send noncompliant, *unsolicited* fax ads. Yet Plaintiff asserts that a fax recipient’s consent is *irrelevant*. In Plaintiff’s view, a recipient who consents to receive a fax is nonetheless entitled to between \$500 and \$1,500 in statutory damages under the TCPA — as implemented by the Commission — if the fax does not include an opt-out notice or

²⁸ See *Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission’s Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient’s Prior Express Consent*, Order, 27 FCC Rcd 4912, 4915 (CGB 2012) (dismissing Anda petition on procedural grounds and accordingly “declin[ing] to go beyond what the Commission has already stated” on the merits). Notably, the Bureau’s order is under review by the full Commission. See *Application for Review of Anda, Inc.*, CG Docket Nos. 02-278, 05-338 (filed May 14, 2012).

²⁹ See *Am. Library Ass’n. v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005) (“It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.”).

³⁰ *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 844 (1984).

includes an opt-out notice that deviates in any respect from the opt-out notices required on *unsolicited* faxes. UVI's Petition asks the Commission to reject Plaintiff's erroneously expansive view of the Commission's rules — a request that does not call for the Commission to resolve any of the factual disputes in Plaintiff's underlying lawsuit against UVI. Rather, UVI asks only that the Commission exercise its ordinary, well-established authority to interpret or waive its own regulations. For the reasons set forth herein and in UVI's Petition, the Commission should grant the relief requested.

Respectfully submitted,

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Its Attorneys

Dated: September 26, 2014

Exhibit A

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

AROUND THE WORLD TRAVEL, INC.,
a Michigan corporation, individually and
as the representative of a class of similarly
MJH
situated persons,

Case No.: 2:14-cv-12589-GCS-

Plaintiffs,

Honorable George Caram Steeh
Magistrate Michael J. Hluchaniuk

v.

UNIQUE VACATIONS, INC., and JOHN DOES 1-10,
Defendants.

**REPLY MEMORANDUM IN SUPPORT
OF DEFENDANT’S MOTION TO STAY**

Defendant Unique Vacations, Inc. (“UVI” or “Defendant”), by and through its undersigned counsel submits this Reply Memorandum in response to Plaintiff’s Response in Opposition to Defendant’s Motion to Stay Proceedings Pending Determination by Federal Communications Commission or in the Alternative, For a 30 Day Enlargement of Time to Respond to Complaint.

Respectfully submitted,

Date: September 24, 2014

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

AROUND THE WORLD TRAVEL, INC.,
a Michigan corporation, individually and
as the representative of a class of similarly
MJH
situated persons,

Case No.: 2:14-cv-12589-GCS-

Plaintiffs,

Honorable George Caram Steeh

Magistrate Michael J. Hluchaniuk

v.

UNIQUE VACATIONS, INC., and JOHN DOES 1-10,
Defendants.

**BRIEF REPLY MEMORANDUM
IN SUPPORT OF DEFENDANT'S MOTION TO STAY**

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 Comment on Petitions Concerning the Commission’s Rule on Opt-
 Out Notices on Fax Advertisements, CG Docket Nos. 02-278, 05-
 338, DA 14-9237

*Was Not the Statutory Basis for Commission’s Rule Requiring an Opt-
 Out Notice for Fax Advertisements Sent with Recipient’s Prior
 Express Consent, Order, 27 FCC Rcd 4912, 4915 (CGB 2012)8*

INTRODUCTION

Plaintiff's opposition confirms that this Court should issue the stay requested by Unique Vacations, Inc. ("UVI"). First, the decision by the Federal Communications Commission ("FCC") on UVI's and the other pending administrative petitions will directly affect the present litigation. The central legal issue underlying both this case and the pending FCC petitions is whether the FCC had authority to promulgate regulations prescribing opt-out notice requirements for *solicited* faxes (*i.e.*, faxes sent with "prior express invitation or permission, in writing or otherwise"). Although the Junk Fax Prevention Act of 2006 ("JFPA") may have authorized opt-out notice requirements for unsolicited faxes, the same cannot be said for solicited faxes. Indeed, the plain language of the JFPA suggests that solicited faxes, fall outside its scope entirely. As a result, a determination by the FCC in favor of UVI reduces this lawsuit to a single-plaintiff case focused on faxes sent to Plaintiff after it withdrew its prior express invitation or permission to receive such faxes. Thus, a stay would avoid the expenditure of resources associated with class certification, or decertification if the FCC renders its determination after a class has been prematurely certified.

Second, a stay is consistent with the overwhelming majority of district court decisions in TCPA cases with nearly identical circumstances. *See* Composite **Exhibit A**. Indeed, the court in *Physicians Healthsource, Inc. v. Anda*, No. 12-

60798-cv-RSR (S.D. Fla. May 23, 2014) went as far as to *sua sponte* reinstate a stay of the action pending FCC determination, a fact that Plaintiff fails to disclose in its discussion of *Anda*. Plaintiff also fails to advise the Court that the trend is not to deny stay requests wholesale, but to grant them and impose periodic reporting obligations on the parties. Plaintiff has cited only two cases where courts have denied stays in TCPA actions and both are easily distinguishable on their facts.

Third, not staying the case will irreparably harm UVI. UVI will be forced to continue this class action litigation under Plaintiff's contention that the FCC's opt-out notice regulations for solicited faxes are valid. Conversely, Plaintiff will not suffer any prejudice as a result of a monitored stay of this action. UVI is not seeking an indefinite stay, has stopped sending faxes and is mindful of its preservation obligations. The Court may require periodic status reports and may reassess a stay on a regular basis, if needed.

ARGUMENT

I. The Opt-Out Regulations Are The Central Legal Issue In This Case

The opt-out regulations currently under review by the FCC are the central issue in this case. Plaintiff's Complaint defines the putative class as:

All persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising the commercial

availability of any property, goods, or services by or on behalf of Defendants, and (3) *which did not display a proper opt-out notice*.

(Complaint at ¶ 23) (emphasis added). Plaintiff makes no distinction between “solicited” or “unsolicited” faxes. Throughout Plaintiff’s Complaint, the allegations tie directly to facsimiles purportedly sent “without the required opt out language to Plaintiff and more than 25 other recipients....” (Compl. at ¶ 20); *See also* (“Defendants’ facsimiles did not display a proper opt-out notice as required by 47 C.F.R. § 64.1200.”) (*Id.* at ¶ 22); (alleging that even where a sender claims to have prior express invitation or permission, FCC regulations state the faxes must include an opt-out notice) (*Id.* at ¶ 33). Similarly, Plaintiff alleges that “without the required opt-out notice, UVI cannot raise a permission defense, leaving it with a TCPA violation even if it had ‘prior express permission or invitation.’” (*Id.* at ¶ 35). Thus, Plaintiff clearly bases its claims on the alleged failure of *all faxes* to comply with the technical opt-out language requirement, regardless of whether the facsimiles were “unsolicited” or “sent without prior express invitation.”

Evidently recognizing that its own allegations support UVI’s requested stay, Plaintiff’s opposition attempts to recast this case from one premised on opt-out notice language to one about consent to receive faxes. Plaintiff argues that an FCC decision to overturn the opt-out notice regulations would not dispose of this case because the question of whether the faxes are solicited remains. This argument is

unavailing. Any allegation in the Complaint as to whether *solicited* faxes contain proper opt-out notice would become irrelevant upon a favorable FCC ruling.

Moreover, the opt-out notice issue is the only focus of Plaintiff's definition of the putative class. Thus, an FCC decision overturning the opt-out notice regulation would materially affect consideration of a motion to certify a class as, among other things, Plaintiff's proposed class definition would no longer be viable, and would lead to a motion to decertify any class prematurely certified.

Furthermore, aside from the isolated exception of a handful of faxes mistakenly sent to Plaintiff in late March and early April 2013 and three faxes sent in late June 2014 after it opted out, all of the faxes alleged to have been transmitted were sent to individuals who gave "prior express invitation or permission" in writing to receive such faxes. UVI does not employ "fax broadcasters" or other third-parties to create advertisements to send on UVI's behalf. UVI sent faxes only to those who provided their fax numbers and expressly agreed to receive facsimile communications, e-mails and direct mail, including material advertising the commercial availability or quality of property, goods or services. To the extent Plaintiff alleges she received faxes after she opted out, the only remaining issue for this Court is whether those faxes contain opt-out language that comply with the statutory requirements. This circumstance would be unique to Plaintiff and not resolvable on a class basis. As to the sufficiency of the opt-out language in UVI's

faxes, it is worth noting that Plaintiff clearly saw and acted on it. This alone belies Plaintiff's allegations that the opt-out language in UVI's faxes is defective.

Plaintiff's reliance on *Kaye v. Amicus Mediation & Arbitration Group, Inc.*, No. 13-347, Order ECF No. 87 (D. Conn. May 27, 2014) is misplaced. In *Kaye*, the court denied defendants' request for a stay pending FCC review of the opt-out regulations. The court found the defendant waited until long after it knew of the issues to seek a stay and never filed an administrative petition with the FCC. Also, the *Kaye* Plaintiff had moved for certification of three separate classes, only one of which pertained to opt-out notices. The court expressly stated that the class premised on allegedly defective opt-out notices "would *benefit* from authoritative administrative guidance and uniform treatment by courts." *Id.*

Unlike *Kaye*, this case is in its infancy. It was commenced on July 1, 2014, and the deadline for UVI to file its answer is October 3, 2014. Moreover, Plaintiff's complaint is largely centered around the lack of proper opt-out notice, and its class certification is based solely on the technical deficiencies of the opt-out notice.

As the majority of district courts have already found, these circumstances warrant the granting of UVI's stay. Should the FCC grant the petitions, the universe of faxes at issue in this case would be dramatically reduced from an unwieldy, amorphous putative class action to a single-plaintiff complaint for

several faxes sent to Plaintiff after Plaintiff allegedly opted out. The nature and amount of discovery and other proceedings associated with such a case would be significantly reduced, thereby conserving this Court's and the parties' valuable resources. This is a scenario that could be resolved expeditiously without the necessity of protracted class action litigation. Moreover, the stay would allow for uniformity in these TCPA cases as the FCC resolves the petitions. As at least one court has stated on this precise issue, "the more cases that are stayed pending the resolution of [the FCC] proceedings, the greater the potential for consistent results in TCPA litigation." *Physicians Healthsource, Inc. v. Purdue Pharma L.P.*, 3:12-cv-1208 SRU, 2014 WL 518992 (D. Conn. Feb. 3, 2014).

Plaintiff's other citations are equally unavailing. *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 683 (7th Cir. 2013), does not bear on the present issues. It did not involve a motion to stay. *Holtzman's* issue was whether the faxes constituted "advertisements" under the TCPA. Nor did *In re Sandusky Wellness Ctr., LLC*, 14-0301, 2014 WL 2809283 (6th Cir. June 12, 2014) involve a motion to stay. In *Sandusky*, the Sixth Circuit addressed a petition to appeal the district court's denial of class certification. The Court remanded the case for the district court to conduct a more rigorous analysis of class certification factors, including commonality. The Court noted that commonality might possibly exist if the faxes did not contain opt-out language or if such language was not sufficient.

II. The Stay Will Not Cause Undue Delay or Prejudice Plaintiff

Plaintiff relies on *Physicians HealthSource, Inc. v. Stryker Corp.*, No. 12-cv-7299 (W.D. Mich. Sept. 8, 2014), as the primary case to support its position that a stay pending the FCC ruling on opt-out regulations will cause undue delay and prejudice. *Stryker*, one of the only instances in which a stay was denied in TCPA cases, is inapplicable here. In *Stryker*, the defendant asked the court to stay the case pending final action by the FCC on the same regulations at issue in this case, but had not yet filed a petition or joined any of the petitions pending at the time. Moreover, class certification already had been granted which the appellate court declined to disturb. Most importantly, in *Stryker*, the case already had advanced through multiple years of litigation and was at the summary judgment stage with cross-motions pending before a stay was sought.

In stark contrast, UVI has submitted a petition to the FCC regarding the subject opt-out notice regulations. It did so prior to filing its instant Motion to Stay. Also, a class has not yet been certified, much less briefed, and the case has been pending a mere two months. These factors all weigh in favor of granting a stay.

With only two clearly distinguishable exceptions (*Kaye* and *Stryker*), every district court to address this issue in the nearly identical TCPA class action cases have granted stays. See Composite **Exhibit A**. Each of these courts has reasoned

that, among other factors, because the FCC's resolution of the administrative action will "directly affect analysis of the instant lawsuit, the better course of action is to await the FCC's ultimate decision." *See, e.g., Anda.*, No. 12-60798-cv-RSR (S.D. Fla. May 23, 2014). This will potentially "conserve judicial resources and minimize the chance of error." *Purdue Pharma L.P.*, 2014 WL 518992, at *3.

There can be little doubt that the FCC is actively considering the issue raised by UVI and others in their administrative petitions and that the FCC is contemplating action soon. FCC Commissioner Michael O'Reilly recently weighed in on the issue and authored a post on the Official FCC Blog called "TCPA: It is Time to Provide Clarity." (*See* Michael O'Reilly, TCPA: It is Time to Provide Clarity, Official FCC Blog (Mar. 25, 2014), <http://www.fcc.gov/blog/tcpa-it-time-provide-clarity>). Specifically, the Commissioner stated that "the [TCPA] rules have become complex and unclear." *Id.* He then referenced "the problems caused by this lack of clarity [as] evidenced by an increasing number of TCPA-related law suits and a growing backlog of petitions pending at the FCC." *Id.* Most importantly, the Commissioner stated that "the FCC needs to address this inventory of petitions *as soon as possible.*" *Id.* (emphasis added). Consistent therewith, the FCC recently issued additional Public Notices inviting comments on a shortened three-week cycle on multiple petitions seeking declaratory rulings and/or waivers similar to the relief sought by UVI. *See*

Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements, CG Docket Nos. 02-278, 05-338, DA 14-734 (rel. May 30, 2014) (seeking comment on petitions filed by S&S Firestone, Inc. and Cannon & Associates LLC); Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements, CG Docket Nos. 02-278, 05-338, DA 14-923 (rel. June 27, 2014) ("June 27 PN") (seeking comment on petition filed by Stericycle, Inc.). As such, this Court should stay this action due to the fact that the FCC may soon take action on these petitions.

Plaintiff argues that the stay would be indefinite and would cause undue delay as the final FCC action could take years. Multiple district courts have considered and rejected this exact argument. These courts reason that the FCC's recent actions and the FCC Commissioner's blog suggest that the petitions are likely to be addressed soon. *See, e.g., Masimo*, No. 8:14-cv-00001-JVS-AN.

Plaintiff's concern that the stay would be for an indefinite period of time is easily ameliorated by structuring the stay so that the parties are required to file joint periodic status reports. Based on the status reports, the Court can reassess the efficacy of continuing the stay after a certain period of time. This is the procedure that many courts are utilizing in the other pending TCPA cases.

III. A Stay Is Not Futile

Plaintiff's argument that a stay would be futile is based on the premise that the FCC is not likely to change its position. Plaintiff's futility argument, based on the *amicus* briefs submitted by the FCC in *Nack* and by the decision issued by the FCC Consumer & Government Affairs Bureau ("Bureau") in *Anda*, is flawed. Indeed, earlier this year, in *Scott Barr, DDS v. Futuredontics, Inc.*, No. 13-cv-61982-JIC (S.D. Fla. Feb. 14, 2014), the court rejected Plaintiff's precise argument. The court stated that the *Nack amicus* brief was filed more than two years ago by the FCC's general counsel at the Eighth Circuit's request. *Id.* The *Barr* court concluded that the *amicus* brief "is not controlling, or even indicative, of how the FCC will rule on the Petition in the formal administrative proceeding now pending." *Id.* In *Barr*, the court also recognized that the Eighth Circuit found the *amicus* brief contained a "questionable" interpretation of § 64.1200(a)(4)(iv) and suggested remand to address requests to stay proceedings. *Id.* Subsequently, the district court stayed the action to allow the defendant an opportunity to pursue administrative remedies with the FCC.

The court's reasoning in *Barr* is instructive. The Bureau is one of a number of similar bureaus that assists the agency, but its decisions are subject to review by the FCC itself. *See, e.g.*, 47 C.F.R. § 0.361(b) (requiring the Bureau to refer application for review of Bureau actions to the full Commission). The *Anda* Order

is currently under review by the full Commission. (*See* Application for Review of Anda, Inc., CG Docket Nos. 02-278, 05-338 (filed May 14, 2012)). Moreover, the *Anda* Order did not address the merits of the arguments raised by Anda, and subsequently by other petitioners, except in nonbinding *dicta*. *See* *Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission’s Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient’s Prior Express Consent*, Order, 27 FCC Rcd 4912, 4915 (CGB 2012) (dismissing Anda petition on procedural grounds and accordingly “declin[ing] to go beyond what the Commission has already stated” on the merits). In *Nack*, the court was aware of the *Anda* Order and the FCC’s *amicus* brief, yet still suggested that the TCPA defendant should pursue an administrative challenge with the FCC. *See Nack*, 715 F. 3d at 687. Thus, it is apparent that the court did not believe challenging the opt-out regulation issue was futile when recommending that very course of action. Indeed, the Eighth Circuit suggested that “a refusal of the agency to consider a substantive challenge to the regulation” might “allow this court to exercise jurisdiction over such a challenge.” *Nack*, 715 F.3d at 686 n.2. In addition to the Eighth Circuit’s recommendation which disproves Plaintiff’s futility argument, upon remand, the district court granted a stay to allow the defendant to pursue administrative remedies with the FCC. *Nack*, No. 4:10-CV-00478 AGF,

2013 WL 4860104 (E.D. Mo. Sept. 12, 2013). Relying on guidance from *Nack* and cases following it, a stay in the instant case is not futile, but appropriate.

Moreover, recent comments from the highest levels of the FCC itself suggest that challenges to the opt-out notice regulations are far from futile. Particularly, FCC Commissioner Michael O'Reilly stated that "[t]he 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." (See Michael O'Reilly, TCPA: It is Time to Provide Clarity, Official FCC Blog (Mar. 25, 2014), <http://www.fcc.gov/blog/tcpa-it-time-provide-clarity>). The Commissioner then highlighted the FCC's expansion of the TCPA "*to encompass solicited fax advertisements even though the statute is limited to unsolicited fax advertisements,*" and cited to the decision in *Nack*. *Id.* (emphasis added). In light of Commissioner O'Reilly's comments, the decision in *Nack*, and various other district court orders, it is clear that granting a stay pending FCC review is the prudent way to proceed with this action and certainly is not futile.

IV. A Stay Will Not Prejudice Plaintiff Or Lead To Loss Of Evidence

Plaintiff erroneously alleges that, if a stay is granted it will suffer prejudice because "relevant evidence will be lost" and "witness memories will fade." (Opp'n Br. at 19). UVI is well aware of its preservation obligations and has preserved, and

will continue to preserve, all relevant evidence during the pendency of this litigation.

Plaintiff cites to a case plainly inapplicable to the instant case that does not address the issue of potentially lost evidence due to a stay. In *N. County Communications Corp. v. Verizon Global Networks, Inc.*, 08-CV-1518 BEN WMC, 2011 WL 181736 (S.D. Cal. 2011), the court denied a stay where the rulemaking proceedings had been pending for nine years without progress, and the stay was sought two years into the case. In this case, litigation has been pending for only a few months, UVI filed a petition prior to seeking a stay, and the FCC has already openly pursued actions to address the opt-out regulation. As such, a stay is therefore appropriate in this case.

V. Conclusion

WHEREFORE, UVI's Motion for Stay should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System which will send notification of such filing to all properly registered counsel of record.

Respectfully submitted,

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