

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

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

**Bais Yaakov of Spring Valley’s Comments on ACT, Inc. Petition Seeking
“Retroactive Waiver” of the Commission’s Rule Requiring Opt-Out Notices
on Fax Advertisements Sent with Permission**

Commenter Bais Yaakov of Spring Valley is the Plaintiff in a private TCPA class action pending in the United States District Court for the District of Massachusetts against Petitioner ACT, Inc. (“ACT”).¹ ACT filed a petition with the FCC (the “Commission”) on November 12, 2014 (the “ACT Petition”) seeking a retroactive waiver of the regulation (“the opt-out regulation”) requiring opt-out notices on fax advertisements sent with “prior express invitation or permission.”² The Consumer and Governmental Affairs Bureau sought Comments on the Petition on November 28, 2014.³

Commenters Roger H. Kaye and Roger H. Kaye, MD PC (collectively the “Kaye Commenters”) are Plaintiffs in a private TCPA class action against Petitioners Amicus Mediation & Arbitration Group, Inc. (“Amicus”) and Hillary Earle (“Earle”) (collectively “the

¹ See *Bais Yaakov of Spring Valley v. ACT, Inc.*, Docket No. 4:12 CV 40088 (D. Mass.).

² *Petition for Waiver of ACT, Inc., of ACT, Inc.*, CG Docket Nos. 02-278, 05-338 (Nov. 12, 2014). The regulation requiring opt-out notices on permission-based fax advertisements is codified at 47 C.F.R. § 64.1200(a)(4)(iv).

³ *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions for Waiver of the Commission’s Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Nov. 28, 2014) (“Public Notice”).

Amicus Petitioners”) Amicus and Earle filed a Petition on November 13, 2014 (the “Amicus Petition”) seeking a retroactive waiver of the opt-out regulation as well.

Because the Commission does not have the authority to absolve defendants of liability under a private right of action established by Congress, like the private rights of action under TCPA under which ACT, Amicus and Earle have been sued, their requests for waivers must be denied. Moreover, even if the Commission had the power to grant waivers of liability in private TCPA causes of action, the Commission could not do so here because ACT, Amicus and Earle have not satisfied their heavy burden to justify waivers here.

Background

A. Bais Yaakov of Spring Valley v. ACT, Inc.

On July 30, 2012, Bais Yaakov of Spring Valley (“Bais Yaakov”) filed a class action (the “ACT Class Action”) in the United States District Court for the District of Massachusetts against ACT, Inc. (“ACT”) under the TCPA for, among other things, sending thousands of unsolicited and permission-based fax advertisements without proper opt-out notices to Bais Yaakov and other persons throughout the United States.⁴ That case is currently stayed in the District Court pending a resolution of ACT’s interlocutory appeal to the First Circuit of the District Court’s denial of ACT’s motion to dismiss.

In an attempt to be relieved of potential liability for sending permission-based fax advertisements without opt-out notices, ACT filed a cursory, six-page petition with the Commission, on November 12, 2014, requesting a retroactive waiver of the application of the opt-out regulation. In that Petition, ACT argues that it should be granted such a waiver because

⁴ A “permission-based fax advertisement” is a fax advertisement that is transmitted to any person with that person’s prior express invitation or permission. . That term is used herein instead of the undefined term “solicited faxes” used by ACT.

permission-based faxes allegedly (1) “fall outside the scope” of Section 227(b) of the TCPA.”; and (2) are not “unwanted faxes.” In addition, ACT maintains that it should be granted a retroactive waiver because the Commission granted such waivers to allegedly similarly situated parties in its October 30, 2014 Order⁵ (“the Order”) and for “the reasons set forth in the [O]rder.”

Significantly, never once in the District Court litigation did ACT argue that the opt-out regulation was inapplicable to permission-based fax advertisements or that ACT was confused by a footnote in the *Junk Fax Order*⁶ about the applicability of that regulation. Moreover, ACT never contended in the District Court that it was even aware of the opt-out regulation or the *Junk Fax Order* prior to Bais Yaakov’s filing of the Class Action against it. In fact, the one ACT witness who testified about the issue at his deposition specifically stated that he was not aware of the existence of the TCPA until Bais Yaakov’s filing of the Class Action. *See* Deposition of Lawrence Rich attached hereto as Exhibit A at 85-86. In addition, ACT did not argue before the District Court that it was somehow confused in 2005 or thereafter by the Commission’s alleged lack of explicit notice in the Commission’s 2005 Notice of Proposed Rulemaking⁷ of the Commission’s intent to adopt 47 C.F.R. § 64.1200(a)(4)(iv).

⁵ *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014).

⁶ *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 (2006) (*Junk Fax Order*).

⁷ *Junk Fax Protection Act*, CG Docket Nos. 02-278 and 05-338, Notice of Proposed Rulemaking, 20 FCC Rcd 19758, 19767-70, ¶¶ 19-25 (2005) (*Junk Fax NPRM*).

Similarly, ACT has not argued in its petition that the opt-out regulation was inapplicable to permission-based fax advertisements or that ACT was confused by a footnote in the *Junk Fax Order*⁸ about the applicability of that regulation. Indeed, in the second sentence of its Petition, ACT admits, without hesitation, that the opt-out regulation “was promulgated pursuant to the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005 (the ‘TCPA’), and requires [permission-based] fax advertisements to include the same opt-out notice as *unsolicited* fax advertisements.” Moreover, ACT never contends in its Petition that it was even aware of the opt-out regulation or the *Junk Fax Order* prior to Bais Yaakov’s filing of the Class Action against it and ACT does not argue in its Petition that it was somehow confused in 2005 or thereafter by the Commission’s alleged lack of explicit notice in the Commission’s 2005 Notice of Proposed Rulemaking⁹ of the Commission’s intent to adopt the opt-out regulation.

B. Kaye et al. v. Amicus Mediation & Arbitration Group, Inc., et al.

On March 14, 2013, Kaye Commenters filed a class action (the “Kaye Class Action”) in the United States District Court for the District of Connecticut under the TCPA against the Amicus Petitioners for, among other things, sending thousands of unsolicited and permission-based fax advertisements without proper opt-out notices to the Kaye Commenters and other persons throughout the United States. The District Court has certified classes in the case and the case is currently stayed pending determinations on the Petitions for review of the Order and well as the resolution of the instant Petition.

⁸ *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 (2006) (*Junk Fax Order*).

⁹ *Junk Fax Protection Act*, CG Docket Nos. 02-278 and 05-338, Notice of Proposed Rulemaking, 20 FCC Rcd 19758, 19767-70, paras. 19-25 (2005) (*Junk Fax NPRM*).

Attempting to be relieved of potential liability for sending permission-based fax advertisements without opt-out notices, the Amicus Petitioners also filed a cursory, six-page petition with the Commission, on November 13, 2014, requesting a retroactive waiver of the application of the opt-out regulation. In that Petition, the Amicus Petitioners argue that their petition should be granted because they were confused about the applicability of the opt-out regulation because of a footnote in the 2005 Notice of proposed Rulemaking and because that Notice of Proposed Rulemaking allegedly did not provide explicit notice in of the Commission's intent to adopt the opt-out regulation. The Amicus Petitioners also contend that granting them a retroactive waiver of the applicability of the opt-out regulations would be in the public interest because (1) the Amicus Petitioners failure to abide by the opt-out regulation "would potentially subject Amicus to millions of dollars in damages under the TCPA," an amount that would allegedly cause it to go out of business; and (2) a waiver allegedly serves the public interest "to ensure that any confusion on the part of [the] Amicus [Petitioners] does not result in inadvertent violations of the requirements o [the opt-out regulation]."

What the Amicus Petitioners have neglected to inform the Commission is that Earle, who established Amicus with her husband, is employee of Amicus, and was personally responsible for sending out the faxes at issue, specifically testified at her deposition that she was even aware of the TCPA until she and Amicus were sued in the District Court. See Deposition of Hillary Earle attached hereto as Exhibit B at 67. In fact, she was not even sure what the TCPA was at her deposition. *See id.*

ARGUMENT

I. ACT'S AND THE AMICUS PETITIONERS' REQUESTS FOR RETROACTIVE WAIVERS OF THE APPLICABILITY OF THE OPT-OUT REGULATION IN PRIVATE CAUSES OF ACTION AUTHORIZED BY THE TCPA MUST BE DENIED BECAUSE THE COMMISSION DOES NOT HAVE THE AUTHORITY TO ABSOLVE DEFENDANTS OF LIABILITY IN SUCH PRIVATE CAUSES OF ACTION ESTABLISHED BY CONGRESS

The requests by ACT and the Amicus Petitioners for a retroactive waiver of the Commission's rules appear to be based on a misconception that the Commission has the power to absolve them of liability under TCPA causes actions brought against them by private parties in court or that will be brought by private parties against them in court. Nothing could be further from the truth.

The private right of action based on violation of the Commission's regulations is authorized by a federal statute, the TCPA, passed by Congress. *See* 47 U.S.C. § 227(b)(3). Any claim by the Commission that it has the power to administratively do away with a private right of action passed by Congress would be invalid as inconsistent with the TCPA statute itself. Nothing in the TCPA suggests, let alone authorizes the Commission to take away a private plaintiff's right to sue a defendant and receive damages for violations of the Commission's regulations. Accordingly, the Commission cannot extinguish private plaintiffs' right to sue through administrative action or even through a regulation, since to do so would be inconsistent with the TCPA statute that authorizes that private right of action. *See, e.g., Brown v. Gardner*, 513 U.S. 115, 116-121 (1994)(regulation that required persons injured at a Veteran's Administration ["VA"] facility as a result of medical treatment to prove fault on the VA's part in order to recover struck down as inconsistent with the statute which said nothing at all about requiring fault as a condition of recovery). Indeed, if the Commission grants the waivers requested here, that action would not only violate TCPA statute but would violate the Separation

of Powers between Congress and the Executive Branch. *See, e.g., id.*

Moreover, the Supreme Court has long made clear that even an agency that has been granted authority to administer a statute, “the judiciary, not any executive agency, determines ‘the scope’ — including the available remedies — ‘of judicial power vested by’ statutes establishing private rights of action.” *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 n.3 (2013)(quoting *Adams Fruit Co. v. Barret*, 494 U.S. 638, 650 (1990)). *Accord, e.g., Natural Resources Defense Council v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014). This is true even if the agency has the authority to administer the statute in question by issuing regulations. *See, e.g., Adams Fruit*, 494 U.S. at 650. As the Supreme Court has squarely held “[t]his delegation, [] does not empower the [agency] to regulate the scope of the judicial power vested by the statute. Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction.” *Id.* (internal quotation marks omitted). Such an action would violate the separation of powers between executive and judiciary.¹⁰

In addition, a retroactive waiver of ACT and the Amicus Petitioners’ liability for past illegal faxing would also violate the Supreme Court’s long-standing holding that, unless specifically authorized by statute to do so, and administrative agency does not have the power to alter the legal consequences of past actions. Indeed, the Supreme Court has made abundantly clear that an administrative agency, like the Commission, does not even have the power to pass a retroactive regulation if Congress has not clearly and specifically authorized the administrative agency to do so. *See Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988)(“[A]

¹⁰ While the Commission appears to have rejected this argument in the Order, see Order at 11, ¶ 21, Bais Yaakov and the Kaye Commenters respectfully submit that that rejection was error as is made clear by the Supreme Court’s decision in *Brown, supra*, cited above.

statutory grant of legislative rulemaking authority will not, as a general matter be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”). Here of course, Congress never explicitly authorized the Commission to retroactively waive the liability of persons sued under the TCPA’s private right of action. Indeed, such a retroactive waiver without explicit Congressional authorization would improperly impair Bais Yaakov’s and the Kaye Commenters’ right to damages against ACT and the Amicus Petitioners and would impermissibly interfere with the right of recovery under the TCPA against them for their past conduct. *See generally, Landgraf v. USI Film Products*, 511 U.S. 244 (1994)(discussing presumption against retroactivity of substantive laws when Congress has not explicitly authorized such retroactivity).

For the reason stated above, the Commission does not have the authority to waive the applicability of the opt-out regulation to the private causes of action under the TCPA brought by Bais Yaakov and the Kaye Commenters.

B. EVEN IF THE COMMISSION HAD THE AUTHORITY TO GRANT THE WAIVERS OF LIABILITY FOR TCPA PRIVATE RIGHTS OF ACTION, THE COMMISSION COULD NOT GRANT THE WAIVERS REQUESTED HERE BECAUSE ACT AND THE AMICUS PETITIONERS HAVE NOT SATISFIED THEIR HEAVY BURDENS FOR SUCH WAIVERS

The Commission’s rules generally provide that “[a]ny provision of the [Commission’s] rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.” 47 C.F.R. § 1.3. However, a petitioner requesting a waiver of a Commission rule may not simply make a “generalized plea” for a waiver, but must show “special circumstances,” “articulate a specific pleading, and adduce concrete support, preferably documentary” for a waiver. *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 n.9 (D.C. Cir. 1969); *NetworkIP, LLC v.*

F.C.C., 548 F.3d 116, 127 (D.C. Cir. 2008). Moreover, “before the FCC can invoke its good cause exception, it *both* ‘must explain why deviation better serves the public interest, *and* articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation,’” *Id.*, quoting *Northeast Cellular Telephone Co., L.P. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). “The reason for this two-part test flows from the principle ‘that an agency must adhere to its own rules and regulations,’ and ‘[a]d hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.’” *Id.*, quoting *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, 950-51 (D.C. Cir. 1986).

The Amicus Petitioners and ACT have failed provided concrete evidentiary support for a waiver, much less articulated a public interest that supports granting any waiver of application of the Opt-Out Regulation. First of all, ACT and the Amicus Petitioners have absolutely failed to submit any evidence that prior to sending out the fax advertisements at issue they suffered any actual confusion about the applicability of the opt-out regulation because of a footnote in the 2005 Notice of proposed Rulemaking or because that Notice of Proposed Rulemaking allegedly did not provide explicit notice in of the Commission’s intent to adopt the opt-out regulation. Moreover, ACT has never even claimed to have been so actually confused. Furthermore, Earle, as discussed above, specifically testified that she never even knew about the TCPA before the lawsuit against the Amicus Petitioners was filed, and the one witness who testified about this issue for ACT said the same. Therefore, none of the petitioners could not have been actually confused by the footnote or the Notice of Proposed Rulemaking because ***they did not even know that the TCPA and the NPRM existed before they caused the fax advertisements at issue to be***

transmitted. Accordingly, the reasons given by the Commission for granting waivers in the Order simply do not apply here.¹¹

Moreover, while the petitioners complain about the possible financial liability that they may face in the private TCPA lawsuits, they not submitted a shred of concrete evidence to the Commission, such as their financial conditions and insurance coverage, of how they will likely be affected by these lawsuits. Such specific evidence is specifically required under the waiver cases discussed above. It is also instructive to note that none of the Petitioners has brought forth a single example of a company that was put out of business as a result of a judgment under the TCPA or a TCPA settlement. That is not surprising because putting a company out of business for its TCPA violations would most likely prevent any recompense for consumers and their advocates. That is because, if a company was in bankruptcy, class members, as unsecured creditors, would likely receive little or nothing. For that reason, consumer advocates who sue on behalf of consumers take into consideration the financial condition of defendants and are careful to enter into settlements that permit the defendants to continue to exist as going concerns. In any event, as the Commission made a finding that parties who violate the TCPA may face substantial liability for doing so is not an “inherently adequate ground” for a waiver. Order at 14 ¶ 28.

Nor would such waivers based on the vast number of violations the petitioners may have committed be fair to fax advertisers in general. Granting waivers on that basis would effectively reward entities that have engaged in massive violations of the law, while leaving other entities that did not violate the law on that scale still open to liability, resulting in precisely the type of

¹¹ By making the above arguments, Bais Yaakov and the Kaye Commenters are not conceding that the reasons given by the Commission for granting the waivers it did in the order were a legally sufficient basis to do so. In fact, even if the Commission had the power to waive liability in private causes of action under the TCPA, Bais Yaakov and the Kaye Commenters still maintain that the reasons given by the Commission for granting the waivers were legally insufficient and that the waivers should not have been granted.

“discriminatory application” of waivers that the Courts have admonished the Commission to avoid. *NetworkIP, LLC v. F.C.C.*, *supra*, 548 F.3d at 127.

In any event, none of the petitioners has provided concrete evidentiary support for a waiver, much less articulated a public interest that supports granting any waiver of application of the Opt Out Regulation. That is not surprising, as no public interest could be served by allowing fax advertisers not to inform the persons to whom they send their fax advertisements of the only effective method of opting out of receiving future unsolicited faxes. *See* 42 C.F.R. § 64.1200(a)(4)(v) (requiring that a request to opt-out of receiving future fax advertisements must abide by all of the requirements of § 64.1200(a)(3)(v), or else it can be ignored by sender of such fax advertisements). Indeed, the only interest that the petitioners have identified in support of their request for a waiver is their own *self-interest* in not being held financially liable for their thousands of violations of the TCPA – a private interest that is wholly insufficient to support a waiver.

Essentially, as petitioners’ cursory waiver petitions reflect that petitioners believe that the retroactive waivers they seek in this case are simply for the asking. The Commission made absolutely clear in the Order that that is not the case when it stated “we note that all future waiver requests will be adjudicated on a case-by-case basis and do not prejudge the outcome of future waiver requests in this Order.” Order at 15 ¶ 32 n. 102. Moreover, as the Commission also made clear, “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.” Order at 13 ¶ 26. Because the Commission’s stated reasons for granting the waivers it did in the Order simply are not present regarding ACT and the Amicus Petitioners, the Commission’s reasoning simply does not apply to these petitions.

What ACT and the Amicus petitioners have done here is simply make a “generalized

plea” for a waivers, and have failed to show “special circumstances,” “articulate a specific pleading, and adduce concrete support, preferably documentary” for a waiver. *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 n.9 (D.C. Cir. 1969); *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 127 (D.C. Cir. 2008). Accordingly, because ACT and the Amicus Petitioners have failed to carry their heavy burden to justify the granting of retroactive waivers of the opt-out regulation to them, their requests for such waivers must be denied.

CONCLUSION

For all the foregoing reasons, The Commission should deny the petitions of ACT and the Amicus Petitioners in their entirety.

Dated: December 12, 2014

Respectfully submitted,

BELLIN & ASSOCIATES LLC

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Roger H. Kaye and Roger H. Kaye, MD PC*

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ORIGINAL

C.A. No 4:12-CV-40088-TSH

BAIS YAAKOV OF SPRING VALLEY,)
Plaintiff)

vs.)

ACT, INC.,)
Defendants)

DEPOSITION OF
LAWRENCE RICH

THURSDAY, JUNE 6, 2013

10:06 A.M. - 3:52 P.M.

DOHERTY, WALLACE, PILLSBURY AND MURPHY, P.C.

ONE MONARCH PLACE

1414 MAIN STREET, SUITE 1900

SPRINGFIELD, MASSACHUSETTS

Sandra A. Deschaine, CSR, RPR, CLR, CRA
Job #117572

1 address, was there any other -- was there any
2 other indication or notice to people that
3 they could opt out of receiving future faxes
4 on the faxes themselves?

5 MR. LEONARD: Objection.

6 If you know. Just testify to your
7 personal knowledge concerning that.

8 THE WITNESS: I don't know because
9 I didn't approve all of those. I just
10 approved the process.

11 BY MR. BELLIN:

12 Q. Who did actually review the faxes,
13 if anybody, before they were sent out from
14 the Albany office?

15 A. Sha'ron.

16 Q. Sha'ron. Okay.

17 Prior to this lawsuit, and not --
18 I'm obviously not asking about communications
19 you had with your lawyer because it's not
20 prior to this lawsuit.

21 Prior to the lawsuit, were you
22 aware of the Telephone Consumer Protection
23 Act?

24 A. No.

1 Q. Were you aware of any statute or
2 regulations concerning the sending of faxes?

3 A. No.

4 Q. Do you know whether anyone in your
5 region was aware of any statutes or
6 regulations concerning the sending of faxes?

7 A. I don't know.

8 Q. Do you know whether anyone in the
9 central office was aware of statutes or
10 regulations concerning the sending of faxes?

11 A. I don't know.

12 Q. When you discussed with the
13 various people in the central office the
14 faxes you were sending -- the fact that you
15 were sending the faxes out, did anyone raise
16 any concerns about the legality -- about the
17 legality of that practice?

18 A. No.

19 Q. Would it be fair to say that other
20 than -- and I may have covered this already,
21 so I apologize.

22 Would it be fair to say that other
23 than the fax in Exhibit 1 on Bates stamp 1855
24 about giving the students their home field

1 COMMONWEALTH OF MASSACHUSETTS

2 HAMPDEN SS.

3
4
5 I, Sandra A. Deschaine, Registered
6 Professional Reporter and Notary Public
7 within and for the Commonwealth of
8 Massachusetts at large, do hereby certify
9 that the deposition of Lawrence Rich, in the
10 matter of Bais Yaakov of Spring Valley vs.
11 ACT, INC., at Doherty, Wallace Pillsbury &
12 Murphy, One Monarch Place, Springfield,
13 Massachusetts, on Thursday, June 6, 2013, was
14 taken and transcribed by me; that the witness
15 provided satisfactory evidence of
16 identification as prescribed by Executive
17 Order 455 (03-13) issued by the Governor of
18 the Commonwealth of Massachusetts; that the
19 transcript produced by me is a true record of
20 the proceedings to the best of my ability;
21 that I am neither counsel for, related to,
22 nor employed by any of the parties to the
23 action in which this deposition was taken,
24 and further that I am not a relative or
employee of any attorney or counsel employed
by the parties thereto, nor financially or
otherwise interested in the outcome of the
action on this 20th day of June, 2013.

17
18
19 
20 Sandra A. Deschaine

21 Registered Professional Reporter

22
23
24 My Commission Expires:
July 7, 2017

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

----- x

ROGER H. KAYE AND ROGER H. KAYE, M.D. PC., ON BEHALF OF
THEMSELVES AND ALL OTHERS SITUATED,

Plaintiff, Docket No. 13-CV-00347

-against-

AMICUS MEDIATIONS & ARBITRATION GROUP, INC. AND HILLARY
EARLE,

Defendants.

----- x

EXAMINATION BEFORE TRIAL of the Defendant, HILLARY
EARLE, taken by the Plaintiff, pursuant to Order, held at
the offices of Eckert Seamans Cherin & Merllot, LLC, 10
Bank Street, White Plains, New York 10601, on November
20, 2013, at 10:47 a.m., before, Stephanie Morano, a
court reporter and a Notary Public of the State of New
York.

MAGNA LEGAL SERVICES

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EARLE

2 hired in April. She works more hours. She's
3 more generic. She'll just put called on
4 cases, seven hours, but that could be
5 anything. Cold calls.

6 Q. How far back do you have time sheets
7 for your employees or contractors or whatever
8 you want to call them?

9 A. I'm not sure. I think I started to
10 keep them in the last year and a half, but I
11 could have them further back. I'd have to
12 look and see.

13 Q. Until you were sued in this lawsuit,
14 were you familiar with the telephone consumer
15 protection act?

16 A. No, not really.

17 Q. You never heard of it?

18 A. No. I still get the letters wrong
19 TC -- what. I think it's connected to a do
20 not call -- like if you say to a
21 telemarketer --

22 MR. BILDER: There's no
23 question pending.

24 (Plaintiff's Exhibit 5,
25 Document, was marked for

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C E R T I F I C A T E

I, STEPHANIE MORANO, hereby certify that the Examination Before Trial of HILLARY EARLE was held before me on the 20th day of November, 2013; that said witness was duly sworn before the commencement of his testimony; that the testimony was taken stenographically by myself and then transcribed by myself; that the party was represented by counsel as appears herein;

That the within transcript is a true record of the Examination Before Trial of said witness;

That I am not connected by blood or marriage with any of the parties; that I am not interested directly or indirectly in the outcome of this matter; that I am not in the employ of any of the counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this day of **DEC 06 2013** 2013.

Stephanie Morano

STEPHANIE MORANO