

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

In the Matter of)	
)	CG Docket No. 02-278
Petition of Houghton Mifflin Harcourt)	
Publishers, Inc., Houghton Mifflin Harcourt)	CG Docket No. 05-338
Publishing Company, and Laurel Kaczor)	
for Retroactive Waiver of 47 C.F.R.)	
§ 64.1200(a)(4)(iv))	

PETITION FOR RETROACTIVE WAIVER

Pursuant to 47 C.F.R. § 1.3 and the order styled *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278, 05-338, FCC 14-164 (Oct. 30, 2014) (hereinafter the “Order”), Petitioners Houghton Mifflin Harcourt Publishers, Inc., Houghton Mifflin Harcourt Publishing Company, and Laurel Kaczor (collectively, “Petitioners” or “HMH”) respectfully request that the Commission grant Petitioners a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) for “solicited” fax advertisements that were sent by or on behalf of HMH, *i.e.*, fax advertisements that were sent with the recipients’ prior express invitation or permission.

I. RETROACTIVE WAIVERS UNDER THE OCTOBER 30, 2014 ORDER

On October 30, 2014, the Commission issued an order clarifying that the opt-out notice requirement under the Telephone Consumer Protections Act, 47 U.S.C. § 227(b)(1)(C), (2)(D) (the “TCPA”), and its implementing regulation, 47 C.F.R § 64.1200(a)(4)(iv), applies to solicited fax advertisements. Order ¶ 1. The parties to the proceeding requested retroactive waivers of the opt-out notice requirement if the Commission were to so conclude. *See id.* ¶ 11. Noting that those “who have sent fax ads with the recipient’s prior express permission may have reasonably been uncertain about whether [the] requirement for opt-out notices applied to them,” the

Commission found “good cause” to waive the requirement and granted retroactive waivers to *all* the parties to the proceeding. *See id.* ¶¶ 1, 15, 36.

The Commission found “good cause” for waiving the opt-out notice requirement because “(1) special circumstances warrant[ed] deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.” *Id.* ¶ 23. With regard to the “special circumstances” prong, the Commission identified “two grounds” leading to “confusion” or “misplaced confidence” about the applicability of the opt-out notice requirement to solicited faxes. *Id.* ¶ 24. First, a footnote contained in a prior order of the Commission “caused confusion or misplaced confidence” by stating that the “opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.” *Id.* (quoting *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, 3810 n.154 (2006) (emphasis added) (hereinafter the “*Junk Fax Order*”)). Second, the Commission recognized that the notice of its intent to adopt the implementing regulation “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.” *Id.* ¶ 25.

With regard to the “public interest” prong, the Commission balanced “legitimate business and consumer interests.” *Id.* ¶ 27. It determined that subjecting businesses to “significant damage awards under the TCPA’s private right of action or possible Commission enforcement” would be “unjust or inequitable” given the confusion and misplaced confidence about the rule’s applicability. *Id.* ¶¶ 27, 28. While acknowledging the “offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads,” the Commission noted that the retroactive waivers would be limited in time.

Id. On balance, therefore, the Commission concluded that a waiver would better serve the public interest than a strict application of the rule. *See id.* ¶¶ 27-29.

Having determined that retroactive waivers were appropriate under these circumstances, the Commission invited “similarly situated parties” to seek retroactive waivers for solicited fax advertisements. *See id.* ¶ 2. The Commission instructed such parties to “make every effort to file [their waiver requests] within six months of the release of this Order,” *i.e.*, before April 30, 2015. *Id.* This Petition is timely filed within the six-month period.

II. PENDING PUTATIVE CLASS ACTION LAWSUIT AGAINST PETITIONERS

Petitioners are defendants in a putative class action lawsuit filed in July 2013 and captioned *Bais Yaakov of Spring Valley v. Houghton Mifflin Harcourt Publishers, Inc.*, No. 13-cv-4577 (S.D.N.Y.). A true and correct copy of the operative Complaint is attached hereto as Exhibit 1. The plaintiff is a religious school in New York – and long-time *customer* of HMH – that has brought suit for alleged violations of the TCPA and New York General Business Law § 396-aa. *See* First Am. Compl. [Dkt. No. 55], ¶¶ 6, 12; Mem. of Law in Supp. of Defs.’ Mot. to Compel Arbitration on an Individual Basis and to Dismiss or Stay the Case (“Mem.”) [Dkt. No. 57], at 1. Defendant Houghton Mifflin Harcourt Publishing Company is a wholly-owned subsidiary of Houghton Mifflin Harcourt Publishers, Inc. and a publisher and provider of educational content and solutions. *See* Mem. at 24-25. Defendant Laurel Kaczor is an HMH employee. *See* First Am. Compl. [Dkt. No. 55], ¶ 9.

In its Complaint, the plaintiff specifically identified and attached as an exhibit only a single alleged “unsolicited” fax advertisement, sent or caused to be sent by HMH on or about November 15, 2012, that allegedly did not contain a properly worded opt-out notice (the

“Criterion Fax”).¹ *See id.* ¶ 11.² However, the lawsuit further alleges that HMH “jointly and severally caused to be sent out over seventeen thousand (17,000) unsolicited *and solicited* fax advertisements for goods and/or services without proper opt-out notices to persons throughout the United States.” *Id.* ¶ 2 (emphasis added). The plaintiff seeks to represent several classes of schools to whom HMH “sent or caused to be sent” fax advertisements from July 2009 to the present that did not contain a fully compliant opt-out notice, whether the fax was solicited or unsolicited. *See id.* ¶ 21. Petitioners deny that they are liable under either the TCPA or New York law because, among other defenses, the Criterion Fax was solicited by plaintiff and other schools. *See* Ans. to First Am. Compl. [Dkt. No. 62], ¶ 11; *id.* at 10 (Third Defense); *id.* at 11 (Sixth Defense).

III. PETITIONERS ARE SIMILARLY SITUATED TO ORIGINAL RECIPIENTS OF WAIVERS GRANTED BY THE COMMISSION

Like many of the original recipients of waivers granted by the Commission,³ HMH is subject to a putative class action lawsuit claiming violations of the TCPA for allegedly solicited fax advertisements. The lawsuit against HMH, like the actions brought against those parties,⁴ seeks minimum statutory damages of \$500 (with trebling sought up to \$1,500) for each solicited fax that allegedly did not contain a proper opt-out notice. *See* First Am. Compl. [Dkt. No. 55], at

¹ The Criterion Fax provided some information only on the Criterion® Online Writing Evaluation Service, developed by Educational Testing Service and distributed by HMH, for students in grades 4-12.

² The First Amended Complaint stated that “[a] copy of the Fax Advertisement is attached as Exhibit A and incorporated into this Complaint.” First Am. Compl. [Dkt. No. 55], ¶ 11. However, the Criterion Fax is not attached to the First Amended Complaint as filed on the public docket; it appears as an attachment (“Exhibit A”) to the original complaint. *See* Compl. [Dkt. No. 1], Ex. A. For ease of reference, a true and correct copy of Exhibit A to the original complaint is attached hereto as Exhibit 2.

³ *See* CARFAX Petition at 3, CG Docket Nos. 02-278, 05-338 (filed July 11, 2014); All Granite Petition at 5, CG Docket Nos. 02-278, 05-338 (filed Oct. 28, 2013); Gilead Petition at 3, CG Docket Nos. 02-278, 05-338 (filed Aug. 9, 2013); Forest Petition at 3, CG Docket No. 05-338 (filed June 27, 2013).

⁴ *See* CARFAX Petition at 2; All Granite Petition at 10; Gilead Petition at 2, 12; Forest Petition at 11.

14.⁵ And like those parties, HMH has been targeted by a plaintiff (Bais Yaakov of Spring Valley), that is far from an aggrieved individual consumer, and their counsel (Bellin & Associates LLC), who have brought numerous “gotcha”-type TCPA class action lawsuits over alleged fax advertisements with technically noncompliant opt-out notices.⁶ Further, like those parties,⁷ HMH has asserted that the faxes were sent pursuant to the recipients’ prior express invitation or permission. *See* Ans. to First Am. Compl. [Dkt. No. 62], at 11. Finally, like Forest Pharmaceuticals, Inc. and Gilead Sciences, Inc.,⁸ HMH did not omit an opt-out notice altogether but, rather, provided its school-customers with a way to opt out through a notice that substantially complied with the TCPA’s requirements. *See id.*

The same rationale above that supported the Commission’s grant of retroactive waivers to various parties on October 30, 2014, equally establishes Petitioners’ entitlement to relief here. Among other things, Laurel Kaczor is simply an HMH employee who was dragged into a TCPA class action lawsuit by Plaintiff merely because her name appeared on the Criterion Fax. *See* Ex. 2. The lawsuit potentially subjects Petitioners to substantial statutory damages for *all* solicited faxes sent by or on behalf of HMH over a multi-year period since July 2009, including the Criterion Fax. Rejecting the position advanced by Bellin & Associates, among others, the Commission squarely held that potential exposure in private lawsuits was a factor to take into consideration in deciding whether to grant a waiver. *See* Order ¶¶ 28. Further, Petitioners are

⁵ Incredibly, the plaintiff even seeks to obtain more than \$1,500 for each such solicited fax on the specious ground that a technically non-compliant opt-out notice in a single facsimile can give rise to multiple violations thereby triggering multiple statutory damage awards. *See* Pl.’s Reply Mem. of Law in Further Supp. of Mot. to Amend Pl.’s First Am. Compl. [Dkt. No. 72], at 10 n.9.

⁶ *See, e.g., Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 4:12-cv-40088 (D. Mass.).

⁷ *See* CARFAX Petition at 3; All Granite Petition at 2, 5; Gilead Petition at 4, 5; Forest Petition at 4.

⁸ *See* Gilead Petition at 4; Forest Petition at 4.

worthy of being granted a retroactive waiver here, where HMM acted as a responsible company by including opt-out information on solicited faxes.

In sum, given Petitioners' similar situation to the parties that received waivers on October 30, 2014, the Commission should grant retroactive waivers to Petitioners insofar as the faxes sent by or on behalf of HMM were solicited.

IV. RELIEF SOUGHT

The factual determination as to whether any fax advertisement sent by or on behalf of HMM was solicited or unsolicited belongs to the appropriate adjudicator in the aforementioned dispute.⁹ But the Commission may grant retroactive waivers for those faxes that are ultimately found to be solicited, provided there is "good cause" for waiving section 64.1200(a)(4)(iv). *See* 47 C.F.R. § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."). As discussed above, Petitioners are being sued on behalf of a putative class of persons who were allegedly sent unsolicited *and solicited* fax advertisements, and the Commission has found good cause to retrospectively waive section 64.1200(a)(4)(iv) for the solicited fax advertisements sent by the parties listed in the Order. As Petitioners are similarly situated to these parties, there is also good cause to waive section 64.1200(a)(4)(iv) for any solicited fax advertisements sent by or on behalf of HMM. Therefore, Petitioners respectfully request the Commission to grant retroactive waivers of the

⁹ HMM has filed a motion to compel arbitration of the dispute pursuant to a binding arbitration clause, with an express class-action waiver, governing the relationship between the plaintiff and HMM. *See* Notice of Mot. to Compel Arbitration on an Individual Basis and to Dismiss or Stay the Case [Dkt. No. 56]. If the motion is granted, the determination of whether any alleged fax advertisement sent by or on behalf of HMM was solicited will be for an arbitrator or a panel of arbitrators. If the motion is denied, such determination will belong to the district court. In making the present request for a retroactive waiver, Petitioners expressly do not waive in any way their right to compel arbitration of the underlying dispute with the plaintiff on an individual basis. Petitioners also reserve their right to supplement this petition with any additional information requested or required by the Commission.

opt-out notice requirement under section 64.1200(a)(4)(iv) insofar as any fax advertisements sent by or on behalf of HMH were sent with the recipients' prior express invitation or permission.

Dated: New York, New York
January 20, 2015

Respectfully submitted,

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Kaczor*

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BAIS YAAKOV OF SPRING VALLEY, on behalf of
itself and all others similarly situated,

Plaintiff,

-vs.-

HOUGHTON MIFFLIN HARCOURT
PUBLISHERS, INC., HOUGHTON MIFFLIN
HARCOURT PUBLISHING COMPANY and
LAUREL KACZOR,

Defendants.

7:13 CV 4577 (KMK)(LMS)

First Amended Complaint

Class Action

Jury Demanded

FIRST AMENDED COMPLAINT

Plaintiff Bais Yaakov of Spring Valley, on behalf of itself and all others similarly situated, alleges as follows:

INTRODUCTION

1. Bais Yaakov of Spring Valley (“Plaintiff”) brings this action against Houghton Mifflin Harcourt Publishers, Inc. (“Houghton Inc.”), Houghton Mifflin Harcourt Publishing Company (“Houghton Co.”) and Laurel Kaczor (“Kaczor”) (Houghton Inc., Houghton Co. and Kaczor are collectively referred to as “Defendants”) for violating the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the “TCPA”) and N.Y. General Business Law (“GBL”) § 396-aa. Congress enacted the TCPA in 1991 to prevent the faxing of unsolicited advertisements to persons who had not provided express invitation or permission to receive such faxes. In addition, the TCPA and regulations promulgated pursuant to it prohibit the sending of unsolicited as well as solicited fax

advertisements that do not contain properly worded opt-out notices. The New York legislature enacted GBL § 396-aa for similar purposes.

2. Upon information and belief, Defendants have jointly and severally caused to be sent out over seventeen thousand (17,000) unsolicited and solicited fax advertisements for goods and/or services without proper opt-out notices to persons throughout the United States within the applicable limitations period for the TCPA, which is four years. As a result, Defendants are liable to Plaintiff and the proposed Classes A and B of similarly situated persons under the TCPA.

3. Upon information and belief, Defendants have jointly and severally caused to be sent out thousands of fax advertisements for goods and/or services that were unsolicited and lacked proper opt-out notices to persons throughout New York state within the applicable limitations period for GBL §396-aa, which is three years. As a result, Defendants are liable to Plaintiff and the proposed Class C of similarly situated persons under GBL § 396-aa.

JURISDICTION AND VENUE

4. This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 47 U.S.C. § 227.

5. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(2) because this is the judicial district in which a substantial part of the events or omissions giving rise to the claims in this case occurred. This Court also has supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over Plaintiff's and one of the Classes' claims under GBL § 396-aa.

THE PARTIES

6. Plaintiff is a New York religious corporation, with its principal place of

business at 11 Smolley Drive, Monsey, New York 10952.

7. Upon information and belief, defendant Houghton Inc. is a Delaware Corporation with its principal place of business located at 222 Berkeley Street, Boston, Massachusetts 02116.

8. Upon information and belief Houghton Co. is a Massachusetts Corporation with its principal place of business located at 222 Berkeley Street, Boston, Massachusetts 02116.

9. Upon information and belief, defendant Kaczor is a sales executive at Houghton.

DEFENDANTS' ILLEGAL JUNK FAXES

10. At all times relevant to this action, Plaintiff had telephone service at 845-356-3132 at its place of business at 11 Smolley Drive, Monsey, New York 10952. Plaintiff receives facsimile transmissions at this number, using a telephone facsimile machine.

11. On or about November 15, 2012, Defendants, jointly and severally, without Plaintiff's express invitation or permission, arranged for and/or caused a telephone facsimile machine, computer, or other device to send an unsolicited fax advertisement (the "Fax Advertisement") advertising the commercial availability or quality of any property, goods, or services, to Plaintiff's fax machine located at 11 Smolley Drive, Monsey, New York 10952. A copy of the Fax Advertisement is attached as Exhibit A and incorporated into this Complaint.

12. Plaintiff did not provide Defendants with express invitation or permission to send any fax advertisements. The Fax Advertisement was wholly unsolicited.

13. The Fax Advertisement contains a notice (the "Opt-Out Notice") that

provides in full: “If you do not wish to receive faxes from Houghton Mifflin Harcourt in the future, and/or if you would prefer to receive communication via email, please contact your representative. Upon your request, we will remove you from our fax transmissions within 30 days.”

14. The Opt-Out Notice in the Fax Advertisement violates the TCPA and regulations thereunder because, among other things, it

(A) fails to provide a facsimile number to which the recipient may transmit an opt-out request;

(B) fails to provide a domestic contact telephone number to which the recipient may transmit an opt-out request;

(C) fails to provide a cost-free mechanism to which the recipient may transmit an opt-out request;

(D) fails to state that a recipient’s request to opt out of future fax advertising will be effective only if the request identifies the telephone number(s) of the recipient’s telephone facsimile machine(s) to which the request relates;

(E) fails to state that the sender’s failure to comply with an opt-out request within 30 days is unlawful; and

(F) fails to state that a recipient’s opt-out request will be effective so long as that person does not, subsequent to making such request, provide express invitation or permission to the sender, in writing or otherwise, to send such advertisements.

15. The Opt-Out Notice in the Fax Advertisement violates GBL § 396-aa because, among other things, it

(A) fails to provide a domestic facsimile number to which the recipient may transmit such an opt-out request;

(B) fails to provide a domestic contact telephone number to which the recipient may transmit an opt-out request;

(C) fails to provide a separate cost-free mechanism, including a website address or email address, to which the recipient may transmit an opt-out notice; and

(D) fails to state that a recipient may make an opt-out request by written, oral or electronic means.

16. Upon information and belief, Defendants either negligently or willfully and/or knowingly arranged for and/or caused the Fax Advertisement to be sent to Plaintiff's fax machine.

17. Upon information and belief, Defendants have, from July 2, 2009 through the date of the filing of this First Amended Complaint in this action, either negligently or willfully and/or knowingly sent and/or arranged to be sent well over seventeen thousand (17,000) *unsolicited and/or solicited* fax advertisements advertising the commercial availability or quality of any property, goods, or services, to fax machines and/or computers belonging to thousands of persons all over the United States. Upon information and belief, those fax advertisements contained a notice identical or substantially similar to the Opt-Out Notice contained in the Fax Advertisement sent to Plaintiff.

18. Upon information and belief, Defendants have, from July 2, 2009 through the filing of this First Amended Complaint in this action, either negligently or willfully and/or knowingly sent and/or arranged to be sent well over seventeen thousand (17,000)

unsolicited fax advertisements advertising the commercial availability or quality of any property, goods, or services, to fax machines and/or computers belonging to thousands of persons throughout the United States. Upon information and belief, those facsimile advertisements contained an opt-out notice identical or substantially similar to the Opt-Out Notice contained in the Fax Advertisement sent to Plaintiff.

19. Upon information and belief, Defendants have, from July 2, 2010 through the date of the filing of this First Amended Complaint in this action, either negligently or willfully and/or knowingly sent and/or arranged to be sent thousands of *unsolicited* fax advertisements advertising the commercial availability or quality of any property, goods, or services, to fax machines and/or computers belonging to thousands of persons in New York. Upon information and belief, those facsimile advertisements contained an opt-out notice identical or substantially similar to the Opt-Out Notice contained in the Fax Advertisement sent to Plaintiff.

CLASS ALLEGATIONS

20. Plaintiff brings this class action on behalf of itself and all others similarly situated under rules 23(a) and 23(b)(1)-(3) of the Federal Rules of Civil Procedure.

21. Plaintiff seeks to represent three classes (the “Classes”) of individuals, each defined as follows:

Class A: All persons from July 2, 2009 through the date of the filing of this First Amended Complaint in this action to whom Defendants sent or caused to be sent at least one *solicited or unsolicited* facsimile advertisement advertising the commercial availability or quality of any property, goods, or services that contained a notice identical or substantially similar to the Opt-Out Notice in the Fax Advertisement sent to Plaintiff.

Class B: All persons from July 2, 2009 through the date of the filing of this First Amended Complaint in this action to whom Defendants sent or caused to be sent at least one *unsolicited* facsimile advertisement advertising the commercial availability or quality of any property, goods, or services that contained a notice identical or substantially similar to the Opt-Out Notice on the Fax Advertisement sent to Plaintiff.

Class C: All persons in the State of New York to whom, from July 2, 2010 through the date of the filing of this First Amended Complaint in this action, Defendants sent or caused to be sent at least one facsimile advertisement without having obtained express invitation or permission to do so and/or that contained a notice identical or substantially similar to the Opt-Out Notice on the Fax Advertisement sent to Plaintiff.

22. Numerosity: The Classes are so numerous that joinder of all individual members in one action would be impracticable. The disposition of the individual claims of the respective class members through this class action will benefit the parties and this Court. Upon information and belief there are, at a minimum, thousands of class members of Classes A, B and C. Upon information and belief, the Classes' sizes and the identities of the individual members thereof are ascertainable through Defendants' records, including Defendants' fax and marketing records.

23. Members of the Classes may be notified of the pendency of this action by techniques and forms commonly used in class actions, such as by published notice, e-mail notice, website notice, fax notice, first class mail, or combinations thereof, or by other methods suitable to the Classes and deemed necessary and/or appropriate by the Court.

24. Typicality: Plaintiff's claims are typical of the claims of the members of Class A because the claims of Plaintiff and members of Class A are based on the same legal theories and arise from the same unlawful conduct. Among other things, Plaintiff and members of Class A were sent or caused to be sent by Defendants at least one fax advertisement advertising the commercial availability or quality of any property, goods, or services that contained a notice identical or substantially similar to the Opt-Out Notice in the Fax Advertisement that Defendants sent or caused to be sent to Plaintiff.

25. Plaintiff's claims are typical of the claims of the members of Class B because the claims of Plaintiff and members of Class B are based on the same legal theories and arise from the same unlawful conduct. Among other things, Plaintiff and the members of Class B were sent or caused to be sent by Defendants, without Plaintiff's or the Class B members' express permission or invitation, at least one fax advertisement advertising the commercial availability or quality of any property, goods, or services that contained a notice identical or substantially similar to the Opt-Out Notice in the Fax Advertisement that Defendants sent or caused to be sent to Plaintiff.

26. Plaintiff's claims are typical of the claims of the members of Class C because the claims of Plaintiff and members of Class C are based on the same legal theories and arise from the same unlawful conduct. Among other things, Plaintiff and members of Class C were sent or caused to be sent by Defendants, without Plaintiff's or the Class C members' express permission or invitation, at least one fax advertisement advertising the commercial availability or quality of any property, goods, or services that contained a notice identical or substantially similar to the Opt-Out Notice in the Fax Advertisement that Defendants sent or caused to be sent to Plaintiff.

27. Common Questions of Fact and Law: There is a well-defined community

of common questions of fact and law affecting the Plaintiff and members of the Classes.

28. The questions of fact and law common to Plaintiff and Class A predominate over questions that may affect individual members, and include:

(a) Whether Defendants' sending and/or causing to be sent to Plaintiff and the members of Class A, by facsimile, computer or other device, fax advertisements advertising the commercial availability or quality of any property, goods or services that contained a notice identical or substantially similar to the Opt-Out Notice in the Fax Advertisement, violated 47 U.S.C. § 227(b) and the regulations thereunder;

(b) Whether Defendants' sending and/or causing to be sent such fax advertisements was knowing or willful;

(c) Whether Plaintiff and the members of Class A are entitled to statutory damages, triple damages and costs for Defendants' conduct; and

(d) Whether Plaintiff and members of Class A are entitled to a permanent injunction enjoining Defendants from continuing to engage in their unlawful conduct.

29. The questions of fact and law common to Plaintiff and Class B predominate over questions that may affect individual members, and include:

(a) Whether Defendants' sending and/or causing to be sent to Plaintiff and the members of Class B, without Plaintiff's or the Class B members' express invitation or permission, by facsimile, computer or other device, fax advertisements advertising the commercial availability or quality of any property, goods, or services that contained a notice identical or substantially similar to the

Opt-Out Notice in the Fax Advertisement, violated 47 U.S.C. § 227(b) and the regulations thereunder;

(b) Whether Defendants' sending and/or causing to be sent to Plaintiff and the members of Class B such unsolicited fax advertisements was knowing or willful;

(c) Whether Plaintiff and the members of Class B are entitled to statutory damages, triple damages and costs for Defendants' conduct; and

(d) Whether Plaintiff and members of Class B are entitled to a permanent injunction enjoining Defendants from continuing to engage in their unlawful conduct.

30. The questions of fact and law common to Plaintiff and Class C predominate over questions that may affect individual members, and include:

(a) Whether Defendants' sending and/or causing to be sent to Plaintiff and the members of Class C, without Plaintiff's and Class C's express invitation or permission, by facsimile, computer or other device, fax advertisements advertising the commercial availability or quality of any property, goods, or services, violated GBL § 396-aa; and

(b) Whether Plaintiff and the members of Class C are entitled to statutory damages for Defendants' conduct.

31. Adequacy of Representation: Plaintiff is an adequate representative of the Classes because its interests do not conflict with the interests of the members of the Classes. Plaintiff will fairly, adequately and vigorously represent and protect the interests of the members of the Classes and has no interests antagonistic to the members of the Classes. Plaintiff has retained counsel who are competent and experienced in litigation in

the federal courts, class action litigation, and TCPA cases.

32. Superiority: A class action is superior to other available means for the fair and efficient adjudication of the Classes' claims. While the aggregate damages that may be awarded to the members of the Classes are likely to be substantial, the damages suffered by individual members of the Classes are relatively small. The expense and burden of individual litigation makes it economically infeasible and procedurally impracticable for each member of the Classes to individually seek redress for the wrongs done to them. The likelihood of the individual Class members' prosecuting separate claims is remote. Plaintiff is unaware of any other litigation concerning this controversy already commenced against Defendants by any member of the Classes.

33. Individualized litigation also would present the potential for varying, inconsistent or contradictory judgments, and would increase the delay and expense to all parties and the court system resulting from multiple trials of the same factual issues. The conduct of this matter as a class action presents fewer management difficulties, conserves the resources of the parties and the court system, and would protect the rights of each member of the Classes. Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action.

34. Injunctive Relief: Defendants have acted on grounds generally applicable to the members of Classes A and B, thereby making appropriate final injunctive relief with respect to Classes A and B.

FIRST CLAIM FOR VIOLATION OF THE TCPA

35. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-35.

36. By the conduct described above, Defendants committed more than

seventeen thousand (17,000) violations of 47 U.S.C. § 227(b) against Plaintiff and the members of Class A, to wit: the fax advertisements Defendants sent and/or caused to be sent to Plaintiff and the members of Class A were either (a) unsolicited and did not contain a notice satisfying the requirements of the TCPA and regulations thereunder, or (b) solicited and did not contain a notice satisfying the requirements of the TCPA and regulations thereunder.

37. Plaintiff and the members of Class A are entitled to statutory damages under 47 U.S.C. § 227(b) in an amount greater than eight million, five hundred thousand dollars (\$8,500,000).

38. If it is found that Defendants willfully and/or knowingly sent and/or caused to be sent fax advertisements that did not contain a notice satisfying the requirements of the TCPA and regulations thereunder to Plaintiff and the members of Class A, Plaintiff requests that the Court increase the damage award against Defendants to three times the amount available under 47 U.S.C. § 227(b)(3)(B), as authorized by 47 U.S.C. § 227(b)(3).

SECOND CLAIM FOR VIOLATION OF THE TCPA

39. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-35.

40. By the conduct described above, Defendants committed more than seventeen thousand (17,000) violations of 47 U.S.C. § 227(b) against Plaintiff and the members of Class B, to wit: the fax advertisements Defendants sent and/or caused to be sent to Plaintiff and the members of Class B were unsolicited and did not contain notices satisfying the requirements of the TCPA and regulations thereunder.

41. Plaintiff and the members of Class B are entitled to statutory damages

under 47 U.S.C. § 227(b) in an amount greater than eight million, five hundred thousand dollars (\$8,500,000).

42. If it is found that Defendants willfully and/or knowingly sent and/or caused to be sent unsolicited fax advertisements that did not contain a notice satisfying the requirements of the TCPA and regulations thereunder to Plaintiff and the members of Class B, Plaintiff requests that the Court increase the damage award against Defendants to three times the amount available under 47 U.S.C. § 227(b)(3)(B), as authorized by 47 U.S.C. § 227(b)(3).

THIRD CLAIM FOR INJUNCTIVE RELIEF

43. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-35.

44. Defendants committed thousands of violations of 47 U.S.C. § 227(b).

45. Under 47 U.S.C. § 227(b)(3)(A), Plaintiff and the members of Classes A and B are entitled to an injunction against Defendants, prohibiting Defendants from committing further violations of the TCPA and regulations thereunder.

FOURTH CLAIM FOR VIOLATION OF GBL § 396-aa

46. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-35.

47. By the conduct described above, Defendants committed numerous violations of GBL § 396-aa against Plaintiff and the members of Class C, to wit: the fax advertisements Defendants sent and/or caused to be sent to Plaintiff and the members of Class C were unsolicited and/or did not contain notices satisfying the requirements of GBL § 396-aa.

48. Pursuant to GBL § 396-aa, Plaintiff and the members of Class C are entitled to statutory damages in an amount to be determined at trial.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff, on behalf of itself and the members of the Classes, requests:

A. An order certifying the Classes, appointing Plaintiff as the representative of the Classes, and appointing the lawyers and law firms representing Plaintiff as counsel for the Classes;

B. an award to Plaintiff and the members of Classes A and B of statutory damages in excess of \$8,500,000 for each of Classes A and B, pursuant to 47 U.S.C. § 227(b), for Defendants' violations of that statute and the regulations promulgated thereunder;

C. if it is found that Defendants willfully and/or knowingly sent and/or caused to be sent the fax advertisements alleged to classes A and/or B, an award of three times the amount of damages described in the previous paragraph, as authorized by 47 U.S.C. § 227(b)(3);

D. an injunction against Defendants prohibiting them from committing further violations of the TCPA and regulations described above;

E. an award to Plaintiff and the members of Class C of statutory damages of \$100 per violation of GBL § 396-aa in an aggregate amount to be determined at trial; and

F. such further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury.

EXHIBIT 2

EXHIBIT A

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