

(denying motion to stay TCPA junk-fax case); *Around the World Travel, Inc. v. Unique Vacations, Inc.*, No. 14-CV-12589, 2014 U.S. Dist. LEXIS 162157 (E.D. Mich. Nov. 19, 2014) (denying renewed motion to stay TCPA junk-fax case).

Moreover, Degnen believes that the FCC will deny Defendant's untimely retroactive-waiver petition, because Defendant is not similarly situated to the parties who were granted retroactive relief through the October 30, 2014 Fax Order. The FCC has not yet issued an order establishing a deadline for Degnen, or anyone, to file a Comment in opposition to Defendant's waiver petition; therefore, Degnen has not yet prepared and filed a Comment in opposition to Defendant's petition. Nor has the FCC established a deadline for Defendant to reply to any comments.

Although Degnen has not yet prepared its Comment, given the opportunity, it would inform the FCC that Defendant made "no effort" rather than "every effort" to file the July 16, 2015 retroactive-waiver petition within six months of the release of the October 30, 2014 FCC Order. Defendant is not "similarly situated" to others who were granted waivers; the waiver was intended only for those who were confused about whether opt-out notices were required in the first place. Defendant failed to support its waiver petition with any affidavit from anyone claiming knowledge of the TCPA, much less actual confusion, nor explaining how such person was knowledgeable enough about the TCPA to be confused about the opt-out requirement yet paid no heed to the October 30 Order even when the FCC dispelled any possible confusion and referred to a six-month period for others to file waiver petitions. Defendant continued its illegal faxing campaign well after the FCC issued its order in October 2014. (*See* Doc. 9 Ex. 18-19 (faxes sent December 9 and 16, 2015)). Moreover, the FCC has no authority to "waive" violations of the regulations prescribed under the TCPA in a private right of action. *See*

Physicians Healthsource, Inc. v. Stryker Sales Corp., No. 1:12-CV-0279, 2014 U.S. Dist. LEXIS 175425, at **40-41 (W.D. Mich. Dec. 12, 2014) (“[T]he FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action; at most, the FCC can choose not to exercise its own enforcement power. It would be a fundamental violation of the separation of powers for the administrative agency to ‘waive’ retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court.”) (citation omitted); *see also Fauley*, 2015 U.S. Dist. LEXIS 87060, at *7.

Finally, Degnen will be prejudiced by a stay due to the risk of lost evidence and fading memories of witnesses.¹ Unfortunately, the wait for a ruling by the FCC on Defendant’s petition might take a very long time due to the severe backlog faced by the FCC. *See An Update on Process Reform Efforts to Reduce Backlog*, <https://www.fcc.gov/blog/update-process-reform-efforts-reduce-backlog> (last visited July 28, 2015). As noted above, the FCC has not even established a deadline for Degnen to file its Comment. While Degnen appreciates Defendant’s acknowledging its duty to preserve evidence (Doc. 16 at 5), in the event Defendant conspired with third-parties to send the faxes, the stay would do nothing to prevent spoliation of evidence from the third-party fax-blasters, whose identities Degnen has not yet had the opportunity to

¹ In the event this Court grants a stay, Degnen requests that the Court issue hold in abeyance the pending motion for class certification (Doc. 10) rather than dismiss it without prejudice, as occurred in *Suzanne Degnen, D.M.D., P.C. v. Free Continuing Educ. Ass’n, LLC d/b/a FCEA*, No. 4:15-CV-527-RLW (E.D. Mo. June 17, 2015) (Doc 16-2 at 3), so that Defendant does not complicate the case by attempting a “pick-off” through an offer of judgment while no class-certification motion is pending. Recently Judge E. Richard Webber recently issued such an order in another junk-fax case. *See Suzanne Degnen, D.M.D., P.C. v. Megadent, Inc.*, No. 4:15-CV-00929-ERW: “**Motion to Certify Class [8] is HELD IN ABEYANCE**, pending further Orders of this Court.” (*Megadent* Doc. 10 (emphasis added).)

discover. Such fax-blasters are often fly-by-night companies which—unlike Defendant Zimmer Dental, Inc.—may simply vanish while a protracted stay is in effect.

WHEREFORE, Plaintiff Suzanne Degnen, D.M.D., P.C., requests that Defendant's Motion be denied and that Plaintiff be granted any additional relief deemed just and proper.

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CERTIFICATE OF SERVICE

I certify that on July 28, 2015, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon all registered counsel of record.

/s/ Ronald J. Eisenberg