

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

In the Matter of)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 02-278
)	
Petitions for Declaratory Ruling and)	CG Docket No. 05-338
Retroactive Waiver of 47 C.F.R.)	
§ 64.1200(a)(4)(iv) Regarding the Commission's)	
Opt-Out Notice Requirement for Faxes Sent with)	
The Recipient's Prior Express Permission)	

**REPLY IN FURTHER SUPPORT OF APPLICATION FOR FULL
COMMISSION REVIEW**

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Kaye MD PC

INTRODUCTION

Pursuant to 47 C.F.R. § 1.115(d), Bais Yaakov of Spring Valley, Roger H. Kaye, and Roger H. Kaye MD PC (collectively, “Applicants”) hereby submit this reply in further support of their Application for Full Review of the August 28, 2015 Order issued by the Acting Chief, Consumer and Governmental Affairs Bureau (the “Bureau”) of the Commission in *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278 & 05-338, DA 15-976 (Aug. 28, 2015) (the “Supplemental Waiver Ruling”). The arguments opposing full Commission review have already been amply refuted by the Applicant’s opening papers. Nevertheless, the Applicants are submitting this reply as a further aid to the Commission in its consideration of the Application.

I. THE APPLICANTS CLEARLY HAVE STANDING TO SEEK FULL COMMISSION REVIEW.

As discussed previously, because all three Applicants are plaintiffs in pending TCPA litigations in which they have asserted claims for violation of the 47 C.F.R. § 64.1200(a)(4)(iv) (the “Opt-Out Regulation”) against parties to whom the Bureau has just granted retroactive waivers of those violations, Applicants are “aggrieved” persons who have standing pursuant to 47 C.F.R. § 1.115 to seek full Commission review of the Supplemental Waiver Ruling.

First, Roger H. Kaye and Roger H. Kaye MD, PC have been appointed by the Federal District Court in Connecticut as class representatives of, among other classes, “all persons to whom [the] defendants sent or caused to be sent a fax advertisement containing a notice identical or substantially similar to the Opt–Out Notice [on particular dates].” *Kaye v. Amicus Mediation & Arbitration Group, Inc.*, 300 F.R.D. 67, 82 (D. Conn. 2014). This class includes persons to whom the defendants sent permission-based, i.e., solicited, and unsolicited fax advertisements. *See id.* at 73, 80. Accordingly, it is plain that Roger H. Kaye and Roger H. Kaye MD, PC have

standing to seek full commission review of, and are aggrieved by the Bureau's Supplemental Waiver Ruling.

Second, Roger H. Kaye and Roger H. Kaye, MD PC alleged in the complaint that the defendants in that case were liable to them because the fax advertisements the defendants sent to them were either (a) unsolicited and did not contain a notice meeting the requirements of the TCPA and regulations thereunder, or (b) solicited and did not contain a notice meeting the requirements of the TCPA and regulations.” Complaint in *Bais Yaakov v. Amicus*, ¶ 33 (attached hereto as Exhibit 1). For this reason also, it is plain that Roger H. Kaye and Roger H. Kaye MD, PC have standing to seek full commission review of, and are aggrieved by the Bureau's Supplemental Waiver Ruling.

In addition, in *Bais Yaakov v. ACT*, the Court has not made any finding as to whether the Fax Advertisements ACT sent to Bais Yaakov were permission-based or not. And, Bais Yaakov specifically asserted in its complaint that ACT is liable to Bais Yaakov for violating the Opt-out Regulation by sending Bais Yaakov fax advertisements that lacked any opt-out notice. *See Complaint in Bais Yaakov of Spring Valley v. ACT, Inc.*, ¶¶ 13-14 (attached hereto as Exhibit 2).¹ Moreover, Bais Yaakov is seeking to represent a class of persons that includes persons to whom ACT sent permission-based fax advertisements that did not contain opt-out notices. *See Complaint in Bais Yaakov of Spring Valley v. ACT, Inc.*, ¶ 34. These reasons, whether considered independently or together, make clear that *Bais Yaakov* has standing to seek full Commission review of, and is aggrieved by the Bureau's Supplemental Waiver Ruling.

¹ Paragraph 14 of the complaint in *Bais Yaakov v. ACT* refers to the violation of, among other things, 47 C.F.R. § 64.1200(a)(3)(iv) because that was the citation for the Opt-Out Regulation at the time that complaint was filed. As noted above, the current citation for the Opt-Out Regulation is 47 C.F.R. § 64.1200(a)(4)(iv).

II. THE BUREAU HAD AN OPPORTUNITY TO PASS ON ALL OF THE QUESTIONS OF FACT AND LAW THAT THE APPLICANTS ARE RAISING IN THEIR APPLICATION FOR FULL REVIEW, AND THEREFORE, THE COMMISSION CLEARLY HAS THE POWER GRANT THAT APPLICATION BASED ON THOSE QUESTIONS OF FACT AND LAW

A number of parties opposing the Applicants' Application for Review claim that that the Applicants allegedly never made arguments before the Bureau about (1) 1 U.S.C. § 109; (2) the fact that the retroactive waivers would be invalid as an improper retroactive legislative rule or adjudicatory rule; and (3) and that if it were an adjudicatory rule, it would fail the *Retail/Wholesale* test. Accordingly, citing 47 C.F.R. § 1.115(c), they claim that the full Commission may not review these arguments. This contention is without merit.

47 C.F.R s 1.115(c) provides that “[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.” As is apparent, there is nothing in this regulation that requires the specific party, who is applying for full Commission review and wishes to make a particular argument in support of that application, to have been the very party who has made the argument to the designated authority, here the Bureau. Rather, the regulation merely requires that the designated authority be afforded an opportunity to pass on the argument. *Cf., e.g., Hennessey v. Securities & Exchange Comm’n*, 285 F.2d 511, 514-517 (3rd Cir. 1961)(holding that similarly worded statute delineating circumstances under which a court can consider arguments on review of an administrative agency’s determination only required the arguments to have been made to the administrative agency, not that the party making the argument to the court was the party who made the argument before the agency); *Contact Lens Mfrs. Ass’n v. Food & Drug Admin.*, 766 F.2d 592, 597 n.5 (D.C. Cir. 1985)(same); *Toys Mfrs. Of Am. v. Consumer Prod. Safety Comm’n*, 630 F.2d 70, 73 n.5 (2nd Cir. 1980)(same).

Here, in its February 13, 2015 submission (dated February 12, 2015) to the Bureau in response to the waiver petition of Houghton Mifflin Harcourt Publisher's Inc. et al. in this very proceeding (attached as Exhibit 3), Bais Yaakov made all of the arguments that the parties opposing this application claim were never made by the Applicants. *See id.* at 4-6. The same arguments were made in an April 9, 2015 submission by P&S Printing LLC in this proceeding before the Bureau. *See* April 9, 2015 Comments by P&S Printing (attached hereto as Exhibit 4) at 4-6. Accordingly, the Full Commission must consider all of these arguments in this Application.

In addition, even if Bais Yaakov and P&S had not made their February and April submissions to the Bureau, the arguments would still be reviewable in this Application because these arguments were "necessarily implicated" by the arguments the Applicants made to the Bureau in their comments regarding ACT's and Amicus' petitions for waiver. *Time Warner Entertainment Co., L.P. v. F.C.C.*, 144 F.3d 75, 80 (D.C. Cir. 1998) ("Nor have we required that the *precise* issue be presented to the Commission in order to afford it a 'fair opportunity' to pass on the issue.) In those comments the Applicants specifically argued that "[n]othing 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 a plaintiff's 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." (emphasis added). In addition, the Applicants argued

a retroactive waiver of ACT and the Amicus Petitioners' liability for past illegal faxing would also violate the Supreme Court's longstanding holding that unless specifically authorized to do so, an[] administrative agency does not have the power to alter the legal consequences of past actions. . . . 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.

Applicants December 12, 2014 and December 15, 2014 Comments to the Commission.

III. OTHER ISSUES

Applicants can challenge the Bureau's Order granting all 117 waivers petitions because the order does not distinguish between them and gives the identical reasons for granting them all, without any individual analysis. In other words, the order is unitary, and therefore stands or falls as a whole. Therefore, Applicants may ask for the reversal of all of the waiver grants.

In addition, the argument that the Bureau's waiver ruling is consistent with the TCPA's statutory private right of action for violation of the Commission's regulations is without merit. According to the TCPA's statutory private right of action, the parties seeking a waiver were civilly liable for violating the TCPA statute, by violating the opt-out regulation, long-before the Bureau granted any waivers. The fact that the Bureau granted a waiver does not change the fact that that statutory liability already previously existed. Because only Congress may "undo [] statutory rights it has created," *Omar v. McHugh*, 643 F.3d 13, 22 (D.C. Cir. 2011), the Bureau had no power to grant the waivers that it did.

Finally, it is well settled that 1 U.S.C. § 109 applies in the civil context. *See, e.g., Washington Metropolitan Area Transit Authority v. Beynum*, 145 F.3d 371, 372-73 (D.C. Cir. 1998); *Gawarecki v. ATM Network, Inc.*, 2014 WL 2600056, **6-7 (D. Minn. June 10, 2014).

Dated: September 22, 2015

Respectfully submitted,

BELLIN & ASSOCIATES LLC

/s/ Aytan Y. Bellin
By: Aytan Y. Bellin, Esq.

EXHIBIT 1

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

**ROGER H. KAYE and ROGER H. KAYE, MD
PC**, on behalf of themselves and all others similarly
situated,

Plaintiffs,

-vs.-

**AMICUS MEDIATION & ARBITRATION
GROUP, INC. and HILLARY EARLE,**

Defendants.

13 CV _____

Complaint

Class Action

Jury Demanded

MARCH 14, 2013

COMPLAINT

Plaintiffs Roger H. Kaye and Roger H. Kaye, MD PC, on behalf of themselves and all others similarly situated, allege as follows:

INTRODUCTION

1. Roger H. Kaye and Roger H. Kaye, MD PC (collectively, "Plaintiffs") bring this action against Amicus Mediation and Arbitration Group, Inc. ("Amicus") and Hillary Earle ("Earle") (Amicus and Earle are collectively referred to as "Defendants") for violating the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"), and Conn. Gen. Stat. § 52-570c. 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 Connecticut legislature enacted Conn. Gen. Stat. § 52-570c for similar purposes.

2. Upon information and belief, Defendants have jointly and severally caused to be sent out over five thousand (5,000) unsolicited and solicited fax advertisements for goods and/or services without proper opt-out notices to persons throughout the United States, including Connecticut, within applicable limitations periods. As a result, Defendants are liable to Plaintiffs and the proposed Classes of similarly situated persons under the TCPA and Conn. Gen. Stat. § 52-570c.

JURISDICTION AND VENUE

3. This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 47 U.S.C. § 227. This Court also has supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over Plaintiffs' and one of the classes' claims under Conn. Gen. Stat. § 52-570c.

4. Venue in this judicial district is proper 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.

THE PARTIES

5. Plaintiff Roger H. Kaye is a citizen and resident of the State of Connecticut.

6. Plaintiff Roger H. Kaye, MD PC is a Connecticut professional corporation, with its principal place of business located at 30 Stevens Street, Norwalk, Connecticut 06850.

7. Upon information and belief, defendant Amicus is a New York Corporation, with its principal place of business located at 557 Windmill Avenue, Suite 25, West Babylon, New York 11704.

8. Upon information and belief, defendant Earle is the Chairman of Amicus and is a resident of New York State.

DEFENDANTS' ILLEGAL JUNK FAXES

9. At all times relevant to this action, Plaintiffs had telephone service at 30 Stevens Street, Norwalk, Connecticut 06850, where Plaintiffs receive facsimile transmissions.

10. On or about October 17, 2010, January 14, 2011, January 22, 2011, January 30, 2011, June 6, 2011 and June 25, 2011, Defendants, jointly and severally, without Plaintiffs' express invitation or permission, arranged for and/or caused a telephone facsimile machine, computer, or other device to send unsolicited at least six fax advertisements (the "Fax Advertisements") advertising the commercial availability or quality of any property, goods, or services, to Plaintiffs' fax machine located at 30 Stevens Street, Norwalk, Connecticut 06850. Copies of those six Fax Advertisements are attached collectively as Exhibit A and incorporated into this Complaint.

11. Plaintiffs did not provide Defendants with express invitation or permission to send any of the Fax Advertisements. The fax advertisements were wholly unsolicited.

12. All of the Fax Advertisements contain a notice (the "Opt-Out Notice") that provides:

NOTE: The information contained in this email message is intended only for use of the individual or entity named above. If the reader of this message is not the intended recipient, or if you have received this communication in error, or wish to not receive any further emails please immediately notify us notify us [sic] by e-mail at hillary.earle@amicusadr.com and destroy the original message. Thank you.

This Opt-Out Notice appears on the first page of some of the Fax Advertisements, and on the second page of the other Fax Advertisements.

13. The Opt-Out Notices in the Fax Advertisements violate the TCPA and regulations thereunder because, among other things, they

(A) fail to state that a recipient may make a request to the sender not to send any future unsolicited advertisements to the recipient's telephone facsimile machine(s);

(B) fail to provide a telephone number to which the recipient may transmit such an opt-out request;

(C) fail to provide a facsimile number to which the recipient may transmit such an opt-out request;

(D) fail 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) fail to state that the sender's failure to comply with an opt-out request within 30 days is unlawful;

(F) fail 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; and

(G) do not appear on the first page of the Fax Advertisement.

14. Upon information and belief, Defendants either negligently or willfully and/or knowingly arranged for and/or caused the fax advertisements to be sent to Plaintiffs' fax machine.

15. Upon information and belief, Defendants have, from four years prior to the date of the filing of the Complaint in this action through the present, either negligently or willfully and/or knowingly sent and/or arranged to be sent well over five thousand (5,000) *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 Advertisements sent to Plaintiffs.

16. Upon information and belief, Defendants have, from four years prior to the date of the filing of the Complaint in this action through the present, either negligently or willfully and/or knowingly sent and/or arranged to be sent well over five thousand (5,000) *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 Advertisements sent to Plaintiffs.

17. Upon information and belief, Defendants have, from two years prior to the filing of the Complaint in this action to the present, 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 Connecticut.

CLASS ALLEGATIONS

18. Plaintiffs bring this class action on behalf of themselves and all others similarly situated under rules 23(a) and 23(b)(1)-(3) of the Federal Rules of Civil Procedure.

19. Plaintiffs seek to represent three classes (the “Classes”) of individuals, each defined as follows:

Class A: All persons from four years prior to the date of the filing of the Complaint through the present to whom Defendants sent or caused to be sent a *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 Advertisements sent to Plaintiffs.

Class B: All persons from four years prior to the date of the filing of the Complaint through the present to whom Defendants sent or caused to be sent an *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 Advertisements sent to Plaintiffs.

Class C: All persons in the State of Connecticut to whom, from two years prior to the date of the filing of the Complaint to the present, Defendants sent or caused to be sent a facsimile advertisement without having obtained express invitation or permission to do so.

20. 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.

21. 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.

22. Typicality: Plaintiffs' claims are typical of the claims of the members of Class A because the claims of Plaintiffs and members of Class A are based on the same legal theories and arise from the same unlawful conduct. Among other things, Plaintiffs 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 Advertisements that Defendants sent or caused to be sent to Plaintiffs.

23. Plaintiffs' claims are typical of the claims of the members of Class B because the claims of Plaintiffs and members of Class B are based on the same legal theories and arise from the same unlawful conduct. Among other things, Plaintiffs and members of Class B were sent or caused to be sent by Defendants, without Plaintiffs' 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 Advertisements that Defendants sent or caused to be sent to Plaintiffs,

24. Plaintiffs' claims are typical of the claims of the members of Class C because the claims of the Plaintiffs and members of Class C are based on the same legal theories and arise from the same unlawful conduct. Among other things, Plaintiffs and members of Class C were sent or caused to be sent by Defendants, without Plaintiffs' 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.

25. Common Questions of Fact and Law: There is a well-defined community of common questions of fact and law affecting the Plaintiffs and members of the Classes. The questions of fact and law common to Plaintiffs and Class A predominate over questions that may affect individual members, and include:

- (a) Whether Defendants' sending and/or causing to be sent to Plaintiffs 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 Advertisements, 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 Plaintiffs and the members of Class A are entitled to statutory damages, triple damages and costs for Defendants' conduct; and
- (d) Whether Plaintiffs and members of Class A are entitled to a permanent injunction enjoining Defendants from continuing to engage in their unlawful conduct.

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

(a) Whether Defendants' sending and/or causing to be sent to Plaintiffs and the members of Class B, without Plaintiffs' 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 Advertisements, violated 47 U.S.C. § 227(b) and the regulations thereunder;

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

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

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

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

(a) Whether Defendants' sending and/or causing to be sent to Plaintiffs and the members of Class C, without Plaintiffs' 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 Conn. Gen. Stat. Ann. § 52-570c(a);

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

(c) Whether Plaintiffs and members of Class C are entitled to a permanent injunction enjoining Defendants from continuing to engage in their unlawful conduct.

28. Adequacy of Representation: Plaintiffs are adequate representatives of the Classes because their interests do not conflict with the interests of the members of the Classes. Plaintiffs will fairly, adequately and vigorously represent and protect the interests of the members of the Classes and have no interests antagonistic to the members of the Classes. Plaintiffs have retained counsel who are competent and experienced in litigation in the federal courts, class action litigation, and TCPA cases.

29. 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. Plaintiffs are unaware of any other litigation concerning this controversy already commenced against Defendants by any member of the Classes.

30. 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. Plaintiffs know of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action.

31. Injunctive Relief: Defendants have acted on grounds generally applicable to the members of the Classes, thereby making appropriate final injunctive relief with respect to the Classes as a whole.

FIRST CLAIM FOR VIOLATION OF THE TCPA

32. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-31.

33. By the conduct described above, Defendants committed more than five thousand (5,000) violations of 47 U.S.C. § 227(b) against Plaintiffs and the members of Class A, to wit: the fax advertisements Defendants sent and/or caused to be sent to Plaintiffs and the members of Class A were either (a) unsolicited and did not contain a notice meeting the requirements of the TCPA and regulations thereunder, or (b) solicited and did not contain a notice meeting the requirements of the TCPA and regulations thereunder.

34. Plaintiffs and the members of Class A are entitled to statutory damages under 47 U.S.C. § 227(b) in an amount greater than two million, five hundred thousand dollars (\$2,500,000).

35. 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 meeting the requirements of the TCPA and regulations thereunder to Plaintiffs and the members of Class A, Plaintiffs request 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

36. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-31.

37. By the conduct described above, Defendants committed more than five thousand (5,000) violations of 47 U.S.C. § 227(b) against Plaintiffs and the members of Class B, to wit: the fax advertisements Defendants sent and/or caused to be sent to Plaintiffs and the members of Class B were unsolicited and did not contain notices satisfying the requirements of the TCPA and regulations thereunder.

38. Plaintiffs and the members of Class B are entitled to statutory damages under 47 U.S.C. § 227(b) in an amount greater than two million, five hundred thousand dollars (\$2,500,000).

39. 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 Plaintiffs and the members of Class B, Plaintiffs request 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 VIOLATION OF CONN. GEN. STAT. § 52-570(c)

40. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-31.

41. By the conduct described above, Defendants committed numerous violations of Conn. Gen. Stat. § 52-570c against Plaintiffs and the members of Class C, to

wit: the fax advertisements Defendants sent and/or caused to be sent to Plaintiffs and the members of Class C were unsolicited by Plaintiffs and the members of Class C.

42. Pursuant to Conn. Gen. Stat. § 52-570c(d), Plaintiffs and the members of Class C are entitled to statutory damages in an amount to be determined at trial, plus their attorneys' fees and costs.

FOURTH CLAIM FOR INJUNCTIVE RELIEF

43. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1-31.

44. Defendants committed thousands of violations of 47 U.S.C. § 227(b) and Conn. Gen. Stat. § 52-570c(a).

45. Under 47 U.S.C. § 227(b)(3)(A) and Conn. Gen. Stat. § 52-570c(d), Plaintiffs and the members of the Classes are entitled to an injunction against Defendants, prohibiting Defendants from committing further violations of those statutes and regulations thereunder.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and the members of the Classes, request:

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

B. an award to Plaintiffs and the members of Classes A and B of statutory damages in excess of \$2,500,000 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 fax advertisements 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 award to Plaintiffs and the members of Class C of statutory damages of \$500 per violation of Conn. Gen. Stat. 52-570c(a) in an aggregate amount to be determined at trial;

E. an injunction against Defendants prohibiting them and all others acting on behalf of or in concert with them from committing further violations of statutes and regulations described above;

F. an award to Plaintiffs and the members of Class C of attorneys' fees and costs in this action; and

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

JURY DEMAND

Plaintiffs demand a trial by jury.

**ROGER H. KAYE and ROGER H.
KAYE, MD PC, ON BEHALF OF
THEMSELVES AND ALL OTHERS
SIMILARLY SITUATED**

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(motion for admission pro hac vice to this Court to be filed shortly)

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EXHIBIT A

06/25/11 10:57AM EDT Amicus Mediation & Arbitration Group -> Roger Kaye
2038663660 Pg 2/2



Upcoming Amicus Mediation Days



Liberty Mutual

July 20, 2011 - Mediator: William Beckert, Esq.

August 4, 2011 - Mediator: Gerald Cooper, Esq.



Progressive Insurance

August 30th & September 8th, 2011

Mediators: Rick Mahoney, Esq. Bill Beckert, Esq. & Frank Forgione, Esq.

If you have a case that you wish to schedule, please contact **Hillary Earle** at 888-7-AMICUS or via email at hillary.earle@amicusadr.com. Or provide your case information below and return via fax to 631-619-9501. An Amicus consultant will follow up with you promptly.

Your Name:	Your Firm/Company:	Your Phone:
Case Caption:		
Name of opposing counsel/adjuster	Their Phone	
Claim No.		
Additional Comments:		

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Toll Free 1.888.7.AMICUS ♦ www.amicusadr.com

06/06/11 08:32PM EDT Amicus Mediation & Arbitration Group -> Roger Kaye
2038663660 Pg 1/2

Amicus Mediation & Arbitration Group

Phone: 631-881-0882
Fax: 631-619-9501

Fax

To: Roger Kaye

From: Hillary Earle

Fax: 2038663660

Pages: 2

Re: Liberty Mutual Mediations

Date: June 06, 2011

Dear Roger:

I thought you may be interested in the details of our next mediation days with Liberty Mutual.

Please let me know if you have any cases pending with them that you would like to mediate.

Thank you.

445 Broad Hollow Rd. Suite 25, Melville, NY 11747

06/06/11 08:32PM EDT Amicus Mediation & Arbitration Group -> Roger Kaye
2038663660 Pg 2/2



Liberty Mutual Mediation Day

Coordinated by Amicus Mediation & Arbitration Group

June 15, 2011

Mediator: Gerald Cooper, Esq.

July 20, 2011

Mediator: William Beckert, Esq.

Conferences to be scheduled at:

Liberty Mutual
101 Barnes Rd.
Wallingford, CT

**SPECIAL
OFFER
\$350.00**

Mediation Fee
(This is a per party fee
and covers 1 hour of the
mediator's time)

Did you know?
78% of all cases mediated,
settle? Saving on average,
89 staff hours per file,
> \$11,000 in expenses and 6
months in litigation time?

If you have a case that you wish to schedule, please contact *Hillary Earle* at 888-7-AMICUS or 631-881-0882 or via email at hillary.earle@amicusadr.com. Or provide your case information below and return via fax to 631-619-9501. An Amicus consultant will follow up with you promptly.

Your Name:	Your Firm/Company:	Your Phone:
Case Caption:		
Name of opposing counsel/adjuster	Their Phone	Claim No. (if applicable)
Additional Comments:		

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01/22/11 11:44AM EST Amicus Mediation & Arbitration Group -> Roger Kaye
2038663660 Pg 1/2

Amicus Mediation & Arbitration Group

Phone: 631-881-0882
Fax: 631-619-9501

Fax

To: Roger Kaye

From: Hillary Earle

Fax: 2038663660

Pages: 2

Re: Liberty Mutual Day

Date: January 22, 2011

Dear Roger

I wanted to forward you the details or our upcoming mediation day with Liberty Mutual.

Please let me know if you have any matters pending against them, that you would like to resolve via mediation.

Thank you.

445 Broad Hollow Rd. Suite 25, Melville, NY 11747

01/22/11 11:44AM EST Amicus Mediation & Arbitration Group -> Roger Kaye
2038663660 Pg 2/2



Liberty Mutual Mediation Day

Coordinated by Amicus Mediation & Arbitration Group

February 17, 2011

Mediator: Frank Forgione, Esq.

Conferences to be scheduled at:

Liberty Mutual
101 Barnes Rd.
Wallingford, CT

**SPECIAL
OFFER**

\$350.00

Mediation Fee

(This is a per party fee
and covers 1 hour of the
mediator's time)

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89 staff hours per file,
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Your Name:	Your Firm/Company:	Your Phone:
Case Caption:		
Name of opposing counsel/adjuster	Their Phone	Claim No. (if applicable)
Additional Comments:		

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01/14/11 12:30PM EST Amicus Mediation & Arbitration Group -> Roger Kaye
2038663660 Pg 1/2

Amicus Mediation & Arbitration Group

Phone: 631-881-0882
Fax: 631-619-9501

Fax

To: Roger Kaye

From: Hillary Earle

Fax: 2038663660

Pages: 2

Re: Liberty Mutual Day

Date: January 14, 2011

Dear Roger:

I wanted to forward you some information on our upcoming mediation day with Liberty Mutual.

If you have any matters pending with them that you would like to settle via mediation, please let me know.

Thank you.

445 Broad Hollow Rd. Suite 25, Melville, NY 11747

01/14/11 12:30PM EST Amicus Mediation & Arbitration Group -> Roger Kaye
2038663660 Pg 2/2



Liberty Mutual Mediation Day

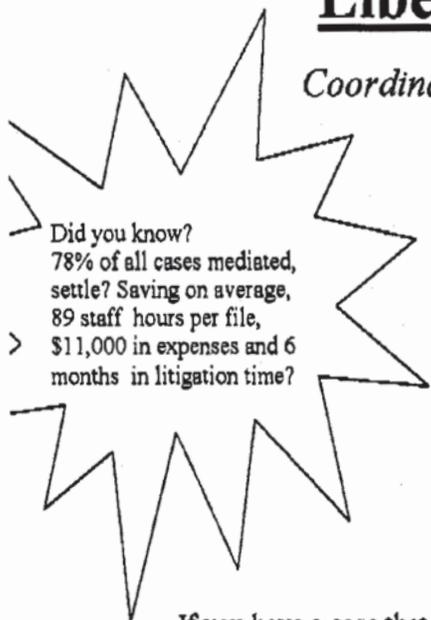
Coordinated by Amicus Mediation & Arbitration Group

February 17, 2011

Mediator: Frank Forgione, Esq.

Conferences to be scheduled at:

Liberty Mutual
101 Barnes Rd.
Wallingford, CT



Did you know?
78% of all cases mediated,
settle? Saving on average,
89 staff hours per file,
> \$11,000 in expenses and 6
months in litigation time?



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Mediation Fee
(This is a per party fee
and covers 1 hour of the
mediator's time)

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Your Name:	Your Firm/Company:	Your Phone:
Case Caption:		
Name of opposing counsel/adjuster	Their Phone	Claim No. (if applicable)
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10/17/10 11:22AM EDT Amicus Mediation & Arbitration Group -> Roger Kaye
2038663660 Pg 1/1



Progressive Insurance Mediation Days

Coordinated by Amicus Mediation & Arbitration Group

November 17, 2010 – Glastonbury, CT

Mediator:
Hon. Joseph Mengacci

November 18, 2010 – Milford, CT

Mediator:
Hon. Frank Forgione

Did you know?
78% of all cases mediated, settle?
Saving on average, 89 staff hours per file, \$11,000 in expenses and 6 months in litigation time?

SPECIAL OFFER
\$350.00
Mediation Fee
(This is a per party fee and covers 1 hour of the mediator's time)

If you have a case that you wish to schedule, please contact *Hillary Earle* at 888-7-AMICUS or via email at hillary.earle@amicusadr.com. Or provide your case information below and return via fax to 631-619-9501. An Amicus consultant will follow up with you promptly.

Your Name:	Your Firm/Company:	Your Phone:
Case Caption:		
Name of opposing counsel/adjuster	Their Phone	
Claim No.		
Additional Comments:		

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01/30/11 12:32PM EST Amicus Mediation & Arbitration Group -> Roger Kaye
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Helping Your Path to Settlement Better

Mediation Fact:

Did you know?

78% of all cases mediated, settle? Saving on average, 89 staff hours per file, \$11,000 in expenses and 6 months in litigation time.

PROGRESSIVE®

Mediation Days

Coordinated by Amicus Mediation & Arbitration Group

March 2, 2011 – Milford Office

March 3, 2011 – Glastonbury Office

Mediators:

Frank Forgione & Rick Mahoney

SPECIAL OFFER

\$350.00

Mediation Fee

(This is a per party fee and covers 1 hour of the mediator's time)

If you have a case that you wish to schedule, please contact *Hillary Earle* at 888-7-AMICUS or via email at hillary.earle@amicusadr.com. Or provide your case information below and return via fax to 631-619-9501. An Amicus consultant will follow up with you promptly.

Your Name:	Your Firm/Company:	Your Phone:
Case Caption:		
Name of opposing counsel/adjuster	Their Phone	
Claim No.		
Additional Comments:		

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2038663660 Pg 3/3



Nationwide Insurance Mediation Day

Coordinated by Amicus Mediation & Arbitration Group

March 29, 2011

Mediator - Gerald Cooper, Esq. & William Beckert, Esq.

Conferences to be held at
Bridgeport Holiday Inn
1070 Main Street - Bridgeport, CT 06604



**SPECIAL
OFFER
\$350.00
Mediation
Fee**
(This is a per party
fee and covers 1 hour
of the mediator's time)

If you have a case that you wish to schedule, please contact *Hillary Earle* at 888-7-AMICUS or via email at hillary.earle@amicusadr.com. Or provide your case information below and return via fax to 631-619-9501. An Amicus consultant will follow up with you promptly.

Your Name:	Your Firm/Company:	Your Phone:
Case Caption:		
Name of opposing counsel/adjuster	Their Phone	
Claim No.		
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EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

Plaintiff,

-vs.-

ACT, INC.,

Defendant.

COMPLAINT

12 CV ____

Class Action

Jury Demanded

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

INTRODUCTION

1. Bais Yaakov of Spring Valley (hereinafter “Plaintiff”) is bringing this action against ACT, Inc. (hereinafter “Defendant”) for violating the Telephone Consumer Protection Act (hereinafter “the TCPA”), 47 U.S.C. § 227 (hereinafter “the TCPA”), the regulations promulgated thereunder 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. Congress believed that unsolicited fax advertisements improperly shift advertising costs to the unwilling fax recipients and interfere with the use of fax machines by these recipients, who are consumers and businesses. In addition, regulations enacted pursuant to the TCPA prohibit the sending of solicited fax advertisements that do not contain the proper opt-out notice.

2. New York enacted GBL § 396-aa for similar reasons. GBL § 396-aa also prohibits the sending of unsolicited fax advertising and also requires that every unsolicited fax

contain an opt-out notice.

3. Defendant has recently caused to be sent out thousands of unsolicited and solicited fax advertisements throughout the United States for goods and/or services without the proper opt-out notice required by the TCPA and the regulations promulgated thereunder. Defendant has also recently caused to be sent thousands of unsolicited fax advertisements to persons in New York state for goods and/or services without the proper opt-out notice required by GBL § 396-aa. Defendant is therefore liable to Plaintiff and the proposed Classes of similarly situated persons under the TCPA and GBL § 396-aa.

JURISDICTION AND VENUE

4. This Court has federal question jurisdiction over Plaintiff's and the Classes' A and B's TCPA claims under 28 U.S.C. § 1331 and 47 U.S.C. § 227.

5. This Court has supplemental jurisdiction over Plaintiff's and Class C's GBL § 396-aa claims pursuant to 28 U.S.C. § 1367(a).

6. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(1) because Defendant is a resident of the state of Massachusetts within the meaning of 28 U.S.C. § 1391(c).

7. Venue in this judicial district is also proper 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.

THE PARTIES

8. Plaintiff is a New York religious corporation with its principal place of business at 11 Smolley Drive, Monsey, New York 10952.

9. Upon information and belief, Defendant ACT, Inc. is an Iowa Corporation with has a regional office located at 144 Turnpike Road Suite 370, Southborough, Massachusetts

01772 and provides a broad array of assessment, research, information, and program management solutions in the areas of education and workforce development.

10. Plaintiff still has and had at all relevant times to this action telephone service at 845-356-3132 at its place of business at 11 Smolley Drive, Monsey, New York 10952. Plaintiff receives facsimile transmissions (hereinafter "faxes") at this number, using a telephone facsimile machine (hereinafter "fax machine").

11. Upon information and belief, on or about March 5, 2012, April 22, 2012 and May 13, 2012, Defendant, from Massachusetts, 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, advertising the commercial availability or quality of any property, goods, or services, to Plaintiff's fax machine located at its principal place of business in Monsey, New York. Copies of the fax advertisements whose dates are specifically listed above (hereinafter "the attached fax advertisements") are attached hereto as Exhibit A and are incorporated herein by reference.

12. The attached fax advertisements were wholly unsolicited in that they were sent to Plaintiff by Defendant without Plaintiff's express invitation or permission.

13. None of the attached fax advertisements contains any purported opt-out notice whatsoever.

14. Thus the attached fax advertisements violate all of the opt-out requirements of 47 U.S.C. § 227(b)(2)(D), 47 C.F.R. § 64.1200(a)(3)(iii), (iv) and GBL § 396-aa(2).

15. Upon information and belief, Defendant either negligently or willfully and/or knowingly arranged for and/or caused the attached fax advertisements to be sent to Plaintiff's fax machine.

16. Upon information and belief, Defendant has, from four years prior to the date of the filing of the instant Complaint through the present, 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 throughout the United States, which contained no purported opt out notice whatsoever.

17. Upon information and belief, Defendant has, from four years prior to the date of the filing of the instant Complaint through the present, either negligently or willfully and/or knowingly sent and/or arranged to be sent thousands of 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 throughout the United States, which contained no purported opt out notice whatsoever.

18. Upon information and belief, Defendant has from three years prior to the filing of the instant Complaint 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 state, which contained no purported opt out notice whatsoever.

THE FEDERAL STATUTE AND THE REGULATIONS THEREUNDER

19. The Telephone Consumer Protection Act of 1991, Pub. L. 102-243, § 3(a), added Section 227 to Title 47 of the United States Code, 47 U.S.C. § 227.

20. In pertinent part, 47 U.S.C. § 227(b) provides "[i]t shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within

the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine[.]"

21. In pertinent part, 47 C.F.R. § 64.1200(a), a regulation prescribed under 47 U.S.C. § 227(b) and effective as of December 20, 1992, provides that "No person may . . . [u]se a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."

22. As used in both 47 U.S.C. § 227 and 47 C.F.R. § 64.1200, "[t]he term 'unsolicited advertisement' means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(5).

23. 47 U.S.C. § 227(b)(1)(C)(iii) provides that it is unlawful to send an unsolicited facsimile advertisement unless, among other things, the unsolicited facsimile advertisement contains a notice meeting the requirements under 47 U.S.C. § 227(b)(2)(D).

24. 47 U.S.C. § 227(b)(2)(D) provides that:

a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if--

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes--

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d) of [47 U.S.C. § 227].

25. 47 C.F.R. § 64.1200(a)(3) provides that no person or entity may:

Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless--:

* * *

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this paragraph only if--

(A) The notice is clear and conspicuous and on the first page of the advertisement;

(B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(3)(v) of this section is unlawful;

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(3)(v) of this section;

(D) The notice includes--

(1) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and

(2) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or e-mail address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-

free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

(E) The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

26. 47 C.F.R. § 64.1200(a)(3)(iv) provides that “[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(3)(iii) of this section.”

27. Paragraph (3) of 47 U.S.C. § 227(b) provides:

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State --

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(emphasis added).

28. 47 U.S.C. § 312(f)(1) provides that “[t]he term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of [the chapter under which 47 U.S.C § 227 falls] or any rule or regulation of the Commission authorized by [the chapter under which 47 U.S.C § 227 falls] or by a treaty ratified by the United

States.”

GBL § 396-aa

29. GBL § 396-aa(1) prohibits anyone from initiating the unsolicited transmission of fax advertisements.

30. GBL § 396-aa(1) also makes it unlawful to initiate the sending of any fax advertisement to a recipient who has previously clearly indicated to the initiator by any verbal, written or electronic means that the recipient does not want to receive fax advertisements from the initiator.

31. GBL § 396-aa(2) requires all unsolicited fax advertisements to contain a notice that informs the recipients of their rights, as described under GBL §§ 396-aa(1), to prevent the transmission of fax advertisements.

32. GBL § 396-aa(3) provides for statutory damages of \$100 for each violation of GBL § 396-aa or actual damages, whichever is greater.

CLASS ALLEGATIONS

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

34. Plaintiff seek to represent three classes of individuals defined as follows:

Class A: All persons in the United States from four years prior to the date of the filing of the instant Complaint through the date of the filing of the instant Complaint to whom Defendant sent or caused to be sent an unsolicited facsimile advertisement, advertising the commercial availability or quality of any property, goods, or services, which contained no purported opt out notice.

Class B: All persons in the United States from four years prior to the date of the

filing of the instant Complaint through the date of the filing of the instant Complaint to whom Defendant sent or caused to be sent a facsimile advertisement, advertising the commercial availability or quality of any property, goods, or services, which contained no purported opt out notice.

35. Class C: All persons in New York state from three years prior to the date of the filing of the instant First Amended Complaint through the date of the filing of the instant Complaint to whom Defendant sent or caused to be sent an unsolicited facsimile advertisement, advertising the commercial availability or quality of any property, goods, or services, which contained no purported opt out notice.

36. Classes A, B and C are hereinafter referred to collectively as the Classes.

37. 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 both the parties and this Court.

38. Upon information and belief there are, at a minimum, thousands of class members of Classes A, B and C.

39. Upon information and belief, the Classes' sizes and the identities of the individual members thereof are ascertainable through Defendant's records, including, but not limited to Defendant's fax and marketing records.

40. 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 this class and deemed necessary and/or appropriate by the Court.

41. Typicality: Plaintiff's claims are typical of the claims of the members of Class A.

The claims of the Plaintiff and members of Class A are based on the same legal theories and arise from the same unlawful conduct.

42. Plaintiff and members of Class A each received at least one fax advertisement, advertising the commercial availability or quality of any property, goods, or services, which contained no purported opt out notice, which Defendant sent or caused to be sent to Plaintiff and the members of Class A without Plaintiff's and the members of Class A's express permission or invitation.

43. Plaintiff's claims are typical of the claims of the members of Class B. The claims of the Plaintiff and members of Class B are based on the same legal theories and arise from the same unlawful conduct.

44. Plaintiff and members of Class B each received at least one fax advertisement, advertising the commercial availability or quality of any property, goods, or services, which contained no purported opt out notice, which Defendant sent or caused to be sent to Plaintiff and the members of Class B.

45. Plaintiff and members of Class C each received at least one fax advertisement, advertising the commercial availability or quality of any property, goods, or services, which contained no purported opt out notice, which Defendant sent or caused to be sent to Plaintiff and the members of Class C without Plaintiff's and the members of Class C's express permission or invitation.

46. 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.

47. The questions of fact and law common to Plaintiff and Class A predominate over questions which may affect individual members and include the following:

(a) Whether Defendant's conduct of sending and/or causing to be sent to Plaintiff and the members of Class A fax advertisements without Plaintiff's and members of class A's express invitation or permission, which advertised the commercial availability or quality of any property, goods, or services and contained no purported opt out notice, by facsimile, computer or other device violated 47 U.S.C. § 227(b) and/or the regulations thereunder;

(b) Whether Defendant's conduct of sending and/or causing to be sent to Plaintiff and the members of Class A fax advertisements without Plaintiff's and members of class A's express invitation or permission, which advertised the commercial availability or quality of any property, goods, or services and contained no purported opt out notice, by facsimile, computer or other device, was knowing or willful;

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

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

48. The questions of fact and law common to Plaintiff and Class B predominate over questions which may affect individual members and include the following:

(a) Whether Defendant's conduct of sending and/or causing to be sent to Plaintiff and the members of Class B fax advertisements, which advertised the commercial availability or quality of any property, goods, or services and which contained no purported opt out notice, by facsimile, computer or other device violated 47 U.S.C. § 227(b);

(b) Whether Defendant's conduct of sending and/or causing to be sent to Plaintiff and the members of Class B fax advertisements, which advertised the commercial availability or

quality of any property, goods, or services and which contained no purported opt out notice, by facsimile, computer or other device, was knowing or willful;

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

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

49. The questions of fact and law common to Plaintiff and Class C predominate over questions which may affect individual members and include the following:

(a) Whether Defendant's conduct of sending and/or causing to be sent to Plaintiff and the members of Class C fax advertisements without Plaintiff's and members of Class C's express invitation or permission, which advertised the commercial availability or quality of any property, goods, or services and which contained no purported opt out notice, by facsimile, computer or other device violated GBL § 396-aa(2); and

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

50. Adequacy of Representation: Plaintiff is an adequate representatives of the Classes because Plaintiff's 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, TCPA litigation and class action litigation.

51. Superiority: A class action is superior to other available means for the fair and efficient adjudication of the claims of the Classes. While the aggregate damages which 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. As a result, 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. Plaintiff does not know of any other litigation concerning this controversy already commenced against Defendant by any member of the Classes. The likelihood of the individual members of the Classes prosecuting separate claims is remote. Individualized litigation would also 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. In contrast, 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.

52. Injunctive Relief: Defendant has acted on grounds generally applicable to Plaintiff and members of Classes A and B, thereby making appropriate final injunctive relief with respect to Plaintiff and the Classes A and B as a whole.

AS AND FOR A FIRST CAUSE OF ACTION

53. Plaintiff repeats each and every allegation contained in all of the above paragraphs and incorporates such allegations by reference.

54. By Defendant's conduct, described above, Defendant committed thousands of violations of 47 U.S.C. § 227(b) against Plaintiff and the members of Class A to wit: the fax advertisements Defendant sent and/or caused to be sent to Plaintiff and the members of Class A were unsolicited and did not contain a notice meeting the requirements of 47 U.S.C. §

227(b)(2)(D) and/or 47 C.F.R. § 64.1200(a)(3)(iii);

55. Accordingly, Plaintiff and the members of Class A are entitled to statutory damages under 47 U.S.C. § 227(b) in an amount greater than one million five hundred thousand dollars (\$1,500,000).

56. If it is found that Defendant willfully and/or knowingly sent and/or caused to be sent unsolicited fax advertisements which did not contain a notice meeting the requirements of 47 U.S.C. § 227(b)(2)(D) and/or 47 C.F.R. § 64.1200(a)(3)(iii) to Plaintiff and the members of Class A, Plaintiff requests an increase by the Court of the damage award against Defendant, described in the preceding paragraph, 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) for willful or knowing violations.

AS AND FOR A SECOND CAUSE OF ACTION

57. Plaintiff repeats each and every allegation contained in all of the above paragraphs and incorporates such allegations by reference.

58. By Defendant's conduct described above, Defendant committed thousands of violations of 47 U.S.C. § 227(b) against Plaintiff and the members of Class B to wit: the fax advertisements Defendant sent and/or caused to be sent to Plaintiff and the members of Class B were either unsolicited and did not contain a notice meeting the requirements of 47 C.F.R. § 64.1200(a)(3)(iii) and/or 47 U.S.C. § 227(b)(2)(D), or were solicited and did not contain a notice meeting the requirements of 47 C.F.R. § 64.1200(a)(3)(iii) as required by 47 C.F.R. § 64.1200(a)(3)(iv).

59. Accordingly, Plaintiff and the members of Class B are entitled to statutory damages under 47 U.S.C. § 227(b) in an amount greater than one million five-hundred thousand (\$1,500,000).

60. If it is found that Defendant willfully and/or knowingly sent and/or caused to be sent fax advertisements to Plaintiff and the members of Class B were either unsolicited and did not contain a notice meeting the requirements of 47 C.F.R. § 64.1200(a)(3)(iii) and/or 47 U.S.C. § 227(b)(2)(D) , or were solicited and did not contain a notice meeting the requirements of 47 C.F.R. § 64.1200(a)(3)(iii), as required by 47 C.F.R. § 64.1200(a)(3)(iv), Plaintiff requests an increase by the Court of the damage award against Defendant, described in the preceding paragraph, 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) for willful or knowing violations.

AS AND FOR A THIRD CAUSE OF ACTION

61. Plaintiff repeats each and every allegation contained in all of the above paragraphs and incorporates such allegations by reference.

62. As described above, upon information and belief, Defendant committed numerous violations of 47 U.S.C. § 227(b).

63. Accordingly, under 47 U.S.C. § 227(b)(3)(A), Plaintiff and the members of Classes A and B are entitled to an injunction against Defendant, prohibiting Defendant from committing further violations of the above-mentioned statutes and regulations.

AS AND FOR A FOURTH CAUSE OF ACTION

64. Plaintiff repeats each and every allegation contained in all of the above paragraphs and incorporates such allegations by reference.

65. As described above, upon information and belief, Defendant committed thousands of violations of GBL § 396-aa.

66. Accordingly, pursuant to GBL § 396-aa(3), Plaintiff and the members of Class C are entitled to statutory damages in an amount greater than three-hundred thousand dollars

(\$300,000).

PRAYER FOR RELIEF

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

A. An order certifying the Classes and appointing Plaintiff as the representatives of the Classes and appointing the 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 \$1,500,000 for each of Classes A and B, pursuant to 47 U.S.C. § 227(b), for Defendant's violations of that statute.

C. If it is found that Defendant willfully and/or knowingly sent and/or caused to be sent fax advertisements to classes A and/or B, an increase by the Court of the award of statutory damages pursuant to 47 U.S.C. § 227(b) prayed for by Plaintiff and the members of Classes A and/or B in the preceding paragraph, to three times that amount described in the previous paragraph, as authorized by 47 U.S.C. § 227(b)(3), for willful and/or knowing violations. Plaintiff will therefore seek an increase from an award in excess of \$1,500,000 for each of classes A and B to an award in excess of \$4,500,000 for each of Classes A and B against Defendant.

D. An injunction against Defendant, prohibiting Defendant from committing further violations of the TCPA and the regulations promulgated thereunder;

E. An award to Plaintiff and the members of Classes C of statutory damages, in excess of \$300,000 for Defendant's violations of GBL § 396-aa(2).

F. Such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury.

Dated: July 28, 2012

Respectfully submitted,

BELLIN & ASSOCIATES LLC

/s/ Aytan Y. Bellin
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submitted simultaneously with Complaint)
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EXHIBIT A

Don't forget to register for the ACT!

Counseling Staff
Please Remind Your Students

The next ACT and the ACT plus Writing Test is

April 14, 2012

Registration Deadlines:

Regular – March 9, 2012

Late – March 10-23, 2012 (late fee required)

Students can meet the March 9, 2012 registration deadline by registering on-line at

www.actstudent.org

Northeast Region 144 Turnpike Road Suite 370 Southborough MA 01772

Ph. 508.229.0111 Fax 508.229.0166 Boston@act.org



Don't forget to register for the ACT!

Counseling Staff
Please Remind Your Students

The next ACT and the ACT plus Writing Test is

June 9, 2012

Registration Deadlines:

Regular – May 4, 2012

Late – May 5-18, 2012 (late fee required)

Students can meet the June 9, 2012 registration deadline by registering on-line at

www.actstudent.org

Northeast Region 144 Turnpike Road Suite 370 Southborough MA 01772
Ph. 508.229.0111 Fax 508.229.0166 Boston@act.org





Offer the ACT College Admission Test at Your High School.

By offering the ACT at your high school you provide your students with a competitive edge. Students will be able to take the ACT closer to home and in a familiar environment.

Your school can benefit too. Your school staff will be compensated for assuming the roles of test supervisor, room supervisors, and proctors. ACT also provides reasonable reimbursement to schools for test-related expenses including room rent, custodial services, and security.

The curriculum-based ACT is accepted by all 4-year colleges and universities in the U.S.

To sign up to become a test site for the 2012-2013 school year please visit:
<http://www.act.org/aap/forms/tc-signup.php>

For more information or with questions please contact: boston@act.org

EXHIBIT 3

**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 Houghton Mifflin Harcourt Publishers, Inc.’s, Houghton Mifflin Harcourt Publishing Company’s, and Laurel Kaczor’s 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 (“Bais Yaakov”) is the Plaintiff in a private TCPA class action currently pending in the United States District Court for the Southern District of New York against Houghton Mifflin Harcourt Publishers, Inc., Houghton Mifflin Harcourt Publishing Company, and Laurel Kaczor (collectively “Houghton”).¹ Houghton filed a petition with the FCC (the “Commission”) on January 20, 2015 (the “Petition”) seeking a retroactive waiver of a 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 January 30, 2015.³

¹ See *Bais Yaakov of Spring Valley v. Houghton Mifflin Harcourt Publishers, Inc. et al.*, Docket No. 7:13 CV 4577 (S.D.N.Y.).

² *Petition for Waiver of Houghton Mifflin Harcourt Publishers, Inc., Houghton Mifflin Harcourt Publishing Company, and Laurel Kaczor*, CG Docket Nos. 02-278, 05-338 (January 20, 2015). 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 (January 30, 2015) (“Public Notice”).

Because the Commission does not have the authority to retroactively absolve defendants of liability under a private right of action established by Congress, like the private right of action under TCPA under which Houghton has been sued, Houghton's request for waiver 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 Houghton has not satisfied its heavy burden to justify waiver here.

Background

A. Bais Yaakov of Spring Valley v. Houghton Mifflin Harcourt Publishers, Inc. et al.

Currently pending before the United States District Court for the Southern District of New York is a class action Bais Yaakov filed against Houghton 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

In an attempt to be relieved of potential liability for sending permission-based fax advertisements without proper opt-out notices, Houghton filed a cursory, seven-page petition with the Commission, on January 20, 2015, requesting a retroactive waiver of the application of the opt-out regulation. In that petition, Houghton argues that it should be granted such a waiver because Houghton allegedly (1) is similarly situated to the persons to whom the Commission granted retroactive waivers to in its October 30, 2014 Order⁵ ("the Order"); and (2) included

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 Houghton.

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).

some opt-out information on its faxes.

Significantly, never once in in the instant petition or in the District Court litigation has Houghton argued that it was confused by a footnote in an earlier Commission Order (“the *Junk Fax Order*”)⁶ about the applicability of the opt-out regulation. Moreover, Houghton has never one contended in the instant petition or 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 addition, Houghton has not argued in its petition or in 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).

ARGUMENT

I. HOUGHTON’S REQUEST FOR RETROACTIVE WAIVER 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 RETORACTIVELY ABSOLVE DEFENDANTS OF LIABILITY IN SUCH PRIVATE CAUSES OF ACTION ESTABLISHED BY CONGRESS

The request by Houghton for a retroactive waiver of the Commission’s rules appear to be based on a misconception that the Commission has the power to retroactively 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

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*).

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. *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 waiver requested here, that action would not only violate TCPA statute but would violate the Separation of Powers between Congress and the Executive Branch.

Nothing in the TCPA suggests, let alone authorizes the Commission to retroactively do away with a private plaintiff's right to sue a defendant and receive damages for the defendant's violations of the statute through the defendant's violations of the Commission's regulations. Indeed, under 1 U.S.C. § 109, if Congress itself had wished to wished to retroactively do away with that such private causes of action, it would have been required to do so explicitly. *See, e.g., Washington Metropolitan Area Transit Auth. V. Beynum*, 145 F.3d 371, 372-373 (D.C. Cir. 1998)(pursuant to 1 U.S.C. 109 claim for workers compensations for injury incurred before repeal of 1928 workers compensation law should be decided under that old law because where there was not explicit retroactivity provision in the new statute). Accordingly, because the Commission's powers are limited to those powers that Congress has delegated to it, and because Congress did not explicitly state that the private right of action under the TCPA for the violations of the Commission's regulations was retroactively repealed, let alone explicitly state that the Commission had the power the power to retroactively do away with private rights of action under the TCPA, the Commission cannot, through administrative action (i.e, through an adjudicatory rule) or even through regulation, extinguish private plaintiffs' right to sue. Indeed,

such a retroactive waiver without explicit Congressional authorization would improperly impair Bais Yaakov's right to damages and other relief against Houghton 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).

Moreover, the Commission's ruling on retroactive waiver in the Order is the equivalent of a regulation, notwithstanding the Commission's claims that each future individual request for waiver will be considered on its merits. That is because, among other things, as will be discussed below, the Commission has required no individual evidence from any waiver applicant as to why that waiver applicant is entitled to a waiver. Rather the Commission has concluded, as a general rule, that because there was allegedly confusion over the applicability of the opt-out regulation, persons who are being sued for the violation of the opt-out regulation are entitled to a waiver. Indeed, in the Order, the Commission granted retroactive waivers to 30 applicants and did not require any individual evidence from any of them as to their alleged confusion over the meaning of the opt-out regulation and did not make any individual evaluations of each of the waiver applicants' circumstances. Therefore because the Commission's Order released on October 30, 2014 is a regulation, it may not be applied retroactively. *See Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988)("[A] 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.").

Besides the reasons given above, even if the Commission's granting of a retroactive waiver could be considered an adjudicatory rule, rather than a regulation it would also be improper because it would not satisfy the requirements for retroactive applications of

adjudicatory rules. *See, e.g., Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972)(listing factors to consider for determining the appropriateness of retroactive application of adjudicatory rules); *Williams Natural Gas Co. v. F.E.R.C.*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)(where an adjudicatory rule “substitu[tes] new law for old law that was reasonable clear. . . .it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule.”). Here it would be improperly retroactive to grant Houghton’s request to be retroactively absolved from past violations of the TCPA for which Bais Yaakov and the classes of persons it intends to represent are suing Houghton. *See, e.g., Matthews v. Kidder Peabody & Co., Inc.*, 161 F.3d 156, 165, 170-71 (3d Cir. 1998) (in ruling that provision in Private Securities Litigation Reform Act (“PSLRA”) eliminating RICO causes of action based on predicate acts of securities fraud did not apply retroactively to causes of action that had accrued and had been asserted by plaintiff prior to effective date of PSLRA, court reasons: “Settled expectations and vested rights and obligations are highly prized in our legal system. Absent clear evidence ‘that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits,’ . . . we are extremely reluctant to create causes of action that did not previously exist, or—as in this case—to destroy causes of action and remedies that clearly did exist before Congress acted”) (citations omitted).

Moreover, the Supreme Court has long made clear that even when an agency that has been granted authority to administer a statute, it is “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.⁸ This reasoning makes clear that the Commission does not have the power to grant the waivers of liability requested here with regard to private rights of action under the TCPA.

For the reasons stated above, the Commission does not have the authority to retroactively waive liability in private TCPA causes of action that are based on violations of the opt-out regulation, including but not limited to the causes of action brought by Bais Yaakov against Houghton.

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 HOUGHTON HAS NOT SATSIFIED ITS HEAVY BURDEN 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

⁸ While the Commission appears to have rejected this argument in the Order, see Order at 11, ¶ 21, Bais Yaakov respectfully submits that that rejection was error as is made clear by the case law cited above and below.

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).

Houghton has failed to provide concrete evidentiary support for waivers, much less to articulate a public interest that supports granting any waivers of application of the Opt-Out Regulation. First of all, Houghton has absolutely failed to submit any evidence that prior to sending out the fax advertisements at issue it 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 the Notice of Proposed Rulemaking allegedly did not provide explicit notice in of the Commission’s intent to adopt the opt-out regulation. Moreover, Houghton has never even claimed to have been so actually confused. Accordingly, the reasons given by the

Commission for granting waivers in the Order simply do not apply here.⁹

Moreover, while Houghton complains about the possible financial liability that it may face in the private TCPA lawsuit against it, Houghton has not submitted a shred of concrete evidence to the Commission, such as its financial condition and insurance coverage, of how it will likely be affected by these lawsuits. Such specific evidence is explicitly required under the waiver cases discussed above. It is also instructive to note that Houghton has not brought forth a single example of a company that has been 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, in the Order, the Commission held that the fact that parties who violate the TCPA may face substantial liability is not an “inherently adequate ground” for a waiver. Order at 14 ¶ 28.

Nor would such waivers based on the vast number of violations Houghton has 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 “discriminatory application” of waivers that the Courts have admonished the Commission to

⁹ By making the above arguments, Bais Yaakov is 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 still maintains that the reasons given by the Commission for granting the waivers were legally insufficient and that the waivers should not have been granted.

avoid. *NetworkIP, LLC v. F.C.C.*, *supra*, 548 F.3d at 127.

In any event, Houghton has not 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 the request can be ignored by sender of such fax advertisements). Indeed, the only interest that Houghton has identified in support of their request for a waiver is its 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, Houghton’s cursory waiver petition reflects that Houghton believes that the retroactive waivers they seek in this case are simply for the asking. Because the Commission’s stated reasons for granting the waivers it did in the Order are simply not present regarding Houghton, the Commission’s reasoning simply does not apply to these petitions.

What Houghton has done here is simply make a “generalized plea” for a waiver, and has 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 Houghton has failed to carry its heavy burden to justify the granting of retroactive waiver of the application of the opt-out regulation to it, their requests for such waivers must be denied.

CONCLUSION

For all the foregoing reasons, The Commission should deny Houghton's petition in its entirety.

Dated: February 12, 2015

Respectfully submitted,

BELLIN & ASSOCIATES LLC

/s/ Aytan Y. Bellin

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Attorneys for Bais Yaakov of Spring Valley,

EXHIBIT 4

**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)	

**P & S Printing LLC’s Comments on USI, Inc.’s Petition Seeking
“Retroactive Waiver” of the Commission’s Rule Requiring Opt-Out Notices
on Fax Advertisements Sent with Permission**

Commenter P & S Printing LLC (“P&S”) is the Plaintiff in a private TCPA class action currently pending in the United States District Court for the District of Connecticut against U S I, Inc. d/b/a USI, Inc. (“USI”).¹ USI filed a petition with the FCC (the “Commission”) on March 11, 2015 (the “Petition”) seeking a retroactive waiver of a regulation (“the opt-out regulation”) requiring op-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 March 27, 2015.³

Because the Commission does not have the authority to retroactively absolve defendants of liability under a private right of action established by Congress, like the private right of action under TCPA under which USI has been sued, USI’s request for waiver must be denied.

¹ See *P & S Printing LLC v. U S I, Inc.*, Docket No. 3:14 CV 01893 (D. Conn.).

² *Petition for Waiver of USI, Inc.*, CG Docket Nos. 02-278, 05-338 (March 11, 2015). 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 (March 27, 2015) (“Public Notice”).

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 USI has not satisfied its heavy burden to justify waiver here.

Background

A. P&S Printing LLC v. USI, Inc. Mifflin Harcourt Publishers, Inc. et al.

Currently pending before the United States District Court for the District of Connecticut is a class action P&S filed against USI for, among other things, sending thousands of unsolicited and permission-based fax advertisements without proper opt-out notices to P&S and other persons throughout the United States.⁴

In an attempt to be relieved of potential liability for sending permission-based fax advertisements without proper opt-out notices, USI filed a cursory, eight-page petition with the Commission, on March 27, 2015, requesting a retroactive waiver of the application of the opt-out regulation. In that petition, USI argues that it should be granted such a waiver because USI allegedly is similarly situated to the persons to whom the Commission granted retroactive waivers to in its October 30, 2014 Order⁵ (“the Order”).

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 USI.

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).

Significantly, never once has USI argued that it was actually confused by a footnote in an earlier Commission Order (“the *Junk Fax Order*”)⁶ about the applicability of the opt-out regulation. Moreover, USI has never once contended that it was even aware of the opt-out regulation or the *Junk Fax Order* prior to P&S’s filing of the Class Action against it. In addition, USI has not argued that it was somehow actually 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).

ARGUMENT

I. USI’S REQUEST FOR RETROACTIVE WAIVER 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 RETROACTIVELY ABSOLVE DEFENDANTS OF LIABILITY IN SUCH PRIVATE CAUSES OF ACTION ESTABLISHED BY CONGRESS

The request by USI for a retroactive waiver of the Commission’s rules appears to be based on a misconception that the Commission has the power to retroactively absolve USI of liability under TCPA causes actions brought against USI by private parties in court or that will be brought by private parties against USI 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. *See, e.g., Brown v. Gardner*, 513 U.S. 115, 116-121 (1994)(regulation that required persons injured at

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*).

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 waiver requested here, that action would not only violate TCPA statute but would violate the Separation of Powers between Congress and the Executive Branch.

Nothing in the TCPA suggests, let alone authorizes the Commission to retroactively do away with a private plaintiff's right to sue a defendant and receive damages for the defendant's violations of the statute through the defendant's violations of the Commission's regulations. Indeed, under 1 U.S.C. § 109, if Congress itself had wished to wished to retroactively do away with that such private causes of action, it would have been required to do so explicitly. *See, e.g., Washington Metropolitan Area Transit Auth. V. Beynum*, 145 F.3d 371, 372-373 (D.C. Cir. 1998)(pursuant to 1 U.S.C. 109 claim for workers compensations for injury incurred before repeal of 1928 workers compensation law should be decided under that old law because where there was not explicit retroactivity provision in the new statute). Accordingly, because the Commission's powers are limited to those powers that Congress has delegated to it, and because Congress did not explicitly state that the private right of action under the TCPA for the violations of the Commission's regulations was retroactively repealed, let alone explicitly state that the Commission had the power the power to retroactively do away with private rights of action under the TCPA, the Commission cannot, through administrative action (e.g., through an adjudicatory rule/waiver) or even through regulation, extinguish private plaintiffs' right to sue. Indeed, such a retroactive waiver without explicit Congressional authorization would improperly impair P&S's right to damages and other relief against USI and would impermissibly interfere with the right of recovery under the TCPA against USI for its 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).

Moreover, the Commission's ruling on retroactive waiver in the Order is the equivalent of a regulation, notwithstanding the Commission's claims that each future individual request for waiver will be considered on its merits. That is because, among other things, as will be discussed below, the Commission has required no individual evidence from any waiver applicant as to why that waiver applicant is entitled to a waiver. Rather the Commission has concluded, as a general rule, that because there was allegedly confusion over the applicability of the opt-out regulation, persons who are being sued for the violation of the opt-out regulation are entitled to a waiver. Indeed, in the Order, the Commission granted retroactive waivers to 30 applicants and did not require any individual evidence from any of them as to their alleged confusion over the meaning of the opt-out regulation and did not make any individual evaluations of each of the waiver applicants' circumstances. Therefore because the Commission's Order released on October 30, 2014 is a regulation, it may not be applied retroactively. *See Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988)("[A] 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.").

Besides the reasons given above, even if the Commission's granting of a retroactive waiver could be considered an adjudicatory rule, rather than a regulation it would also be improper because it would not satisfy the requirements for retroactive applications of adjudicatory rules. *See, e.g., Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972)(listing factors to consider for determining the appropriateness of retroactive application of adjudicatory rules); *Williams Natural Gas Co. v. F.E.R.C.*, 3 F.3d

1544, 1554 (D.C. Cir. 1993)(where an adjudicatory rule “substitu[tes] new law for old law that was reasonable clear. . . .it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule.”). Here it would be improperly retroactive to grant USI’s request to be retroactively absolved from past violations of the TCPA for which P&S and the classes of persons it intends to represent are suing USI. *See, e.g., Matthews v. Kidder Peabody & Co., Inc.*, 161 F.3d 156, 165, 170-71 (3rd Cir. 1998) (in ruling that provision in Private Securities Litigation Reform Act (“PSLRA”) eliminating RICO causes of action based on predicate acts of securities fraud did not apply retroactively to causes of action that had accrued and had been asserted by plaintiff prior to effective date of PSLRA, court reasons: “Settled expectations and vested rights and obligations are highly prized in our legal system. Absent clear evidence ‘that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits,’ . . . we are extremely reluctant to create causes of action that did not previously exist, or—as in this case—to destroy causes of action and remedies that clearly did exist before Congress acted”) (citations omitted).

Moreover, the Supreme Court has long made clear that even when an agency that has been granted authority to administer a statute, it is “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.⁸ This reasoning makes clear that the Commission does not have the power to grant the waivers of liability requested here with regard to private rights of action under the TCPA.

For the reasons stated above, the Commission does not have the authority to retroactively waive liability in private TCPA causes of action that are based on violations of the opt-out regulation, including but not limited to the causes of action brought by P&S against USI.

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 USI HAS NOT SATISFIED ITS HEAVY BURDEN 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

⁸ While the Commission appears to have rejected this argument in the Order, see Order at 11, ¶ 21, P&S respectfully submits that that rejection was error as is made clear by the case law cited above and below.

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,’” *NetworkIP*, 548 F.3d at 127 (*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, 950-951 (D.C. Cir. 1986)).

USI has failed to provide concrete evidentiary support for waivers, much less to articulate a public interest that supports granting any waivers of application of the Opt-Out Regulation. First of all, USI has absolutely failed to submit any evidence that prior to sending out the fax advertisements at issue it 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 the Notice of Proposed Rulemaking allegedly did not provide explicit notice in of the Commission’s intent to adopt the opt-out regulation. Moreover, USI has never even claimed to have been so actually confused. Accordingly, the reasons given by the Commission for granting waivers in the Order simply do not apply here.⁹

Moreover, while USI complains about the possible financial liability that it may face in the private TCPA lawsuit against it, USI has not submitted a shred of concrete evidence to the

⁹ By making the above arguments, P&S is 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, P&S still maintains that the reasons given by the Commission for granting the waivers were legally insufficient and that the waivers should not have been granted.

Commission, such as its financial condition and insurance coverage, of how it will likely be affected by these lawsuits. Such specific evidence is explicitly required under the waiver cases discussed above. It is also instructive to note that USI has not brought forth a single example of a company that has been 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, in the Order, the Commission held that the fact that parties who violate the TCPA may face substantial liability is not an “inherently adequate ground” for a waiver. Order at 14 ¶ 28.

Nor would such waivers based on the vast number of violations USI has 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 “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, USI has not 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 the request can be ignored by sender of such fax advertisements). Indeed, the only interest that USI has identified in support of their request for a waiver is its 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, USI’s cursory waiver petition reflects that USI believes that the retroactive waivers they seek in this case are simply for the asking. Because the Commission’s stated reasons for granting the waivers it did in the Order are simply not present regarding USI, the Commission’s reasoning simply does not apply to these petitions.

What USI has done here is simply make a “generalized plea” for a waiver, and has 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 USI has failed to carry its heavy burden to justify the granting of retroactive waiver of the application of the opt-out regulation to it, their requests for such waivers must be denied.

CONCLUSION

For all the foregoing reasons, The Commission should deny USI’s petition in its entirety.

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Respectfully submitted,

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