Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Petition for Declaratory Ruling to Clarify	)	
Statutory Basis for Rule 64.1200(a)(3)(iv)	)	CG Docket No. 02-278
and/or for Ruling Regarding Substantial	)	
Compliance with Section 64.1200(a)(4)(iii)	)	CG Docket No. 05-338
and (iv) and/or Waiver	)	

MOTION TO STRIKE JEFFERSON RADIATION ONCOLOGY'S UNAUTHORIZED AND UNTIMELY ADDITIONAL COMMENT, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE ADDITIONAL COMMENT

Advanced Care Scripts, Inc. ("ACS") hereby moves to strike Jefferson Radiation Oncology's ("Jefferson") unauthorized and untimely comment. ACS filed its Petition for Waiver on November 12, 2015. The Commission then issued a Public Notice on December 4, 2015, opening a comment period on ACS's Petition until December 18, 2015, with ACS's reply comment period ending on December 30, 2015. Jefferson filed a comment on December 17, 2015, and ACS filed its reply on December 30, 2015.

Well after the Commission's comment period closed, on January 4, 2016, Jefferson submitted a document titled "Sur-Reply" to assert again its opposition to the ACS's Petition. Under the express terms of the Public Notice, Jefferson's so-called Sur-Reply is an untimely and unauthorized effort to re-state Jefferson's opposition, which stems from Jefferson's desire to protect its private litigation position against ACS. In failing to seek authorization from the Commission prior to filing its Sur-Reply, Jefferson has violated 47 C.F.R. § 1.415(d). Further, Jefferson's stated reason for filing the Sur-Reply—to address new arguments ACS made in its reply—has no merit. Jefferson asserts that ACS's new arguments relate to its reliance on Westfax for compliance with the TCPA. ACS clearly set forth in its Petition that it relied on

Westfax regarding the opt-out language asserted by Jefferson to be deficient. *See* ACS Petition at 8 n.3. Jefferson thus had every opportunity to address ACS's reliance on Westfax in its comment submitted on December 17, 2015. Indeed, that Jefferson did not do so looks to be a calculated decision given that Jefferson's comment carefully excerpted the deposition testimony of ACS's corporate representative, Steve Lynch, to avoid Mr. Lynch's repeated reference to Westfax and ACS's reliance on Westfax for compliance with the TCPA.

For these two reasons—the untimeliness of Jefferson's Sur-Reply and that the Sur-Reply does not address new arguments made by ACS—the Sur-Reply is improper and should be stricken.

In the alternative, if the Commission elects not to strike Jefferson's Sur-Reply, ACS seeks authorization from the Commission pursuant to 47 C.F.R. § 1.415, to provide a brief response to the arguments set forth by Jefferson. ACS's response is attached hereto.

Dated: January 8, 2016

Respectfully submitted,

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ADVANCED CARE SCRIPTS, INC.'S RESPONSE TO SUR-REPLY

If the Commission elects to consider Jefferson's Sur-Reply, it should reject Jefferson's repackaged arguments. Jefferson now argues principally that (1) ACS is "disingenuous" in asserting that Westfax provided opt-out language for its fax advertisements and (2) whether Westfax even provided that language is irrelevant because ACS cannot claim that ACS itself was "confused" by the TCPA or the Commission's 2006 Order. Neither argument has merit.

First, ACS has in no way been disingenuous. Like Magna Check, ACS has alleged—and provided evidence—that Westfax supplied the opt-out language that it used in its fax transmissions.[1] ACS's corporate representative, Steve Lynch, testified that Westfax supplied this language around late 2008. *See* Declaration of Scott Voelz in Support of Reply Comment, Ex. A at 58:24-60:2. While Jefferson cites Westfax's own allegation in an Answer to ACS's Third Party Complaint against Westfax denying this testimony, such a counter-allegation does not warrant the Commission reaching a decision to reject ACS's evidence. At best, even if the Commission were to credit Westfax's counter-allegation as actual evidence, Jefferson asks the Commission to make a factual determination about a dispute as to whether Westfax supplied the opt-out language. As the Commission itself has recognized (*see* August 28, 2015 Order ¶¶ 9, 17), its waiver decisions do not depend on engaging in resolution of disputed facts raised by private litigants that oppose petitioners' requests. Moreover, at the least, ACS submitted undisputed evidence that it believed Westfax was providing ACS with appropriate notice language, and that itself establishes confusion sufficient for purposes of obtaining the waiver. Jefferson's argument should be denied.

[1] As illustrated in ACS's Reply, filed on December 30, 2015, Magna Chek's allegations regarding its reliance on Westfax are essentially identical. Jefferson fails to distinguish these allegations, beyond the fact that Magna Chek filed its petition earlier.

Second, Jefferson argues that ACS is not entitled to a waiver because it has not demonstrated that ACS was sufficiently confused by the TCPA in the right way. According to Jefferson, ACS could only receive a waiver if it demonstrated ACS itself was confused about "who" was required to receive the mandated opt-out language. (Jefferson's Sur-Reply at 2-3.) Jefferson argues that by including some language on both solicited and unsolicited faxes, ACS was not confused and therefore is not entitled to a waiver. The Commission has never imposed this stringent standard on petitioners. *See* Aug. 28, 2015 Order ¶ 19 (rejecting argument that petitioners must "plead specific, detailed grounds for individual confusion"). Nor should it—it would penalize companies that provided an opt-out mechanism even when those companies did not properly understand when specific language was legally mandated. Moreover, this standard would make the Commission responsible for reviewing hundreds of factual records. As ACS has already explained, it relied on Westfax to transmit faxes on its behalf, and Westfax has claimed it was "confused" by the TCPA's requirements. The Commission has not previously required proof of how and why this confusion manifested and, contrary to Jefferson's argument, it should not impose a new requirement to do so here.

For the reasons stated above, if the Commission chooses to consider the arguments set forth in Jefferson's Sur-Reply, it should reject them.

Dated: January 8, 2016

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