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 Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	

TCPA Plaintiffs' Comments on Petitions for Retroactive Waiver filed by
Humana Insurance Co. and Weinberg & Associates, Inc.

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Executive Summary

The Commission should deny the Humana and Weinberg petitions under its October 30, 2014 Order. That Order granted "retroactive waivers" of 47 C.F.R. § 64.1200(a)(4)(iv) to several petitioners and allowed "similarly situated" persons to seek waivers, but it repeatedly stressed that "in light of our confirmation here that a fax ad sent with the recipient's prior express permission must include an opt-out notice, we expect that parties will make every effort to file within six months of the release of this Order." The Commission has not yet denied a waiver petition for failure to "make every effort" to file by April 30, 2015, and it should make the Humana and Weinberg petitions the first.

Humana filed its petition on December 18, 2015. Humana does not claim it made any "effort" to file by April 30, 2015, or explain why it could not file sooner. The underlying private TCPA litigation has been pending since 2010, and the record shows Humana had actual knowledge of the ability to seek a waiver for well over a year before filing its petition. Humana's briefs discuss other cases where the defendants had filed waiver petitions and obtained stays, and the district court held Humana was required to raise its arguments before the Commission under the Hobbs Act, asking Humana whether the case should be stayed pending those proceedings on September 29, 2014. For whatever reason, Humana chose not to file a petition until over a year later, nearly eight months after the deadline. Humana does not explain this delay, merely presuming its petition will be granted because the faxes at issue were "sent prior to the April 30, 2015 deadline," but that is not the standard. The standard is whether Humana made "every effort" to file by April 30, 2015, and it did not.

Humana should also be denied a waiver because it attempts to justify its fax advertising based on contractual language it claims all class members agreed to referring to an "established business relationship" between the parties, not "prior express invitation or permission." The Bureau refused to grant a waiver for EBR faxes in its December 9, 2015 Order, and it should do the same here.

Weinberg did not "make every effort" to file by April 30, 2015. Weinberg's *co-defendant* in the underlying TCPA litigation, Ohio National Mutual, Inc., filed a waiver petition August 21, 2015, and filed a motion to stay the case pending a decision on its petition September 16, 2015, which the district court granted October 1, 2015. Weinberg did not file a waiver petition until December 8, 2015, more than two months after the stay order and nearly three months after the motion to stay. Weinberg's petition does not explain this delay, and the Commission should deny the waiver request on that basis alone.

Finally, read carefully, Weinberg's petition does not actually *claim* that Weinberg obtained "prior express invitation or permission" from Plaintiff or any other class member. The Commission previously ruled a petitioner need not *prove* prior express permission to obtain a waiver, but there should be a requirement that the petitioner at least *assert* that defense. Without a claim of prior express permission, a waiver would be futile, and the Commission should deny the Weinberg petition on this independent basis.

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TCPA Plaintiffs' Comments on Petitions for Retroactive Waiver filed by Humana Insurance Co. and Weinberg & Associates, Inc.

Commenters Lawrence S. Brodksy and JT's Frames, Inc. are Plaintiffs in private TCPA actions against Petitioners Humana Insurance Co. ("Humana") and Weinberg & Associates, Inc. ("Weinberg").[1] Petitioners seek "retroactive waivers" of 47 C.F.R. § 64.1200(a)(4)(iv), the rule requiring opt-out notice on fax advertisements sent with "prior express invitation or permission."[2] The Consumer & Governmental Affairs Bureau sought comments on January 29, 2016.[3]

The Commission should deny the petitions because Humana and Weinberg failed to "make every effort" to file by April 30, 2015, as required by the October 30, 2014 Order. Neither petitioner offers any reason why it did not file by the deadline, which in itself justifies denying both petitions. Moreover, Humana had actual knowledge of the opportunity to seek a waiver since, at the latest, September 29, 2014, but did not file a petition until

[1] *Brodsky v. HumanaDental Ins. Co.*, No. 10-cv-3233 (N.D. Ill.); *JT's Frames, Inc. v. Weinberg & Assocs., Inc. & Ohio Nat'l Mut. Co.*, No. 15-cv-7923 (N.D. Ill.).

[2] *Petition for Retroactive Waiver by Humana Ins. Co.*, CG Docket Nos. 02-278, 05-338 (filed Dec. 18, 2015) ("Humana Petition"); *Petition for Retroactive Waiver by Weinberg & Assocs.*, CG Docket Nos. 02-278, 05-338 (filed Dec. 8, 2015) ("Weinberg Petition").

[3] *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning Commission's Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Jan. 29, 2016).

December 18, 2015, and Weinberg had actual knowledge of the opportunity to seek a waiver since September 16, 2015, but did not file until December 8, 2015.

In addition, the Commission should deny Humana's petition because, like one of the petitioners denied a waiver in the December 9, 2015 Bureau Order, Humana sent its faxes pursuant to an "established business relationship," not "prior express invitation or permission," and the opt-out-notice requirement for EBR faxes in Rule § 64.1200(a)(4)(ii) is not subject to waiver under the October 30, 2014 Order.

Finally, the Commission should deny the Weinberg petition because Weinberg does not even *claim* it obtained "prior express invitation or permission." The Commission has not required previous waiver recipients to *prove* prior express permission to obtain a waiver, but all previous waiver recipients at least *asserted* permission.

Procedural History

On October 30, 2014, the Commission issued its Order rejecting several challenges to the validity of § 64.1200(a)(4)(iv),[4] but granting the covered petitioners "retroactive waivers."[5] The Commission allowed "similarly situated" parties to petition for waivers, but stressed that "in light of our confirmation here that a fax ad sent with the recipient's prior express permission must include an opt-out notice, we expect that parties will make every

[4] *In re Rules & Regulations Implementing the Tel. 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) ¶¶ 19–20, 32 & n.70 (ruling that Commission issued regulation under its statutory authority to "implement" the TCPA by empowering consumers to "halt unwanted faxes" and regulation is enforceable through the TCPA's private right of action) ("Opt-Out Order").

[5] *Id.* ¶¶ 22–31.

effort to file within six months of the release of this Order."[6] The Commission repeated, "[w]e expect parties making similar waiver requests to make every effort to file within six months of the release of this Order."[7] The same day, the Commission issued a public notice, which announced that "similarly situated parties" may seek waivers, but "emphasized that such parties should make every effort to file such requests prior to April 30, 2015," and again repeated that the Commission "expect[s] these parties to make every effort to file such requests prior to April 30, 2015."[8]

On August 28, 2015, the Bureau granted 117 follow-on waiver petitions, including seven petitions filed after April 30, 2015, where the petitioners were sued after (or in one case 10 days before) the deadline.[9]

On December 9, 2015, the Bureau for the first time denied several petitions.[10] One of those petitions was denied because the petitioner argued "the faxes were sent to registered customers" and so it "reasonably believed that they were within the provision of the Junk Fax Protection [*sic*] Act stating that the opt-out notice does not apply because the transmissions were not unsolicited."[11] The Bureau ruled that "[n]ot only does this assertion establish that the petitioner was ignorant of the law – which provides independent grounds

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[6] *Id.* ¶ 2.

[7] *Id.* ¶ 30.

[8] *FCC Confirms Opt-Out Notice Requirements Applicable to All Fax Advertisements*, 29 FCC Rcd. 13498, 13498 (Oct. 30, 2014).

[9] *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2015 WL 5120879, at *1 (CGAB Aug. 28, 2015) ("August 28, 2015 Bureau Order").

[10] *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2015 WL 8543949 ¶¶ 20–21 (CGAB Dec. 9, 2015) ("December 9, 2015 Bureau Order").

[11] *Id.* ¶ 21.

to deny the petition – but the *2014 Anda Commission Order* was clear in stating that a waiver will not be extended to the requirement to include opt-out language on faxes pursuant to an existing business relationship, which it said was clear and without controversy."[12]

Factual Background

A. The Humana litigation.

On March 18, 2010, Brodsky filed a private TCPA action against Humana in Illinois state court, which Humana removed to the Northern District of Illinois.[13] The Amended Class Action Complaint, filed August 5, 2011, alleges Humana sent Brodsky and a class of other persons unsolicited fax advertisements, including two faxes on May 14, 2008.[14] These faxes ask recipients to "[s]ell HumanaDental and HumanaVision plans and earn credits towards Humana's Leaders Club trip to Maui in 2009," stating "[w]e've made it even easier for them and you to do business with us," and "[c]all your Humana Specialty Benefits sales executive for details."[15] The faxes are not addressed to anyone.[16]

The faxes contain an opt-out notice stating "If you don't want us to contact you by fax, please call 1-800-U-CAN-ASK."[17] The notice (1) does not contain a domestic facsimile number for opt-out requests, (2) is not clear and conspicuous, (3) does not state a sender's failure to comply with a request within 30 days is unlawful, and (4) does not disclose the

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[12] *Id.*

[13] *Brodsky v. Humanadental Ins. Co.*, No. 10-cv-3233 (N.D. Ill.), Doc. 5, Notice of Removal.

[14] *Brodsky* Compl. ¶ 10, Doc. 33, attached Declaration of Glenn L. Hara ("Hara Decl."), Ex. A ,

[15] *Id.*, Ex. A.

[16] *Id.*

[17] *Id.*

requirements to make an enforceable request, as required by 47 C.F.R. § 64.1200(a)(4)(iii).[18] The Complaint alleges that, because the faxes lack compliant opt-out notice, Humana cannot claim EBR or "prior express invitation or permission."[19]

On August 22, 2011, Humana asserted affirmative defenses that "Plaintiff consented to receiving the fax(es) at issue" and Plaintiff and Humana "had a business relationship which allowed the fax transmission(s)."[20] Discovery revealed these defenses are based solely on the following contractual language, to which Humana says all class members agreed:

> GPA understands and agrees that the Company and GPA through the *established business relationship* by this agreement may choose to communicate with GPA through the use of mail, email or facsimile to the address(es) and facsimile number(s) of the GPA. In addition, Company may begin immediately using any changes to such contact information.[21]

On January 2, 2013, Humana filed a motion for summary judgment arguing that it obtained Brodsky's prior express permission and the TCPA applies only to "unsolicited" faxes.[22] Plaintiff filed a response arguing Humana could not claim prior express permission because its faxes lack compliant opt-out notice.[23] Plaintiff noted the district court in *Nack v. Walburg*, 2011 WL 310249, at *4 (E.D. Mo. Jan. 28, 2011), "interpreted" § 64.1200(a)(4)(iv) as not applying to faxes sent with permission, but that decision was on appeal to the Eighth Circuit, where the Commission filed an amicus brief stating the regulation means what it says

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[18] *Id.*

[19] *Id.* ¶¶ 25–26.

[20] Answer, Doc. 34, First & Second Aff. Defenses, Hara Decl., Ex. B.

[21] Humana Mem. Supp. Am. Mot. Summ. J. at 1, Doc. 130, Hara Decl., Ex. C.

[22] *Id.* at 13–14.

[23] Pl.'s Mem. Opp. Def.'s Mot. Summ. J. at 14–18, Doc. 142, Hara Decl., Ex. D.

and the district court "interpreted" its plain language away as *ultra vires* when it lacked jurisdiction to do so under the Hobbs Act.[24]

On February 28, 2013, Humana filed a reply arguing the Commission has no authority "to regulate faxes sent with permission" under the TCPA and asking the district court to hold § 64.1200(a)(4)(iv) was not entitled to *Chevron* deference.[25]

On March 15, 2013, Plaintiff filed a sur-reply arguing Humana was challenging the validity of § 64.1200(a)(4)(iv) in a district court in violation of the Hobbs Act, just as Walburg had attempted to do, and that Humana must first raise its arguments before the Commission and *then* seek judicial review before the court of appeals.[26]

On March 15, 2013, Humana filed a response, stating it would not file a petition with the Commission because it was "too late" to seek reconsideration of the 2006 regulation and it "cannot now petition the FCC to amend the regulation retroactively, as retroactive amendments are prohibited absent express Congressional authorization."[27]

On May 21, 2013, Plaintiff submitted as supplemental authority the Eighth Circuit's decision in *Nack*, issued the day before.[28] Plaintiff attached a copy of the opinion, which agreed with the Commission that "[a] party challenging an FCC regulation as *ultra vires* must first petition the agency itself and, if denied, appeal the agency's disposition directly to the

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[24] *Id.*

[25] Def.'s Reply Supp. Am. Mot. Summ. J. at 13, Doc. 160, Hara Decl., Ex. E.

[26] Pl.'s Sur-Reply Opp. Summ. J. at 6–7, Doc. 166, Hara Decl., Ex. F.

[27] Def.'s Resp. Pl.'s Surreply at 6 (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)), Doc. 167, Hara Decl., Ex. G.

[28] Pl.'s Notice Supp. Authority, Doc. 169, Hara Decl., Ex. H.

Court of Appeals" as provided by the Hobbs Act.[29] The Eighth Circuit noted Walburg had "not yet elected to seek a stay of litigation to pursue administrative remedies through the FCC," but held "the district court may entertain any requests to stay proceedings for pursuit of administrative determination of the issues raised herein."[30]

On August 19, 2013, Walburg filed his petition "for declaratory judgment and/or waiver."[31] Like the first petitioner to seek a "retroactive waiver" on June 27, 2013,[32] Walburg argued the Commission may relieve a party of "class action liability" in a pending private TCPA action under Commission Rule 1.3.[33] On September 12, 2013, the district court stayed the case to allow Walburg to "pursue administrative remedies through a Petition for Declaratory Ruling and/or Waiver that Defendant filed with the FCC on August 19, 2013."[34]

On June 12, 2014, the district court denied Humana's motion for summary judgment, holding, "the regulation as written requires the senders of fax advertisements to employ the above-described opt-out language even if the sender received prior express permission to send the fax," quoting *Nack*.[35]

On August 6, 2014, Humana moved to certify two questions for appeal to the Seventh Circuit: (1) whether § 64.1200(a)(4)(iv) "applies to faxes sent with the permission of

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[29] *Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir. 2013)

[30] *Id.* at 686, 687.

[31] *Petition of Douglas Paul Walburg and Richie Enters., LLC for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed Aug. 19, 2013) ("Walburg Petition").

[32] *See Petition of Forest Pharms., Inc., for Declaratory Ruling and/or Waiver*, CG Docket No. 05-338, at 11–12 (filed June 27, 2013) ("Forest Pharmaceuticals Petition").

[33] Walburg Pet. at 1, 2–3, 13–15.

[34] *Nack v. Walburg*, 2013 WL 4860104, at *1 (E.D. Mo. Sept. 12, 2013).

[35] *Brodsky v. HumanaDental Ins. Co.*, 2014 WL 2780089, at *9 (N.D. Ill. June 12, 2014) (hereinafter "*Brodsky I*") (quoting *Nack*, 715 F.3d at 682).

the recipient" and (2) "[w]hether a private right of action exists" for violations.[36] Humana argued there was substantial ground for difference of opinion on these questions, citing decisions issued in cases against Merck & Co., Purdue Pharma, and Harbour Capital Corp., in which the courts ruled there was a question about the Commission's authority to issue § 64.1200(a)(4)(iv) and stayed the case pending the defendant's (or Walburg's) petition for declaratory relief and/or "retroactive waiver" before the Commission.[37]

On September 29, 2014, the district court denied Humana's motion to certify questions for appeal.[38] On the first question, the court held there is no "substantial ground for difference of opinion" on the scope of § 64.1200(a)(4)(iv), since the plain language of the rule "*does* apply to faxes sent with the permission of the recipient."[39]

On the second question, the court held "any direct or indirect challenge to the FCC's authority to promulgate the regulations or to whether a private right of action exists, at this time, should be through the FCC's administrative processes."[40] The court noted that "numerous petitions have been made to the FCC seeking a declaratory ruling as to the scope of its rulemaking authority regarding the requirement of opt-out notices in unsolicited *and* solicited advertisements."[41] The district court cited the three decisions

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[36] Humana Mem. Supp. Mot. Certify at 5, Doc. 202, Hara Decl., Ex. I.

[37] *Id.* at 11 (citing *Kaye v. Merck & Co., Inc.*, 2014 WL 2002447, at *2 (D. Conn. May 15, 2014); *Physicians Healthsource, Inc. v. Purdue Pharma L.P.*, 2014 WL 518992, at *3 (D. Conn. Feb. 3, 2014); *Raitport v. Harbour Capital Corp.*, 2013 WL 4883765, at *1 (D.N.H. Sept. 12, 2013) (stayed pending Walburg's petition)).

[38] *Brodsky v. HumanaDental Ins. Co.*, 2014 WL 4813147, at *6 (N.D. Ill. Sept. 29, 2014) (hereinafter "*Brodsky II*").

[39] *Id.*

[40] *Id.*

[41] *Id.*

Humana relied on in its motion, noting these courts did not rule on the Commission's authority, but instead "stayed the case pending resolution of the administrative proceedings."[42] The district court asked Humana "whether a stay is appropriate in light of the ongoing administrative proceedings on the relevant TCPA issues."[43]

On October 30, 2014, the Commission released its Order granting "retroactive waivers" to 24 petitioners, including Walburg, Merck, and Purdue Pharma, and stating similarly situated parties may seek waivers, provided they "make every effort" to file by April 30, 2015.[44] The Commission issued a public notice announcing that similarly situated parties may seek waivers, provided they "make every effort to file such requests prior to April 30, 2015."[45] Humana did not file a waiver petition. Instead, over the next year, the parties conducted discovery to prepare for Plaintiff's motion for class certification.

On October 7, 2015, Brodsky filed his motion for class certification, explaining discovery revealed Humana sent at least 25,232 fax advertisements without compliant opt-out notice during the class period.[46]

On December 17, 2015, Humana filed a motion to stay all proceedings in the case, including its deadline to respond to the motion for class certification, so it could file a waiver

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[42] *Id.* (citing *Kaye v. Merck & Co., Inc.*, 2014 WL 2002447, at *2 (D. Conn. May 15, 2014); *Physicians Healthsource, Inc. v. Purdue Pharma L.P.*, 2014 WL 518992, at *3 (D. Conn. Feb. 3, 2014); *Raitport v. Harbour Capital Corp.*, 2013 WL 4883765, at *1 (D.N.H. Sept. 12, 2013).

[43] *Id.*

[44] Opt-Out Order ¶¶ 2, 30.

[45] *FCC Confirms Opt-Out Notice Requirements Applicable to All Fax Advertisements*, 29 FCC Rcd. 13498, 13498 (Oct. 30, 2014).

[46] Pl.'s Mot. Class Certification at 19, Doc. 290, Hara Decl., Ex. J.

petition with the Commission.[47] Humana argued that "[r]ecently, several parties petitioned the FCC seeking retroactive waivers of the Opt Out Notice Rule,"[48] and that the Commission granted the waivers and "invited similarly situated parties to submit petitions seeking a retroactive waiver of the Opt-Out Notice Rule."[49] Humana did not mention that the first of these "recent" petitions was filed June 27, 2013, or that the Commission ruled over a year earlier that petitioners must "make every effort" to file by April 30, 2015.[50]

On December 18, 2015, Humana filed its waiver petition. Humana's petition does not mention the requirement that parties "make every effort" to file petitions by April 30, 2015.[51] Humana does not claim it made any effort to file by that date but was unable to do so or explain why it waited until nearly eight months after the deadline.[52] Instead, Humana argues the Commission merely "suggested" that parties file waiver requests by April 30, 2015.[53] Humana argues this "suggested time frame" was not "a hard cut-off date," and since the Bureau granted waivers to some petitioners who filed after the deadline in its order of August 28, 2015, Humana is entitled to a waiver as well.[54]

On December 22, 2015, the district court denied Humana's motion to stay pending resolution of its waiver petition and ordered Humana to respond to Brodsky's motion for

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[47] Humana Mot. Stay, Doc. 311, Hara Decl., Ex. K.

[48] *Id.* ¶¶ 16, 17

[49] *Id.* ¶ 20.

[50] *Id.* ¶¶ 16–22.

[51] Humana Pet. at 5–6.

[52] *Id.*

[53] *Id.*

[54] *Id.*

class certification.[55] On January 18, 2016, Humana filed its opposition, arguing individual issues predominate over common issues because "[i]f HDIC's pending petition with the FCC is granted and HDIC is extended a waiver from the requirement of specific opt-out language on faxes sent with the permission of the recipient, then whether or not the recipient consented to the fax will become a highly relevant issue in this litigation."[56]

B. The Weinberg litigation.

On August 5, 2015, JT's Frames filed a putative TCPA class action against Weinberg and Ohio National Mutual, Inc. in Illinois state court, which Ohio National removed to the Northern District of Illinois.[57] The Complaint alleges Defendants sent JT's Frames and a class of others unsolicited fax advertisements, including a fax on May 10, 2013.[58] That fax states it is from "Weinberg & Associates, Inc." and "Joe Gillings, Sr. Client Specialist" with "Ohio National Life Insurance Company" and "Ohio National Life Assurance Corporation," stating "I work with my clients to construct 'safety nets' to protect their income, assets and retirement plans for their companies, individuals and families" and "[p]lease let me know your availability."[59] The fax contains no opt-out notice.[60]

The Complaint alleges the fax is an "unsolicited advertisement" and that Defendants sent the same and other unsolicited fax advertisements to Plaintiff and a class of others.[61]

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[55] Minute Order, Doc. 314, Hara Decl., Ex. L.

[56] Def.'s Mem. Opp. Pl.'s Mot. Class Certification at 23, Doc. 319, Hara Decl., Ex. M.

[57] *Weinberg* Compl. ¶ 14, Doc. 1-2, Hara Decl., Ex. N.

[58] *Id.*

[59] *Id.*, Ex. A.

[60] *Id.*

[61] *Id.* ¶ 2.

The Complaint alleges that, because the faxes lack compliant opt-out notice, Defendants cannot claim EBR or "prior express invitation or permission."[62]

On August 21, 2015, Ohio National filed a waiver petition, acknowledging it was filed after April 30, 2015, but arguing it "had no cause to file such a petition for retroactive waiver pursuant to the Order until it was recently sued" on August 5, 2015.[63] Ohio National argued that "[a]fter the class action complaint was filed (and even before it was served), Ohio National acted promptly to file this Waiver Petition" and that "Petitioners should not be denied relief because they filed their Waiver Petition after April 30, 2015."[64] The petition does not seek a waiver on behalf of Ohio National's co-defendant, Weinberg.[65]

On September 3, 2015, Weinberg was served with the Complaint.[66] On September 13, 2015, Weinberg's counsel filed an appearance in the action.[67]

On September 16, 2015, Ohio National filed a motion with the district court to stay the case pending the outcome of its waiver petition.[68] On October 1, 2015, the district court granted Ohio National's motion to stay the case.[69]

On December 8, 2015, Weinberg filed its waiver petition.[70] Weinberg does not mention that its co-defendant filed a waiver petition four months earlier.[71] Weinberg does

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[62] *Id.* ¶ 31.

[63] Ohio Nat'l Pet. at 4.

[64] *Id.*

[65] *Id.* at 1–6.

[66] Affidavit of Service, Hara Decl., Ex. O.

[67] Appearance by Counsel for Weinberg & Associates, Inc., Doc. 10, Hara Decl., Ex. P.

[68] Ohio Nat'l Mem. Supp. Mot. Stay, Doc. 21, Hara Decl., Ex. Q.

[69] Minute Order, Doc. 26, Hara Decl., Ex. R.

not mention the requirement that parties "make every effort" to file waiver requests by April 30, 2015.[72] Weinberg does not address whether its petition is timely or explain why it waited to file until December 8, 2015.[73]

Argument

I. The Commission has no authority to "waive" violations of the regulations prescribed under the TCPA in a private right of action.

Numerous commenters in these proceedings, including undersigned counsel, have argued the TCPA creates a private right of action to sue for "a violation of this subsection or the regulations prescribed under this subsection"[74] and gives the Commission no power to "waive" that right. Brodsky and JT's Frames will not repeat those arguments here, but incorporate them by reference.[75]

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[70] Weinberg Pet. at 6.

[71] *Id.* at 1–6.

[72] *Id.*

[73] *Id.*

[74] 47 U.S.C. § 227(b)(3).

[75] *See* TCPA Pls.' Comments on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements, CG Docket Nos. 02-278, 05-338 at 20–23 (Feb. 14, 2014); TCPA Pls.' Reply Comments at 3–6 (Feb. 21, 2014); TCPA Pls.' Comments on Stericyle, Inc. Petition at 6–7 (July 11, 2014); TCPA Pls.' Comments on American Caresource Petition at 1–3 (Aug. 8, 2014); TCPA Pls.' Comments on Unique Vacations, Inc. Petition at 6–8 (Sept. 12, 2014); Beck Simmons LLC's Comments on Francotyp-Postalia Petition at 2, n.6 (Nov. 18, 2014); Physicians Healthsource, Inc.'s Comments on Allscripts Petition at 2, n.6 (Nov. 18, 2014); TCPA Pls.' Comments on Petitions by Alma Lasers, ASD Specialty Healthcare, Den-Mat Holdings, and Stryker Corp. at 23–31 (Dec. 12, 2014); TCPA Pls.' Comments on Petitions by EatStreet Inc., McKesson Corp., Philadelphia Consolidated Holding Corp., St. Luke's Center for Diagnostic Imaging, LLC, Sunwing Vacations, Inc., and ZocDoc, Inc. at 19–22 (Jan. 13, 2015); Physicians Healthsource, Inc.'s Comments on A-S Medication Solutions LLC's Petition at 9–13 (Feb. 13, 2015); Christopher Lowe Hicklin, DC, PLC's Comments on National Pen Petition at 7–11 (Mar. 13, 2015); TCPA Pls.' Comments on Petitions by Boehringer Pharmaceuticals and Esaote North America at 10–14 (Apr. 10, 2015); TCPA Pls.' Comments on Thirty-One Petitions Filed on or Before April 30, 2015 at 5–8 (May 22, 2015); TCPA Pls.' Comments on Endo Pharms. Petition at 9–13 (June 12, 2015); TCPA Pls.' Comments on

II. Humana and Weinberg failed to "make every effort" to file a waiver petition by April 30, 2015.

The Commission has not yet denied a waiver request for failure to "make every effort" to file by April 30, 2015. The current petitions are a perfect place to start because neither petitioner offers any explanation for why it did not file by the deadline. Moreover, the record in the underlying litigation demonstrates that (1) Humana had actual knowledge of the opportunity to seek a waiver since September 29, 2014, at the latest, but chose not to file until December 18, 2015, and (2) Weinberg had actual knowledge, at the latest, as of September 16, 2015, but waited until December 8, 2015.

A. Humana offers no reason for its failure to file a petition by April 30, 2015, and it had actual knowledge of the opportunity to seek a waiver by September 29, 2014, at the latest.

In general, where a petitioner seeking relief from the Commission has had "ample time" to comply with a deadline and "offers no reason for its failure to do so," the Commission will deny the relief.[76] Humana had ample time to file a petition by April 30, 2015, and it offers no reason for its failure to do so.[77] Humana does not, for example, claim it tried to file by that date but was somehow forced to wait until December 18, 2015.[78] Nor can Humana argue it had no reason to seek a waiver because it was not sued until after the deadline, as several petitioners have, since it has been vigorously defending the opt-out-

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Petitions by athenahealth, Inc. & Ohio Nat'l Mut., Inc. at 5–9 (Sept. 11, 2015); Wilder Chiropractic, Inc.'s Comments on Scrip Inc. Petition at 4–7 (Oct. 9, 2015); Shaun Fauley's Comments on Petitions by Virbac Corp. and Petplan at 4–8 (Dec. 18, 2015).

[76] *In re Atlanta Channel, Inc.*, 27 FCC Rcd. 14541, 14545-46, ¶ 9 (rel. Nov. 9, 2012) (denying request to waive filing deadline).

[77] Humana Pet. at 1–6.

[78] *Id.*

notice allegations in the underlying TCPA action since 2010, as detailed in the factual background, above.

Instead, Humana argues the Commission merely "suggested" that parties file waiver requests by April 30, 2015, and this "suggested time frame" was not "a hard cut-off date."[79] When the Commission stated it "expected" petitioners to "make every effort to file within six months," it was not making a suggestion, and the Commission should take this opportunity to correct Humana's misperception.[80] Although the Commission did not say petitions filed after the deadline would automatically be denied, it should be incumbent on a petitioner filing after the deadline to at least explain why it could not file by April 30, 2015. There should be a particularly good reason when the delay is not a matter of days, but nearly eight months. Humana chose not to provide any such explanation, and the Commission should deny the petition for that reason alone.[81]

Humana is correct that the Bureau granted waivers to some petitioners who filed after April 30, 2015 in its order of August 28, 2015, but each of those seven petitioners explained in its petition that it was either sued after April 30, 2015,[82] or just days before the

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[79] *Id.* at 5–6.

[80] Opt-Out Order ¶ 2; *id.* ¶ 30 ("We expect parties making similar waiver requests to make every effort to file within six months of the release of this Order."); Public Notice, 29 FCC Rcd. 13498 (Oct. 30, 2014) (noting Commission "emphasized that such parties should make every effort to file such requests prior to April 30, 2015," and Commission "expect[s] these parties to make every effort to file such requests prior to April 30, 2015").

[81] *In re Atlanta Channel*, 27 FCC Rcd. at 14545-46, ¶ 9 ("Deadlines often have harsh consequences for those who fail to meet them.").

[82] *Petition of AEP Energy, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338, at 4 (filed May 7, 2015) (complaint filed May 1, 2015); *Petition of United Stationers Inc., et al. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338, at 5 & 7 (filed May 18, 2015) (complaint filed May 1, 2015); *Petition of Business Promotion LLC for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338, at 2 (filed May 20, 2105)

deadline.[83] This justification is not available to Humana because Plaintiff sued it for opt-out-notice violations on March 18, 2010, exactly five years and nine months before Humana filed its petition on December 18, 2015.

Moreover, Humana had actual knowledge of the opportunity to seek a waiver. As detailed in the factual background, above, in briefing Humana's motion for summary judgment throughout 2013 and 2014, the parties extensively discussed the proceedings in *Nack v. Walburg*, where the Eighth Circuit ultimately ruled Walburg was required to seek relief before the Commission under the Hobbs Act. Walburg filed his petition for retroactive waiver on August 19, 2013, and moved to stay the private litigation, which was granted. Humana could not have been unaware of these developments, where it recognized in its motion to certify questions for appeal nearly a year later that "the Eighth Circuit suggested to the *Nack* defendants the possibility of pursuing an administrative remedy asking the FCC to repeal the regulation."[84]

In August 2014, in its continuing attempt to challenge the validity of the regulation outside a Hobbs Act proceeding, Humana relied on three decisions in which the court stayed

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(petitioner served with complaint May 13, 2015); *Petition of Northwood, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338, at 1 (filed June 2, 2015) (petitioner served with "demand letter on or about May 27, 2015"); *Petition of Joseph T. Ryerson & Son, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338, at 2 (filed June 4, 2015) (petitioner served with complaint May 14, 2015); *Petition of Reliant Services Group, LLC d/b/a Reliant Funding for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338, at 4 (filed June 16, 2015) (petitioner served with complaint May 22, 2015).

[83] *Petition of Meadowbrook Ins. Group, Inc. & Meadowbrook, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338, at 2 (filed May 29, 2015) (petitioner served with complaint April 20, 2015).

[84] Humana Mem. Supp. Mot. Certify at 11, n.9, Doc. 202, Hara Decl., Ex. I.

the case pending the defendant's waiver petition[85] or, in one case, Walburg's petition.[86] One of those decisions expressly referred to the defendant's "Petition for Declaratory Ruling and/or Waiver," noting it sought "a waiver from strict compliance."[87] The petitions referred to in these decisions—the Walburg, Merck, and Purdue Pharma petitions—were publicly available on the Commission's Electronic Comment Filing System. Cursory review of those petitions would have revealed these parties were seeking retroactive waivers.[88] Reviewing the ECFS activity in Docket No. 05-338 in August 2014 would have shown there were 22 pending petitions seeking a waiver of § 64.1200(a)(4)(iv), with the first filed June 27, 2013.[89]

Then, on September 29, 2014, the district court denied Humana's motion to certify the validity of the regulation for appeal, holding "any direct or indirect challenge" to the regulation must be brought "through the FCC's administrative processes."[90] The district court noted "numerous petitions have been made to the FCC" regarding § 64.1200(a)(4)(iv), citing the three decisions Humana relied on in its motion and noting these cases were stayed "pending resolution of the administrative proceedings."[91] The district court asked Humana point blank "whether a stay is appropriate in light of the ongoing administrative proceedings

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[85] *Id.* (citing *Kaye v. Merck & Co., Inc.*, 2014 WL 2002447, at *2 (D. Conn. May 15, 2014); *Physicians Healthsource, Inc. v. Purdue Pharma L.P.*, 2014 WL 518992, at *3 (D. Conn. Feb. 3, 2014)).

[86] *Id.* (citing *Raitport v. Harbour Capital Corp.*, 2013 WL 4883765, at *1 (D.N.H. Sept. 12, 2013)).

[87] *Purdue Pharma*, 2014 WL 518992, at *3.

[88] Walburg Pet. at 2, 13–15; Merck Pet. at 2, 16–17; Purdue Pharma Pet. at 2, 17–19.

[89] *Petition of Forest Pharms., Inc., for Declaratory Ruling and/or Waiver Regarding Substantial Compliance with Section 64.1200(a)(4)(iii) of the Commission's Rules and for Declaratory Ruling Regarding the Statutory Basis for the Commission's Opt-Out Notice Rule with Respect to Faxes Sent with the Recipient's Prior Express Invitation or Permission*, CG Docket No. 05-338, at 11–12 (filed June 27, 2013).

[90] *Brodsky II*, 2014 WL 4813147, at *6.

[91] *Id.*

on the relevant TCPA issues."[92] The district court more or less *invited* Humana to file a waiver petition and seek to stay the case. For whatever reason, Humana chose not to do so.

Even assuming against all available evidence that Humana was unaware of the waiver petitions *prior to* the October 30, 2014 Order, Humana cannot credibly claim it was unaware of the opportunity to seek a waiver *after* that Order. In addition to the Order and accompanying public notice,[93] the six-month period was widely discussed by industry observers and legal commentators, who commonly referred to it as a "deadline."[94] The Commission directed the Bureau "to conduct outreach to inform senders of the opt-out

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[92] *Id.*

[93] Opt-Out Order ¶ 2; *id.* ¶ 30 ("We expect parties making similar waiver requests to make every effort to file within six months of the release of this Order."); Public Notice, 29 FCC Rcd. 13498 (parties must "make every effort to file such requests prior to April 30, 2015").

[94] *E.g.*, Alan S. Kaplinsky, Daniel J.T. McKenna, Mark J. Furletti, Matthew A. Morr, *FCC Gave Entities Six Months to Comply with Order Requiring Opt-Out Notices for Faxed Ads Sent with Prior Consent Under TCPA*, 68 Consumer Fin. L.Q. Rep. 417 (2014) (Commission "instructed that such requests should be filed by April 30, 2015"); Allison Grande, *FCC Junk Fax Ruling Signals Agency's Flexibility on TCPA*, http://www.law360.com/articles/594579/fcc-junk-fax-ruling-signals-agency-s-flexibility-on-tcpa (Nov. 7, 2014) (Commission granted "retroactive waiver of the rule to more than two dozen companies and extend[ed] an invitation for others to apply for the waiver within the next six months"); Yaron Dori & Michael Beder, *Waivers of FCC Opt Out Notice Rule Available to Senders of Solicited Faxes During Limited Window*, https://www.cov.com/~/media/files/corporate/publications/2014/12/waivers_of_fcc_opt_out_notice_rule_available_to_senders_of_solicited_faxes_during_limited_window.pdf (Dec. 3, 2014) ("Other similarly-situated senders of solicited fax advertisements may request their own waivers from the FCC, but the FCC's order stated that such other parties should 'make every effort' to file their requests by **April 30, 2015.**"); Judith L. Harris, Lisa B. Kim, Christine Nielsen Czuprynski, *FCC Confirms that Even Solicited Fax Ads Must Contain Opt-Out Language, and Sets Six-Month Deadline for Companies to Seek a Retroactive Waiver*, https://www.technologylawdispatch.com/2014/11/privacy-data-protection/fcc-confirms-that-even-solicited-fax-ads-must-contain-optout-language-and-sets-sixmonth-deadline-for-companies-to-seek-a-retroactive-waiver (Nov. 6, 2014) ("All businesses sending out fax advertisements should reach out to experienced counsel to review their marketing practices and, if necessary, petition the FCC for a retroactive waiver regarding the inclusion of opt-out language and an opt-out mechanism in their solicited fax ads. All requests for waivers are to be submitted by April 30, 2015.").

notice requirement."[95] On November 17, 2014, Commissioner O'Rielly personally informed members of the U.S. Chamber of Commerce of the waiver opportunity, stating "[t]he Commission also envisions granting relief to additional, similarly situated parties that file waivers in the near-term."[96]

In the weeks leading up to the deadline, many sources warned the deadline was approaching and advised fax advertisers to file their petitions by April 30, 2015, which over 100 advertisers did.[97] Humana must have become aware (if it was not already aware) that the Commission was accepting waiver requests between October 30, 2014, and April 30, 2015. Based on this record, the Commission can only conclude Humana decided, for whatever reason, not to seek a waiver prior to the deadline, and it should be held to that choice.

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[95] Opt-Out Order ¶ 2; *see also* Statement of Comm'r O'Rielly Concurring in Part and Dissenting in Part at 25 ("At my request, staff has committed to engage in significant outreach to ensure that fax senders, including those that might not normally follow FCC proceedings, will be aware of the opt-out requirement.").

[96] Remarks of FCC Commissioner Michael O'Rielly, U.S. Chamber of Commerce Telecom. & E-Commerce Committee Meeting, Nov. 17, 2014 (as prepared for delivery).

[97] *E.g.*, Lawren A. Zann, *Opt-Out Notices Seem to be in With the FCC*, http://www.law360.com/articles/646563/tcpa-opt-out-notices-seem-to-be-in-with-the-fcc (Apr. 27, 2015) ("[I]t is incumbent on every individual and entity that sends fax advertisement to confer with counsel and make every effort to file a petition for retroactive waiver by April 30, 2015, or risk an unnecessary uncertainty. Failure to do so is not only counterintuitive, but also may prove to be quite costly."); Dentons, *Deadline for Waiver from FCC "Blast Fax" Rules Approaching—April 30, 2015*, http://www.dentons.com/en/insights/alerts/2015/march/9/deadline-for-waiver-rules-approaching (Mar. 9, 2015) ("The FCC will allow any other companies, who mistakenly failed to provide an opt-out notice or sent incomplete opt-out notices to consenting recipients, to petition the FCC for similar waivers by April 30, 2015. Companies that did not provide adequate opt-out notices should immediately request waivers."); K&L Gates, *Last Week to File for Retroactive Waiver of FCC Rule Requiring Opt-Out Notice on All Fax Advertisements*, http://www.jdsupra.com/legalnews/last-week-to-file-for-retroactive-waiver-13984 (Apr. 28, 2015) (stating "[a]ny company that communicates by fax should strongly consider whether to request a retroactive waiver," and "[o]n April 30, 2015, the period for requesting such waivers will come to a close"); McDermott, Will & Emory, *Junk Fax Act Compliance: One Week Left to Request a Waiver for Non-Compliance*, http://www.natlawreview.com/article/junk-fax-act-compliance-one-week-left-to-request-waiver-non-compliance (Apr. 23, 2015) ("Thursday, April 30, 2015, marks the last day a business can request a retroactive waiver for failing to comply with certain fax advertising requirements promulgated by the Federal Communications Commission (FCC).").

Humana argues it must be entitled to a waiver because its faxes were sent prior to April 30, 2015.[98] Although that is a *necessary* condition for a waiver under the Opt-Out Order,[99] it is not a *sufficient* condition. If all that is required for a waiver is that the subject faxes be sent prior to April 30, 2015, then the Commission's expectation that petitioners "make every effort" to file by that date would be superfluous. Plus, if Humana is right, the Commission will be entertaining opt-out waiver requests for many years, even past April 30, 2019, when the four-year statute of limitations on private TCPA claims runs out on faxes sent prior to April 30, 2015, given that the limitations period is often tolled (*e.g.*, by the pendency of a related class action).[100]

Finally, it is possible Humana changed its mind about filing a waiver petition after Plaintiff filed his motion for class certification on October 7, 2015, laying out the evidence of at least 25,232 fax advertisements sent without compliant opt-out notice during the class period, resulting in a range of at least $12.616 million to $37.848 million in statutory damages.[101] On the other hand, one month later, Humana reported to the SEC that it was holding $1.597 billion in cash and did not disclose Plaintiff's TCPA action to investors as a material risk factor.[102] It is impossible to know why Humana filed when it did, and it has declined to say in its petition. On this record, however, the Commission should deny the

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[98] Humana Pet. at 6.

[99] Opt-Out Order ¶ 36 (waiver limited to faxes sent "prior to **April 30, 2015**").

[100] *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974); *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983); *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 562 (7th Cir. 2011) (TCPA fax class action tolled by prior pending class action).

[101] Pl.'s Mot. Class Certification at 19, Doc. 290, Hara Decl., Ex. J.

[102] Humana Inc. Form 10-Q for Period Ended Sept. 30, 2015, at 6, http://www.sec.gov/Archives/edgar/data/49071/000004907115000098/hum-20150930x10q.htm (filed Nov. 6, 2015).

Humana petition for failure to "make every effort" to file within six months of the October 30, 2014 Order.

B. Weinberg offers no reason for its failure to file a petition by the deadline, and it had actual knowledge of the opportunity to seek a waiver by September 16, 2015, at the latest.

Weinberg also "offers no reason for its failure" to file by April 30, 2015.[103] Weinberg filed its petition December 8, 2015, but the petition does not mention the deadline or address the timeliness of the petition in any way.[104] A petitioner filing more than seven months after a deadline should be required to give some explanation for why it could not comply. The Commission should deny Weinberg's petition on this basis alone.

Weinberg may argue in its reply comments that it did not file a petition by April 30, 2015, because it was not sued until August 5, 2015. That should make no difference. Other petitioners complied with the deadline without having been sued. For example, on April 28, 2015, Truckers B2B, LLC, filed a petition explaining it sought a waiver because it was "concerned that it could one day face significant liability" for opt-out-notice violations.[105] On April 29, 2015, Wells Fargo filed a petition explaining it sought a waiver "as a prophylactic measure."[106] Both petitions were granted.[107] There was nothing preventing Weinberg from doing the same.

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[103] *In re Atlanta Channel*, 27 FCC Rcd. at 14545-46, ¶ 9.

[104] Weinberg Pet. at 1–6.

[105] *Petition for Waiver by Truckers B2B, LLC*, CG Docket Nos. 02-278, 05-338, at 2 (filed Apr. 28, 2015).

[106] *Petition of Wells Fargo & Co. for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338, at 5 (filed Apr. 29, 2015).

[107] August 28, 2015 Bureau Order ¶ 24.

In addition, as explained in the factual background, above, Weinberg's co-defendant, Ohio National, filed a motion with the district court to stay the case pending the outcome of its waiver petition on September 16, 2015.[108] By that time, Weinberg had been served with the Complaint (September 3, 2015), and appeared through counsel (September 13, 2015). Ohio National's motion to stay recites the background of the October 30, 2014 Order, and argues the Commission "expressly invited other parties to petition the Commission for the same relief."[109]

Ohio National's motion to stay attached a copy of its waiver petition as an exhibit.[110] Given the cursory nature of these petitions, Weinberg could have used Ohio National's petition as a template and filed a petition of its own within hours. Instead, Weinberg did not file a waiver petition until nearly three months later. Weinberg offers no explanation for the delay, and the Commission should deny its petition for failure to "make every effort" to file by April 30, 2015.

III. Humana sent its faxes pursuant to a claim of EBR, like one of the petitioners denied a waiver in the December 9, 2015 Bureau Order.

The December 9, 2015 Bureau Order denied one waiver request on the basis that the petitioner argued "the faxes were sent to registered customers" and so it "reasonably believed that they were within the provision of the Junk Fax Protection [*sic*] Act stating that the opt-out notice does not apply because the transmissions were not unsolicited."[111] The

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[108] Ohio Nat'l Mem. Supp. Mot. Stay, Doc. 21, Hara Decl., Ex. Q.

[109] *Id.* at 3.

[110] *Id.*, Ex. A.

[111] December 9, 2015 Bureau Order ¶ 21.

Bureau ruled "[n]ot only does this assertion establish that the petitioner was ignorant of the law – which provides independent grounds to deny the petition – but the *2014 Anda Commission Order* was clear in stating that a waiver will not be extended to the requirement to include opt-out language on faxes pursuant to an existing business relationship, which it said was clear and without controversy."[112]

The same reasoning applies to Humana's waiver request. Humana justifies sending the faxes at issue in the underlying TCPA litigation based solely on contractual language, which it says every class member agreed to, that a GPA "understands and agrees that the Company and GPA through the *established business relationship* by this agreement may choose *to communicate with* GPA through the use of mail, email or facsimile to the address(es) and facsimile number(s) of the GPA."[113] The language expressly invokes the term of art, "established business relationship," and an agreement to "communicate with" a company by fax is not "express" permission to receive fax advertisements.[114] These are EBR faxes, not "prior express permission" faxes, and the Commission may deny Humana's petition on that basis alone.

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[112] *Id.*

[113] Humana Mem. Supp. Am. Mot. Summ. J. at 1, Doc. 130, Hara Decl., Ex. C.

[114] *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, ¶ 193 (rel. July 3, 2003 (recipient must "understand that by providing a fax number, he or she is agreeing to receive faxed advertisements," as opposed to other communications); *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd. 3787, ¶ 45 (rel. Apr. 6, 2006) (sender should "include a clear statement indicating that, by providing such fax number, the individual or business agrees to receive facsimile advertisements from that company or organization").

IV. Weinberg does not claim it obtained "prior express invitation or permission."

Read carefully, Weinberg's petition does not claim that Weinberg obtained "prior express invitation or permission" from Plaintiff or any other putative class member.[115] Instead, Weinberg is careful to state only that "the mistake, as alleged – the sending of a solicited fax without an opt-out provision, was inadvertent and, the opt-out provisions were unclear, at least in a retroactive prospective."[116]

But the violation "as alleged" in the Complaint is *not* "the sending of a solicited fax without an opt-out provision," but the sending of "*unsolicited* advertisements to Plaintiff and the Class,"[117] referring to the faxes as "junk faxes,"[118] seeking an injunction preventing Weinberg "from sending unsolicited advertisements,"[119] specifically alleging "Plaintiff had not invited or given permission to Defendants to send the facsimile,"[120] and alleging "Defendants sent the same and other *unsolicited* facsimiles to Plaintiff and more than 39 other recipients without first receiving the recipients' express permission or invitation."[121]

To be sure, the Complaint *also* alleges "Defendants are precluded from asserting any prior express permission or invitation because of the failure to comply with the Opt-Out Notice Requirements."[122] But the Complaint does not allege Weinberg actually sent any

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[115] Weinberg Pet. at 1–6.

[116] *Id.* at 4–5.

[117] *Weinberg* Compl. ¶ 2 (emphasis added), Hara Decl., Ex. N.

[118] *Id.* ¶ 3.

[119] *Id.* ¶ 5.

[120] *Id.* ¶ 17.

[121] *Id.* ¶ 18 (emphasis added).

[122] *Id.* ¶ 29–30.

faxes with prior express permission.[123] It alleges all the fax advertisements were unsolicited.[124]

The October 30, 2014 Order noted that "whether some of the petitioners had acquired prior express permission of the recipient remains a source of dispute between the parties" and emphasized the waivers should not be "construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action."[125] But those petitioners at least *claimed* they had prior express permission, even if they were not required to *prove* it to obtain a waiver. That is why the issue was a "source of dispute between the parties." The Bureau took note of the same "dispute" with respect to the petitioners covered by the August 28 Bureau Order[126] and the petitioners covered by the December 9, 2015 Bureau Order.[127]

There is no such "dispute" here because no one is claiming Weinberg obtained prior express permission. Plaintiff does not allege it in its Complaint, and Weinberg does not claim it in its waiver petition. Even if a petitioner need not *prove* prior express permission to obtain a waiver, there is no reason to grant a waiver where the petitioner does not even claim to

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[123] *Id.*

[124] *Id.*

[125] Opt-Out Order ¶ 31 n.104.

[126] August 28, 2015 Bureau Order ¶ 8 (noting all 117 petitioners "assert that . . . they sent faxes without compliant opt-out provisions to recipients who had previously provided permission or consent to receive them"); *id.* ¶ 21 n.72 (noting "whether some of the petitioners had acquired prior express permission of the recipient remains a source of dispute between the parties")

[127] December 9, 2015 Bureau Order ¶ 8 (noting all 11 petitioners "assert that they sent faxes without compliant opt-out provisions to recipients who had previously provided permission or consent to receive them"); *id.* ¶ 19 (noting "the question of whether some of the petitioners had acquired prior express permission of the recipient remains a source of dispute between the parties").

have obtained prior express permission, and the Weinberg petition should be denied on this independent basis.

Conclusion

The Commission should deny the Humana and Weinberg petitions because neither petitioner "made every effort" to file by April 30, 2015, and neither petitioner attempts to justify its delay. Humana's petition is particularly objectionable, since the underlying TCPA litigation has been pending for nearly six years, and Humana had actual knowledge of the opportunity to seek a waiver more than a year before the deadline but chose not to file.

The Commission should also deny the Humana petition because Humana justifies sending the faxes at issue based on what is at best a contractual "established business relationship," meaning the faxes require opt-out notice under § 64.1200(a)(4)(ii), a regulation not subject to waiver under the October 30, 2014 Order.

The Commission should also deny the Weinberg petition on the basis that Weinberg does not claim to have sent its faxes with "prior express invitation or permission," so a waiver would be futile.

Dated: February 12, 2016

Respectfully submitted,

By: s/Glenn L. Hara

Glenn L. Hara
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Facsimile: (847) 368-1501

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 Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278

Declaration of Glenn L. Hara

I, Glenn L. Hara, declare as follows:

1. I am an attorney with the law firm of Anderson + Wanca, attorneys of record for certain TCPA Plaintiffs, including Lawrence S. Brodsky and JT's Frames, Inc.

2. I submit this Declaration in support of TCPA Plaintiffs' Comments on Petitions for Retroactive Waiver filed by Humana Insurance Co. and Weinberg & Associates, Inc.

3. I have attached true and correct copies of the following documents filed in *Brodsky v. HumanaDental Ins. Co.*, No. 10-cv-3233 (N.D. Ill.) ("*Humana* Litigation"), and *JT's Frames, Inc. v. Weinberg & Assocs., Inc. & Ohio Nat'l Mut. Co.*, No. 15-cv-7923 (N.D. Ill.) ("*Weinberg* Litigation"):

Document No.	Description	Exhibit Letter
Humana Litigation:		
33	Amended Class Action Complaint	A
34	Answer and Affirmative Defenses to Plaintiff's Amended Class Action Complaint	B
130	Defendant's Memorandum in Support of Amended Motion for Summary Judgment	C

Document No.	Description	Exhibit Letter
142	Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment	D
160	Defendant's Reply in Support of its Amended Motion for Summary Judgment	E
166	Plaintiff's Sur-Reply in Opposition to Defendant's Motion for Summary Judgment	F
167	Defendant's Response to Plaintiff's Sur-Reply	G
169	Plaintiff's Notice of Supplemental Authority	H
202	Defendant's Memorandum in Support of its Motion to Certify Pursuant to 28 U.S.C. § 1292(b)	I
290	Plaintiff's Motion for Class Certification	J
311	Defendant's Motion to Stay	K
314	Minute Order of Dec. 22, 2015	L
319	Defendant's Memorandum in Opposition to Plaintiff's Motion for Class Certification	M
Weinberg Litigation		
1-2	Class Action Complaint	N
	Affidavit of Special Process Server	O
10	Appearance of Weinberg & Associates, Inc.	P
21	Defendant's Memorandum of Law in Support of Motion to Stay	Q
26	Minute Order of Oct. 1, 2015	R

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 12, 2016

s/Glenn L. Hara

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE S. BRODSKY, individually and as the representative of a class of similarly-situated persons,	)	
Plaintiff,	)	Case No. 10-cv-3233
v.	)	Judge James F. Holderman
HUMANADENTAL INSURANCE COMPANY d/b/a HUMANA SPECIALTY BENEFITS,	)	
Defendant.	)	

AMENDED CLASS ACTION COMPLAINT

Plaintiff, LAWRENCE S. BRODSKY ("Plaintiff"), brings this action on behalf of himself and all other persons similarly situated, through his attorneys, and except as to those allegations pertaining to Plaintiff or his attorneys, which allegations are based upon personal knowledge, alleges the following upon information and belief against Defendant, HUMANADENTAL INSURANCE COMPANY d/b/a HUMANA SPECIALTY BENEFITS ("Defendant"):

PRELIMINARY STATEMENT

1. This case challenges Defendant's practice of faxing unsolicited advertisements.

2. The federal Telephone Consumer Protection Act, 47 USC § 227, ("TCPA"), prohibits a person or entity from faxing or having an agent fax advertisements without the recipient's prior express invitation or permission ("junk

faxes" or "unsolicited faxes"). The TCPA requires that all fax advertisements (including unsolicited and solicited fax advertisements) must contain a notice satisfying specific criteria and allowing the recipient to opt-out of receiving future fax advertisements. The TCPA provides a private right of action and provides statutory damages of $500 per violation.

3. Unsolicited faxes damage their recipients. A junk fax recipient loses the use of its fax machine, paper, and ink toner. An unsolicited fax wastes the recipient's valuable time that would have been spent on something else. A junk fax interrupts the recipient's privacy. Unsolicited faxes prevent fax machines from receiving authorized faxes, prevent their use for authorized outgoing faxes, cause undue wear and tear on the recipients' fax machines, and require additional labor to attempt to discern the source and purpose of the unsolicited message.

4. On behalf of itself and all others similarly situated, Plaintiff brings this case as a class action asserting claims against Defendant under the TCPA, the common law of conversion, and the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2 ("ICFA").

5. Plaintiff seeks an award of statutory damages for each violation of the TCPA.

JURISDICTION AND VENUE

6. Jurisdiction is conferred by 735 ILCS 5/2-209 in that Defendant has transacted business and committed tortious acts related to the matters complained of herein.

7. Venue is proper in Cook County pursuant to 735 ILCS 5/2-101, et seq. because some of the tortious acts complained of occurred in Cook County, Illinois.

PARTIES

8. Plaintiff does business as a sole proprietorship under the name The Lawrence S. Brodsky Agency, which is located in Cook County, Illinois.

9. On information and belief, Defendant's principal place of business is Green Bay, Wisconsin.

FACTS

10. On or about May 14, 2008, Defendant faxed two advertisements to the fax number owned by Plaintiff at Plaintiff's location in Cook County, Illinois. Copies of those facsimiles are attached hereto as Exhibit A.

11. Defendant's fax advertisements do not contain the opt-out notice required by the TCPA.

12. Plaintiff did not give Defendant prior express invitation or permission to send Plaintiff advertisements by fax.

13. On information and belief, Defendant faxed the same and similar advertisements to Plaintiff other recipients without first receiving the recipients' express permission or invitation.

14. There is no reasonable means for Plaintiff (or any other class member) to avoid receiving illegal faxes. Fax machines are left on and ready to receive the urgent communications their owners desire to receive.

CLASS ALLEGATIONS

15. In accordance with 735 ILCS 5/2-801, et seq., Plaintiff brings this lawsuit on behalf of the following class of persons:

> All persons who were sent telephone facsimile messages of material advertising the commercial availability of any property, goods, or services by or on behalf of Defendant, with respect to whom Defendant cannot provide evidence of prior express permission or invitation for the sending of such faxes.

16. A class action is warranted because:

(a) On information and belief, the class includes forty or more persons and, therefore, is so numerous that joinder of all members is impracticable.

(b) There are questions of fact or law common to the class predominating over questions affecting only individual class members, including without limitation:

(i) Whether Defendant sent advertisements by fax without first obtaining the recipients' express invitation or permission;

(ii) Whether Defendant's facsimiles advertised the commercial availability of property, goods, or services;

(iii) The manner and method Defendant used to compile or obtain the list of fax numbers to which it sent the unsolicited faxed advertisements;

(iv) Whether Defendant violated the provisions of 47 USC § 227;

(v) Whether Defendant violated the opt-out notice requirements of 47 USC § 227;

(vi) Whether Plaintiff and the other class members are entitled to statutory damages;

(vii) Whether Defendant's practice constituted an "unfair" practice under the Illinois Consumer Fraud and Deceptive Practices Act;

(viii) Whether Defendant converted the class members' paper, toner, machines, and valuable time to Defendant's own use and must compensate them for doing so;

(ix) Whether Defendant should be enjoined from faxing advertisements in the future; and

(x) Whether Defendant's violations of the TCPA were willful or knowing and, if so, whether the Court should award trebled statutory damages.

17. Plaintiff will fairly and adequately protect the interests of the other class members. Plaintiff's counsel are experienced in handling class actions and claims involving unsolicited advertising faxes. Neither Plaintiff nor Plaintiff's counsel has any interests adverse or in conflict with the absent class members.

18. A class action is an appropriate method for adjudicating this controversy fairly and efficiently. The interest of each individual class member in

controlling the prosecution of separate claims is small and individual actions are not economically feasible.

COUNT I
TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227

19. Plaintiff incorporates the preceding paragraphs as though fully set forth herein.

20. Plaintiff brings Count I pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227, on behalf of the class.

21. The TCPA prohibits the "use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine…." 47 U.S.C. § 227(b)(1).

22. The TCPA defines "unsolicited advertisement," as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's express invitation or permission." 47 U.S.C. § 227(a)(4).

23. The TCPA provides:

> 3. Private right of action. A person 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.

24. The Court, in its discretion, can treble the statutory damages if the violation was knowing. 47 U.S.C. § 227.

25. Defendant violated the 47 U.S.C. § 227 et seq. by sending advertising faxes (such as Exhibit A) to Plaintiff and the other members of the class without first obtaining their prior express invitation or permission.

26. Defendant violated 47 U.S.C. § 227 et seq. by not including an adequate opt-out notice when it sent the subject fax advertisements.

27. The TCPA is a strict liability statute and Defendant is liable to Plaintiff and the other class members even if its actions were only negligent.

28. Defendant knew or should have known that Plaintiff and the other class members had not given express invitation or permission for Defendant to fax advertisements about Defendant's goods or services and that Plaintiff and the other class members did not have an established business relationship with Defendant.

29. Defendant knew or should have known that its fax advertisements failed to contain the required opt-out notice. The subject faxes state, "If you don't want us to contact you by fax, please call 1-800-U-CAN-ASK." Exhibit A. This notice violates the TCPA because: (a) it is not clear and conspicuous; (b) it does not state that Defendant's failure to comply with a request to stop future faxes within 30 days is unlawful; (c) it does not contain information the recipient needs in order to make a request not to receive future faxes binding; (d) it does not contain a domestic telephone and facsimile number for the recipients to stop future faxes; and

(e) it does not indicate whether the recipient can call "1-800-U-CAN-ASK" at any time on any day of the week.

30. Defendant's actions caused damages to Plaintiff and the other class members. Receiving Defendant's junk faxes caused the recipients to lose paper and toner consumed in the printing of Defendant's faxes. Moreover, Defendant's faxes used Plaintiff's fax machine. Defendant's faxes cost Plaintiff time, as Plaintiff and its employees wasted their time receiving, reviewing and routing Defendant's illegal faxes. That time otherwise would have been spent on Plaintiff's business activities. Finally, Defendant's faxes unlawfully interrupted Plaintiff's and the other class members' privacy interests in being left alone.

31. Even if Defendant did not intend to cause damage to Plaintiff and the other class members, did not intend to violate their privacy, and did not intend to waste the recipients' valuable time with Defendant's advertisements, those facts are irrelevant because the TCPA is a strict liability statute.

WHEREFORE, Plaintiff, LAWRENCE S. BRODSKY, individually and on behalf of all others similarly situated, demands judgment in his favor and against Defendant, as follows:

A. That the Court adjudge and decree that the present case may be properly maintained as a class action, appoint Plaintiff as the representative of the class, and appoint Plaintiff's counsel as counsel for the class;

B. That the Court award $500.00 in damages for each violation of the TCPA;

C. That the Court treble the statutory damages after Plaintiff demonstrates that Defendant's violations were willful or knowing;

D. That the Court enter an injunction prohibiting Defendant from engaging in the statutory violations at issue in this action; and

E. That the Court award costs and such further relief as the Court may deem just and proper, but in any event, not more than $75,000.00 per individual, inclusive of all damages and fees.

COUNT II
CONVERSION

32. Plaintiff incorporates the preceding paragraphs as though fully set forth herein and brings this claim on behalf of the Class defined above.

33. By sending Plaintiff and the other class members unsolicited faxes, Defendant improperly and unlawfully converted their fax machines, toner and paper to its own use. Defendant also converted Plaintiff's employees' time to Defendant's own use.

34. Immediately prior to the sending of the unsolicited faxes, Plaintiff and the other class members owned an unqualified and immediate right to possession of their fax machines, paper, toner, and employee time.

35. By sending the unsolicited faxes, Defendant permanently misappropriated the class members' fax machines, toner, paper, and employee time to Defendant's own use. Such misappropriation was wrongful and without authorization.

36. Defendant knew or should have known that its misappropriation of paper, toner, and employee time was wrongful and without authorization.

37. Plaintiff and the other class members were deprived of the use of the fax machines, paper, toner, and employee time, which could no longer be used for any other purpose. Plaintiff and each class member thereby suffered damages as a result of their receipt of unsolicited fax advertisements from Defendant.

38. Each of Defendant's unsolicited fax advertisements effectively stole Plaintiff's employees' time because multiple persons employed by Plaintiff were involved in receiving, routing, and reviewing Defendant's illegal faxes. Defendant knew or should have known employees' time is valuable to Plaintiff.

39. Defendant's actions caused damages to Plaintiff and the other members of the class because their receipt of Defendant's unsolicited fax advertisements caused them to lose paper and toner as a result. Defendant's actions prevented Plaintiff's fax machines from being used for Plaintiff's business purposes during the time Defendant was using Plaintiff's fax machines for Defendant's illegal purpose. Defendant's actions also cost Plaintiff employee time, as Plaintiff's employees used their time receiving, routing, and reviewing Defendant's illegal faxes, and that time otherwise would have been spent on Plaintiff's business activities.

WHEREFORE, Plaintiff, LAWRENCE S. BRODSKY, individually and on behalf of all others similarly situated, demands judgment in his favor and against Defendant, as follows:

A. That the Court adjudge and decree that the present case may be properly maintained as a class action, appoint Plaintiff as the representative of the class, and appoint Plaintiff' counsel as counsel for the class;

B. That the Court award appropriate damages;

C. That the Court award costs of suit; and

D. Awarding such further relief as the Court may deem just and proper, but in any event, not more than $75,000.00 to any individual class member.

COUNT III

ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT, 815 ILCS 505/2

40. Plaintiff incorporates the preceding paragraphs as though fully set forth herein and brings this claim on behalf of the Class defined above.

41. Defendant's unsolicited fax practice is an unfair practice, because it violates public policy, and because it forced Plaintiff and the other class members to incur expense without any consideration in return. Defendant's practice effectively forced Plaintiff and the other class members to pay for Defendant's advertising campaign.

42. Defendant violated the unfairness predicate of the ICFA by engaging in an unscrupulous business practice and by violating Illinois statutory public policy, which public policy violations in the aggregate caused substantial injury to hundreds of persons.

43. Defendant's misconduct caused damages to Plaintiff and the other members of the class, including the loss of paper, toner, ink, use of their facsimile machines, and use of their employees' time.

44. Defendant's actions caused damages to Plaintiff and the other class members because their receipt of Defendant's unsolicited fax advertisements caused them to lose paper and toner consumed as a result. Defendant's actions prevented Plaintiff's fax machine from being used for Plaintiff's business purposes during the time Defendant was using Plaintiff's fax machine for Defendant's illegal purpose. Defendant's actions also cost Plaintiff employee time, as Plaintiff's employees used their time receiving, routing, and reviewing Defendant's illegal faxes and that time otherwise would have been spent on Plaintiff's business activities.

WHEREFORE, Plaintiff, LAWRENCE S. BRODSKY, individually and on behalf of all others similarly situated, demands judgment in his favor and against Defendant, as follows:

A. That the Court adjudge and decree that the present case may be properly maintained as a class action, appoint Plaintiff as the class representative, and appoint Plaintiff's counsel as counsel for the class;

B. That the Court award damages to Plaintiff and the other class members;

C. That the Court award attorney fees and costs to Plaintiff's attorneys; and

D. Awarding such further relief as the Court may deem just and proper.

Respectfully submitted,

LAWRENCE S. BRODSKY, individually and as the representative of a class of similarly-situated persons

By: s/ James M. Smith
One of Plaintiff's Attorneys

Brian J. Wanca
Ryan M. Kelly
ANDERSON + WANCA
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Rolling Meadows, IL 60008
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BOCK & HATCH, LLC
134 N. La Salle St., Suite 1000
Chicago, IL 60602
Telephone: 312/658-5500
Attorney # 44533

EXHIBIT A

Enhance your clients' benefits with dental and vision

One quote. One application. One enrollment. One bill.

Help your clients choose the dental and vision plan with the level of benefits that's best for their employees at little additional cost. We've made it even easier for them and you to do business with us, providing a single source for a quote, application, enrollment and bill.

Our portfolio of specialty benefits products now include:

› Cost-effective DHMO products that focus on preventive care:

- No waiting periods
- No annual maximum
- No claims to file
- Available for your clients with two or more employees, or 10 or more if they want to include orthodontic coverage

› Advantage Plus dental plans:

- Use the HumanaDental Advantage Plus Network
- Members can see any dentists in the network
- Adult and child orthodontia included in most plans
- Available to groups with as few as 10 enrolled, or two enrolled if orthodontia is not included

› HumanaVision VCP options:

- Have multiple copayments and allowances
- Available to groups with 10 or more enrolled employees; with 2 – 9 enrolled employees when sold with a Humana medical or dental plan

Sell HumanaDental and HumanaVision plans and earn credits towards Humana's Leaders Club trip to Maui in 2009.

Materials to help you promote the new product offerings include:

- Flyer to share with clients or prospects (form number: GN-51517-FY)
- Dental brochure
- Vision brochure

To order log in to the secured agent section of **Humana.com**. Select "Marketing & Products," then "Dental, vision and life."

Call your Humana Specialty Benefits sales executive for details.

HUMANA.
Specialty Benefits

If you don't want us to contact you by fax, please call 1-800-U-CAN-ASK.

GN-FAX 4/08

Enhance your clients' benefits with dental and vision

One quote. One application. One enrollment. One bill.

Help your clients choose the dental and vision plan with the level of benefits that's best for their employees at little additional cost. We've made it even easier for them and you to do business with us, providing a single source for a quote, application, enrollment and bill.

Our portfolio of specialty benefits products now include:

Cost-effective DHMO products that focus on preventive care:

- No waiting periods
- No annual maximum
- No claims to file
- Available for your clients with two or more employees, or 10 or more if they want to include orthodontic coverage

Advantage Plus dental plans:

- Use the HumanaDental Advantage Plus Network
- Members can see any dentists in the network
- Adult and child orthodontia included in most plans
- Available to groups with as few as 10 enrolled, or two enrolled if orthodontia is not included

HumanaVision VCP options:

- Have multiple copayments and allowances
- Available to groups with 10 or more enrolled employees; with 2 – 9 enrolled employees when sold with a Humana medical or dental plan

*

Sell HumanaDental and HumanaVision plans and earn credits towards Humana's Leaders Club trip to Maui in 2009.

Materials to help you promote the new product offerings include:

- Flyer to share with clients or prospects (form number: GN-51517-FY)
- Dental brochure
- Vision brochure

To order log in to the secured agent section of **Humana.com**. Select "Marketing & Products," then "Dental, vision and life."

Call your Humana Specialty Benefits sales executive for details.

HUMANA.
Specialty Benefits

If you don't want us to contact you by fax, please call 1-800-U-CAN-ASK.

GN-FAX 4/08

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE S. BRODSKY, Individually and as the representative of a class of similarly-situated persons	)	
Plaintiff,	)	
vs.	)	
	)	**No.: 1:10-cv-03233**
HUMANADENTAL INSURANCE COMPANY d/b/a HUMANA SPECIALTY BENEFITS,	)	**Judge James F. Holderman**
Defendant.	)	

ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S AMENDED CLASS ACTION COMPLAINT

Defendant HumanaDental Insurance Company ("HumanaDental") by its attorneys, William A. Chittenden, III, Vittorio F. Terrizzi and Chittenden, Murday, & Novotny, LLC, as and for its Answer and Affirmative Defenses to Lawrence S. Brodsky's ("Plaintiff") Amended Class Action Complaint, states as follows:

1. This case challenges Defendant's practice of faxing unsolicited advertisements.

ANSWER: HumanaDental denies the averments of Paragraph 1.

2. The federal Telephone Consumer Protection Act, 47 USC § 227, ("TCPA"), prohibits a person or entity from faxing or having an agent fax advertisements without the recipient's prior express invitation or permission ("junk faxes" or "unsolicited faxes"). The TCPA requires that all fax advertisements (including unsolicited and solicited fax advertisements) must contain a notice satisfying specific criteria and allowing the recipient to opt-out of receiving future fax advertisements. The TCPA provides a private right of action and provides statutory damages of $500 per violation.

ANSWER: HumanaDental denies the averments of Paragraph 2.

3. Unsolicited faxes damage their recipients. A junk fax recipient loses the use of its fax machine, paper, and ink toner. An unsolicited fax wastes the recipient's valuable time that would have been spent on something else. A junk fax interrupts the recipient's privacy.

Unsolicited faxes prevent fax machines from receiving authorized faxes, prevent their use for authorized outgoing faxes, cause undue wear and tear on the recipients' fax machines, and require additional labor to attempt to discern the source and purpose of the unsolicited message.

ANSWER: HumanaDental denies the averments of Paragraph 3.

4. On behalf of itself and all others similarly situated, Plaintiff brings this case as a class action asserting claims against Defendant under the TCPA, the common law of conversion, and the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILLS 505/2 ("ICFA").

ANSWER: HumanaDental denies this case is properly brought as a class action and denies the remaining averments of Paragraph 4.

5. Plaintiff seeks an award of statutory damages for each violation of the TCPA.

ANSWER: HumanaDental denies violations of the TCPA and denies Plaintiff is entitled to any damages statutory or otherwise.

6. Jurisdiction is conferred by 735 ILCS 5/2-209 in that Defendant has transacted business and committed tortious acts related to the matters complained of herein.

ANSWER: HumanaDental denies the averments of Paragraph 6.

7. Venue is proper in Cook County pursuant to 735 ILLS 5/2-101, et seq. because some of the tortious acts complained of occurred in Cook County, Illinois.

ANSWER: HumanaDental denies the averments of Paragraph 7.

8. Plaintiff does business as a sole proprietorship under the name The Lawrence S. Brodsky Agency, which is located in Cook County, Illinois.

ANSWER: HumanaDental denies the averments of Paragraph 8.

9. On information and belief, Defendant's principal place of business is Green Bay, Wisconsin.

ANSWER: HumanaDental denies the averments of paragraph 9 but states that its principal place of business is located in DePere, Wisconsin.

10. On or about May 14, 2008, Defendant faxed two advertisements to the fax number owned by Plaintiff at Plaintiff's location in Cook County, Illinois. Copies of those facsimiles are attached hereto as Exhibit A.

ANSWER: HumanaDental denies the averments of Paragraph 10.

11. Defendant's fax advertisements do not contain the opt-out notice required by the TCPA.

ANSWER: HumanaDental denies the averments of Paragraph 11.

12. Plaintiff did not give Defendant prior express invitation or permission to send Plaintiff advertisements by fax.

ANSWER: HumanaDental denies the averments of Paragraph 12.

13. On information and belief, Defendant faxed the same and similar advertisements to Plaintiff other recipients without first receiving the recipients' express permission or invitation.

ANSWER: HumanaDental denies the averments of Paragraph 13.

14. There is no reasonable means for Plaintiff (or any other class member) to avoid receiving illegal faxes. Fax machines are left on and ready to receive the urgent communications their owners desire to receive.

ANSWER: HumanaDental denies the averments of Paragraph 14.

15. In accordance with 735 ILCS 5/2-801, et seq., Plaintiff brings this lawsuit on behalf of the following class of persons:

> All persons who were sent telephone facsimile messages of material advertising the commercial availability of any property, goods, or services by or on behalf of Defendant, with respect to whom Defendant cannot provide evidence of prior express permission or invitation for the sending of such faxes.

ANSWER: HumanaDental denies the averments of Paragraph 15.

16. A class action is warranted because:

(a) On information and belief, the class includes forty or more persons and, therefore, is so numerous that Joinder of all members is impracticable.

(b) There are questions of fact or law common to the class predominating over questions affecting only individual class members, including without limitation

(i) Whether Defendant sent advertisements by fax without first obtaining the recipients' express invitation or permission;

(ii) Whether Defendant's facsimiles advertised the commercial availability of property, goods, or services;

(iii) The manner and method Defendant used to compile or obtain the list of fax numbers to which it sent the unsolicited faxed advertisements;

(iv) Whether Defendant violated the provisions of 47 USC §227;

(v) Whether Defendant violated the opt-out notice requirements of 47 USC § 227;

(vi) Whether Plaintiff and the other class members are entitled to statutory damages;

(vii) Whether Defendant's practice constituted an "unfair" practice under the Illinois Consumer Fraud and Deceptive Practices Act;

(viii) Whether Defendant converted the class members' paper, toner, machines, and valuable time to Defendant's own use and must compensate them for doing so;

(ix) Whether Defendant should be enjoined from faxing advertisements in the future; and

(x) Whether Defendant's violations of the TCPA were willful or knowing and, if so, whether the Court should award trebled statutory damages.

ANSWER: HumanaDental denies the averments of Paragraph 16.

17. Plaintiff will fairly and adequately protect the interests of the other class members. Plaintiffs counsel are experienced in handling class actions and claims involving unsolicited advertising faxes. Neither Plaintiff nor Plaintiffs counsel has any interests adverse or in conflict with the absent class members.

ANSWER: HumanaDental denies the averments of Paragraph 17.

18. A class action is an appropriate method for adjudicating this controversy fairly and efficiently. The interest of each individual class member in controlling the prosecution of separate claims is small and individual actions are not economically feasible.

ANSWER: HumanaDental denies the averments of Paragraph 18.

COUNT I
TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227

19. Plaintiff incorporates the preceding paragraphs as though fully set forth herein.

ANSWER: HumanaDental incorporates its answers to the preceding paragraphs as though fully set forth herein.

20. Plaintiff brings Count I pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227, on behalf of the class.

ANSWER: HumanaDental denies this case is properly brought as a class action and denies the remaining averments of Paragraph 20.

21. The TCPA prohibits the "use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine...." 47 U.S.C. § 227(b)(1).

ANSWER: HumanaDental denies the averments of Paragraph 21, as stated.

22. The TCPA defines "unsolicited advertisement," as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's express invitation or permission." 47 U.S.C. § 227(a)(4).

ANSWER: HumanaDental denies the averments of Paragraph 22, as stated.

23. The TCPA provides

> 3. Private right of action. A person 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.

ANSWER: HumanaDental denies the averments of Paragraph 23, as stated.

24. The Court, in its discretion, can treble the statutory damages if the violation was knowing. 47 U.S.C. § 227.

ANSWER: HumanaDental denies the averments of Paragraph 24, as stated.

25. Defendant violated the 47 U.S.C. § 227 et seq. by sending advertising faxes (such as Exhibit A) to Plaintiff and the other members of the class without first obtaining their prior express invitation or permission.

ANSWER: HumanaDental denies the averments of Paragraph 25.

26. Defendant violated 47 U.S.C. § 227 et seq. by not including an adequate opt-out notice when it sent the subject fax advertisements.

ANSWER: HumanaDental denies the averments of Paragraph 26.

27. The TCPA is a strict liability statute and Defendant is liable to Plaintiff and the other class members even if its actions were only negligent.

ANSWER: HumanaDental denies the averments of Paragraph 27.

28. Defendant knew or should have known that Plaintiff and the other class members had not given express invitation or permission for Defendant to fax advertisements about Defendant's goods or services and that Plaintiff and the other class members did not have an established business relationship with Defendant.

ANSWER: HumanaDental denies the averments of Paragraph 28.

29. Defendant knew or should have known that its fax advertisements failed to contain the required opt-out notice. The subject faxes state, "If you don't want us to contact you by fax, please call 1-800-U-CAN-ASK." Exhibit A. This notice violates the TCPA because (a) it is not clear and conspicuous (b) it does not state that Defendant's failure to comply with a request to stop future faxes within 30 days is unlawful (c) it does not contain information the recipient needs in order to make a request not to receive future faxes binding; (d) it does not contain a domestic telephone and facsimile number for the recipients to stop future faxes; and (e) it does not indicate whether the recipient can call "1-800-U-CAN-ASK" at any time on any day of the week.

ANSWER: HumanaDental denies the averments of Paragraph 29.

30. Defendant's actions caused damages to Plaintiff and the other class members. Receiving Defendant's junk faxes caused the recipients to lose paper and toner consumed in the printing of Defendant's faxes. Moreover, Defendant's faxes used Plaintiff's fax machine. Defendant's faxes cost Plaintiff time, as Plaintiff and its employees wasted their time receiving, reviewing and routing Defendant's illegal faxes. That time otherwise would have been spent on Plaintiff's business activities. Finally, Defendant's faxes unlawfully interrupted Plaintiff's and the other class members' privacy interests in being left alone.

ANSWER: HumanaDental denies the averments of Paragraph 30.

31. Even if Defendant did not intend to cause damage to Plaintiff and the other class members, did not intend to violate their privacy, and did not intend to waste the recipients' valuable time with Defendant's advertisements, those facts are irrelevant because the TCPA is a strict liability statute.

ANSWER: HumanaDental denies the averments of Paragraph 31.

WHEREFORE, Defendant HumanaDental Insurance Company denies that Plaintiff Lawrence S. Brodsky is entitled to the relief sought, or any relief whatsoever, and prays that judgment be entered in its favor and against Plaintiff dismissing Count I of the Class Action Complaint, with prejudice, and awarding HumanaDental Insurance Company with its costs and attorney fees awarded.

COUNT II
CONVERSION

32. Plaintiff incorporates the preceding paragraphs as though fully set forth herein and brings this claim on behalf of the Class defined above.

ANSWER: HumanaDental incorporates its answers to the preceding paragraphs as though fully set forth herein.

33. By sending Plaintiff and the other class members unsolicited faxes, Defendant improperly and unlawfully converted their fax machines, toner and paper to its own use. Defendant also converted Plaintiff's employees' time to Defendant's own use.

ANSWER: HumanaDental denies the averments of Paragraph 33.

34. Immediately prior to the sending of the unsolicited faxes, Plaintiff and the other class members owned an unqualified and immediate right to possession of their fax machines, paper, toner, and employee time.

ANSWER: HumanaDental denies the averments of Paragraph 34.

35. By sending the unsolicited faxes, Defendant permanently misappropriated the class members' fax machines, toner, paper, and employee time to Defendant's own use. Such misappropriation was wrongful and without authorization.

ANSWER: HumanaDental denies the averments of Paragraph 35.

36. Defendant knew or should have known that its misappropriation of paper, toner, and employee time was wrongful and without authorization.

ANSWER: HumanaDental denies the averments of Paragraph 36.

37. Plaintiff and the other class members were deprived of the use of the fax machines, paper, toner, and employee time, which could no longer be used for any other purpose. Plaintiff and each class member thereby suffered damages as a result of their receipt of unsolicited fax advertisements from Defendant.

ANSWER: HumanaDental denies the averments of Paragraph 37.

38. Each of Defendant's unsolicited fax advertisements effectively stole Plaintiffs employees' time because multiple persons employed by Plaintiff were involved in receiving, routing, and reviewing Defendant's illegal faxes. Defendant knew or should have known employees' time is valuable to Plaintiff.

ANSWER: HumanaDental denies the averments of Paragraph 38.

39. Defendant's actions caused damages to Plaintiff and the other members of the class because their receipt of Defendant's unsolicited fax advertisements caused them to lose paper and toner as a result. Defendant's actions prevented Plaintiffs fax machines from being used for Plaintiffs business purposes during the time Defendant was using Plaintiffs fax machines for Defendant's illegal purpose. Defendant's actions also cost Plaintiff employee time, as Plaintiffs employees used their time receiving, routing, and reviewing Defendant's illegal faxes, and that time otherwise would have been spent on Plaintiffs business activities.

ANSWER: HumanaDental denies the averments of Paragraph 39.

WHEREFORE, Defendant HumanaDental Insurance Company denies that Plaintiff Lawrence S. Brodsky is entitled to the relief sought, or any relief whatsoever, and prays that judgment be entered in its favor and against Plaintiff dismissing Count II of the Class Action Complaint, with prejudice, and awarding HumanaDental Insurance Company with its costs and attorney fees awarded.

COUNT III
ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT, 815 ILLS 505/2

40. Plaintiff incorporates the preceding paragraphs as though fully set forth herein and brings this claim on behalf of the Class defined above.

ANSWER: HumanaDental incorporates its answers to the preceding paragraphs as though fully set forth herein.

41. Defendant's unsolicited fax practice is an unfair practice, because it violates public policy, and because it forced Plaintiff and the other class members to incur expense without any consideration in return. Defendant's practice effectively forced Plaintiff and the other class members to pay for Defendant's advertising campaign.

ANSWER: HumanaDental denies the averments of Paragraph 41.

42. Defendant violated the unfairness predicate of the ICFA by engaging in an unscrupulous business practice and by violating Illinois statutory public policy, which public policy violations in the aggregate caused substantial injury to hundreds of persons.

ANSWER: HumanaDental denies the averments of Paragraph 42.

43. Defendant's misconduct caused damages to Plaintiff and the other members of the class, including the loss of paper, toner, ink, use of their facsimile machines, and use of their employees' time.

ANSWER: HumanaDental denies the averments of Paragraph 43.

44. Defendant's actions caused damages to Plaintiff and the other class members because their receipt of Defendant's unsolicited fax advertisements caused them to lose paper and toner consumed as a result. Defendant's actions prevented Plaintiff's fax machine from being used for Plaintiffs business purposes during the time Defendant was using Plaintiffs fax machine for Defendant's illegal purpose. Defendant's actions also cost Plaintiff employee time, as Plaintiffs employees used their time receiving, routing, and reviewing Defendant's illegal faxes and that time otherwise would have been spent on Plaintiffs business activities.

ANSWER: HumanaDental denies the averments of Paragraph 44.

WHEREFORE, Defendant HumanaDental Insurance Company denies that Plaintiff Lawrence S. Brodsky is entitled to the relief sought, or any relief whatsoever, and prays that judgment be entered in its favor and against Plaintiff dismissing Count III of the Class Action Complaint, with prejudice, and awarding HumanaDental Insurance Company with its costs and attorney fees awarded.

AFFIRMATIVE DEFENSES

Defendant HumanaDental Insurance Company ("HumanaDental"), in the alternative, without admitting any of the allegations in the Class Action Complaint and without prejudice to its denials set forth in this Answer, states as follows for its Affirmative Defenses:

First Affirmative Defense

Each Count of Plaintiff's Class Action Complaint is barred because Plaintiff consented to receiving the fax(es) at issue.

Second Affirmative Defense

Each Count of Plaintiff's Class Action Complaint is barred because Plaintiff and Humana Inc. and HumanaDental had a business relationship which allowed the fax transmission(s).

Third Affirmative Defense

Each count of Plaintiff's Class Action Complaint is barred because Plaintiff was not sent, and did not receive, the faxes attached as exhibits to the Complaint.

Fourth Affirmative Defense

Count I of Plaintiff's Class Action Complaint based on the Telephone Consumer Protection Act ("TCPA") is barred because the faxes attached as exhibits to the complaint are not the prohibited by the TCPA because they are not material advertising the commercial availability or quality of any property, goods, or services.

Fifth Affirmative Defense

This Court lacks subject matter jurisdiction over this litigation because all of Plaintiff's claims are moot.

Sixth Affirmative Defense

Count I of Plaintiff's Class Action Complaint based on the TCPA is barred because the

TCPA violates HumanaDental's First Amendment constitutionally protected right to commercial free speech.

Seventh Affirmative Defense

To the extent Plaintiff's Conversion claim or any relief sought under the Complaint is based on the alleged conversion of his employee's time, said claim or relief sought is barred pursuant to this Court's Memorandum Opinion dated February 8, 2011.

Respectfully submitted,

HUMANADENTAL INSURANCE COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2011 I electronically filed the foregoing ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S AMENDED CLASS ACTION COMPLAINT with the Clerk of the U.S. District Court, Northern District of Illinois, Eastern Division, using the CM/ECF system which sent notification of such filing to the following CM/ECF registered participants:

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EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE S. BRODSKY,	)	
Individually and as the representative of	)	
a class of similarly-situated persons	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	**No.: 1:10-cv-03233**
HUMANADENTAL INSURANCE	)	
COMPANY d/b/a HUMANA SPECIALTY	)	
BENEFITS,[1]	)	
	)	
Defendant.	)	

HUMANADENTAL INSURANCE COMPANY'S MEMORANDUM
IN SUPPORT OF AMENDED MOTION FOR SUMMARY JUDGMENT

[1] Plaintiff's characterization of Defendant as "HumanaDental Insurance Company d/b/a Humana Specialty Benefits" is incorrect. "Humana Specialty Benefits" is a marketing brand referring to a group of insurance products issued by several different companies in the Humana family. (SOF ¶54.) HumanaDental Insurance Company does not "do business as" "Humana Specialty Benefits."

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Defendant HumanaDental Insurance Company ("HDIC") states as follows for its Memorandum in Support of its Amended Motion for Summary Judgment:

I. INTRODUCTION

Plaintiff, as the purported representative of a class,[2] seeks relief against HDIC based on two single-page faxes he alleges he received from HDIC on May 14, 2008. His three-count Amended Complaint asserts claims under the Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA" or the "Act"), a common law conversion theory, and the Illinois Consumer Fraud and Deceptive Business Practices Act 815 ILL. COMP. STAT. 505/1 *et seq.* ("ICFA"). As established below, HDIC is entitled to summary judgment on all three counts.

II. STATEMENT OF UNDISPUTED FACTS

Plaintiff is an insurance producer holding marketing agreements with many insurance companies. (SOF ¶5)[3] He conducts his business as a sole proprietor under the name "Lawrence Brodsky Agency." (*Id.*) At the time the fax that is the subject of this litigation was transmitted, Plaintiff held a "Group Producing Contract or Agency Contract" ("Plaintiff's Contract") with "Humana Insurance Company, Humana Health Plan, Inc., and all of their affiliates." (SOF ¶6) In Plaintiff's Contract, Plaintiff extended his permission to all Humana companies to send him faxes at the number he had provided, specifically, (847) 991-0152:

> H. GPA[4] understands and agrees that the Company and GPA through the established business relationship by this agreement may choose to communicate with GPA through the use of mail, email or facsimile to the address(es) and facsimile number(s) of the GPA. In addition, Company may begin immediately using any changes to such contact information.

---

[2] No class has been certified in this litigation.

[3] References to HDIC's Statement of Material Facts pursuant to L.R. 56.1(a)(3) are cited herein as "SOF ¶__"

[4] The "GPA" is defined in the contract as the Group Producing Agent, in this case, Plaintiff.

(SOF ¶¶6-9).

Plaintiff is affiliated with over 100 agents he refers to as "independent contractors." (SOF ¶¶27, 30) The independent contractors hold contracts with various insurance companies whose products they are authorized to sell. (SOF ¶28) Plaintiff receives overrides on commissions the "independent contractors" are paid through their sales of insurance products. (SOF ¶29) He has given all of these independent contractors permission to use his fax machine and number. (SOF ¶¶ 31, 32) They also have permission to use Plaintiff's office space. (SOF ¶31)

Plaintiff also had a corporate entity that was known at times as Brodsky Ingrassia Life. (SOF ¶14) That corporation likewise held a Group Producing Agent/Agency Contract with all Humana companies, effective July 22, 2003 (the "Brodsky Ingrassia Contract"). (SOF ¶¶15, 16) That contract contained the same provision quoted above, whereby Brodsky Ingrassia Life extended its permission to all Humana companies to send it faxes at the number it had provided. (SOF ¶¶17, 18) The fax number Brodsky Ingrassia Life had provided to the Humana companies was (847) 991-0152 – which is the fax number of Plaintiff's machine. (SOF ¶¶10, 11, 19) Brodsky Ingrassia Life had Plaintiff's permission to use Plaintiff's fax machine and number. (SOF ¶37) The Brodsky Ingrassia Contract was signed on behalf of the corporation by Chris Degen. (SOF ¶35) Degen also is an independent contractor to whom Plaintiff had extended permission to use his fax machine and number. (SOF ¶36)

Benefit Marketing Services, Inc. was a corporation through which Arno Filerman, one of the "independent contractors," conducted business. (SOF ¶¶32, 38) That corporation also held a Group Producing Agent/Agency Contract with all Humana companies, effective May 5, 2003 (the "BMS Contract"). (SOF ¶¶21, 22) The BMS Contract contained the same provision quoted

above, whereby Benefit Marketing Services, Inc. extended its permission to the Humana companies to send it faxes at the number it had provided. (SOF ¶¶23, 24) The fax number Benefit Marketing Services, Inc. had provided to the Humana companies was (847) 991-0152 – the fax number of Plaintiff's machine. (SOF ¶¶10, 11, 25) Both Arno Filerman and Benefit Marketing Services, Inc. had Plaintiff's permission to use his fax machine and number. (SOF ¶¶39, 40)

The facts surrounding the preparation and transmission of the subject fax have been explained by witnesses employed by Humana companies. Melanie Buehler, who at the time was a manager for Humana Insurance Company (not HDIC), testified that she directed staff of the Marketing Department of Humana, Inc. (not HDIC) to prepare a "Producer Communication" to be faxed to producing agents and agencies located in states in which the products discussed in the fax were filed and approved by the respective state regulatory authorities. (SOF ¶¶42-45) The purpose of the Producer Communication was to educate brokers and agents of Humana companies concerning products they were authorized to market to their customers. (SOF ¶44) The Marketing Department in fact prepared the Producer Communication. (SOF ¶46; Ex. 1 to Declaration of Melanie Buehler, submitted as Ex. F to SOF.) The Marketing Department then obtained a spreadsheet containing the names and fax numbers of the producing agents and agencies located in those states who would receive the Producer Communication. (SOF ¶¶47, 48) The Marketing Department then provided the Producer Communication and spreadsheet to the Information Technology Group of Humana, Inc. (not HDIC). (SOF ¶¶48-49) The Information Technology Group then faxed the Producer Communication to the recipients and fax numbers listed on the spreadsheet. (SOF ¶49)

The Producer Communication mentions three product lines: DHMO products;

"Advantage Plus" dental plans, which are described as "us[ing] the HumanaDental Advantage Plus Network;" and "HumanaVision VCP." (SOF ¶¶50-53) HDIC did not insure or issue any of the products that are the subject of the Producer Communication. (*Id.*) The first two product lines were insured by another company in the Humana family, not HDIC. (SOF ¶¶50, 51) The third product line was insured by another company in the Humana family, not HDIC. (SOF ¶52) At the time the Producer Communication was faxed, Humana Dental Insurance Company was not the insuring entity for any of the three insurance products identified in the Communication, specifically: the Dental HMO, the Advantage Plus dental plan, and the HumanaVision VCP options. (SOF ¶53) [5]

The spreadsheet described above shows that the Producer Communication was faxed to Brodsky Ingrassia Life and Benefit Marketing Services, both at (847) 991-0152 – the fax number of Plaintiff's fax machine that Plaintiff had allowed Brodsky Ingrassia Life and Benefit Marketing Services, Inc. to use. (SOF ¶¶10, 11, 56)[6] Plaintiff is not listed in the spreadsheet. (SOF ¶56) The fax was sent only to Brodsky Ingrassia Life and Benefit Marketing Services at the listed fax number. (SOF ¶57) It was not faxed to Plaintiff Lawrence Brodsky. (*Id.*)

Plaintiff testified that if a fax is received by his machine, addressed to one of the independent contractors, he does not consider the fax to be "his" (Plaintiff's), or to have been sent to him (Plaintiff). Rather, the fax "belongs to" the independent contractor. (SOF ¶33) Plaintiff has "no idea" whether the fax that is the subject of his claim was intended for him by Humana. (SOF ¶34)

---

[5] The stand-alone terms "HumanaDental" and "HumanaVision" are, and were in 2008, marketing brands referring to a group of insurance products issued by different companies in the Humana family. (SOF ¶¶51, 52) They do not refer to any corporate entities. (*Id.*) The term "Humana Specialty Benefits" is, and was in 2008, a marketing brand referring to a group of insurance products issued by several different companies in the Humana family. (SOF ¶54) It does not refer to a corporate entity. (*Id.*)

[6] See specifically Ex. 2 to Declaration of Melanie Buehler (Ex. F to SOF), at p. HU 00657.

Plaintiff also testified that he is seeking only statutory damages of $500 per fax. (SOF ¶58) He is not specifically making a claim for the cost of the paper and toner, and "[t]here is no indication of a specific cost to be reimbursed." (*Id.*)

III. STANDARD OF REVIEW

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A party may not rest upon pleadings to oppose a motion for summary judgment and must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also TIG Insurance Company v. Reliable Research Company, Inc.*, 228 F.Supp.2d 921, 925 (S.D. Ill. 2002). The mere existence of a "scintilla" of evidence in support of the non-movant's position is not sufficient to show that a genuine issue of material fact exists. *Id.*

IV. ARGUMENT AND AUTHORITIES

A. HDIC IS ENTITLED TO SUMMARY JUDGMENT ON THE TCPA CLAIM.

(1.) HDIC Is Not The Entity That Sent The Fax, Neither Was The Fax Sent On HDIC's Behalf.

The TCPA provides that, under certain circumstances, an individual may have a private right of action against a "person" who "*use[s]* any telephone facsimile machine, computer, or other device to *send*, to a telephone facsimile machine, an unsolicited advertisement . . ." 47 U.S.C. §227(c)(1)(C) (emphasis added). Herein lies the first fatal defect in Plaintiff's claim: HDIC did not "use" any fax machine to "send" the faxes that are the subject of Plaintiff's Amended Complaint. Neither were the faxes "sent" on behalf of HDIC.

It is undisputed that on or about March 17, 2008, Melanie Buehler, an employee of

Humana Insurance Company (not HDIC), directed the staff of the Marketing Department – which was a part of Humana, Inc., not HDIC – to write and design the subject faxes, or "Producer Communications," to be faxed to certain producing agents and agencies located in states in which the products described in the fax were authorized to be sold by the respective state authorities. In response to Ms. Buehler's directive, the Marketing Department prepared the Producer Communication. The Marketing Department obtained a spreadsheet containing the names and fax numbers of producing agents and agencies based on their geographic location that would receive the subject Producer Communication. The Marketing Department then provided the spreadsheet and Producer Communication to the Information Technology Group – which is a part of Humana, Inc., not HDIC – to be faxed to the producers listed in the spreadsheet. Ann Neta of the Information Technology Group then in fact transmitted the Producer Communication to the producing agents and agencies listed on the spreadsheet.

The Producer Communication refers to "HumanaDental," "HumanaDental Advantage Plus Network," "DHMO," "HumanaVision," "HumanaVision VCP" and "Humana Specialty Benefits." However, "HumanaDental" and "HumanaDental Advantage Plus Network" are merely marketing names – not corporate entities – that refer to a group of insurance products that were insured by companies other than HDIC. These terms do not refer to any insurance products for which HDIC was the insuring company. "HumanaVision" and "HumanaVision VCP" are likewise marketing names that encompass a group of insurance produces that were insured by other companies in the Humana family and do not refer to any insurance products for which HDIC was the insuring company. Finally, "Humana Specialty Benefits" is a marketing name that refers to a group of insurance products issued by several different companies in the Humana family and does not refer to a separate corporate entity.

Thus, HDIC did not produce, develop, draft or transmit the Producer Communication and did not decide to whom the Producer Communication was sent. Moreover, none of the products enumerated in the Producer Communication were insured or issued by HDIC.

It is therefore undisputed that HDIC did not send the faxes that are the subject of Plaintiff's Amended Complaint. It is also undisputed that the subject faxes cannot, under any stretch, be deemed to have been sent "on behalf of" HDIC. None of the product lines listed in the fax were insured by HDIC; rather, they were insured by companies other than HDIC. Assuming *arguendo* Plaintiff has a claim of some kind under the TCPA (which he clearly does not for other reasons, including those explained below), he clearly does not have a claim against the party he sued: HDIC. HDIC did not "use" a fax machine to "send" a fax to anyone and thus *did not commit the acts of which Plaintiff complains*. HDIC therefore is not liable to Plaintiff as a matter of law. On this basis alone HDIC is entitled to the entry of summary judgment in its favor on the TCPA claim.[7]

(2) The Fax Was Not "Sent" To Plaintiff, But To Two Other Entities To Which Plaintiff Had Extended Permission To Use His Fax Machine and Number.

While HDIC did not send the faxes in the first place (and is entitled to summary judgment on that basis alone), HDIC is entitled to summary judgment on another, independent basis: The subject faxes were not "sent" *to Plaintiff*; rather, they were sent to two other entities that Plaintiff had expressly *permitted* to send and receive faxes on his equipment. Plaintiff therefore has not sustained an injury and lacks standing.

Plaintiff testified at his deposition that he permitted approximately 100 other

[7] As this Court is aware, Plaintiff filed an earlier action against Humana Inc. entitled *Brodsky v. Humana Inc.*, No. 3:08-cv-50188 (N.D. Ill. W.Div.), seeking recovery for the same fax that is the subject of the instant litigation. After receiving an offer of full relief from all Humana companies, Plaintiff moved to drop Humana Inc. and substitute HDIC as the sole defendant. The District Court ultimately denied Plaintiff's motion and dismissed that litigation. The full history of Plaintiff's earlier suit against Humana Inc. is set forth in HDIC's Memorandum In Support of Motion to Dismiss, Doc. 16-1, pp. 1-3, filed in the current litigation.

"independent contractors" who held agent contracts with various insurance companies to use his office space and send and receive faxes on his fax machine – and among the "independent contractors" to which Plaintiff had extended such permission were Lawrence S. Brodsky Brokerage Agency (also known as Brodsky Ingrassia Life) and Benefit Marketing Services, Inc. In the spreadsheet described above in the "Statement of Undisputed Facts" (which lists the names and fax numbers to which the subject fax was sent), Plaintiff is not listed as a recipient of the fax. It does, however, list Benefit Marketing Services and Brodsky Ingrassia Life as entities to which the faxes were sent, at the fax number Plaintiff had allowed those entities to use. Thus it is undisputed the subject fax was not "sent to" Plaintiff, but to Brodsky Ingrassia Life and Benefit Marketing Services, Inc. – two entities that Plaintiff had expressly permitted to send and receive faxes on his machine. Because the fax was not sent to Plaintiff, Plaintiff obviously has not sustained an "injury in fact" and therefore cannot have a private right of action under the TCPA, 47 U.S.C. § 227 (b)(3). *See Lujan, Jr. v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); U.S. CONST. art. III § 2. On this additional, independent basis, HDIC is entitled to the entry of summary judgment in its favor on the TCPA claim.[8]

(3) <u>The Faxes Were Not "Advertisements" Within The Meaning Of The TCPA.</u>

HDIC is entitled to summary judgment on another independent ground: The faxes that are the subject of the Amended Complaint were not "advertisements" within the meaning of the TCPA.

The TCPA describes an advertisement as "material advertising the commercial availability or quality of any property, goods or services." 47 U.S.C. §227(a)(5). In determining

[8] Because the faxes were not "sent" to Plaintiff, Plaintiff clearly has no cause of action under the TCPA. To add to the absurdity of Plaintiff's claim, the entities to which the faxes *were* sent had Plaintiff's permission to use his fax number *and* those recipients had Agent Contracts with Humana companies in which they had *expressly permitted* all Humana companies to send them faxes. (SOF ¶¶17, 18, 23, 24) Thus, not only is Plaintiff precluded from bringing an action against any Humana company, the actual recipients are barred from asserting claims based on the language of their contracts as well. *See* pp. 13-15. *infra*. *Also see* note 12, *infra*.

whether a fax potentially falls within the ambit of the TCPA, "[t]he inquiry is not whether there is an ancillary benefit to either party [contemplated in the fax] but whether the message is an advertisement . . . ." *N.B. Industries v. Wells Fargo & Company*. No. C 10-03203 L.B., 2010 WL 4939970 at *10 (N.D. Cal. Nov. 30, 2010). Moreover, the mere fact that a fax has "commercial relevance" does not mean the fax qualifies as an "advertisement" under the TCPA. *Id.*

Case law under the TCPA and FCC regulations demonstrate that a fax is not an "advertisement" if it is informational in nature, or if the recipient is not the potential purchaser of the product or service discussed in the fax, or if the purpose of the fax is to facilitate a commercial transaction in which the recipient previously agreed to participate with the sender. For example, in *Phillip Long Dang, P.C. v. XLHealth Corp.*, No. 1:09-CV-1076-RWS, 2011 WL 553826 (N.D. Ga. Feb. 7, 2011), the plaintiff chiropractor had received a fax from the defendants, which were wholly-owned subsidiaries of a preferred provider organization that owned and operated Medicare Advantage health plans. *Id.* at *1. The faxes invited the recipients to a seminar that "promised to offer providers, such as Plaintiff, information regarding claims and utilization management, to demonstrate use of [defendant's] secure provider portal, and to afford providers and their staffs opportunities to meet [defendant's] representatives." *Id.* Plaintiff filed a claim under the TCPA, and the defendants moved to dismiss on the basis that the fax was not an "advertisement" within the meaning of the Act. The court dismissed the TCPA claim, holding that the fax was not an "advertisement" because it merely sought "to inform the recipient" of an upcoming seminar at which the recipient could "learn more about the defendant's billing processes and thereby speed up payment to the recipient" as well as "meet the defendant's representatives." *Id.* at *4. The court also stated, significantly, that there was

nothing on the communication seeking "to sell insurance to the recipient, or even promote the benefits of becoming a contracted provider, assuming the recipient was not one already." *Id.*

In *Holmes v. Back Doctors, Ltd.*, No. 09-540-GPM, 2009 WL 3425961 (S.D. Ill. Oct. 21, 2009), a personal injury law firm brought a TCPA action after receiving a fax from a group of chiropractors. Defendant moved to dismiss on the basis that the fax did not constitute an "advertisement" under the TCPA. The court dismissed the TCPA claim, noting that the faxes contained "bona fide medical information of interest to personal injury lawyers" and that the faxes were "directed to specific regular recipients, specifically, personal injury law firms that have been logged as willing to receive faxes from" the defendants. *Id.* at *4.[9]

In *Phillips Randolph Enterprises, LLC. v. Adler-Weiner Research Chicago, Inc.*, 526 F.Supp.2d 851 (N.D. Ill. 2007), the plaintiff complained that it had received an unsolicited fax from the defendants, with the following content:

> Attention: *Business Owners & Business Decision Makers*. Adler Weiner Research is currently inviting business owners or business decision makers to participate in a research discussion on the topic of a new HEALTHCARE PROGRAM sponsored by The Chicagoland Chamber of Commerce ...
>
> HONORARIUM: * * *$200.00 CASH* * *
>
> If you are interested in participating in this research study, please call to see if you qualify between the hours of 9:00 am to 4:30 pm.

Id. at 852. The defendant moved to dismiss the complaint on the basis that the fax was not an "advertisement" within the meaning of the TCPA. In determining whether the fax amounted to an "advertisement," the court considered whether the fax promoted the "'commercial

[9] The court relied prominently on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act of 2005, 71 FR 25967-01, 25973 (May 3, 2006), which discusses the principle that informational faxes are not advertisements. Significantly, one of the factors enumerated by the FCC in determining if a fax is "informational" is whether "recipients . . . initiated membership in the organization that sends the communication." *Holmes v. Back Doctors, Ltd.*, 2009 WL 3425961 at *3. In the instant case, Plaintiff of course initiated his relationship with Humana companies by entering into an agent contract with those companies, providing his fax number, and specifically consenting to receive faxes – thereby underscoring the "informational" nature and basis of the fax.

availability' of a product or service" and focused on the content of the fax and the status of the recipient. *Id.* The court also noted that Congress' primary purpose in enacting the TCPA was to prevent the shifting of advertising costs. *Id.* The court dismissed the complaint, concluding that the fax was not an advertisement because it had merely promoted a research study and, moreover, was "not an indiscriminate, open-ended invitation." *Id.* at 853.

In *Ameriguard, Inc. v. University of Kansas Medical Center Research Institute, Inc.*, No. 06-0369-CV-W-ODS, 2006 WL 1766812 (W.D. Mo. June 23, 2006), the plaintiff had received a fax from the defendant generally seeking participants for a clinical research trial for "prevention of diabetes." *Id.* at *1. The defendant moved to dismiss, contending the fax was not an advertisement. The court agreed, noting that the plaintiff had not alleged the defendant sold medication directly to public.[10]

Finally, the case law and regulations also provide that a fax is not an advertisement if its "purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender." Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act of 2005, 71 FR 25967-01, 25972-25973 (May 3, 2006). *See also N.B. Industries v. Wells Fargo & Co.*, No. C 10-03203 LB, 2010 WL 4939970 (N. D. Cal. Nov. 30, 2010).

Under the cases discussed above, the subject faxes clearly were *not* advertisements – they were *informational* "producer communications" that informed agents of Humana companies concerning available group insurance products the *recipients* were authorized to market to their

[10] In an analogous case, *Lutz Appellate Services, Inc. v. Curry*, 859 F. Supp. 180 (E.D. Pa. 1994), the plaintiff had received two faxes from the defendant in the form of "help wanted" ads (apparently from a printer of appellate briefs), seeking "appellate specialists" and offering a "generous pay structure." The defendant moved to dismiss the plaintiff's TCPA claim, arguing that the faxes did not amount to "unsolicited advertisements" under the Act. The court agreed, stating simply that "no one speaks or thinks of a [help wanted ad] as a property solicitation or an offer of property." *Id.* at 181. Likewise, no one would think of the faxes at issue as solicitations to the agent recipients to purchase group products for themselves.

own customers pursuant to their contractual arrangements with Humana companies.[11] Just as the fax in *Dang* invited the recipient to a seminar to "learn more about the defendant's billing processes," the faxes in the case at bar invited the recipient agents to "call your Humana Specialty Benefits sales executive" to *learn* "details" about products the agents were contractually authorized to sell. Just as the fax in *Dang* did not "seek to sell insurance to the recipient, or promote the benefits of becoming a contracted provider," the fax in the instant case did not seek to sell group insurance products *to* the recipient agents, neither did it promote the benefits of *becoming* contracted with Humana companies, as the fax was sent to agents already under contract. As in *Phillips Randolph*, the subject faxes were not "indiscriminate, open-ended" solicitations; rather, they were targeted informational pieces directed to agents under contract with Humana companies concerning the products they were authorized to sell – information that was clearly "of interest" to the recipients. As in *Ameriguard*, the fax did not purport to offer the listed products directly to the consuming public – it advised agents concerning the products *they* were authorized to sell.

As in *Holmes*, the recipients of the faxes were "logged as willing to receive faxes" in that they had signed contracts in which they specifically consented to receive faxes from Humana companies. As in *Phillips Randolph*, the faxes focused on how the recipients could earn value – in the instant case, by compiling points to earn a trip to Hawaii by marketing Humana's products or services to their clients pursuant to established business relationships with Humana companies. Neither did the subject fax shift the advertising costs of Humana companies to the *employers* to which the recipients may ultimately have chosen to market the particular group insurance products.

[11] The fax advised agents that *they* could "enhance [their] clients' benefits" and "help [their] clients choose the dental and vision plan with the level of benefits that's best for [their] employees." (*See* Exhibit 1 to Declaration of Melanie Buehler, Ex. F to Statement of Facts.)

Not only were the faxes informational in nature, they facilitated the existing and continuing contractual agency relationships or "transactions" between the agents and the Humana companies and thus were clearly *transactional* within the meaning of the regulations. For all of these reasons, the subject faxes were not "advertisements" within the meaning of the TCPA, and on that independent basis HDIC is entitled to summary judgment on Plaintiff's TCPA claim.

(4) <u>Plaintiff Had Extended His Written Permission To All Humana Companies, Including HDIC, To Send The Fax.</u>

A fax is potentially actionable under the TCPA only if it is "unsolicited." 47 U.S.C. §227(b)(1)(c). An "unsolicited" fax is one "which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227 (a)(5). In the case at bar, Plaintiff himself, expressly and in writing, permitted all Humana companies to send him faxes. On this additional, independent ground, HDIC is entitled to summary judgment in its favor.

Plaintiff executed an agent contract effective October 30, 2006 with "Humana Insurance Company, Humana Health Plan, Inc., and all of their affiliates," which of course includes HDIC.[12] The contract provided in part:

> H. GPA understands and agrees that the Company and GPA through the established business relationship by this agreement may choose to communicate with GPA through the use of mail, email or facsimile to the address(es) and facsimile number(s) of the GPA. In addition, Company may begin immediately using any changes to such contact information.

[12] *See* Exhibit 21 to Humana Inc.'s 10-K for the year ended December 31, 2006 filed with the Securities and Exchange Commission., which reflects that Humana Health Plan, Inc. (under Kentucky), Humana Insurance Company (under Wisconsin) and HDIC (under Wisconsin) are all subsidiaries of Humana Inc. The 10-K filing is attached as Ex. P to HDIC's Statement of Facts. (SOF ¶64) Exhibit 21 of the 10-K appears at the last 3 pages of the document. The same information is reflected in Exhibit 21 to Humana Inc.'s 10K for the year ended December 31, 2003 (the year of the effective dates of the Brodsky Ingrassia Life and Benefit Marketing Services, Inc. contracts. (*See* Ex. O to HDIC's Statement of Facts, SOF ¶63.) (This Court may take judicial notice of SEC filings. *In re Guidant Corp. Securities Litigation*, 536 F.Supp.2d 913, 920 (S.D. Ind. 2008), citing *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1355 (7th Cir. 1995).)

Although HDIC did not send the faxes that are the subject of the Amended Complaint, although the faxes were not sent on behalf of HDIC, although the faxes were not "sent" to Plaintiff, but to other entities that Plaintiff allowed to use his fax machine and number, and although the faxes are not "advertisements" under the TCPA, Plaintiff gave all Humana companies his express written permission to send him the faxes in any event. In the face of such written, express permission, as a matter of law the subject fax was not "unsolicited," and HDIC has no liability to Plaintiff under any scenario. *See Practice Management Support Services, Inc. v. Appeal Solutions, Inc.*, No. 09 C 1937, 2010 WL 748170 (N.D. Ill. Mar. 1, 2010) (granting defendant summary judgment in light of written permission); *Travel 100 Group, Inc. v. Mediterranean Shipping Co.*, 889 N.E.2d 781 (Ill. App. Ct. 2008) (affirming summary judgment for defendant in light of permission); *David L. Smith and Associates v. Advanced Placement Team, Inc.*, 169 S.W.3d 816, 820 (Tex. App. 2005) ("if a transmission is invited by the recipient *or* if the sender has express written permission to send it, the transmission is not banned by the statute"). On this independent basis, HDIC is entitled to summary judgment on Plaintiff's TCPA claim.

B. HDIC IS ENTITLED TO SUMMARY JUDGMENT ON THE CONVERSION CLAIM.

Count II seeks recovery under a conversion theory, alleging HDIC "converted [Plaintiff's] fax machine, toner and paper to its own use." (Amended Complaint, Ct. III, ¶33.)[13] HDIC is entitled to summary judgment on this count as well.

The elements of a conversion claim are "(1) an unauthorized and wrongful assumption

[13] The Amended Complaint also purports to base the conversion claim on Plaintiff's alleged loss of employee time. This Court previously dismissed Plaintiff's claim to the extent it seeks recovery for such loss, however. *Brodsky v. HumanaDental Insurance Co.*, No. 10-C-3233, 2011 WL 529302 *7-8 (N.D. Ill. Feb. 8, 2011).

for control, dominion, or ownership by a defendant over a plaintiff's property; (2) plaintiff's right in the property; (3) plaintiff's right to the immediate possession of the property, absolutely and unconditionally; and (4) a demand for possession of the property." *Republic Tobacco, L.P. v. North Atlantic Trading Co., Inc.*, 254 F. Supp. 2d 985, 1006 (N.D. Ill. 2002) (quoting *Fonda v. General Cas. Co.*,665 N.E.2d 439, 442 (Ill. App. Ct. 1996)). While HDIC refutes Plaintiff's characterization of the events that are the subject of his Amended Complaint as "conversion," the fact remains HDIC did not send the subject faxes, neither were they sent on HDIC's behalf. In short, HDIC did not commit the acts Plaintiff contends amounted to "conversion." On this basis alone HDIC is entitled to summary judgment.

Moreover, as HDIC has established, the faxes were not "sent" to Plaintiff, but to two other entities Plaintiff had permitted to use his fax machine. Having permitted the recipients to use the fax machine, Plaintiff obviously did not have the "right to the immediate possession of" the toner, paper, and fax machine, "*absolutely* and *unconditionally*." *Id.* (emphasis added). On this additional basis HDIC is entitled to summary judgment.

Earlier in this litigation, HDIC filed a Motion to Dismiss under Rule 12(b)(6) on the basis that the allegations of the conversion claim required dismissal under the maxim *de minimus non curat lex.*[14] This Court declined to dismiss the claim on that basis at the pleadings stage. *Brodsky v. HumanaDental Insurance Co.*, No. 10-C-3233, 2011 WL 529302 *7 (N.D. Ill. Feb. 8, 2011). Plaintiff now has been deposed, and at his deposition he testified he was not making a claim for the actual cost of the toner and paper and that "[t]here is no indication of a specific actual cost to be reimbursed." (SOF ¶58) In light of Plaintiff's admission that he is not seeking recovery for the paper and toner, and because the loss of use of the fax machine for a matter of

[14] Doc. No. 16-1, pp. 15-16.

mere seconds is not, realistically, a basis for assessing monetary damages. HDIC is entitled to summary judgment in its favor on Count II under the *de minimis* rule. *See Old Town Pizza of Lombard, Inc. v. Corfu-Tasty Gyro's, Inc.*, No. 11-cv-6959, 2012 WL 638765 (N.D. Ill. Feb. 23, 2012); *Paldo Sign and Display Co. v. Topsail Sportswear, Inc.*, No. 08 C 5959, 2010 WL 276701 (N.D. Ill. Jan 15, 2010); *G.M. Sign, Inc. v. Stergo*, 681 F.Supp.2d 929 (N.D. Ill. 2009); *Stonecrafters, Inc. v. Foxfire Printing and Packaging, Inc.*, 633 F.Supp.2d 610 (N.D. Ill. 2009); *ABC Business Forms, Inc. v. Pridamor, Inc.*, No. 09 C 3222, 2009 WL 4679477 (N.D. Ill. Dec. 1, 2009); *Rosario's Fine Jewelry, Inc. v. Paddock Publications, Inc.*, 443 F.Supp.2d 976 (N.D. Ill. 2006).[15]

Finally, as established above, Plaintiff expressly consented in writing to the receipt of faxes from Humana companies in his agent contract. It is elementary that if a plaintiff consents to the defendant's alleged "control, dominion, or ownership" over his property, he has no cause of action for conversion. *See, e.g., Hahn v. Tanksley*, 317 S.W.3d 145, 156 (Mo. App. S.D. 2010). Moreover, because Plaintiff consented to the receipt of faxes from Humana companies, he did not have the "right to the immediate possession of" the toner, paper, and fax machine, "absolutely and unconditionally." *Republic Tobacco, L.P. v. North Atlantic Trading Co., Inc.*, 254 F. Supp. 2d at 1006. For these additional reasons, HDIC is entitled to summary judgment on the conversion claim.

C. <u>HDIC IS ENTITLED TO SUMMARY JUDGMENT ON THE ICFA CLAIM.</u>

Plaintiff's claim under the ICFA alleges that the purported transmission of the faxes was

[15] HDIC acknowledges that courts in this district are split on the applicability of the *de minimis* rule to conversion claims based upon a single fax. *See e.g.*, cases cited in HDIC's Memorandum in Support of Motion to Dismiss, Doc. No. 16-1, p. 16 n.4. However, in light of Plaintiff's admission herein that he is not seeking recovery for the paper and toner, and in light of his concession that his damages are realistically unquantifiable (SOF ¶58), HDIC submits there is no logical alternative under the uncontroverted facts but to grant summary judgment in HDIC's favor based on the *de minimis* rule.

"an unfair practice, because it violates public policy, and because it forced Plaintiff and the other class members to incur expense without any consideration in return." (Ct. III, ¶41.) HDIC is entitled to summary judgment on this final count of the Amended Complaint as well.

The elements of a private cause of action for damages based on a violation of the Act are: (1) a deceptive or "unfair" act or practice by the defendant; (2) intent by the defendant that the plaintiff rely on the deception; (3) the deception occurred in the course of conduct involving trade or commerce; (4) actual damage to the plaintiff; (5) proximately caused by the deception. *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134, 147 (2002); *Rockford Memorial Hosp. v. Havrilesko*, 368 Ill.App.3d 115, 121 (2d Dist. 2006). In the instant case, again, HDIC did not send the fax, neither was the fax sent on its behalf. Because HDIC did not commit the "unfair" acts on which Plaintiff bases his ICFA claim, HDIC is entitled to summary judgment.

Additionally, as the faxes were not sent to Plaintiff, but to two other entities Plaintiff had allowed to send and receive faxes on his machine, HDIC clearly did not intend the allegedly unfair acts to impact *Plaintiff*. Moreover, Plaintiff was not "damaged" because the faxes were not sent to him, but to other recipients he had authorized to use the fax number and equipment.

It is also clear the alleged conduct is not "unfair," and therefore not actionable under any circumstances under the ICFA. "In determining whether conduct is unfair in violation of the ICFA, courts consider: (1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive or unscrupulous; and (3) whether it causes substantial injury to consumers." *Old Town Pizza of Lombard, Inc. v. Corfu-Tasty Gyro's, Inc.*, No. 11-cv-6959, 2012 WL 638765 *4 (N.D. Ill. Feb. 23, 2012). With respect to the second factor, in ruling on HDIC's Motion to Dismiss this Court adopted the view that "[c]onduct is considered oppressive when it leaves the plaintiff with the lack of a meaningful choice." *Brodsky v. HumanaDental*

Insurance Co., No. 10-C-3233, 2011 WL 529302 *9 (N.D. Ill. Feb. 8, 2011) (quoting *Green v. Anthony Clark Int'l Ins. Brokers, Ltd.*, No. 09 C 1541, 2009 WL 2515594 at *4 (N.D. Ill. August 17, 2009)).[16] It is now clear from Plaintiff's deposition testimony that he indeed had a choice – he chose to allow others to send and receive faxes on his machine, including the entities to which the faxes in fact were sent. Moreover, the question whether Plaintiff "had [a] way to remedy the harm [he] experienced from receipt of the ... unsolicited fax" is completely inapplicable to the undisputed facts: Plaintiff did not experience harm at all because the faxes were sent not to him, but to individuals he had allowed to use his machine. Thus the second "unfairness" factor must be resolved in HDIC's favor.

As to the third factor, Plaintiff stated at his deposition that he is not making a claim for the actual cost of the toner and paper and that "[t]here is no indication of a specific actual cost to be reimbursed." (SOF ¶58) Thus, the alleged "damages" to the recipients of the fax herein are insubstantial and insignificant – indeed they are nonexistent. Given Plaintiff's deposition testimony, the third prong of the "unfairness" analysis must be resolved in HDIC's favor as well. *See Old Town Pizza of Lombard, Inc. v. Corfu-Tasty Gyro's, Inc.*, No. 11-cv-6959, 2012 WL 638765 *4 (N.D. Ill. Feb. 23, 2012); *Paldo Sign and Display Co. v. Topsail Sportswear, Inc.*, No. 08 C 5959, 2010 WL 276701 (N.D. Ill. Jan 15, 2010); *GM Sign, Inc. v. Stergo*, 681 F. Supp. 2d 929 (N.D. Ill. 2009); *Stonecrafters, Inc. v. Foxfire Printing and Packaging, Inc.*, 633 F.Supp.2d 610 (N.D. Ill. 2009); *Rosario's Fine Jewelry, Inc. v. Paddock Publications, Inc.*, 443 F.Supp.2d 976 (N.D. Ill. 2006).[17]

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[16] HDIC moved to dismiss Plaintiff's ICFA claim on the basis, *inter alia*, that the allegations of the Complaint were insufficient to show that HDIC's alleged conduct was "unfair" under these three factors. This Court declined to dismiss the claim at the pleadings stage. *Brodsky v. HumanaDental Ins. Co., supra* at *9. Having engaged in discovery and deposed Plaintiff, HDIC submits the uncontroverted facts show that the three "unfairness" factors are unsatisfied as a matter of law and that HDIC is entitled to summary judgment on the ICFA claim on that basis.

[17] HDIC acknowledges that some courts have concluded that an unsolicited fax can satisfy the three-prong

Simply put, it is inconceivable that an insurance broker whose sub-agents receive a fax from an insurer with which both they and the broker have an established business relationship, and with which both they and the broker hold contracts in which they expressly consent to receive faxes, can be viewed as the victim of "unfair practices." HDIC clearly is entitled to judgment in its favor as a matter of law on Plaintiff's ICFA claim.

D. HDIC IS ENTITLED TO JUDGMENT IN ITS FAVOR ON THE AMENDED COMPLAINT BASED ON RES JUDICATA.

HDIC previously moved to dismiss Plaintiff's original Complaint on the ground that his claims are barred by the doctrine of *res judicata*.[18] While other aspects of HDIC's Motion to Dismiss were granted (and portions of the original Complaint therefore were stricken), this Court denied HDIC's motion to the extent it was based on *res judicata* on February 8, 2011.[19] After HDIC filed a Motion for Reconsideration, the Seventh Circuit decided *Joseph v. Elan Motorsports Technologies Racing Corp.*, 638 F.3d 555 (7th Cir. 2011),[20] which supports HDIC's contention that *res judicata* bars Plaintiff from maintaining the instant litigation against HDIC. In light of this intervening opinion, HDIC respectfully requests that this Court reconsider its denial of HDIC's *res judicata* argument in light of *Joseph*.

As this Court is aware, Plaintiff had filed an earlier action against Humana Inc. (not HDIC) that was removed to the United States District Court for the Northern District of Illinois,

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"unfairness" test. *See, e.g., Centerline Equipment Corp. v. Banner Personal Service, Inc.* 545 F.Supp.2d 768, 780 (N.D. Ill. 2008); *Sadowski v. Med1 Online, LLC*, No. 07 C 2973, 2008 WL 2224892 (N.D.Ill. May 27, 2008). While HDIC respectfully disagrees with the conclusions reached in those decisions, HDIC submits they are distinguishable in any event because, in the case at bar, Plaintiff *admitted* at his deposition that he is not making a claim for damages for the paper and toner and that there is "no indication of a specific cost to be reimbursed." Given this testimony, as a matter of law the transmission of the fax cannot be considered a "violation of public policy" or "oppressive" and cannot have caused "substantial injury."

[18] HDIC's Memorandum in Support of Motion to Dismiss, Doc. No. 16-1, pp. 7-11.

[19] Doc. No. 22.

[20] *Joseph* was decided March 14, 2001. The petition for rehearing was denied March 31, 2011.

Western Division.[21] In that litigation, Plaintiff moved for leave to amend his pleadings to substitute HDIC as the sole defendant in lieu of HDIC. In his motion, Plaintiff admitted that Humana Inc. was "not the business on whose behalf of the fax was transmitted." (SOF ¶60, Ex. L thereto, ¶4.) The Magistrate Judge denied Plaintiff's motion on November 12, 2009 (SOF ¶61, Ex. M thereto), and Plaintiff filed a motion to reconsider before the District Judge on December 12, 2009 (SOF ¶59, Ex. K thereto). On December 22, 2009 the District Court entered an order noting that Plaintiff had admitted "he [had] no claim against Humana Inc." (SOF ¶62, Ex. N thereto.) Apparently on that basis the Court concluded there was no "case or controversy" and dismissed the suit for lack of subject matter jurisdiction. (*Id.*)

In its Motion to Dismiss in the instant litigation, HDIC argued that Plaintiff's current claims against HDIC are barred under *res judicata* in light of the District Court's December 22, 2009 order in the prior litigation. HDIC pointed out that a party asserting *res judicata* must establish three requisites: (a) identity of the claim; (b) identity of the parties, which include those who are in privity with the original parties; and (c) a final judgment on the merits. *Ross v. Board of Education of Township High School District 21*, 486 F.3d 279, 282 (7th Cir. 2007).[22] Plaintiff did not dispute that the claims he asserts against HDIC are identical to those he asserted against Humana Inc. in the prior litigation. Plaintiff disputed that Humana Inc. and HDIC are in privity,[23] but that argument is clearly without merit as HDIC is a subsidiary of Humana Inc. *See Aetna Casualty Co. v. Kerr-McGee Chemical Corp.*, 875 F.2d 1252, 1257 (7th Cir. 1989); *Janusz v. FASCO Industries, Inc.*, No. 97 C 7976, 1999 WL 162793, *5 (N.D. Il. March 15, 1999).[24]

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[21] *Brodsky v. Humana Inc.*, No. 3:08-cv-50188 (N.D. Ill. W.Div.),

[22] *See* HDIC's Memorandum in Support of Motion to Dismiss, Doc. No. 16-1, pp. 7-8

[23] *See* Plaintiff's Response to HDIC's Motion to Dismiss, Doc. No. 19, pp. 11-12.

[24] *See* HDIC's Memorandum in Support of Motion to Dismiss, Doc. No. 16-1, pp. 9-10; HDIC's Reply in Support of

With respect to the third element of *res judicata* – the requirement of a final judgment on the merits -- HDIC argued that, even though the Court had characterized its order as a dismissal for lack of subject matter jurisdiction, the dismissal in fact was "on the merits" because it was based on Plaintiff's admission that Humana Inc. did not commit the acts upon which he based his claim. *American National Bank & Trust Co. v. City of Chicago*, 826 F.2d 1547, 1552 (7th Cir. 1987).[25] On that basis, HDIC contended, the third prong of the *res judicata* test was satisfied. This Court rejected HDIC's position, however, essentially concurring in the District Court's characterization of the dismissal order as a dismissal for lack of subject matter jurisdiction.[26]

HDIC respectfully submits that the Seventh Circuit's intervening opinion in *Joseph v. Elan Motorsports Technologies Racing Corp.* confirms that the District Court's dismissal order indeed was "on the merits." In *Joseph*, plaintiff had brought an action against Elan Motorsports Technologies Racing Corp. ("Elan Corp.") for breach of a written employment agreement. After the litigation had been filed, plaintiff discovered that his employment agreement actually was with a related company, Elan Motorsports Technologies, Inc. ("Elan Inc."). Plaintiff therefore moved for leave to amend his complaint to change the defendant to Elan, Inc. Because plaintiff acknowledged that Elan Corp. (the original defendant) was not liable to him, the District Court "concluded that there was no controversy between the parties" and on that basis dismissed the suit. 638 F.3d at 558. Though not central to its holding, the Seventh Circuit explained that the dismissal of the suit against Elan Corp. for lack of a case or controversy was incorrect, stating that "[t]he judge . . . should have rendered judgment on the merits" for Elan Corp. "because it had not broken any contract with" plaintiff. (*Id.*)

Motion to Dismiss, Doc. No. 20, pp. 9-11.

[25] *See* HDIC's Memorandum in Support of Motion to Dismiss, Doc. No. 16-1, pp.10-12.

[26] *See* Memorandum Opinion, Doc. No. 22, pp. 9-10.

In the instant case, the District Court's dismissal order in the prior litigation likewise should have been characterized as – and indeed *was* in substance – a dismissal on the merits in light of Plaintiff's admission that Humana Inc. was not liable for the matters alleged in his pleadings. As a matter of law, HDIC therefore is entitled to judgment in its favor under the doctrine of *res judicata*. In light of the *Joseph* opinion, and for the reasons HDIC set forth in support of its Motion to Dismiss, HDIC therefore respectfully requests that this Court reconsider its ruling of February 8, 2011 and enter judgment in favor of HDIC on the Amended Complaint.

V. CONCLUSION

For the above reasons, HDIC requests that this Court enter summary judgment in its favor and against Plaintiff on all counts of the Amended Complaint.

Respectfully submitted,

HUMANADENTAL INSURANCE COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2013, I electronically filed the foregoing HUMANADENTAL INSURANCE COMPANY'S MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR SUMMARY JUDGMENT with the Clerk of the U.S. District Court, Northern District of Illinois, Eastern Division, using the CM/ECF system which sent notification of such filing to the following CM/ECF registered participants:

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EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE S. BRODSKY, individually and as the representative of a class of similarly-situated persons,	)	
Plaintiff,	)	No. 1:10-cv-03233
v.	)	
HUMANADENTAL INSURANCE COMPANY d/b/a HUMANA SPECIALTY BENEFITS,	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Lawrence Brodsky ("Plaintiff"), submits this Memorandum of Law in Opposition to Defendant HumanaDental Insurance Company's ("Defendant" or "HDIC") Motion for Summary Judgment.

INTRODUCTION

The Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(C) ("TCPA"), forbids the use of "any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine." The TCPA defines an "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services." 47 U.S.C. § 227(a)(4). The Federal Communications Commission ("FCC") regulations implementing the TCPA ("Regulations") define "sender" as "[T]he person or entity <u>on whose behalf</u> a facsimile unsolicited advertisement is sent <u>or whose goods or services are advertised</u> <u>or promoted in the unsolicited advertisement</u>." 47 C.F.R. § 64.1200(f)(8) (emphasis added).

The TCPA creates a private right of action for any person or entity that receives an advertisement in violation of the act and provides for statutory damages in the amount of $500 for

each violation as well as injunctive relief against future violations." 47 U.S.C. § 227(b)(3)(A)-(B). Additionally, the TCPA provides treble damages may be assessed if in the court's discretion the defendant willfully and knowingly violated the act. 47 U.S.C. § 227(b)(3). To prevail under the TCPA, a plaintiff must show: (1) defendant used a telephone facsimile machine, computer or other device to send one or more faxes to plaintiffs' facsimile machines; (2) the faxes sent contained material advertising the commercial availability or quality of any property, goods, or services, and (3) plaintiff did not give prior express invitation or permission for defendant to send the faxes. *Hinman v. M and M Rental Ctr., Inc.*, 596 F. Supp. 2d 1152, 1158 (N.D. Ill. 2009).

On May 14, 2008, HDIC sent two facsimiles (hereafter, "Facsimile") to the fax number owned by Plaintiff, advertising dental and vision insurance plans. The Facsimile did not contain the name of any individual or entity to which they were being sent. At the bottom of the Facsimile was the name "Humana Specialty Benefits," a marketing umbrella for Humana "specialty" products, which include, among other things, dental plans insured by HDIC. The Facsimile promotes selling HumanaDental plans (which include HDIC dental plans) and, as part of that promotion, references a "dental brochure." The dental brochure, created on a state by state basis, expressly and repeatedly references HDIC and advertises HDIC dental plans, among others. Prior to receiving the Facsimiles, Plaintiff called the telephone number listed on a previously received Humana facsimile and asked that his fax number, (847) 991-0152, be removed from Humana's fax distribution list. It wasn't, and after receiving the two Facsimiles, Plaintiff subsequently filed suit under the TCPA.

HDIC seeks summary judgment, arguing: (1) it is not the entity that sent the Facsimile to Plaintiff nor was the Facsimile sent on HDIC's behalf; (2) although Plaintiff received two Facsimiles, he was not the intended recipient; (3) the Facsimile is not an advertisement under the TCPA because it is "informational" and because the products advertised were to be consumed by third parties – not Plaintiff; (4) Plaintiff consented to receiving advertisements such as the Facsimile by consenting to

receive fax "communications" from a different Human entity; and (5) HDIC is entitled to summary judgment based on res judicata.

As demonstrated in this Memorandum and in Plaintiff's Statement of Additional Facts That Require Denial of Summary Judgment ("PSOAF") filed contemporaneously herewith, HDIC has not and cannot meet its burden of demonstrating there are no genuine issues of material fact and cannot demonstrate, as a matter of law, that it is entitled to judgment in its favor.[1]

STATEMENT OF FACTS

Plaintiff does business as a sole proprietorship under the name Lawrence S. Brodsky Agency. (PSOAF ¶1). Plaintiff started a corporation in the early 1980's that was called the Brodsky Ingrassia Life Organization, Inc. ("Brodsky Ingrassia Life"). (PSOAF ¶2). Ingrassia retired in the late 1980's and Brodsky Ingrassia Life was thereafter changed to the Lawrence S. Brodsky Agency, Inc. (PSOAF ¶¶3, 4). The Insurance License for Brodsky Ingrassia Life expired on March 11, 1996. (PSOAF ¶5).

On or about June 22, 2003, a Group Producing Agent/Agency Contract was entered into that listed as the "Applicable Companies" the following: Humana Insurance Company, Humana Health Plan, Inc. and all of their affiliates, collectively referred to as the "Company," and Lawrence S. Brodsky Agency, referred to as the "GPA," or Group Producing Agent/Agency ("2003

[1] Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c); *Paul v. Theda Med. Centr., Inc.*, 465 F.3d 790, 793 (7th Cir. 2006); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The movant bears the burden of establishing the non-existence of a genuine material dispute and that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a); *Kasalo v. NCSPLUS, Inc.*, 2011 WL 2582195, at *3 (N.D. Ill. June 27, 2011); *Doe v. Cunningham,* 30 F.3d 879, 883 (7th Cir.1994). If the moving party meets this burden, the nonmoving party must then go beyond the pleadings and set forth specific facts showing that there is a genuine issue for trial. FED. R. CIV. P. 56(e); *Paul*, 465 F.3d at 793. In ruling on a motion for summary judgment, the court must draw every justifiable inference from the record in the light most favorable to the nonmoving party. *Paul*, 465 F.3d at 793-94; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). Summary judgment is not appropriate if a reasonable jury could return a verdict for the nonmoving party. *Marshall v. Local 701, Intern. Broth. Of Elec. Workers*, 2008 WL 4389868, at *6 (N.D. Ill. Sept. 19, 2008), *citing Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

Contract"). (PSOAF ¶10). The 2003 Contract was signed by Christopher Degen, identified as a Group Producing Agent. (PSOAF ¶11). The name Brodsky Ingrassia Life does not appear anywhere in the 2003 Contract. (PSOAF ¶12). The 2003 Contract provides the GPA understands that "Humana Insurance Company," "Humana Health Plan, Inc.," and "all of their affiliates" may choose to "communicate" with the GPA through the use of facsimiles. (PSOAF ¶13). The 2003 Contract says nothing about fax advertising. (PSOAF ¶13). The 2003 Contract also provides that it supercedes "any and all prior contracts . . . regarding the services of the GPA performed for the Company with respect to such products." (PSOAF ¶14).

On October 7, 2006, Plaintiff signed a "Group Producing Agent or Agency (GPA) Contract" that listed as the "Applicable Companies" the following: Humana Insurance Company, Humana Health Plan, Inc. and all of their affiliates, collectively referred to as the "Company," and Lawrence Brodsky Agency, referred to as the "GPA," or Group Producing Agent/Agency (the "2006 Contract"). (PSOAF ¶15). The name Brodsky Ingrassia Life does not appear anywhere in the 2006 Contract. (PSOAF ¶16). The 2006 Contract similarly says nothing about advertising but instead states that the GPA understands that "Humana Insurance Company," "Humana Health Plan, Inc.," and "all of their affiliates" may choose to "communicate" with the GPA through the use of facsimiles. (PSOAF ¶17). The 2006 Contract also provides it supercedes "any and all prior contracts . . . regarding the services of the GPA performed for the Company with respect to such products." (PSOAF ¶18). From at least October 2006 to the present, Plaintiff has never sold any "Humana" related insurance plans or products to any of his past or present clients. (PSOAF ¶19).

Plaintiff is the sole owner of the telephone line for 847-991-0152 and has been since 1977. (PSOAF ¶¶66, 68). Plaintiff pays all bills concerning 847-991-0152. (PSOAF ¶67). Plaintiff has also owned and paid for every fax machine that has been connected to 847-991-0152, as well as for the toner and paper used in the fax machine connected to 847-991-0152. (PSOAF ¶¶69-71).

HDIC is a Wisconsin corporation that insures various dental plans, including the HumanaDental Preventative Plus plan, the HumanaDental PPO and Traditional Preferred plans. (PSOAF ¶¶6-7, 51-60). Humana Specialty Benefits is a marketing umbrella for "specialty products," which include dental, vision, life insurance and disability products. (PSOAF ¶8). Underneath the Humana Specialty Benefits marketing umbrella are dental products insured by HDIC and marketed by Humana Specialty Benefits. (PSOAF ¶9, 51-60).

A short time (six to eight weeks to a year) prior to receiving the Facsimiles on May 14, 2008, Plaintiff called a telephone number listed on a previous Humana fax advertisement, spoke to a female representative of Humana and all its affiliates and asked that Plaintiff's fax number 847-991-0152 be taken off the fax advertising broadcast list. (PSOAF ¶21). The woman answering for Humana laughed, said it's only a fax, and then said they would take care of it. (PSOAF ¶21). During the conversation Plaintiff had with the Humana representative to remove his facsimile number from their fax advertising broadcast list, the Humana representative verified the fax number as 847-991-0152. (PSOAF ¶22). On May 14, 2008, Plaintiff received two Facsimiles advertisements on line 847-991-0152 that contained the name "Humana Specialty Benefits" at the bottom of the Facsimile and which encouraged recipients to sell HumanaDental insurance products. (PSOAF ¶20). The Facsimiles, sent to Plaintiff's fax number 847-991-0152, did not contain the name of any individual or entity to which they were being sent. (PSOAF ¶23).

The Facsimiles sent to Plaintiff's fax number stated, *inter alia*, the following:

- Help your clients choose the dental and vision plan with the level of benefits that's best for their employees at little additional cost. **We've made it even easier for them and you to do business with us**, providing a single source for a quote, application, enrollment and bill. (PSOAF ¶28) (emphasis added).

- Sell HumanaDental and HumanaVision plans and earn credits towards Humana's Leaders Club trip to Maui in 2009. (PSOAF ¶29).

- Materials to help you **promote** the new product offerings include:

- Flyer: to share with clients or prospects (form number: GN-51517-FY)
- Dental brochure
- Vision brochure

To order log into the secured agent section of Humana.com, Select "Marketing & Products," then Dental, vision and life." (PSOAF ¶30).

- Call your Humana Specialty Benefits sales executive for details. (PSOAF ¶30).

George Burleton, a Director for HDIC, testified that the Facsimile was sent by the Marketing Department of Humana to "promote products that are underneath the Human Specialty Benefits marketing umbrella." (PSOAF ¶¶32, 38). In fact, the phrase in the Facsimile -- "Sell HumanaDental and HumanaVision plans and earn credits towards Humana's Leaders Club trip to Maui in 2009" -- refers to *every* type of dental plan that falls underneath the Humana Specialty Benefits marketing umbrella. (PSOAF ¶36). Burleton further stated: "We rely on brokers and agents to sell our products, and so by providing them with information [in the Facsimile], it helps them sell our products." (PSOAF ¶37). Melanie Buehler ("Buehler"), a former HDIC employee and current manager for Humana Insurance Company, testified that the purpose of the Facsimile is to let the brokers know what products are available so they will sell the products to groups. (PSOAF ¶39). Burleton testified the Facsimile "went to our brokers and agents that sell our products." (PSOAF ¶40).

The purpose of the dental brochures referenced in the Facsimile was to let brokers know what products are available to sell with the hope that the brokers would then sell those products. (PSOAF ¶48). The Marketing Department has a system where brokers can go to order the fliers and dental and vision brochures referenced in the Facsimile. (PSOAF ¶46). The cover of the dental brochures for Florida, Alabama, Indiana, Illinois, Ohio, Missouri, Tennessee, Kentucky, Kansas, Georgia, and Texas each state the following: "HumanaDental" and (with the exception of Georgia) "Humana Specialty Benefits." (PSOAF ¶49). These brochures each state in part the following:

> We're happy you are considering HumanaDental plans. You'll find **our products** are easy to choose and use, and our passion for service is simply part of who we are. You can be confident that you and your employees will be well taken care of.
>
> ➢ A.M. Best rates **HumanaDental Insurance Company** as "excellent."

(PSOAF ¶50). The dental brochures for Florida, Alabama, Indiana, Illinois, Ohio, Missouri, Tennessee, Kentucky, Kansas, Georgia, and Texas each specifically advertised and/or offered, among other plans, the following: the HumanaDental Preventative Plus plan and the HumanaDental PPO and Traditional Preferred plans, which are insured or administered by HDIC. (PSOAF ¶¶51-61).

ARGUMENT

I. HDIC WAS A "SENDER" OF THE FACSIMILE AT ISSUE.

HDIC argues that it "did not 'use' any fax machine to 'send' the faxes that are the subject of Plaintiff's Amended Complaint" and that the faxes were not "sent" on behalf of HDIC. (Def.'s Br. at 5). HDIC notes that non-HDIC employees and the Marketing Department of Humana, Inc. were responsible for writing and designing the Facsimile that HDIC states was to be sent to brokers/agents in states where the products described in the fax were authorized to be sold by the respective state authorities. (Def.'s Br. at 5, 6).

The problem with HDIC's argument is it ignores the dispositive fact that it is a "sender" under the Regulations and is thus liable for violating the TCPA. As noted previously, the Regulations define "sender" as "[T]he person or entity <u>on whose behalf</u> a facsimile unsolicited advertisement is sent <u>or whose goods or services are advertised or promoted in the unsolicited advertisement</u>." 47 C.F.R. § 64.1200(f)(8) (emphasis added). Thus, "sender" under the Regulations is not limited to the person or entity which actually physically transmitted the fax, but extends to include the person or entity whose goods or services are advertised or promoted by the fax as well. *See* 47 C.F.R. § 64.1200(f)(8). Plaintiff does not dispute that Humana, Inc. acted as a fax blaster for

the companies whose products were referenced in the Facsimile that were being advertised under the Humana Specialty Benefits marketing umbrella. (PSOAF ¶¶41, 42). However, the products promoted and advertised in the Facsimile included those of HDIC, making HDIC a sender pursuant to the Regulations. (PSOAF ¶¶8, 9, 36, 49-61).

The record evidence demonstrates conclusively that HDIC is a "sender" under the TCPA and the Regulations – the Facsimile advertises HDIC dental products. *See* PSOAF ¶¶8, 9, 49-61. In fact, it is undisputed that the phrase in the Facsimile -- "Sell HumanaDental and HumanaVision plans and earn credits towards Humana's Leaders Club trip to Maui in 2009" -- refers to any type of dental plan that falls under the Humana Specialty Benefits marketing umbrella, which includes HDIC products. (PSOAF ¶¶9, 36). On that basis alone, the Facsimile advertises HDIC products.[2] Furthermore, the brochures referenced in the Facsimile expressly advertise/promote HDIC and products insured by HDIC, namely, the HumanaDental Preventative Plus plan and the HumanaDental PPO and Traditional Preferred plans. (PSOAF ¶¶49-60). As Buehler testified, the purpose of the dental brochures was to let the brokers know what products were available for them to sell with the hope that the brokers do sell the products. (PSOAF ¶48). What is available, in addition to DHMO and Advantage Plus dental products, are also dental products insured by HDIC. (PSOAF ¶¶41-61).

In sum, HDIC's claim that it is not a sender of the Facsimile is eviscerated by the text of the Facsimile, the testimony of Burleton and Buehler, and by the brochures produced by HDIC in response to Plaintiff's discovery requests.

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[2] HDIC's assertion that "HumanaDental" is a marketing name that "refers to a group of insurance products that were issued by companies other than HDIC," and that "HumanaDental" does not "refer to any insurance products for which HDIC was the insuring company" is simply wrong, (Def.'s Br. at 6), as Burleton's testimony and the brochures produced by HDIC make indisputably clear. (PSOAF ¶¶36-39). The brochures were produced in response to Plaintiff's discovery requests and are thus self-authenticating. *Architectural Iron Workers Local No. 63 Welfare Fund v. United Contractors, Inc.*, 46 F. Supp.2d 769, (N.D. Ill. 1999); *Frederick v. Abbot Lab.*, 2005 WL 627957, at *8 (N.D. Ill. March 16, 2005). In addition, the brochures constitute admissions. *Id.*

II. PLAINTIFF HAS STANDING UNDER THE TCPA.

HDIC next contends Plaintiff does not have standing to bring suit under the TCPA, arguing as follows:

> [I]t is undisputed the subject fax was not "sent to" Plaintiff, but to Brodsky Ingrassia Life and Benefit Marketing Services, Inc., two entities that Plaintiff had expressly permitted to send and receive faxes on his machine. Because the fax was not sent to Plaintiff, Plaintiff obviously has not sustained an "injury in fact" and therefore cannot have a private right of action under the TCPA, 47 U.S.C. § 227(b)(3).

(Def.'s Br. at 8).

HDIC's argument fails both legally and factually. First, it cannot genuinely be contended that Plaintiff does not have standing to bring this TCPA claim. Plaintiff has suffered the exact injury that Congress sought to address in the TCPA. In order to establish standing under Article III, a plaintiff: (i) must have suffered an injury in fact -- an invasion of a legally protected interest which is concrete and particularized; (ii) there must be a causal connection between the injury and the conduct complained of; and (iii) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). The Supreme Court has held that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). *See also Warth v. Seldin*, 422 U.S. 490, 514 (1975) (same).

The legislative history of the TCPA shows that Congress was concerned about the costs imposed on recipients of an unsolicited fax advertisement, including the cost associated with use of the machine and the cost of paper and ink used to print the advertisements. *Am. Painting, LLC v. Fin. Solutions and Assoc.*, 315 S.W.3d 719, 724 (Mo. 2010). In *All Am. Painting,* the Missouri Supreme Court addressed the standing issue of whether the owner of the fax machine had standing to bring suit where the fax was addressed to individuals rather than the plaintiff corporation, and stated as follows:

> Here, plaintiffs owned the machines and computers on which the advertisements were

> received. Plaintiffs paid for the ink and paper that was consumed to print those advertisements. As such, plaintiffs were the parties damaged by the receipt of the unsolicited advertisements. The legislative history of the TCPA shows the act was intended to protect against this type of harm. Therefore, the plaintiffs had standing to sue under the TCPA. Financial Solutions' [Defendants'] argument to the contrary is without merit.
>
> Additionally, if the Court were to accept Financial Solutions' argument that the name at the top of the header controls who has a cause of action under the TCPA, advisors could circumvent the act and avoid liability completely by simply addressing every advertisement to "John Doe." This Court presumes that Congress did not intend to enact an absurd law, incapable of being enforced.

All Am. Painting, 315 S.W.3d at 724. And in the recently decided case of *Physician's Healthsource, Inc. v. Cephalon, Inc.*, No. 12-cv-3753, at 5 (E.D. Pa. Jan. 28, 2013) (attached to Appendix of Exhibits as Exhibit 34), the court similarly rejected the argument that plaintiff who owned fax machine and paid telephone bills lacked standing because the fax was addressed to someone else.

Here, it is undisputed that Plaintiff owned the fax machine, paid the telephone bills for the fax machine, and paid for the paper and toner. (PSOAF ¶¶66-71). When HDIC sent the <u>unaddressed</u> Facsimiles advertisements to (847) 991-0152, in violation of the TCPA and the Regulations, HDIC sent those fax advertisements to Plaintiff's fax machine and a telephone line owned and paid for by Plaintiff, <u>and thus to Plaintiff</u>, and tied up Plaintiff's phone line. In doing so, HDIC invaded Plaintiff's statutory right under the TCPA and Regulations to be free from the sending of faxes that violate the TCPA and FCC regulations promulgated thereunder, and so caused Plaintiff the requisite injury in fact. *Linda R.S.*, 410 U.S. at 617 n.3; *Warth*, 422 U.S. at 500.

Second, assuming *arguendo* that HDIC at some point had permission to send a facsimile to Plaintiff's fax line, Plaintiff revoked any such permission. (PSOAF ¶¶21, 22). This fact precludes a summary judgment finding that HDIC had permission to send the Facsimiles advertisements to Plaintiff's fax line. *See* 47 C.F.R. § 64.1200(a)(3)(v)and (vi).

Third, HDIC has not and cannot produce <u>any</u> contract that mentions Brodsky Ingrassia Life, which is to whom HDIC claims it sent one of the two Facsimile. (PSOAF ¶¶12, 16; RDSOF

¶¶56, 57). In fact, HDIC's claim in this regard is unsupportable. The name Brodsky Ingrassia Life was changed to the Lawrence S. Brodsky Agency, Inc. in the late 1980's, and the Insurance License for Brodsky Ingrassia Life is inactive and expired on March 11, 1996. (PSOAF ¶¶4, 5). Thus, HDIC's purported "permission" from Brodsky Ingrassia is based on purported permission that goes back at least eighteen years before the name change, twelve years before the Brodsky Ingrassia Licence expired, and (apparently) relates to some circumstance HDIC neglects to mention. The 2003 contract expressly supercedes all prior contracts, so HDIC can have no permission from some prior undisclosed contract (and Plaintiff contends HDIC never had permission to fax him advertisements). (PSOAF ¶14). The name Brodsky Ingrassia Life appears nowhere in the 2003 Contract, (PSOAF ¶12), so HDIC cannot have permission based on the 2003 Contract.

In sum, Plaintiff has standing as a matter of law.

III. THE FACSIMILE IS AN ADVERTISEMENT.

Notwithstanding that the Facsimile at issue implores recipient brokers/producers to "Sell HumanaDental and HumanaVision plans," and notwithstanding that the Facsimile references a brochure and flier the recipient can access to help sell HumanaDental and HumanaVision products, HDIC claims the Facsimiles are not advertisements under the TCPA, but are instead "informational producer communication" which told agents what products were available for sale and which did not seek to sell insurance products to the recipient agents. (Def.'s Br. at 11, 12).

HDIC's argument collapses under its own weight and is further conclusively disposed of by the text of the Facsimile, the testimony of Buehler and Burleton, and the case authority that HDIC mistakenly relies upon. As noted above, an "advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services." 47 U.S.C. § 227(a) (4). It cannot be seriously contended that the Facsimile at issue does not do just that – it advertises the commercial availability and quality of HumanaDental dental plans, including those insured by

HDIC. HDIC's argument that the Facsimile is an "informational producer communication" letting the brokers know there are HumanaDental and HumanaVision insurance products available to be marketed and sold is nothing less than an admission the Facsimile is an advertisement under the TCPA.

Further underscoring the baseless nature of this argument is the text of the Facsimile, which has been set forth in detail in PSOAF ¶¶27-31, and is incorporated by reference herein. Specifically, in addition to encouraging the recipients in the Facsimile to "Sell HumanaDental plans," and the reference to dental brochures to assist in this effort, the Facsimile expressly states the Humana Specialty Benefits has "made it even easier for them [employers] and you [brokers/agents] **to do business with us** . . ." (PSOAF ¶28). This language makes the claim the Facsimile is not "advertising the commercial availability or quality of any property, goods, or services," 47 U.S.C. § 227(a)(4), nothing short of frivolous. Adding to the overwhelming record evidence demonstrating the Facsimile is an advertisement is the testimony of Burleton and Buehler. *See* PSOAF ¶¶37-40, incorporated by reference herein.

Several courts have rejected creative arguments that particular junk faxes were not advertisements because they did not directly offer the sale of any goods or services. In *Green v. Time Insurance Company*, 629 F. Supp. 2d 834, 837 (N.D. Ill. 2009), the court found that the fax advertisement in issue was "clearly" an "unsolicited advertisement" in that it advertised the availability and quality of Time insurance's products and service. The court rejected the argument that the fax was not an advertisement but an invitation to establish a business relationship, stating that "the TCPA does not require an overt sales pitch to the recipient for a cause of action to exist." *Id.* In *Stonecrafters, Inc. v. Almo Distributing New York, Inc.,* No. 07 C 5105 (N.D. Ill. July 23, 2008)(attached to Appendix of Exhibits as Exhibit 29), the district court held that an advertisement for purposes of the TCPA is not limited to a direct sale of any specific product as "such overt

advertising techniques are not required to maintain a cause of action under the TCPA." *See also Holtzman v. Turza*, 2008 WL 2510182, at *2, (N.D. Ill. June 19, 2008) (the plain text of the TCPA does not require that the fax to propose a sale, but merely just advertise the "commercial availability" of defendants services); *Schumacher Fin. Svcs., Inc. v. Steckelberg,* No.: 03 AC-8706 Y CV, at *5 (Mo. Cir. Ct., Oct. 14, 2003) (attached to Appendix of Exhibits as Exhibit 30) (to be an advertisement under the TCPA, a fax "need only make known to, or notify, someone about the commercial availability of any property, goods or services"); *Harjoe v. Colonial Life & Accident Ins. Co.,* No. 02 CC-1983, at 3, 4 (Mo. Cir. Ct. Aug. 29, 2002) (attached to Appendix of Exhibits as Exhibit 31) (no requirement that to be covered by TCPA, goods or services advertised actually must be for sale, they only have to be advertised.)

Here, the Facsimile is replete with statements that advise the recipient of the availability of HumanaDental products, offers materials to the recipient to market those products, encourages recipients to "Sell HumanaDental and HumanaVision plans and earn credits towards Humana's Leaders Club trip to Maui in 2009," and claims "[w]e've made it even easier for them [employers] and you [brokers/agents] **to do business with us.**" (PSOAF ¶¶20, 27-31, 49-60). In short, HDIC's claim the Facsimile is not an advertisement is unsupportable.

Finally, the case law relied upon by HDIC, most of which concerns free seminars, is inapplicable and easily distinguished. Like the defendant in *Stonecrafters*, HDIC relies upon *Phillips Randolph Enterprises v. Adler-Weiner Research Chicago, Inc.*, 526 F. Supp. 2d 851 (N.D. Ill. 2007), and *Ameriguard, Inc. v. University of Kansas Medical Center Research Institute, Inc.*, 2006 WL 1766812 (W.D. Mo. June 23, 2006), but those cases are inapplicable. (*See* Def.'s Br. at 5, 6). In fact, in *Stonecrafters*, the court specifically distinguished *Ameriguard* and *Phillips*: "Unlike the faxes in those cases, both of which involved non-commercial research studies, defendant's advertisement in this case is directly linked to commercially available appliances and even includes the logos of certain manufacturers

whose products presumably will be the focus of the training session." *Stonecrafters*, at 2.

HDIC reliance on *Holmes v. Back Doctors, Ltd.*, 2009 WL 3425961 (S.D. Ill. Oct. 21, 2009), order amended to remand state law claims, 695 F.Supp.2d 843 (S.D. Ill. 2010) and *Phillip Long Dang, D.C., P.C. v. XLHealth Corp.*, 2011 WL 553826 (N.D. Ga. Feb. 7, 2011), is equally misplaced. In *Holmes*, in finding that the faxes at issue were not advertisements, the court noted that the faxes contained information regarding the care and treatment of various medical disorders, the faxes were issued on a regular schedule, the text of the faxes changed issue to issue, and that the faxes were sent to personal injury law firms that "have been logged as being willing to receive faxes from Back Doctors." *Holmes*, at *4. Here, the Facsimile was sent as part of a 22,000 fax blast touting the availability of HumanaDental and HumanaVision insurance products. *XHealth* concerned whether a fax that alerted the recipient to a seminar wherein defendant's explained their billing practices constituted an advertisement. *XHealth*, at *4. Moreover, in *XHealth*, the court specifically stated that there was "nothing in the communication which seeks to sell insurance to the [fax] recipient, or even promote the benefits of becoming a contracted provider, assuming the recipient was not one already." *XHealth*, at *4. Here, the exclusive purpose of the Facsimile is to encourage the sale of insurance.

Finally, HDIC's argument that the faxes at issue are "transactional" communications, *see* Def.'s Br. at 13, is a nonstarter. From at least October 2006 to the present, Plaintiff has never sold any "Humana" related insurance plans or products to any of his past or present clients. (PSOAF ¶19).

IV. PLAINTIFF'S EBR/CONSENT ARGUMENT FAILS; ANY PURPORTED CONSENT WAS REVOKED AND THE FACSIMILE FAILS TO INCLUDE A PROPER OPT-OUT.

HDIC also argues that pursuant to the 2006 Contract with "Humana Insurance Company," "Humana Health Plan, Inc.," and "all their affiliates," executed in October of 2006, *see* PSOAF ¶15,

which permitted "communication" by facsimiles, *see* PSOAF ¶17, Plaintiff consented to receive fax advertisements from HDIC. (Def.'s Br. at 13, 14). HDIC's argument fails for several reasons.

First, as discussed *supra*, Plaintiff revoked any permission to send any facsimiles to his fax number, much less fax advertisements. *See supra* at 10, incorporated by reference herein, and PSOAF ¶¶21, 22.

Second, even if this Court holds that pursuant to the 2006 Contract, HDIC as an "affiliate" had express consent to fax advertisements to Plaintiff, which Plaintiff denies[3], HDIC still violated the TCPA because the subject faxes do not contain the required "opt-out" notice. The TCPA states that a sender of an unsolicited fax advertisement "shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if …" 47 U.S.C. § 227(b)(2)(D). The notice must: (1) be clear and conspicuous and on the first page of the advertisement; (2) state that the recipient may make a request to the sender not to send any future unsolicited advertisements and that failure to comply within 30 days is unlawful; (3) set forth the requirements for a request under 47 U.S.C. § 227(b)(2)(E)[4]; (4) include a domestic contact telephone and facsimile number for the recipient, and a cost-free mechanism for a recipient to transmit a request; and (5) permit the recipient to make such a request at any time on any day of the week. *See* 47 U.S.C. § 227(b)(2)(D)(i-vi); and 47 C.F.R. § 64.1200(a)(3)(iii).

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[3] Moreover, the FCC stated that "[t]o permit companies to transfer their EBRs to affiliates would place an enormous burden on consumers to prevent faxes from companies with which they have no direct business relationship." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 2006 WL 1151584 at * 25969, *supra*. As a result, an "enormous burden" would be placed on Plaintiff if HDIC were permitted to send Plaintiff fax advertisements when Plaintiff has not conducted any business with HDIC. Humana, Inc. 69 subsidiaries in 2008. (PSOAF ¶65). Plaintiff did not expressly authorize sixty-nine different companies to fax him advertisements

[4] 47 U.S.C. § 227(b)(2)(E) states that a request not to send future unsolicited advertisements will be binding only if: (1) identifies the telephone number or numbers of the telephone facsimile machine to which the request relates; (2) the request is made to the telephone or facsimile number of the sender; and (3) the person making the request has not "subsequent to such request" provided express invitation or permission to the sender.

Moreover, 47 C.R.F. § 64.1200 states, "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." 47 C.F.R. § 64.1200 (a)(3)(iv). *See also Vandervort v. Balboa Capital Corp.*, 2012 WL 5248420, at *6 (C.D. Cal. Oct. 23, 2012)("The FCC's TCPA regulation now also prohibits sending solicited fax advertisements without the required opt-out notice.")[5]

Here, the Facsimile provides: "If you don't want us to contact you by fax, please call 1-800-U-CAN-ASK." (PSOAF ¶20). That language fails to satisfy the requirements of the TCPA and the Regulations for four reasons.[6] First, the opt-out notice is not "clear and conspicuous" because it is in small font at the bottom of the page. Second, the opt-out notice does not state that Humana Specialty Benefits or HDIC's failure to comply with an opt-out request within 30 days is unlawful. Third, the opt-out notice does not identify the statutory requirements Plaintiff would have to follow to make an effective opt-out request. *See* fn.5, *supra*. Fourth, the opt-out notice does not include a facsimile number for Plaintiff to send an opt-out request to and HDIC has not established that the

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[5] It must also be noted that the district court in *Nack v. Walburg*, 2011 WL 310249, at *4 (E.D. Mo. Jan. 28, 2011), held that the opt-out requirement only applies to unsolicited, not solicited advertisements. However, *Nack* is currently on appeal in the United States Court of Appeals for the Eighth Circuit, as *Michael R. Nack v. Douglas Paul Walburg*, No. 11-1460. Furthermore, the FCC in that appeal filed an Amicus Brief urging reversal, a copy of which is attached to the Appendix of Exhibits as Exhibit 31. As stated by the FCC:

> The plain language of 47 C.F.R. § 64.1200(a)(3)(iv) requires facsimile advertisements sent with the recipient's consent to contain an opt-out notice . . . By contrast, construing the regulation to apply only to unsolicited faxes – as the court below held – would render it entirely duplicative of the separate opt-out notice requirement applicable to such faxes contained in 47 C.F.R. § 64.1200(a)(3)(i)-(iii). Because the district court's reading of the FCC's regulation is inconsistent with its text, and undermines the goals of Congress and the FCC in regulating abusive telemarketing practices, the decision below should be reversed.

(FCC Amicus Brief, at 10, 11).

[6] A Colorado Court held that a similar opt-out notice – "If you wish to be removed from this list please call 800-915-2571 Ext 12560, or fax your documents to 512-249-5336 with the word remove written on it. Thank you." – failed to meet the TCPA's opt-out notice requirements. *A&L Abatement, LLC v. Construction Expo, Inc.*, 08 CV 1223, District Court, Denver Colorado (October 28, 2009), attached to the Appendix of Exhibits as Exhibit 33.

"1-800-U-CAN-ASK" number is available 24 hours a day, 7 days a week.

In short, the failure of HDIC (or any other Humana entity) to include the required opt-out trumps any claimed EBR or permission to send Plaintiff fax advertisements. *See* 47 U.S.C. § 227(b)(2)(D)(i-vi); and 47 C.F.R. § 64.1200(a)(3)(iii)(A-E) and (iv); *Vandervort v. Balboa Capital Corp.*, 2012 WL 5248420, at *6. As a matter of law, HDIC's claimed EBR and or permission argument fails.

Third, the 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, in writing or otherwise." 47 U.S.C. § 227 (a)(5) (emphasis added). *Black's Law Dictionary* (8th ed. 2004) defines "express consent" as "[c]onsent that is clearly and unmistakably stated." Similarly, it defines "express" as "[c]learly and unmistakably communicated; directly stated." *Id.*

HDIC's reliance on the 2006 Contract's clause allowing communication by fax is misplaced. An agreement to "communicate" by fax is not an "express" invitation or permission to receive advertisements. *Travel 100 Group, Inc. v. Mediterranean Shipping Co., Inc.*, 383 Ill. App. 3d 149, 889 N.E.2d 781 (1st Dist. 2008), cited by HDIC, illustrates the 2006 Contract did not give anyone "express" permission or invitation to send Plaintiff advertisements. In *Travel 100*, the plaintiff expressly consented "receive information and travel-related facsimile communications … including material advertising the commercial availability or quality of property, goods or services from IATAN." *Travel 100*, 383 Ill. App. 3d at 155, 889 N.E.2d at 787. Here, Plaintiff only agreed to the receipt of "communication" from "Humana Insurance Company," "Humana Health Plan, Inc." and "all of their affiliates." Plaintiff never "expressly" permitted or invited those companies and certainly did not advise HDIC to send him fax advertisements.

HDIC's reliance on *Practice Management Support Services, Inc. v. Appeal Solutions*, 2010 WL 748170 (N.D. Ill. March 1, 2010) and *David L. Smith and Associates v. Advanced Placement Team, Inc.*, 169 S.W.3d 816, 820 (Tex. App. Ct. 2005) is misplaced. (HDIC's Br. at 14). Neither of those cases dealt a plaintiff who expressly revoked any purported authority to send any facsimiles, much less fax advertisements, as Plaintiff has done here. (*See* PSOAF ¶¶21, 22). Furthermore, unlike in *Practice Management*, the Magistrate Judge found that plaintiff failed to rebut defendants' statement of uncontested Plaintiff has alleged and demonstrated that HDIC violated the opt-out provisions of the TCPA and Regulations. (Am. Compl. ¶29).

V. HDIC'S SECOND MOTION TO RECONSIDER THE DENIAL OF ITS MOTION TO DISMISS BASED ON *RES JUDICATA* FAILS.

Plaintiff originally filed suit against Humana, Inc. regarding the Facsimile advertisements that are the subject of this lawsuit. That case, *Brodsky v. Humana, Inc.*, was pending before Judge Phillip Reinhard in the Western Division of this Court. Plaintiff subsequently concluded HDIC was the "sender" of the Facsimile and thus the proper defendant and sought to substitute HDIC as a defendant. The motion was opposed by Humana, Inc. and subsequently denied. Thereafter, in an Order dated December 22, 2009, Dkt. No. 83, Judge Reinhard dismissed *Brodsky v. Humana, Inc.*, stating in part as follows:

> Accordingly, Humana, Inc. is dismissed as a defendant without prejudice. Its pending motions for summary judgment [47] and to dismiss [59] are denied as moot.
>
> The court has no subject matter jurisdiction to consider anything further in this case. The case is dismissed in its entirety for lack of subject matter jurisdiction.

(PSOAF ¶74). Judgment in *Brodsky v. Humana, Inc.* was also entered on December 22, 2009, Dkt. No. 84, as follows:

> IT IS HEREBY ORDERED AND ADJUDGED that Humana, Inc. is dismissed as a defendant without prejudice and the case is dismissed in its entirety for lack of subject matter jurisdiction. All pending motions are denied as moot.

(PSOAF ¶75). HDIC did not seek to amend or appeal this Judgment.

HDIC has previously sought to dismiss this case on the basis of res judicata. The motion was denied by Judge Holderman, who not surprisingly found the dismissal was without prejudice and thus not on the merits. *Brodsky v. HumanaDental Ins. Co.*, 2011 WL 529302, at *5 (N.D. Ill. Feb. 11, 2011). Thereafter, HDIC filed a motion to reconsider, which was also denied by Judge Holderman, who again found that Plaintiff's claims were not barred by res judicata. (Order entered July 25, 2011, Dkt. No. 32, at 2). Simply stated, a dismissal without prejudice is not a judgment on the merits, so it does not have a res judicata effect. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990); *Bernstein v. Bankert*, 2012 WL 6601218, at *23 (7th Cir. (Ind.) Dec. 19, 2012).

HDIC now claims in its second motion to reconsider this issue that the Seventh Circuit's decision in *Joseph v. Elan Motorsports Technonolgy Racing Corp.*, 638 F.3d 555 (7th Cir. 2011) "confirms that the district court's dismissal order was indeed "on the merits." (Def.'s Br. at 21). HDIC is mistaken. The gravamen of HDIC's argument is that based on *Joseph*, Judge Reinhard's dismissal without prejudice based on lack of subject matter jurisdiction is wrong in that it should have been "with prejudice." HDIC's argument fails as a matter of law because it is nothing more than an impermissible collateral attack on the judgment entered by Judge Reinhard in *Brodsky v. Humana, Inc.*

In *Hudson v. Hedge*, 27 F.3d 274 (7th Cir. 1994), the Seventh Circuit, after noting that the district court's dismissal of plaintiff's prior lawsuit with prejudice may have been "mistaken," stated the following:

> But [plaintiff] did not ask [the district court] to change his dismissal to one without prejudice to one with prejudice and did not appeal from that decision; he cannot use a new suit to contend that the disposition of the first was mistaken.

Hudson, 27 F.3d at 276, *citing Federated Dep't Stores, Inc. v. Moite*, 452 U.S. 394, 398 (1981) (res judicata consequences of a final, unappealed judgment on the merits are not altered altered by the fact that the judgment may have been wrong or rested on a legal principal subsequently overruled in another

case.) Similarly, in *Amer. Bottom Conser. v. U.S. Army Corps of Engineers*, 650 F.3d 652 (7th Cir. 2011), the Seventh Circuit, in reversing the district court's dismissal of plaintiff's lawsuit without prejudice based on lack of Article III standing, rejected defendant Waste Management's argument that the Seventh Circuit should have nonetheless granted summary judgment in their favor (a decision on the merits), stating as follows:

> The request is improper. The district court dismissed the suit without prejudice, because on the view it took of standing it had no jurisdiction; it therefore could only dismiss without prejudice. Were we to decide the case on the merits we would be directing the entry of judgment with prejudice; otherwise the plaintiff would be free to relitigate the case. An appellee who wants, not that the judgment of the district court be affirmed on an alternative ground, but that the judgment be changed, in this case from a dismissal without to dismissal with prejudice, must file a cross-appeal. Waste Management didn't do so.

Amer. Bottom Conser., 650 F.3d at 660 (internal citations omitted). *See also Federal Election Commission v. Al Salvi for Senate Committee*, 205 F.3d 1015, 1020 (7th Cir. 2008) (for purposes of res judicata, party cannot use second case "to revisit decisions in the first action it should have challenged directly").

In the same way, HDIC cannot use the instant case to challenge collaterally the dismissal without prejudice based on lack of subject matter judgment rendered by Judge Reinhard in *Brodsky v. Humana, Inc.* *See Federated Dep't Stores*, 452 U.S. at 398; *Amer. Bottom Conser.*, 650 F.3d at 660; *Al Salvi for Senate*, 205 F.3d at 1020; *Hudson*, 27 F.3d at 276. If Humana, Inc. (a different party, *see infra*) had wanted to challenge the dismissal "without prejudice," it should have done so in *Brodsky v. Humana, Inc.* It may not do so here. Furthermore, HDIC's reliance on *Joseph* to support its argument is misplaced. *Joseph* <u>did</u> <u>not</u> involve a second lawsuit wherein a party was challenging a finding in the first lawsuit, as HDIC impermissibly attempts to do so here. HDIC's argument that "the District Court's dismissal order in the prior litigation likewise should have been characterized as – and indeed was in substance – a dismissal on the merits in light of Plaintiff's admission that Humana, Inc. was not liable for the matters alleged in the pleadings," (Def.'s Br. at 22), reveals the the fatal

flaw in its argument -- it simply thinks Judge Reinhard got it wrong in *Brodsky v. Humana, Inc.* As demonstrated above, that is an impermissible collateral attack.

Second, HDIC is unable to establish identity of the parties for res judicata. The Seventh Circuit has stated that whether privity exists between parties is a fact-intensive determination reviewed on a "sliding scale." *In the Matter of L & S Indus., Inc.*, 989 F.2d 929, 932 (7th Cir. 1993). In the recently decided case of *Bernstein v. Bankert*, 2012 WL 6601218, at *26 (7th Cir. (Ind.) Dec. 19, 2012) (citation omitted), the court stated that "[w]hether there is privity between a party against whom claim preclusion is asserted and a party to prior litigation is a functional inquiry in which the formalities of legal relationships provide clues but not solutions." It is a "fact specific analysis." *Id.*

Here, HDIC has expressly taken the position it is not in privity with Humana, Inc., arguing in its Response to Plaintiff's Motion to Compel that "Humana, Inc. and HDIC are different entities, in different circumstances" and that they are not "one and the same." (PSOAF ¶72). Moreover, HDIC succeeded in convincing Judge Mason of this assertion as well. In ruling on the Motion to Compel, Judge Mason stated in part: "However, Humana is a separate entity, and Humana's production in a separate case does not convince us that this defendant should necessarily have responsive documents here." (PSOAF ¶73).

Quite simply, HDIC is judicially estopped to reverse its previously successful position. "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *In the Matter of Cassidy*, 892 F.2d 637, 641(7th Cir. 1990) (citation omitted). Judicial estoppel applies not only to questions of fact but also to legal positions. *Id.* at 641-42. Moreover, although judicial estoppel is usually applied in successive suits, it is not so limited; a party can argue inconsistent positions in the alternative, but once it has sold one to the court, it cannot turn around and repudiate it in order to have a second victory. *Continental Illinois Corp. v. Com'n of Intern. Rev.*, 998

F.2d 513, 518 (7th Cir. 1993). That is exactly what HDIC is attempting to do by claiming that it is in privity with Humana, Inc. HDIC is judicially estopped from doing so. *Cassidy*, 892 F.2d at 641.[7]

Finally, HDIC cites to *Aetna Casualty and Surety Co. of Hartford Connecticut v. Kerr-McGee Chem. Corp.*, 875 F.2d 1252, 1257 (7th Cir. 1989) and *Janusz v. FASCO Indus., Inc.*, 1999 WL 162793, at *5 (N.D. Ill. March 15, 1999), for the proposition that simply because Humana, Inc. and HDIC are parent and subsidiary, they are in privity. HDIC is mistaken. In *Aetna*, Kerr-McGee sued "on behalf of" its subsidiary corporations, prompting the Seventh Circuit to find that the parent's and the subsidiaries' interest were "sufficiently congruent to satisfy the "same parties" requirement of section 2-619(a)(3)." *Aetna*, 875 F.2d at 1257. No such facts are present in this instant case – Humana, Inc. did not sue on behalf of HDIC for injuries HDIC has suffered. Moreover, the Seventh Circuit was applying Illinois law in making its determination in *Aetna*, not federal law, which is applicable in the instant case. *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1289 n.4 (7th Cir. 1993) *Januusz* is equally unpersuasive. There, the district court with no application of the facts simply cited to *Aetna* and stated that the Seventh Circuit "has also found that a corporation and its subsidiaries are in privity for res judicata purposes." In *Aetna*, the Seventh Circuit did make such a finding, but the facts in *Aetna*, as noted above, simply do not apply here.

CONCLUSION

HDIC as the party moving for summary judgment has the burden of demonstrating that there are no genuine issues of material fact and that they are entitled to summary judgment as a matter of law. As this Memorandum of Law and Plaintiff's Statement of Additional Facts That Require Denial of Summary Judgment conclusively demonstrates, HDIC cannot meet that burden. Accordingly, its motion for summary judgment should be denied.

---

[7] Alternatively, HDIC's statements constitute judicial and or evidentiary admissions that require denial of HDIC's motion for summary judgment based on res judicata. See *Lefkas General Partners v. Lefkas General Partners*, 153 B.R. 804, 807 (N.D. Ill. 1993). "Any 'deliberate, clear and unequivocal statement, either written or oral, made in course of judicial proceedings qualifies as a judicial admission.

Respectfully submitted,

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EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE S. BRODSKY,	)	
Individually and as the representative of	)	
a class of similarly-situated persons	)	
	)	**No.: 1:10-cv-03233**
Plaintiff,	)	
	)	
vs.	)	**Judge Durkin**
	)	
HUMANA DENTAL INSURANCE	)	
COMPANY d/b/a HUMANA SPECIALTY	)	
BENEFITS,	)	
	)	
Defendant.	)	

HUMANADENTAL INSURANCE COMPANY'S REPLY IN SUPPORT OF
ITS AMENDED MOTION FOR SUMMARY JUDGMENT

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HumanaDental Insurance Company, defendant herein ("HDIC"), states as follows for its Reply in support of its Amended Motion for Summary Judgment:

I. INTRODUCTION

For four and one-half years, Plaintiff has been pursuing litigation under the Telephone Communications Protection Act, 47 U.S.C. §227 ("TCPA"), and other state law theories seeking to recover damages for two faxes sent to the same number on May 14, 2008. Plaintiff's first effort at recovery was unfruitful: He filed an action against Humana Inc. (HDIC's parent company) which was dismissed by the Western Division on December 22, 2009. He appealed the dismissal, then dismissed the appeal. He thereafter filed this action against HDIC seeking to recover for the same transmission, even though: (1) the faxes were not sent by, or on behalf of, HDIC, and therefore were not actionable under any theory; (2) the faxes were not sent to Plaintiff, and therefore were not actionable under any theory; (3) the faxes were not an advertisement and therefore not actionable under the TCPA; (4) Plaintiff *and* the entities to whom the faxes were sent had expressly consented to them, thereby rendering the faxes not actionable under any theory; and (5) all of Plaintiff's current claims against HDIC are barred under the doctrine of *res judicata* in light of the disposition of his original action against Humana Inc. In its Amended Motion for Summary Judgment, HDIC established that it is entitled to judgment as a matter of law on all counts of the currently pending Amended Complaint for these reasons. Plaintiff's Response memorandum offers nothing to affect the ineluctable outcome of this litigation: HDIC remains entitled to summary judgment on the Amended Complaint in its entirety.

II. ARGUMENT

A. HDIC Is Not The Entity That Sent The Fax, Neither Was The Fax Sent On HDIC's Behalf.

HDIC established it is entitled to summary judgment because it did not send the subject fax, neither was it sent on HDIC's behalf. Plaintiff apparently does not dispute the fax was created by the Marketing Department of Humana Inc. (not HDIC), at the direction of Melanie Buehler, who then was employed by Humana Insurance Company (not HDIC), and that the fax was physically transmitted by the Information Technology Group of Humana Inc. (not HDIC). (SOF 42-49)[1] In spite of these undisputed facts, Plaintiff insists HDIC was nonetheless a "sender" within the meaning of 47 C.F.R. §64.1200(f)(10), which defines a "sender" as "the person or entity whose goods or services are advertised or promoted in the unsolicited advertisement." Plaintiff argues that, even though HDIC did not create, direct the creation of, or transmit the fax, HDIC was still a "sender" because its products were "promoted" in the fax. Plaintiff's characterization of the substance of the fax is simply wrong.

First of all, on its face the fax describes three specific product lines: DHMO Products; "Advantage Plus" dental plans, which "use the HumanaDental Advantage Plus Network"; and "HumanaVision VCP." (SOF ¶¶50-53). It is undisputed HDIC was not the insuring company for any of these three products when the fax was transmitted. (*Id.*) The fax therefore clearly does not "promote" or "advertise" HDIC products.

Plaintiff asserts that the phrase, "Sell HumanaDental and HumanaVision plans and earn credits towards Humana's Leaders Club trip to Maui in 2009," which appears on the fax, refers to any dental plan that falls under the "Humana Specialty Benefits marketing umbrella," and that

[1] References to HDIC's Statement of Material Facts pursuant to L.R. 56.1(a)(3) are cited herein as "SOF ¶__."

the Humana Specialty Benefits" marketing name includes HDIC products.[2] On that basis Plaintiff claims the fax promotes HDIC products. But Plaintiff ignores the clear point of the fax – to provide information to agents holding contracts with Humana companies about three product lines *in particular* -- DHMO Products, "Advantage Plus" dental plans, and "HumanaVision VCP" -- and *none* of those product lines are sold or insured by HDIC. (SOF ¶¶50-53; RSOAF ¶36[3])

Plaintiff also points to language in the fax informing agents they can order brochures over a *secure* website (on which agents may "log in"). Plaintiff asserts that these brochures mentioned products for which HDIC was the insuring company. Plaintiff thus appears to argue that, because the fax reminded agents they could *log in* to a secure website, and because the agent could *order* brochures through the website, and because those brochures mentioned a myriad of products, a *few* of which were insured by HDIC, the fax *itself* therefore effectively "advertised HDIC products." This argument – strained to say the least – clearly holds no water. First of all, the point of the fax was to inform agents concerning three specific product lines, *none* of which were sold or insured by HDIC. (RSOAF ¶36) Second, the *brochures* were not faxed to Plaintiff; thus, the content of the brochures is completely irrelevant. Third, even if they had been faxed, they were not "advertisements," but informational pieces for agents of Humana companies. (RSOAF ¶48). Fourth, the two products mentioned in the brochures that were insured by HDIC were not among the three product lines specified in the fax. (RSOAF ¶¶ 36.) The fact that the brochures may have mentioned two products that were insured by HDIC does not change the fact that the *fax itself* did not promote HDIC products. The TCPA is concerned

[2] The term "Humana Specialty Benefits" is, and was in 2008, a marketing brand referring to a group of insurance products issued by several different companies in the Humana family and is not the name of a corporate entity. SOF ¶54.

[3] References to HDIC's Response to Plaintiff's Statement of Additional Facts pursuant to L.R. 56.1(a)(3) are cited herein as "RSOAF ¶__."

with unsolicited fax advertisements, not the content of brochures an agent under contract with Humana companies can order through a secure website. Nothing in Plaintiff's Response changes the fact that: (a) HDIC did not send the fax; (b) on its face the fax does not advertise, promote or specify HDIC products; and (c) the fax was not sent on HDIC's behalf.[4] HDIC therefore was not the "sender of the fax" under the TCPA and has no liability to Plaintiff under the Act. HDIC likewise is not liable under the two state law claims as it did not commit the alleged wrongful conduct – transmitting a fax – of which Plaintiff complains.

B. <u>The Fax Was Not "Sent" To Plaintiff.</u>

HDIC established in its Motion that it is entitled to summary judgment on the additional ground that the fax was not "sent" to Plaintiff, but to two other entities Plaintiff allowed to use his fax number and machine, and that Plaintiff therefore lacks standing. Plaintiff's efforts to convince this Court of his standing under these peculiar facts fall flat.

Plaintiff first cites *All American Painting, LLC v. Financial Solutions and Assoc., Inc.*, 315 S.W.3d 719 (Mo. 2010). There, the court concluded that the fact that headers on the faxes indicated they were addressed to individuals other than the plaintiff did not, taken alone, deprive the plaintiff of standing to sue under the TCPA. The court based its ruling on its concern that "advertisers could circumvent the [TCPA] and avoid liability completely by simply addressing every advertisement to 'John Doe.'" *Id.* at 724. The case at bar bears no resemblance to the facts in *All American Painting*. Unlike the circumstances in that case, here it is undisputed

[4] 47 C.F.R. §64.1200(f)(10) speaks of parties "on whose behalf" a fax is sent. It appears this narrow concept comes into play primarily when an entity has created its own fax and then retained a vendor to "broadcast" or transmit a multitude of faxes. *See, e.g., Saf-T-Guard Int'l, Inc. v. Wagener Equities, Inc.*, 251 F.R.D. 312 (N.D. Ill. 2008); *Hinman v. M and M Rental Center, Inc.*, 545 F. Supp. 2d 802 (N.D. Ill. 2008); *All American Painting, LLC v. Financial Solutions and Assoc.*, 315 S.W.2d 719 (Mo. 2010). In the instant case there is no evidence HDIC retained an entity to broadcast a fax it had created. Rather, the fax was created by the Marketing Department of Humana Inc., at the direction of an employee of Humana Insurance Company, and physically transmitted by the Information Technology Group of Humana Inc. (SOF ¶¶42-49). Moreover, Plaintiff apparently is proceeding solely on the theory that HDIC was a "sender" in that its goods or services were advertised in the fax. HDIC established in the text above that it was not the "sender" under that, or any, definition.

Plaintiff had expressly allowed approximately 100 other entities to use his fax machine and number, including the two entities – Lawrence S. Brodsky Brokerage Agency a/k/a Brodsky Ingrassia Life and Benefit Marketing Services, Inc. – to which the faxes were sent. (SOF ¶¶27-40, 47, 56) Moreover, those two entities had signed agent contracts with Humana companies (which encompassed HDIC) expressly permitting those companies to send them faxes at the number corresponding to Plaintiff's fax machine. (SOF ¶¶14-20, 21-26) The circumstances in the instant case are thus completely different from those in *All-American Painting*, where the court seemed concerned the party to whom the fax purportedly was sent may have been no more than an unverifiable or perhaps fictitious "John Doe."

Plaintiff asserts that, in enacting the TCPA, Congress was "concerned about the costs imposed on recipients of an unsolicited fax advertisement," but that concern hardly comes into play when the owner of the machine has given *carte blanche* to 100 other entities to send and receive faxes on it, and where the sender transmits faxes to two of those entities with their express permission. (SOF ¶¶27-40) Having voluntarily sustained the "damage" purportedly caused by faxes arriving on his machine, Plaintiff simply did not sustain an actionable injury. *See U.S. v. Wormer*, 80 U.S. 25, 28-29 (1871) (citing the long-established doctrine of *volenti non fit injura*). Otherwise, Plaintiff could assert a claim for *any* fax sent to *any* of the other 100 permitted users of his machine on the basis that *he* had not consented to the receipt of that particular fax – which indeed would be an absurd result.[5]

Plaintiff also points out that the contract between Humana companies and Lawrence S. Brodsky Brokerage Agency a/k/a Brodsky Ingrassia Life identifies *only* "Lawrence S. Brodsky

[5] Plaintiff's reliance on *Physician's Healthsource, Inc. v. Cephalon, Inc.*, an unpublished opinion from another District, is similarly misplaced because, unlike in the case at bar, there was no indication the individual to whom the fax was sent had the fax machine owner's permission to receive faxes at that number, and there was no indication the addressee had consented to the receipt of the fax

Brokerage Agency" as the contracting party, without specifically mentioning "Brodsky Ingrassia Life." Plaintiff thus appears to argue that *Brodsky Ingrassia Life* – whose name appears on the transmitting company's spreadsheet as one of the two entities to which the faxes were sent at the subject fax number (SOF ¶¶47, 56) – did not grant permission in the agent contract for fax communications. First of all, even if Plaintiff were correct, that does not matter. The fax was not directed to *Plaintiff*, and Plaintiff therefore is not the aggrieved party. Moreover, because he voluntarily allowed 100 other parties to receive faxes on his machine, he does not have an actionable injury. *Wormer*, 80 U.S. at 28-29. On these grounds alone, HDIC is entitled to summary judgment. Additionally, Plaintiff testified at his deposition that "Lawrence S. Brodsky Brokerage Agency" and "Brodsky Ingrassia Life" referred to the *same* corporate entity; there had simply been a name change at some point. (SOF ¶14) The corporate entity that had extended its express permission for fax communications in the agent contract was the *same* corporate entity referenced in the transmitting company's records as "Brodsky Ingrassia Life" to which the fax was transmitted. Plaintiff's contention that "Brodsky Ingrassia Life" did not consent to the receipt of fax communications is thus simply not true.[6]

Clearly then, the fax was not sent to Plaintiff. On that basis alone HDIC is entitled to summary judgment on the TCPA claim and on Plaintiff's state law claims. Moreover, the faxes were transmitted to two entities Plaintiff had permitted to use his fax machine, and which had permitted Humana companies to send them faxes at that particular number. Under these circumstances it simply cannot be said the transmitting company "sent" the faxes to Plaintiff, or that Plaintiff sustained an injury entitling him to relief under any theory. HDIC remains entitled

[6] In the section of his Response brief addressing the standing issue, Plaintiff also argues that he revoked any permission he may have given any Humana company to communicate with him by fax. HDIC addresses that argument at pp. 10-11 of this Reply Memorandum, *infra*.

to summary judgment.

C. The Faxes Were Not "Advertisements" Within The Meaning Of The TCPA.

HDIC established in its Motion that it is entitled to summary judgment on the additional basis that the faxes in question were not "advertisements" within the meaning of the TCPA. The faxes did not solicit or encourage the agents to whom the fax was sent to purchase the three product lines described therein; rather, they provided information to the agents concerning products that they, as agents for Humana companies, might keep in mind for their clients. (Even assuming the fax was sent to Plaintiff, it likewise did not solicit Plaintiff to purchase those product lines; it provided Plaintiff with information concerning products he could sell as an agent.) On that basis alone, the faxes were "informational" communications, not "advertisements" within the meaning of 47 U.S.C. §227(a)(5) and the cases cited in HDIC's initial Memorandum.[7] Moreover, the agents to whom the faxes were sent, as well as Plaintiff, had an existing business relationship and agent contract with Humana companies, including HDIC. The faxes merely facilitated their performance under their contracts and thus were not advertisements, but *transactional* communications that do not give rise to liability under the TCPA. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act of 2005, 71 FR 25967-01, 25972-25973 (May 3, 2006). *See also N.B. Industries v. Wells Fargo & Co.*, No. C 10-03203 LB, 2010 WL 4939970 (N. D. Cal. Nov. 30, 2010).[8]

Plaintiff contends, however, that the faxes constituted advertisements, and in support cites a number of cases, none of which are applicable. Plaintiff first cites *Green v. Time Insurance Co.*, 629 F. Supp. 2d 834 (N.D. Ill. 2009). But in that case, the fax solicited the

[7] See HDIC's Memorandum in Support of its Amended Motion for Summary Judgment, pp. 8-13.

[8] See HDIC's Memorandum in Support of its Amended Motion for Summary Judgment, pp. 11-13.

recipient to *become* an agent with the company that had sent the fax. In the instant case, the fax did not solicit anyone enter into an agent contract; it advised existing brokers about three product lines they already were authorized to offer. The parties to which the fax was sent already *had* agent contracts with Humana companies – as did Plaintiff. In furtherance of that existing business and contractual relationship, the fax provided information to the receiving agent concerning products he was authorized to offer in his role under the agent contract. The faxes in the instant case thus were informational or transactional communications which do not give rise to liability under the TCPA. The faxes in *Green* clearly served a different purpose altogether.

Plaintiff also cites an unpublished order entered in *Stonecrafters, Inc. v. Almo Distributing New York, Inc.*, No. 07 C 5105 (N. D. Ill. July 23, 2008). In that case, however, the fax invited the recipient to a "training" session concerning products the sender obviously hoped the *recipient* would *buy*. Unlike in the instant case, the fax did not merely provide information concerning products the recipient was contractually authorized to *sell*; neither did the fax facilitate the recipient's performance under an existing established business relationship and contract. It was a rather transparent attempt to draw the recipient – with whom no contractual or established business relationship existed -- to the point of purchasing the sender's products.

The remaining cases cited by Plaintiff are equally inapplicable. In *Holtzman v. Turza*, 2008 WL 2510182 (N. D. Ill. June 19, 2008), an attorney had sent an unsolicited fax that discussed the use of computers and stated he practiced in the area of "estate planning," "post-mortem administration" and "business succession planning." *Id.* at *1. The court denied the defendant's motion to dismiss, noting "at the very least [the fax] had the effect of informing [recipients] that defendant was an attorney who did work in" the areas described in the fax and that "a recipient likely would have inferred that defendant's services were commercially

available and could be obtained by contacting the defendant at his office." *Id.* at *2. In contrast to the case at bar, the obvious purpose of the fax was to encourage the *recipient* to purchase defendant's products or services; it did not merely provide information concerning products the recipient already was contractually authorized to sell. Neither did the fax facilitate the recipient's ability to perform under an existing business relationship or contract as in the instant case.

In *Schumacher Financial Services, Inc. v. Steckelberg*, No. 03AC-008706 (Mo. Cir. Ct., October 14, 2003), an unpublished opinion of a Missouri state trial court denying a motion to dismiss and having no precedential value in this Court, the nature of the fax is not clearly described. However, it appears to have contained an offer of a "free report" that obviously was intended to encourage the recipient to retain the sender's financial services. Again, unlike the instant case, the fax appears to have been intended to prompt the *recipient* to retain the sender's services and did not merely provide information to the recipient to enable him to perform under an existing contract with the sender.

Finally, in *Harjoe v. Colonial Life & Accident Insurance Co.*, 02CC-001983 (Mo. Cir. Ct. August 29, 2002), yet another unpublished opinion of a Missouri state trial court of no precedential significance, the nature of the fax is similarly unclear, but it appears to have solicited the recipient to enter into an employment or contractual relationship with the sending company. Again, in the instant case, the fax did not solicit the recipient for any purpose; moreover, the recipients (and Plaintiff) already *had* an existing business relationship and agent contract with Humana companies.

Plaintiff's arguments cannot change the substance of the faxes or the circumstances under which they were sent. The faxes were not "advertisements" as that term has been construed

under the TCPA, but were informational or transactional communications. The cases cited by Plaintiff clearly did not concern faxes of an informational or transactional in nature and have no application whatsoever in the case at bar. The faxes therefore were not actionable under the TCPA under any circumstances.

D. The Recipients and Plaintiff Had Extended Their Written Permission To All Humana Companies, Including HDIC, To Send The Fax.

HDIC established in its Motion that the faxes at issue were not "unsolicited," and therefore not actionable under the TCPA, because Plaintiff and the actual recipients had given their express permission for fax communications from Humana companies in their agent contracts.[9] Plaintiff nonetheless has offered a number of theories as to why the express permission contained in the contracts does not matter, none of which have any merit.

Plaintiff first claims that, regardless of whether he had extended permission for fax communications in his agent contract, *he* "revoked" that permission in a vaguely-described telephone conversation with an unknown person at an unknown telephone number. Of course, the faxes were *not* sent to Plaintiff, but to two other entities Plaintiff had allowed to use his machine, and who expressly consented to receive faxes from Humana companies. Whether *Plaintiff* purportedly revoked his consent is therefore irrelevant. Moreover, there is no suggestion that either of the entities to which the fax actually was sent revoked *their* consent. But Plaintiff's references to his alleged telephone conversation must be disregarded for an additional reason. For a telephone conversation to be admissible, Plaintiff must offer "evidence that a call was made to a particular number assigned at the time to: (A) a particular person, if

[9] An actionable "unsolicited advertisement" is explicitly defined in the TCPA as "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, in writing or otherwise*." 47 U.S.C.§227(a)(5) (emphasis added). Plaintiff and the actual recipients of the faxes consented in writing to the faxes in their respective agent contracts and, thus, the faxes were not unsolicited. Of course, the faxes were not "advertisements" either, as established in HDIC's initial Memorandum and *supra*.

circumstances, including self-identification, show that the person answering was the one called; or (B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone." FED. R. EVID. 901. In the instant case, Plaintiff has not identified the telephone number he allegedly called, the particular company he allegedly called, the name or title of the person with whom he allegedly spoke, or the date of the conversation. The alleged conversation is therefore not authenticated under Rule 901, and the substance of the alleged conversation is inadmissible. Because it is inadmissible, that conversation, and Plaintiff's alleged "revocation" of his consent, cannot be considered in this summary judgment proceeding. *Gunville v. Walker*, 583 F.3d 979, 985 (7th Cir. 2009).

Plaintiff next suggests that HDIC is a mere "affiliate" under the agent contracts and questions whether the express permission contained therein applies to HDIC as an "affiliate." Again, HDIC reiterates it was not the sender of the fax. Regardless, Plaintiff is misreading the contracts. HDIC was not merely an *affiliate* of a party to the contracts, it *was* a party to the contracts. The parties to the contracts are the agent on the one hand and "Humana Insurance Company, Humana Health Plan, Inc., and all of their affiliates" on the other -- which Plaintiff does not dispute includes HDIC. Plaintiff's "affiliate" argument is therefore flat wrong.

Plaintiff also argues that, regardless of whether express permission was given for the fax, HDIC is still liable because the "opt-out" language at the bottom of the fax does not comply with an FCC regulation, 47 C.F.R. §64.1200(a)(3). The *statute* governing opt-out language, 47 U.S.C. §227(b)(2)(D), by its clear terms applies only to "unsolicited" fax advertisements, and Plaintiff appears to acknowledge this. The TCPA itself therefore does not require opt-out language for faxes sent with permission. Plaintiff contends, however, that the regulation goes further than the statute and requires specific opt-put language even for faxes sent *with*

permission. It is clear, however, that the regulation applies – and can only apply – to *unsolicited* faxes. Because the entities to which the faxes were sent – as well as Plaintiff – expressly consented to the faxes, the opt-out notice requirements are inapplicable.

Nack v. Walburg, 2011 WL 310249 (E.D. Mo. Jan. 28, 2011), which Plaintiff acknowledges in his brief, is precisely in point. In that case, the plaintiff contended he was entitled to recovery under the TCPA because a fax advertisement he had received *with* permission did not contain the specific opt-out language described in 47 C.F.R. §64.1200(a)(3). The defendant moved for summary judgment on the ground that the regulation did not apply to faxes sent with permission, and the District Court granted the motion, holding that "47 C.F.R. §64.1200 does not apply to the facts of this case, which does not involve an 'unsolicited' fax." *Id.* at *4. The court explained:

> Reviewing the regulation as a whole, the provision in question, 47 C.F.R. §64.1200(a)(3)(iv), purports, on its face, to apply only to unsolicited faxes. The paragraph requiring the opt-out notice, on which Plaintiff relies, is under the paragraph that prohibits the sending of an "unsolicited" fax advertisement.[10]

Id. The court also stated that its interpretation "is supported by the FCC's own explanation" of the regulation, noting "the FCC states several times that its rule requiring an opt-out notice applies to all *unsolicited* fax advertisements. *See* 71 Fed.Reg. at 25970." *Id.* (citing May 3, 3006 Rules and Regulations Implementing the [TCPA] of 1991, 71 Fed.Reg. 25967-01, 2006 WL 1151564 (emphasis supplied by the court)). The court also pointed out that "[t]he clearest statement on the matter" appears in a parenthetical statement in the FCC comments that reads: "The Commission notes that the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements." *Id.* (citing 71 Fed.Reg. at 25791) (emphasis added).

[10] 47 C.F.R. §64.1200(a)(3), which references the opt-out language on which the plaintiff in *Nack* and Plaintiff herein rely, begins with the following language: "No person may . . . [u]se a telephone facsimile machine, computer, or other device to send an *unsolicited* advertisement to a telephone facsimile machine, unless . . . ." (Emphasis added.)

Indeed, the regulation could not have applied to faxes sent with permission even if the FCC had so intended. The *entire purpose* of the TCPA regarding fax transmissions is to regulate *unsolicited advertisements*. See 47 U.S.C. §227(b)(1)(C). The particular paragraph under which 47 C.F.R. §64.1200 was enacted authorizes the commission to "implement the requirements of this subsection," and that, in so doing, "the Commission shall provide that a notice contained in an *unsolicited* advertisement complies with the requirements under this subparagraph . . . ." 47 U.S.C. §227(b)(2)(D) (emphasis added). Given Congress' limited delegation of rulemaking authority to the FCC, subparagraph (a)(3)(iv) of the regulation simply cannot apply to faxes sent *with* the permission of the recipient. To accept Plaintiff's theory that the regulation applies to faxes sent with permission would require this Court to ignore the plain language of the statute, the language of the regulation as a whole, and the expressed intent of the FCC. Had Congress intended to regulate solicited faxes, or authorize the FCC to do so, it would have drafted the legislation accordingly. It did not; therefore, the FCC cannot purport to regulate faxes sent with permission under the rulemaking authority delegated by the statute. *See Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 582 (7th Cir. 2000) (administrative agencies are authorized to carry out duties assigned by Congress, but agencies have no authority to change the statute that granted that authority); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'")[11]

[11] *Also see Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("When a court reviews an agency's construction of a statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . ."). Here, the intent of Congress is clear: it intended to regulate unsolicited fax advertisements and exclude solicited faxes from the scope of the statute. That, in the words of the Supreme Court, "is the end of the matter."

Finally, Plaintiff disputes that the language appearing in the agent contracts constitutes express permission for the subject faxes in any event. He argues that, while the contractual language authorizes the transmission and receipt of "communications" by facsimile, it does not specifically authorize the sending of facsimile "advertisements." First of all, the faxes were not "advertisements," as HDIC has explained herein and in its initial Memorandum. Moreover, the contracts specifically authorize Humana companies to "communicate with" its agents (including Plaintiff) through the use of . . . facsimile to the address(es) and facsimile number(s) of the" agent. At the risk of stating the obvious, an advertisement is a form of communication. Thus, even if the faxes at issue were "advertisements" (and they clearly were not), the fact remains Plaintiff and the agents to which the faxes were transmitted granted Humana companies permission to send them.[12] Having granted permission for the faxes, there can be no recovery under the TCPA as a matter of law. Neither can Plaintiff recover under his state law claims.[13]

E. <u>HDIC Is Entitled To Summary Judgment Based On *Res Judicata.*</u>

HDIC established in its initial Memorandum that it is entitled to summary judgment under the doctrine of *res judicata* in light of the Western Division's dismissal order of December 22, 2009. *Res judicata* applies if three requisites are satisfied: (a) identity of the claim; (b) identity of the parties; and (c) a final judgment on the merits. *Ross v. Board of Education of Township High School District 21*, 486 F.3d 279 (7th Cir 2007). In his Response, Plaintiff does not challenge the first prong but contests the second and third. Again, Plaintiff's arguments miss the mark.

As to the third requisite – the entry of a final judgment on the merits in the Western

[12] Plaintiff cites *Travel 100 Group, Inc. v. Mediterranean Shipping Co., Inc.*, 383 Ill. App. 3d 149, 889 N.E.2d 781 (1st Dist. 2008), but that case offers no support for his argument. In *Travel 100,* the court held that the consent language at issue indeed covered advertisements, but that hardly means that differently phrased consent language is ineffective.

[13] See HDIC's Memorandum in Support of Amended Motion for Summary Judgment, pp. 14-19.

Division litigation – HDIC established that this Court must look beyond the label the Western Division attached to the order and determine whether or not it was based "on the merits." The Seventh Circuit in *American Bank & Trust Co. v. City of Chicago,* 826 F.2d 1547 (7th Cir. 1987), clearly held that, even if a court in prior litigation purports to dismiss a matter for lack of jurisdiction, that characterization does not matter for purposes of determining whether the dismissal was "on the merits" in a *res judicata* analysis. *Id.* at 1552. The court in subsequent litigation must determine whether the prior order effectively bars further litigation. *Id.* If it does, then the order is "on the merits" under *res judicata. Id.* The Western Division entered the dismissal order on the ground that Plaintiff had stated that the defendant in that litigation (Humana Inc.) had not committed the acts of which Plaintiff complained. Indeed, the order states, "plaintiff admit[ted] he [had] no claim against Humana Inc." The order obviously was entered "on the merits" because it was based on Plaintiff's admission that his claim *had* no merit. Accordingly, Plaintiff is barred from bringing further litigation against Humana Inc., and Plaintiff does not contest that. For purposes of the *res judicata* analysis, the prior dismissal was entered "on the merits" – regardless of whether the court employed the term "jurisdiction" in entering the judgment.

Interestingly, Plaintiff does not discuss *American Bank & Trust Co.* in his Response; instead, he cites cases he believes preclude HDIC from contending that the prior dismissal was "on the merits" under *res judicata.* He first cites *Hudson v. Hedge*, 27 F.3d 274 (7th Cir. 1994), but that case is clearly inapplicable. In *Hudson*, a prisoner in a state penitentiary had filed an action under 28 U.S.C.§1983 along with a petition to proceed *in forma pauperis*. The district court concluded the complaint was frivolous and dismissed the suit with prejudice. That disposition was erroneous; under the applicable statute, upon a determination the complaint

appeared frivolous, the court should only have denied the motion for leave to proceed *in forma pauperis* rather than dismiss the entire litigation with prejudice.[14] The plaintiff did not appeal that order but filed a second suit in district court. That court dismissed the second suit because the first suit had been dismissed with prejudice. The Court of Appeals affirmed, noting the plaintiff had failed to appeal the dismissal in the first suit. *Id.* at 276. Thus, in *Hudson*, the Seventh Circuit merely affirmed the dismissal of a second suit on the basis that the first suit had been dismissed with prejudice. It was not faced with the question whether the first dismissal was "on the merits" for purposes of *res judicata*, unlike *American Bank & Trust Co.*[15]

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981), likewise cited by Plaintiff, also is irrelevant. In that case, the Supreme Court merely explained that the preclusive effect of a prior judgment is not affected by the fact that a legal principle upon which it is based is subsequently overruled in another case. *Id.* at 398. In the instant case, HDIC is not contending the dismissal in the earlier litigation should be set aside in light of subsequent case law. Rather, HDIC simply urges this Court to consider, in accordance with *American Bank & Trust Co.*, whether that dismissal was "on the merits" for purposes of *res judicata*.

Plaintiff also cites *American Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652 (7th Cir. 2011), but that opinion has no bearing on the instant case either. There, an action had been dismissed without prejudice based on lack of standing. The plaintiff appealed, and the defendant-appellee argued that the district court should have granted its motion for summary judgment and entered judgment in its favor on the merits. The Seventh Circuit rejected the defendant-appellee's argument, noting the defendant sought to *change* the judgment (rather

[14] *See Denton v. Hernandez*, 504 U.S. 25 (1992); *Billman v. Indiana Dep't of Corrections*, 56 F.3d 785 (7th Cir. 1995).

[15] It is worth noting that both *Hudson* and *American Bank & Trust Co.* were authored by Judge Easterbrook; thus, these two opinions clearly cannot be construed to be in conflict. Neither can *Hudson* be construed to overrule *American Bank & Trust Co.*, otherwise Judge Easterbrook undoubtedly would have made note of it.

than seek affirmance on an alternative basis) and a therefore should have filed a cross-appeal. *Id.* at 660. In the case at bar, HDIC does not ask this Court to change the Western Division's judgment. It merely asks this Court to determine, for purposes of *res judicata,* that the judgment was entered "on the merits," pursuant to *American Bank & Trust Co.*

As explained in its initial Memorandum and in briefing its earlier Motion to Dismiss,[16] the Western Division's dismissal was clearly on the merits because it was based on Plaintiff's admission that Humana Inc. had not committed the acts of which he complained, and that he had no claim against Humana Inc. *Joseph v. Elan Motorsports Technologies Racing Corp.*, 638 F.3d 555, 558 (7th Cir. 2011), cited in HDIC's initial Memorandum, clearly illustrates that the judgment indeed was "on the merits" for purposes of *res judicata.* The cases cited by Plaintiff in response have no applicability here; the "on the merits" prong of the *res judicata* analysis is clearly satisfied.

Plaintiff also challenges the second prong of the *res judicata* analysis, contending a fact question exists as to whether Humana Inc. and HDIC are in privity. In support, Plaintiff first argues that a determination of privity is fact-specific. In some contexts that is the case, but the kind of intensive fact-specific investigation Plaintiff seems to propose is clearly unnecessary in light of the case authority cited by HDIC in its initial brief. Plaintiff attempts to distinguish the cases cited by HDIC, but those attempts are unpersuasive.

Plaintiff first attempts to distinguish *Aetna Casualty & Surety Co. v. Kerr-McGee Chemical Corp.*, 875 F.2d 1252 (7th Cir. 1989), arguing that the issue in that case was not *res judicata* but whether an insurance coverage action brought by Kerr-McGee subsidiaries against Aetna involved the "same parties" and "same cause" as a prior pending action brought by Kerr-

[16] See HDIC's Memorandum in Support of Motion to Dismiss, Doc. No. 16-1, pp. 10-12, and Reply in Support of Motion to Dismiss, Doc. No. 20, pp. 7-9.

McGee itself within the meaning of Section 2-619(a) of the Illinois Code of Civil Procedure, 735 ILL COMP. STAT. 5/2-619(a). Plaintiff overlooks the fact, however, that the Seventh Circuit analyzed the "same parties" issue by considering whether the parties were in privity for purposes of *res judicata*. In its analysis, the court applied Section 59 of the Restatement (2d) of Judgments, which concerns *res judicata* in the context of corporate parties. *Id.* at 1258-61.[17] Significantly (as noted by the *Aetna* court), Section 59 states: "For the purpose of affording opportunity for a day in court on issues contested in litigation . . . there is no good reason why a closely held corporation should be ordinarily regarded as distinct," and "[t]his identity of interest is perhaps most likely when the controlling owner is the parent of a subsidiary corporation." *Id.* at 1259 (citing RESTATEMENT (2D) OF JUDGMENTS, §59, comment *e*) (emphasis added by court). Thus, the *Aetna* court's analysis of the issue before it was based on *res judicata* principles set forth in the Restatements, not on some quirk of state law as Plaintiff suggests.[18] And, in the instant case, as in *Aetna*, HDIC, as the subsidiary corporation of Humana, Inc., is in privity with its parent.

Plaintiff next seeks to attack *Janusz v. FASCO Industries*, 1999 WL 162793 N.D. Ill. March 12, 2999), which clearly held a parent and subsidiary corporation to be in privity for *res judicata* purposes without the intensive fact-finding endeavor Plaintiff proposes. Plaintiff offers no basis for distinguishing *Janusz* from the case at bar other than to suggest the case was

[17] The Seventh Circuit questioned the appropriateness of applying Section 2-619 in federal court. 875 F.2d at 1255. The District Court had applied Section 2-619, and because the appellant (Aetna) did not question its applicability on appeal, the Seventh Circuit deemed the issue waived. However, in light of the Seventh Circuit's treatment of the issue under *res judicata* principles and its resolution of the question based on the Restatements, the fact that the issue came before the Court as a purported 2-619 matter is irrelevant.

[18] Plaintiff also notes that, in the first suit, Kerr McGee had purported to bring suit on behalf of itself and its subsidiaries and suggests that this was a crucial element in the Seventh Circuit's *res judicata* analysis that is absent here. HDIC submits, however, that the *Aetna* Court's decision turned overwhelmingly on the Restatement analysis and the existence of the parent-subsidiary relationship, and that Kerr-McGee's odd manner of styling the first action did little more than reflect that relationship.

wrongly decided, but the fact that *Janusz* fully supports HDIC's position (and refutes Plaintiff's) hardly means it is wrong. Under *Aetna* and *Janusz,* Humana Inc. and HDIC are clearly in privity; that prong of the *res judicata* analysis likewise is fully satisfied.

Finally, Plaintiff asserts that HDIC is judicially estopped from arguing that Humana Inc. and HDIC are in privity because HDIC argued in the context of discovery issues that Humana Inc. and HDIC are separate entities. This is an incredible stretch of logic. The fact that HDIC pointed out that it and Humana Inc. are separate entities for purposes of responding to discovery requests hardly means they are not in privity for *res judicata* purposes. Indeed, the doctrine of privity *presumes* different entities are involved; otherwise there would be no reason for the doctrine. From the inception of the instant litigation, HDIC has maintained that it and Humana Inc. are in privity and that the Plaintiff's suit against HDIC is barred by *res judicata* based on the Western Division's dismissal order.[19] HDIC has never taken a contrary position or changed its position.

III. CONCLUSION

For the reasons stated above and in its Initial Memorandum, HDIC is entitled to summary judgment on Plaintiff's Amended Complaint in its entirety.

HUMANADENTAL INSURANCE COMPANY

By: /s/ David J. Novotny
One of its Attorneys

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[19] HDIC raised these issues immediately in its Motion to Dismiss, Doc. No. 16.

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2013, I electronically filed the foregoing HUMANADENTAL INSURANCE COMPANY'S REPLY IN SUPPORT OF ITS AMENDED MOTION FOR SUMMARY JUDGMENT with the Clerk of the U.S. District Court, Northern District of Illinois, Eastern Division, using the CM/ECF system which sent notification of such filing to the following CM/ECF registered participants:

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EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE S. BRODSKY, individually and as the representative of a class of similarly-situated persons,	)	
Plaintiff,	)	No. 1:10-cv-03233
v.	)	
HUMANADENTAL INSURANCE COMPANY d/b/a HUMANA SPECIALTY BENEFITS,	)	
Defendant.	)	

PLAINTIFF'S SUR-REPLY IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Lawrence Brodsky ("Plaintiff") submits this Sur-Reply in Opposition to Defendant HumanaDental Insurance Company's ("HDIC") Motion for Summary Judgment.

ARGUMENT

HDIC raises two arguments for the first time in its Reply in Support of Its Amended Motion for Summary Judgment. First, HDIC claims Plaintiff's deposition testimony regarding a telephone conversation with a "Humana" entity representative, wherein Plaintiff asked to be taken off Humana's fax broadcast list, is barred by Federal Rule of Evidence 901. Second, HDIC argues that the Federal Communication Commission ("FCC") exceeded its authority in promulgating 47 C.F.R. § 64.1200 (a)(3)(iv), which provides: "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."

As demonstrated below, each of HDIC's arguments fails.

I. PLAINTIFF'S TESTIMONY REGARDING HIS TELEPHONE CONVERSATION WITH HUMANA ASKING TO BE TAKEN OFF THE FAX ADVERTISING BROADCAST LIST WAS PROPERLY AUTHENTICATED.

Plaintiff testified that after receiving a fax advertisement from a "Humana" entity (prior to receiving the fax advertisements at issue here), he called the number on the bottom of that advertisement and spoke to a representative of Humana asking that his fax number be taken off Humana's fax broadcast list. Plaintiff in his Statement of Additional Facts that Require Denial of Summary Judgment ("PSOAF") addresses this telephone call as follows:

> A short time (six to eight weeks to a year) prior to receiving the Facsimiles on May 14, 2008, Plaintiff called a telephone number listed on a previous Humana fax advertisement, spoke to a woman, a representative of Humana, and asked that Plaintiff's fax number (847) 991-0152 be taken off Humana's fax advertising broadcast list. The woman at Humana laughed, said it's only a fax, and then said they would take care of it.

(PSOAF ¶21; Brodsky Dep. Tr. 36-39, 72-75).

> During the conversation Plaintiff had with the Humana representative to remove his facsimile number from their fax advertising broadcast list, the Humana representative verified the fax number as (847) 991-0152.

(PSOAF ¶22; Brodsky Dep. Tr. at 73-74).[1]

HDIC in its Reply Brief argues for the first time that pursuant to Federal Rule of Evidence 901, Plaintiff's testimony regarding his telephone call with a Humana representative is inadmissible, stating as follows:

> In the instant case, Plaintiff has not identified the telephone number he allegedly called, the particular company he allegedly called, the name or title of the person to whom he allegedly spoke, or the date of the conversation. The alleged conversation is therefore not authenticated under Rule 901, and the substance of the conversation is inadmissible.

[1] The deposition of Plaintiff Lawrence Brodsky, taken April 26, 2012, is attached as Exhibit 1 to Plaintiff's Appendix of Exhibits. For convenience, Plaintiff has attached the relevant portions of the Brodsky deposition transcript hereto as Exhibit 1.

(Def.'s Reply at 11).

HDIC's argument is legally and factually defective. A proponent of evidence need only produce "evidence sufficient to support a finding that the matter in question is what the proponent claims." Fed. R. Evid. 901(a). Rule 901 requires only a *prima facie* showing of genuineness and leaves it to the jury to decide the true authenticity and probative value of the evidence. *U.S. v. Harvey*, 117 F.3d 1044, 1049 (7th Cir. 1997). *See also Thanongsinh v. Board of Education*, 462 F.3d 762, 779 (7th Cir. 2006) ("Rule 901(a) does not erect a particularly high hurdle … Rule 901's requirements are satisfied if evidence has been introduced from which a reasonable juror could find that the document is authentic")(citations omitted). The Seventh Circuit has held that the opponent of the evidence bears the burden of showing that a genuine issue of authenticity exists. *Tyson v. Jones & Laughlin Steel Corp.*, 958 F.2d 756, 761 (7th Cir. 1992). The party offering the evidence is not required "to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be." *United States v. Pluta*, 176 F.3d 43, 49 (2d Cir. 1999).

Federal Rule of Evidence 901(b)(6) provides as follows regarding telephone conversations:

> (b) **Examples**. The following are examples only – not a complete list – of evidence that satisfies the requirement:
>
> (6) **Evidence About a Telephone Conversation**. For a telephone conversation, evidence that a call was made to the number assigned at the time to:
>
> (A) a particular person, if circumstances, including self-identification, show that the person answering was the one call; or
>
> (B) a particular business, if the call was made to a particular business and the call related to business reasonably transacted over the telephone.

Fed. R. Evid. 901(b)(6). In addition, Federal Rule of Evidence 901(b)(4) provides as follows:

> (4) **Distinctive Characteristics and the Like.** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

Fed. R. Evid. 901(b)(4) Although Rule 901(b)(6) applies specifically to telephone conversations, Rule 901(b) states that the examples are intended to be just that, examples of authentication techniques rather than rules for authentication that must always be followed. *Bear Stearns Co., Inc. v. Nanos*, 1987 WL 5238, at *3 (N.D. Ill. Jan. 2, 1987). Additionally, authentication of a telephone call may be established by circumstantial evidence. *Hansen v. Harding*, 1989 WL 153563, at *2 (N.D. Ill. Nov. 8, 1989), *citing United States v. Puerta Restrepo*, 814 F.2d 1236, 1239 (7th Cir. 1987). .

As an initial matter, and contrary to HDIC's argument, Plaintiff did identify the telephone number that he called and the company that he called – it was the number on the prior fax advertisement sent by Humana (or one of its entities). (PSOAF ¶21; Brodsky Dep. Tr. at 37). Furthermore, Plaintiff's telephone conversation did relate to business "reasonably transacted over the telephone" – per Humana's instruction, Plaintiff called the number at the bottom of the fax advertisement to request that Humana stop sending fax advertisements. Plaintiff further testified that: (i) he talked to a woman after dialing the number listed at the bottom of Humana's unsolicited fax advertisement and asked her (Humana) to remove his fax number from the fax broadcast list; (ii) the woman on the other end of the telephone call said she would do so; and (iii) the telephone conversation took place between 6 to 8 weeks to a year prior the May 14, 2008 fax advertisements at issue. (PSOAF ¶21; Brodsky Dep. Tr. at 37-39; 72-75). In other words, Plaintiff has offered direct testimony and circumstantial evidence regarding his telephone conversation with the Humana representative and has thus

authenticated the call. Fed. R. Evid 901(b)(4) and (6)(6); *Harvey*, 117 F.3d at 1049; *Thanongsinh*, 462 F.3d 7at 779; *Bear Stearns*, at *3; *Hansen,* at *2.

Finally, it is well-established that a non-movant's own deposition testimony may alone be sufficient to create genuine issues of material fact and defeat a motion for summary judgment if the party's testimony is based on personal knowledge or would otherwise be admissible at trial. *Swearingen v. Portfolio Recovery Associates, LLC*, 2012 WL 4354748, at *2 (N.D. Ill. Sept. 24, 2012). In *Marr v. Bank of Amer., N.A.*, 662 F.3d 963, 968 (7th Cir. 2011), the Seventh Circuit stated: "[a]s we have held in other contexts, 'uncorroborated, self-serving testimony, if based on personal knowledge or firsthand experience, may prevent summary judgment against the non-moving party, as such testimony can be evidence of disputed material facts.' "

In *Hendricks v. CBE Group*, 2012 WL 1191861, at *1 (N.D. Ill. April 10, 2012), plaintiff sued a debt collector under the Fair Debt Collection Practices Act ("FDCPA") claiming, *inter alia*, that the debt collector called repeatedly over two months in violation of the FDCPA. Plaintiff testified at his deposition that for two months, the defendant called three times a day and often seven days a week. *Hendricks*, at *4. Plaintiff also submitted a declaration stating defendant called early in the morning, late at night and in quick succession. *Id.* After noting that plaintiff was unable to obtain his phone records from his cellular service provider and that he did not submit other records of the calls he received from the defendant, the district court denied defendant's motion for summary judgment at to this FDCPA claim (15 U.S.C. 1692d(5), stating:

> Still, his [plaintiff's] testimony and declaration, based on firsthand experience, are evidence of disputed facts. *Marr*, 662 F.3d at 968 (citation omitted). And while it is true that Hendricks [plaintiff] is unable to recall the dates and times of the specific phone calls, this does not preclude a finding of liability under § 1692d(5), though it may be relevant to credibility, which is not a factor that I can consider at the summary judgment stage. *Pratt*, 2012 WL 86957, at *4

> (denying summary judgment where the defendant's call logs showed only twenty-five calls and the plaintiff, who kept no records of calls received, testified that he received between sixty-five to seventy calls).

Hendricks, at *4.

Here, Plaintiff was questioned extensively by HDIC and testified extensively from personal knowledge at his deposition as to the details of a telephone conversation he had with a Humana representative wherein he asked to be removed from a fax broadcast list. (*See* Brodsky Dep. Tr., Exhibit 1 to Pl, at 36-39, 72-75). Other than its recitation of Rule 901, HDIC has offered nothing to attack the genuineness of Plaintiff's testimony nor has HDIC submitted any applicable case authority regarding the authentication of telephone conversations. *See Tyson*, 958 F.2d at 761. Plaintiff's truthful and unrebutted testimony regarding his telephone conversation with a Humana representative has not only been properly authenticated, it also defeats HDIC's motion for summary judgment. *Marr*, 662 F.3d at 968; *Hendricks*, at *4; *Swearingen*, at *2.

II. HDIC'S ARGUMENT IN ITS REPLY THAT THE FCC EXCEEDED ITS AUTHORITY UNDER THE TCPA IN IMPLEMENTING 47 C.F.R. § 64.1200 (a)(3)(iv) IS BARRED BY THE HOBBS ACT.

The Federal Communications Commission ("FCC") regulations implementing the Telephone Communications Protection Act ("TCPA"), 47 U.S.C. § 227, provide in part as follows: "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." 47 C.F.R. § 64.1200 (a)(3)(iv) (emphasis added). *See also Vandervort v. Balboa Capital Corp.*, 2012 WL 5248420, at *6 (C.D. Cal. Oct. 23, 2012)("The FCC's TCPA regulation now also prohibits sending solicited fax advertisements without the required opt-out notice.")

In attempting to escape § 64.1200 (a)(3)(iv), HDIC now argues for the first time in its Reply that the FCC exceeded its authority. HDIC argues as follows:

> Given Congress' limited delegation of rulemaking authority to the FCC, subparagraph (a)(3)(iv) of the regulation simply cannot apply to faxes sent with the permission of the recipient. To accept Plaintiff's theory that the regulation applies to faxes sent with permission would require this Court to ignore the plain language of the statute, the language of the regulation as a whole, and the expressed intent of the FCC. Had Congress intended to regulate faxes, or authorize the FCC to do so, it would have drafted the legislation accordingly. It did not; therefore, the FCC cannot purport to regulate faxes sent with permission under the rulemaking authority delegated by the statute.

(Def.'s Reply Br. at 13)(emphasis added).

Simply stated, HDIC's argument that the FCC acted outside its authority in implementing § 64.1200 (a)(3)(iv) is barred by the Administrative Orders Review Act, 28 U.S.C. § 2342(1); 47 U.S.C. 402(a), also known as the Hobbs Act. *See CE Design v. Prism Business Media, Inc.*, 606 F.3d 443, 447-50 (7th Cir. 2010). As noted by the Seventh Circuit in *Prism*, "the Hobbs Act reserves to the courts of appeals the power to 'enjoin, set aside, suspend (in whole or in part), or to determine the validity of' all final FCC orders, *see* 28 U.S.C. § 2342(1); 47 U.S.C. 402(a), and that before seeking relief from an appellate court, a party aggrieved by the FCC's order must petition the FCC for reconsideration, *see* 28 U.S.C. § 2342(1); 47 U.S.C. 402(a)." *Prism*, 606 F.3d at 446. The Seventh Circuit further stated in *Prism*: "[a]s the Supreme Court has made clear, a litigant can't avoid the Hobbs Act's jurisdictional bar simply by accusing an agency of acting outside its authority." *Prism*, 606 F.3d at 448, citing FCC v. ITT World Commc'ns, Inc., 446 U.S. 463, 468-69 (1984); *Bd. Of Governors of the Fed. Reserve Sys. V. MCorp Fin., Inc.*, 502 U.S. 32, 43-44 (1991

Finally, HDIC's assertion that it is "Plaintiff's theory" that § 64.1200 (a)(3)(iv) requires even solicited facts to contain a proper opt-out ignores not only the text of the FCC regulation but also the FCC's identical position, as set forth in the Amicus Brief submitted

by the FCC in *Michael R. Nack v. Douglas Paul Walburg*, No. 11-1460, currently on appeal in the United States Court of Appeals for the Eighth Circuit, wherein the FCC defends the very regulation that HDIC attacks. *See* Plaintiff's Memorandum in Opposition to Defendants Motion for Summary Judgment, Doc. No. 142, at 16 n.5; FCC Amicus Brief, attached as Exhibit 32 to Plaintiff's Appendix of Exhibits).

In sum, this Court is not the place for HDIC to attack § 64.1200 (a)(3)(iv).

CONCLUSION

Defendant HDIC's Federal Rule of Evidence 901 attack on the deposition testimony of Plaintiff Lawrence Brodsky, and its attack on FCC regulation 47 C.F.R. § 64.1200 (a)(3)(iv), both fail. HDIC's Amended Motion for Summary Judgment should be denied.

Respectfully submitted,

LAWRENCE S. BORDSKY, individually and as the representative of a class of similarly-situated persons

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One of Plaintiff's Attorneys

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON March 15, 2013, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

s/Wallace C. Solberg

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE S. BRODSKY, Individually and as the representative of a class of similarly-situated persons	)	
Plaintiff,	)	**No.: 1:10-cv-03233**
vs.	)	
	)	**Judge Durkin**
HUMANADENTAL INSURANCE COMPANY d/b/a HUMANA SPECIALTY BENEFITS,	)	
Defendant.	)	

DEFENDANT HUMANADENTAL INSURANCE COMPANY'S
RESPONSE TO PLAINTIFF'S SURREPLY

Defendant HumanaDental Insurance Company ("HDIC") states as follows for its Response to Plaintiff's Surreply:

I. PLAINTIFF'S TESTIMONY CONCERNING HIS ALLEGED TELEPHONE CALL IS NOT ADMISSIBLE.

In his Response brief, Plaintiff asserted he had a purported telephone conversation with an unidentified individual, at an unidentified company, in which he claims to have withdrawn the permission for fax communications he had expressly extended in his agent contract with Humana companies. HDIC responded to that argument in its Reply by arguing, *inter alia*, that Plaintiff had failed to authenticate the alleged conversation in accordance with the requirements of FRE 901. In his Surreply, Plaintiff asserts HDIC raised the authentication issue "for the first time" in its Reply, but in fact *Plaintiff* raised the alleged conversation for the first time in his Response brief. Plaintiff's Amended Complaint is based on the unsupported claim that he *never* consented to the receipt of fax communications, not that he had consented but later *withdrew* that consent in

an alleged telephone call. Plaintiff thus seeks to amend his complaint through his argument at the summary judgment stage. It is fundamental, however, that "a plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment." *Grayson v. O'Neill*, 308 F. 3d 808, 817 (7th Cir. 2002) (quoting *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir 1996)).[1] On that basis alone, Plaintiff's argument that he "withdrew" his consent through a purported telephone call, and his arguments in his Surreply attempting to justify the admission of the conversation into evidence, must be rejected.

Moreover, the only case cited by Plaintiff in his Surreply concerning the admissibility of telephone conversations, *Hendricks v. The CBE Group, Inc.*, 2012 WL 1191861 (N. D. Ill. April 10, 2012), is completely inapplicable. In *Hendricks*, the court allowed into evidence certain telephone conversations Plaintiff had with a debt collector in an action brought under the Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq.* The plaintiff testified that "for two months, [the defendant] called him around three times a day, often seven days a week . . . very early in the morning, late at night or in the middle of the night, and that [the defendant] sometimes placed calls in quick succession." *Id.* at *4. The plaintiff clearly established *who* had called him (the caller had identified himself as Mr. Prugh) *and* the entity that person represented (there was no question Mr. Prugh represented, specifically, the defendant company). The plaintiff also established a reasonably short time frame within which these calls occurred. Moreover, there was no issue as to the substance of the telephone calls; the plaintiff's claim was based on the harassing *number* of calls (totaling approximately 159 in a two-month period) and their frequency. In the instant case, however, Plaintiff cannot identify the telephone number he allegedly called; he states only that he called a number listed on a fax that he no longer has and

[1] The March 12, 2012 deadline for filing pleadings is long past in any event. Indeed, Plaintiff's Motion for Leave to file a Second Amended Complaint adding new defendants – filed seven months after the deadline for amending pleadings – was denied by this Court on November 30, 2012. (Doc. No. 116)

cannot produce. Moreover, he does not identify the specific company that sent him the fax and thus cannot tie the fax or the unknown telephone number to *HDIC*, the defendant in this case. He also cannot identify the person he allegedly called or the specific company that person purported to represent. With respect to a time frame, Plaintiff can only state that he made *one* telephone call sometime within a *ten or eleven month* period. Most importantly, the *substance* of Plaintiff's statements to the person on the other end of the call, and the statements of that person in return, are very much in issue. Plaintiff's "evidence" purporting to authenticate the alleged telephone call thus falls far short of the evidence offered in *Hendricks*, and far short of the facts necessary to meet the requirements of FRE 901. The alleged conversation is therefore inadmissible in this summary judgment proceeding.

II. THE HOBBS ACT DOES NOT BAR HDIC's ARGUMENTS CONCERNING THE INAPPLICABILITY OF 47 C.F.R. §1200(a)(3).

Plaintiff also contends HDIC's arguments concerning 47 C.F.R. §1200(a)(3) run afoul of the Hobbs Act, also known as the Administrative Orders Review Act, 28 U.S.C. §2341 *et seq.* Plaintiff contends HDIC has challenged the FCC's authority to adopt the regulation, but that such challenges can only be made in the Court of Appeals under the specific procedures outlined in the Hobbs Act.

Initially, Plaintiff misapprehends HDIC's arguments. HDIC argues primarily that the regulation, by its language, does not apply to faxes sent with the permission of the recipient, as the court clearly held in *Nack v. Walburg,* 2011 WL 310249 (E.D. Mo. Jan. 28, 2011). No court addressing the issue has held to the contrary.[2] HDIC explained in its Reply that, even if the FCC had so intended, it would not have had the authority to adopt a rule purporting to regulate faxes

[2] Plaintiff cites *Vandervort v. Balboa Capital Corp.*, 2012 WL 5248420 (C.D. Cal. Oct. 23, 2012) for the proposition that the regulation prohibits the sending of solicited faxes without the specified opt-out language. However, the applicability of 47 U.S.C. §1200(a)(3) to solicited faxes apparently was never questioned by the defendant in that case and therefore was not litigated or considered by the court.

sent with permission under 47 U.S.C. §227. This argument demonstrated that the *Nack* court's reading of the terms of the regulation was correct, that HDIC's reading likewise is correct, and that Plaintiff's interpretation is wrong.[3]

In the event this Court determines that the regulation, by its terms, applies to faxes sent *with* permission, Plaintiff still does not have a claim under the TCPA. Plaintiff's action is based on the private right of action language in 47 U.S.C. §227(b)(3), which authorizes such actions only for violations of "this subsection or the regulations *prescribed under* this subsection." 47 U.S.C. §227(b)(3) (emphasis added). HDIC explained in its Reply that "this subsection" – specifically, 47 U.S.C. §227(b) -- authorizes the FCC to adopt regulations to ensure that *unsolicited* fax advertisements contain opt-out language that complies with the requirements of that subsection of the Act. 47 U.S.C. §227(b)(2)(D). Thus, to the extent the regulation requires specified opt-out language for *solicited* faxes, the FCC clearly could not have prescribed it "under" subsection 227(b). And since that aspect of the regulation could not have been prescribed under subsection 227(b), Plaintiff does not have a private right of action under subsection 227(b)(3) for alleged deficiencies in the opt-out language in a solicited fax.[4]

Plaintiff's reference to *CE Design Ltd. v. Prism Business Media, Inc.,* 606 F. 3d 443 (7th Cir. 2010), is thus misplaced. In that case, the Seventh Circuit barred a party from seeking to invalidate a related FCC regulation on the basis that the District Court lacked jurisdiction to consider such challenges under the Hobbs Act. In the instant case, however, HDIC merely

[3] Plaintiff points out that *Nack v. Walburg,* 2011 WL 310249 (E.D. Mo. Jan. 28, 2011), is currently on appeal and that the FCC is challenging the District Court's judgment. While Plaintiff's arguments may track the FCC's arguments in *Nack*, and some of HDIC's arguments herein are advanced by the appellees in that case, the point is *Nack* was correctly decided by the District Court and its sound reasoning applies equally in the case at bar.

[4] The appellees in *Nack* suggest that the regulation, to the extent it concerns solicited faxes, may rest on the FCC's general authority reflected in 47 U.S.C. §303(r), which does not provide for a private right of action. Regardless of whether that is the case, it is clear the regulation cannot have been based on 47 U.S.C. §227(b) – which is the sole basis for the private right of action.

contends the regulation by its terms does not apply to solicited faxes and that, should this Court conclude otherwise, Plaintiff has no private right of action based on any perceived shortcomings in the opt-out language contained in the solicited fax. HDIC is not asking this Court to enjoin the FCC from enforcing 47 CFR §1200(a)(3) in regulatory proceedings or suspend the enforcement of the regulation by the FCC. *See* 28 U.S.C. §2342(2). The Hobbs Act therefore does not bar HDIC from asserting these arguments.

There exists an exception to the Hobbs Act's jurisdictional limits on challenges to the validity of FCC regulations that is applicable in the case at bar in any event. Section 704 of the Administrative Procedures Act ("APA"), 5 U.S.C. §704, provides:

> Agency action made reviewable by statute and final agency action *for which there is no other adequate remedy* in a court are subject to judicial review. 5 U.S.C. §704 (emphasis added).

Section 703 of the APA states:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute *or, in the absence or inadequacy thereof, any applicable form of legal action* . . . in a court of competent jurisdiction. 5 U.S.C. §703 (emphasis added).

The APA thus allows judicial review of agency actions in any "legal action" if the "special statutory review proceedings" available for challenging regulations is inadequate. The Hobbs Act, on which Plaintiff relies, reflects the "special statutory review proceeding" applicable to FCC regulations. That "special statutory review proceeding" is clearly inadequate here.

The Hobbs Act specifically provides that the Court of Appeals has "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. §2341(1). Under 47 U.S.C. §402(a), to which the Hobbs Act refers, a party seeking review of an FCC regulation must file a notice of appeal within 30 days from "the date upon

which public notice is given of the . . . order complained of." The regulation at issue in this case was adopted in early 2006. The fax that is the subject of this case was sent on May 14, 2008. Obviously, by the time any party could have reasonably foreseen the issues in this case arising, it was too late to pursue the "special statutory review proceeding." Moreover, HDIC cannot now petition the FCC to amend the regulation retroactively, as retroactive amendments are prohibited absent express Congressional authorization. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988); *Northeast Hospital Corp. v. Sebelius,* 757 F.3d 1, 14 (D.C. Cir. 2011). Thus, to the extent this Court construes HDIC's arguments as falling within the ambit of the Hobbs Act, those arguments clearly qualify under the exception carved out by the APA and may be considered by this Court.

For all of these reasons, 47 CFR §1200(a)(3) is clearly inapplicable to the subject fax, and the fax was not required to contain the specific opt-out language set forth in that regulation.

HUMANADENTAL INSURANCE COMPANY

By: /s/ David J. Novotny

One of its Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2013, I electronically filed the foregoing Response to Plaintiff's Surreply, with the Clerk of the U.S. District Court, Northern District of Illinois, Eastern Division, using the CM/ECF system which sent notification of such filing to the following CM/ECF registered participants:

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DATED this 15th day of March, 2013.

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EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

LAWRENCE S. BRODSKY, individually and as the representative of a class of similarly-situated persons,	)	
Plaintiff,	)	No. 1:10-cv-03233
v.	)	Honorable Thomas M. Durkin Magistrate Judge Michael T. Mason
HUMANADENTAL INSURANCE COMPANY d/b/a HUMANA SPECIALTY BENEFITS,	)	
Defendant.	)	

PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiff, Lawrence S. Brodsky ("Plaintiff"), hereby submits supplemental authority *Nack v. Walburg*, 2013 WL 2157822 (8th Cir. May 21, 2013)(Exhibit A) in support of its previously filed Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment (Doc. #142).

This supplemental authority specifically addresses 47 C.F.R. § 64.1200(a)(3)(iv), a regulation implementing the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, *et seq.*, which requires senders of fax advertisements to employ the required opt-out language even if the sender received prior express permission to send the fax.

Respectfully submitted,

/s/ Wallace C. Solberg
Wallace C. Solberg

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

s/Wallace C. Solberg
Wallace C. Solberg

H
Only the Westlaw citation is currently available.

United States Court of Appeals,
Eighth Circuit.
Michael R. NACK, Individually and on behalf of all others similarly situated, Plaintiff–Appellant
v.
Douglas Paul WALBURG, Defendant–Appellee.
Anda, Inc., Amicus on Behalf of Appellee,
Crown Kosher Meat Market, Inc.; Menachem Raitport, Inc.; Federal Communications Commission, Amici on Behalf of Appellant.

No. 11–1460.
Submitted: Sept. 19, 2012.
Filed: May 21, 2013.

Appeal from United States District Court for the Eastern District of Missouri–St. Louis.

Before WOLLMAN, MELLOY, and COLLOTON, Circuit Judges.

Phillip Andrew Bock, Bock & Hatch, Chicago, IL, Max G. Margulis, Margulis Law Group, Chesterfield, MO, Brian J. Wanca, Anderson & Wanca, Rolling Meadows, IL, for Plaintiff-Appellant.

Patrick A. Bousquet, Robert L. Carter, Russell F. Watters, Timothy J. Wolf, Brown & James, St. Louis, MO, for Defendant-Appellee.

MELLOY, Circuit Judge.

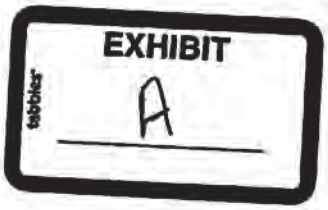
*1 Plaintiff Michael Nack appeals the district court's grant of summary judgment in this case arising under the Telephone Consumer Protection Act of 1991("TCPA"), Pub.L. No. 102–243, 105 Stat. 2394, as amended by the Junk Fax Prevention Act of 2005 ("JFPA"), Pub.L. No. 109–21, 119 Stat. 359. Nack bases his claims upon the receipt of one fax advertisement from Defendant Douglas Walburg, which Nack's agent undisputedly consented to receive. The one fax Nack received did not contain opt-out language that he argues was mandated by federal regulation. 47 C.F.R. § 64.1200(a)(3)(iv). He asserts class-action claims on behalf of persons similarly situated and does not base claims upon any party's receipt of an *unsolicited* fax advertisement. The parties offered competing interpretations of the regulation, and the district court held the regulation did not apply in the current circumstances.

After one round of oral arguments that focused upon regulatory interpretation, our court solicited the input of the Federal Communications Commission ("FCC"). The FCC responded with an amicus brief explaining its interpretation of its own regulation. According to the FCC, the contested opt-out language is required, even on faxes sent after obtaining a potential recipient's consent. Although this interpretation is consistent with the plain language of the regulation, it is questionable whether the regulation at issue (thus interpreted) properly could have been promulgated under the statutory section that authorizes a private cause of action.

Nevertheless, based upon the FCC's interpretation, and for the reasons discussed below, we must reverse the grant of summary judgment. The Administrative Orders Review Act ("Hobbs Act"), 28 U.S.C. § 2342 *et seq.*, precludes us from entertaining challenges to the regulation other than on appeals arising from agency proceedings (except arguably in extenuating circumstances not at issue in this case). Without addressing such challenges, we may not reject the FCC's plain-language interpretation of its own unambiguous regulation. Our reversal today, therefore, places the parties back before the district court where Walburg faces a class-action complaint seeking millions of dollars even though there is no allegation that he sent a fax to any recipient without the recipient's prior express consent.

I. Background

After consenting to receive and then receiving



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the fax advertisement at issue in this case, Nack filed the present complaint against Walburg. According to Nack's complaint, the key statutory and regulatory provisions at issue are 47 U.S.C. § 227(b)(3) and 47 C.F.R. § 64.1200(a)(3)(iv). No party argues additional facts bear upon the case at this stage of the proceedings. Accordingly, we describe the statutory and regulatory provisions at issue, describe the procedural history of the present case, and move directly to our discussion of the merits.

The TCPA, as amended by the JFPA, defines the term "unsolicited advertisement" to mean "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, in writing or otherwise." 47 U.S.C. § 227(a)(5) (2006).[FN1] In relevant part, the statute prohibits the "use [of] any ... device to send, to a telephone facsimile machine, an unsolicited advertisement, unless ... the unsolicited advertisement contains a notice meeting the requirements under paragraph 2(D)." *Id.* § 227(b)(1)(C) & (C)(iii). The notice must be conspicuous, provide a domestic telephone number, and identify a cost-free mechanism for the recipient to opt-out of receiving future "unsolicited advertisements." *Id.* § 227(b)(2)(D)(I), (iv)(I)-(II). The sender must also make the opt-out mechanism available "any time on any day of the week." *Id.* § 227(b)(2)(D)(v). Finally, the TCPA as amended by the JFPA creates a private cause of action based upon § 227(b) or upon regulations promulgated under § 227(b), as follows:

> ***2** 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.
>
> 47 U.S.C. § 227(b)(3) (emphasis added).

The statute itself does not expressly impose similar limitations or requirements on the sending of solicited or consented-to fax advertisements. The most pertinent regulation in this case, however, read most naturally and according to its plain language, extends the opt-out notice requirement to solicited as well as unsolicited fax advertisements:

> 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.
>
> 47 C.F.R. § 64.1200(a)(3)(iv).

In the district court, the parties framed their arguments in terms of regulatory interpretation. Based upon the limited reach of the actual statute, the district court doubted that the above-quoted language from 47 C.F.R. § 64.1200(a)(3)(iv) should be interpreted to apply to faxes other than unsolicited faxes. Looking at other regulatory provisions, headers, titles, and the general organizational structure of the regulation (including the placement of section 64.1200(a)(3)(iv) within a section dealing generally with unsolicited facsimiles), the district court held that the regulation applied only to unsolicited faxes and did not apply in the present case.

In reaching this conclusion, the district court reviewed commentary including an FCC order from

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2006 discussing the regulation of permissive or solicited fax advertisements under the JFPA. In that commentary, the FCC described the purpose of the regulation at issue in a manner largely consistent with the plain language of the regulation, stating:

> In addition, entities that send facsimile advertisements to consumers from whom they obtained permission, must include on the advertisement their opt-out notice and contact information to allow consumers to stop unwanted faxes in the future.

In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Junk Fax Prevention Act of 2005, 21 FCC Rcd 3787, 3812 (2006) ("2006 Order"). As noted by the district court, however, the FCC also set forth a confusing and inconsistent assertion in the 2006 Order. In direct contradiction to the plain language of the regulation and the passage quoted above, the FCC stated, "the opt-out notice requirement only applies to communications that constitute unsolicited advertisements." 2006 Order at 3808 n. 154.

***3** After an initial round of briefing and arguments, we solicited the views of the FCC as an amicus. In its brief, the FCC confirmed its plain-language interpretation of its regulation. The FCC explained that the regulation reached faxes for which the recipient had granted consent because consent, once granted, need not be interpreted as permanent. The FCC sought to ensure that even recipients who consented to receive a fax could easily and without expense stop the sending of any possible future faxes. The FCC acknowledged, but did not attempt to explain, the inconsistent passage from the 2006 Order.

Through supplemental briefing in response to the FCC's brief, and through a second round of arguments, Walburg's position evolved to reflect the shifting landscape around him. Although he initially argued primarily that the regulation could not be interpreted as applying to "solicited" faxes, he now focuses his argument upon the validity of the regulation and the scope of the private right of action. He argues that the regulation could not have been properly promulgated pursuant to the authorizing statute because the statute itself does not reach solicited fax advertisements. He also argues that, even if the FCC otherwise possessed the authority to promulgate the regulation at issue, the FCC's statutory authority for the regulation of solicited fax advertisements could not come from the particular statutory section that authorizes the private cause of action. Further, he argues for the first time on appeal that the regulation, as interpreted by the FCC, is an unconstitutional abridgement of the First Amendment.

Finally, we have received amicus briefing from another party involved in different private litigation under the TCPA. That party, Anda, Inc., has pursued administrative resolution of some of the questions presently before our court. Specifically, Anda petitioned for a declaratory ruling from the FCC concerning the statutory source of authority for the regulation governing solicited faxes and the scope of the private right of action. The FCC dismissed Anda's administrative petition on procedural grounds, holding that Anda's "[p]etition identifies no controversy to terminate or uncertainty to remove, a condition precedent to the Commission issuing a declaratory ruling." *In the Matter of Junk Fax Prevention Act of 2005,* 27 FCC Rcd. 4912, 4912 (May 2, 2012) (Order by the Acting Chief, Consumer & Governmental Affairs Bureau).

II. Discussion

A. Regulatory Interpretation

When an agency is specifically charged with enforcing a statute and promulgating regulations to implement that statute, we "defer to [the] agency's interpretations ... unless we find that a 'regulation is contrary to unambiguous statutory language, that the agency's interpretation of its own regulation is plainly erroneous or inconsistent with the regulation, or that application of the regulation [is] arbitrary or capricious.' " *United States v. J & K Market*

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Centerville, LLC, 679 F.3d 709, 712 (8th Cir.2012) (quoting *Ballanger v. Johanns,* 495 F.3d 866, 872 (8th Cir.2007)). We generally extend this deference to the agency even if the agency's interpretation of its own regulation is expressed merely in a brief to the court rather than through some other means. *See Talk Am., Inc. v. Mich. Bell Tel. Co.,* — U.S. ——, ——, 131 S.Ct. 2254, 2261, 180 L.Ed.2d 96 (2011) ("[W]e defer to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is 'plainly erroneous or inconsistent with the regulation[s]' or there is any other 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.' " (quoting *Chase Bank USA, N.A. v. McCoy,* — U.S. ——, ——, ——, 131 S.Ct. 871, 880, 881, 178 L.Ed.2d 716 (2011))).

***4** Setting aside any concerns regarding the validity of 47 C.F.R. § 64.1200(a)(3)(iv) or the scope of the private right of action, we believe that the regulation as written requires the senders of fax advertisements to employ the above-described opt-out language even if the sender received prior express permission to send the fax. This plain-language interpretation of the regulation is consistent with the FCC's proffered interpretation of its own regulation and is largely consistent with the 2006 Order (other than the confusing passage identified by the district court). In this circumstance, we must defer to the FCC's plain-language interpretation of its own regulation unless the regulation is "contrary to unambiguous statutory language" or "application of the regulation [is] arbitrary or capricious." *Ballanger,* 495 F.3d at 872.

Given the procedural posture of the present case, these two exceptions provide no basis for our court to reject the FCC's proffered interpretation. An argument that this unambiguous regulation is "contrary to unambiguous statutory language," *id.,* is, in our view, a direct challenge to the validity of the regulation. Similarly, because Nack seeks application of the regulation in a manner consistent with the regulation's plain language, any challenge asserting that "application of the regulation [is] arbitrary or capricious," *id.,* appears to be a challenge to the validity of the regulation itself. As explained below, the Hobbs Act precludes us from entertaining such challenges at the present stage. As such, we must interpret the regulation in a manner consistent with its plain language and the FCC's interpretation.

B. Challenges to the Regulation

The Hobbs Act provides that the courts of appeals have exclusive jurisdiction to determine the validity of FCC orders. 28 U.S.C. § 2342 (2006) ("The court of appeals ... has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47[.]"); 47 U.S.C. § 402(a) (2006) ("Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28."). A party challenging an FCC regulation as *ultra vires* must first petition the agency itself and, if denied, appeal the agency's disposition directly to the Court of Appeals as provided by the statute. *FCC v. ITT World Commc'ns, Inc.,* 466 U.S. 463, 468, 104 S.Ct. 1936, 80 L.Ed.2d 480 (1984). "[T]he procedural path designed by Congress serves a number of valid goals: It promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency review, and allows 'uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress' to enforce the TCPA." *CE Design, Ltd. v. Prism Bus. Media, Inc.,* 606 F.3d 443, 450 (7th Cir .2010) (quoting *N.Y. Co. v. N.Y Dep't of Labor,* 440 U.S. 519, 528, 99 S.Ct. 1328, 59 L.Ed.2d 553 (1979) (plurality opinion)).

***5** Here, there was no administrative proceeding because the plaintiff filed a private action. In response, the defendant pursued summary judgment

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and has not yet elected to seek a stay of litigation to pursue administrative remedies through the FCC. However, "[w]here the practical effect of a successful attack on the enforcement of an order involves a determination of its validity," such as a defense that a private enforcement action is based upon an invalid agency order, "the statutory procedure for review provided by Congress remains applicable." *Sw. Bell Tel. v. Ark. Pub. Serv. Comm'n.* 738 F.2d 901, 906 (8th Cir.1984), *vacated and remanded on other grounds,* 476 U.S. 1167, 106 S.Ct. 2885, 90 L.Ed.2d 973 (1986). To hold otherwise merely because the issue has arisen in private litigation would permit an end-run around the administrative review mandated by the Hobbs Act. Such an end run could result in a judicial determination of a regulation's invalidity without participation by the agency and upon a record not developed by the agency.

The Seventh Circuit has confronted this issue and agrees that it "makes no difference" if the question of validity arises in a suit between two private parties because "the Hobbs Act's jurisdictional limitations are 'equally applicable whether [a litigant] wants to challenge the rule directly ... or indirectly.' " *CE Design.* 606 F.3d at 448 (quoting *City of Peoria v. Gen. Elec. Cablevision Corp. (GECCO),* 690 F.2d 116, 120 (7th Cir.1982)). Finally, although not in the context of a private action, we have held clearly that "[a] defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." *United States v. Any & All Radio Station Transmission Equip.,* 207 F.3d 458, 463 (8th Cir.2000). We hold, therefore, that the Hobbs Act generally precludes our court from holding the contested regulation invalid outside the statutory procedure mandated by Congress.[FN2]

C. Scope of the Private Right of Action

The private right of action authorized by 47 U.S.C. § 227(b)(3) extends to violations of § 227 and also to "the regulations prescribed under" § 227(b). Walburg argues correctly that if the agency's promulgation of the regulation was *ultra vires* or was pursuant *exclusively* to some statutory authority other than § 227(b), the private right of action could not reach violations of the regulation. *See, e.g., Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.,* 550 U.S. 45, 47–48, 127 S.Ct. 1513, 167 L.Ed.2d 422 (2007) (holding that Congress rather than the FCC creates the private right of action, but in linking that right of action to a regulation, Congress created a right that extends to lawfully enacted regulations as well); *Alexander v. Sandoval.* 532 U.S. 275, 290–93, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (holding that the scope of a private right of action is limited to the scope set forth in the statutory language creating the private right of action and that no private right exists to enforce regulations promulgated under a different statutory section for which Congress did not create such a right). We hold that, on the facts of the present case, these arguments are, in effect, impermissible challenges to the regulation.

***6** For reasons that require no further elaboration, it is clear that the *ultra vires* argument is wholly indistinguishable from a direct challenge. A challenge that concedes the regulation's validity but asserts that the regulation was not promulgated pursuant to § 227(b) is distinct. Such a challenge, however, involves the same need for deference to the agency and nationally uniform determinations as a direct, Hobbs Act challenge. The rationale for the regulation, as set forth in the 2006 Order and as discussed in the FCC's amicus brief, arguably brings the regulation within range of what § 227(b) authorized the FCC to regulate. We do not believe that, in this circumstance, it is possible or prudent for our court to resolve this issue without the benefit of full participation by the agency. *See, e.g., Fla. Power & Light Co. v. Lorion,* 470 U.S. 729, 743, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985) ("In the absence of specific evidence of contrary congressional intent, however, ... review of orders resolving issues preliminary or ancillary to the core issue in a proceeding should be reviewed in the same forum as the final order resolving the core issue.").

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D. Constitutional Challenge

Finally, Walburg argues that, if the regulation must be interpreted as urged by the FCC, then it is unconstitutional. We held in *Missouri ex rel. Nixon v. Am. Blast* Fax, Inc., 323 F.3d 649, 660 (2003), that the TCPA provisions regarding unsolicited fax advertisements were not an unconstitutional restriction upon commercial speech. Applying the commercial speech test of *Central Hudson Gas & Electric Corporation v. Public Service Comm'n,* 447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), we concluded that, on balance, the TCPA's restrictions on commercial speech represented a sufficiently narrowly tailored restriction in pursuit of a substantial governmental interest. *Am. Blast Fax,* 323 F.3d 655–60. Suffice it to say, the analysis and conclusion as set forth in *American Blast Fax* would not necessarily be the same if applied to the agency's extension of authority over solicited advertisements. Nevertheless, this issue was not raised below and, as such, is not properly before us at this time.

III. Conclusion

We reverse the judgment of the district court and remand for further proceedings. On remand, the district court may entertain any requests to stay proceedings for pursuit of administrative determination of the issues raised herein.

FN1. Neither the statute nor the regulation use or define the term "solicited" fax advertisements, but we employ it in this opinion to refer to a fax sent after obtaining the recipient's consent. We also refer to such faxes as permissive or consented-to faxes.

FN2. Walburg has not attempted to challenge the validity of 47 C.F.R. § 64.1200(a)(3)(iv) either through a petition for reconsideration under 47 U.S.C. § 405(a), *cf. Tri-State Motor Transit Co. v. ICC,* 739 F.2d 1373, 1375 n. 2 (8th Cir.1984), or a petition for rulemaking to repeal the rule pursuant to 47 C.F.R. § 1.401. We therefore need not consider at this juncture whether a refusal of the agency to consider a substantive challenge to the regulation would allow this court to exercise jurisdiction over such a challenge. *Cf. Any & All Radio Station Transmission Equip.,* 207 F.3d at 463 (suggesting that a court of appeals "might" have jurisdiction under those circumstances).

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--- F.3d ----, 2013 WL 2157822 (C.A.8 (Mo.))

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EXHIBIT I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE S. BRODSKY, Individually and as the representative of a class of similarly-situated persons,	)	
Plaintiff,	)	**No.: 1:10-cv-03233**
vs.	)	**Hon. Thomas M. Durkin**
HUMANADENTAL INSURANCE COMPANY d/b/a HUMANA SPECIALTY BENEFITS,	)	
Defendant.	)	

HUMANADENTAL'S MEMORANDUM IN SUPPORT OF ITS
MOTION TO CERTIFY PURSUANT TO 28 U.S.C. § 1292(b)

Defendant HumanaDental Insurance Company ("HDIC") states as follows for its Memorandum in Support of its Motion to Certify this Court's Memorandum Opinion and Order Dated June 12, 2014, pursuant to 28 U.S.C. § 1292(b).[1]

I. BACKGROUND

HDIC filed an Amended Motion for Summary Judgment seeking the entry of summary judgment in its favor on all three counts of plaintiff's Amended Complaint: Count I, which seeks recovery against HDIC under the TCPA; Count II, which sought recovery against HDIC under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505/1 *et seq.* (the "IFCA"); and Count III, which sought recovery under a common law conversion theory. This Court granted HDIC's motion as to Counts II and III, but denied the motion as to plaintiff's TCPA claim.

[1] HDIC has filed contemporaneously herewith a Motion for Reconsideration, requesting this Court to reconsider its denial of HDIC's Amended Motion for Summary Judgment as to plaintiff's TCPA claim (Count I of the Amended Complaint). Should this Court grant HDIC's Motion for Reconsideration and enter summary judgment in HDIC's favor on that claim, this Motion to Certify will be rendered moot.

Among the arguments HDIC made in support of its request for summary judgment on the TCPA claim, HDIC pointed out that, under the TCPA, a fax is potentially actionable only if it is "unsolicited." 47 U.S.C. § 227(b)(1)(C). HDIC further established that plaintiff had given permission in his Group Producing Agent/Agency Contract to all Humana companies, including HDIC, to send him faxes, and that the faxes therefore were not "unsolicited."[2] On that basis, HDIC sought summary judgment.

Plaintiff argued in response that even if the faxes were sent with plaintiff's permission, they were nonetheless actionable because they did not contain the specific opt-out language set forth in the FCC regulation codified at 47 C.F.R. § 64.1200, which plaintiff contended was applicable to both solicited and unsolicited faxes.

In reply, HDIC argued that the regulation construed as a whole did not apply to faxes sent with the permission of the recipient. HDIC referenced the reasoning of the United States District Court in *Nack v. Walburg*, No. 4:10CV00478, 2011 WL 310249, at *4 (E.D. Mo. Jan. 28, 2011), *rev'd and remanded*, 715 F. 3d 680 (8th Cir. 2013), *cert. denied,* --- U.S.---, 134 S. Ct. 1539 (2014),[3] which held:

> Reviewing the regulation as a whole, the provision in question, 47 C.F.R. §64.1200(a)[4](iv),[4] purports, on its face, to apply only to unsolicited faxes. The paragraph requiring the opt-out notice, on which Plaintiff relies, is under the paragraph that prohibits the sending of an "unsolicited" fax advertisement.[5]

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[2] HDIC also argued that the faxes were not "sent to" plaintiff, but to two other entities which he had permitted to use his fax machine, and that plaintiff therefore lacked standing to pursue a TCPA claim. HDIC's argument that plaintiff has no TCPA claim because he consented to the faxes was advanced in the alternative.

[3] The Eighth Circuit had not yet handed down its opinion at the time of briefing.

[4] Since the parties last briefed issues related to 47 C.F.R. §64.1200, some of the subparagraphs under this regulation and the numbering of other subparagraphs were modified. The relevant subparagraph previously known as 47 C.F.R. §64.1200(a)(3) is now known as 47 C.F.R. §64.1200(a)(4) but its wording and substance, and that of its subparts, have not changed. Therefore, HDIC will refer to the relevant subparagraphs and subparts of this regulation by their new numbering: 47 C.F.R. §64.1200(a)(4), including its subparts 47 C.F.R. §64.1200(a)(4)(iii) and (iv).

[5] As HDIC pointed out in its Reply Memorandum: "47 C.F.R. § 1200(a)[4], which references the opt-out language on which the plaintiff in *Nack* and Plaintiff herein rely, begins with the following language: 'No person may … use

HDIC also pointed out, as did the District Court in *Nack*, that the regulation's application solely to unsolicited faxes "'is supported by the FCC's own explanation' of the regulation'" in which "'the FCC states several times that its rule requiring an opt-out notice applies to all *unsolicited* advertisements.'" (HDIC's Reply, Doc. No. 160, p. 12) (quoting *Nack*, 2011 WL 310249, at *4); Rules and Regulations Implementing the [TCPA] of 1991, 71 Fed. Reg. 25967-01 (May 3, 2006). HDIC further explained that the *Nack* court:

> also pointed out that "the clearest statement on the matter" appears in a parenthetical statement in the FCC comments that reads: 'The Commission notes that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.' *Id*. (citing Fed. Reg. at 25791) (emphasis added).

(HDIC's Reply, Doc. No. 160, p. 12).

Alternatively, HDIC pointed out that plaintiff's action is based on the private right of action language in 47 U.S.C. § 227(b)(3). That subsection authorizes private actions only for violations of "this subsection or the regulations prescribed under this subsection." 47 U.S.C. § 227(b). But subsection 227(b) authorizes the FCC to adopt regulations to ensure that *unsolicited* fax advertisements contain opt-out language that complies with the requirements of that subsection of the TCPA. 47 U.S.C. § 227(b)(2)(D). Thus, HDIC argued, to the extent the regulation purports to require specified opt-out language for faxes sent with permission, the FCC could not have prescribed it "under" subsection 227(b). Because the regulation, to the extent it purports to apply to faxes sent with permission, could not have been prescribed under subsection 227(b), plaintiff cannot have a private right of action under subsection 227(b)(3) for alleged deficiencies in the opt-out language.[6]

Although, HDIC submits, the District Court's ruling in *Nack* was completely sound and

---

a telephone facsimile machine, computer, or other devise to send an *unsolicited* advertisement to a telephone facsimile machine, unless . . . .' (Emphasis added.)" (HDIC's Reply, Doc. No. 160, p. 12).

[6] This argument was not addressed by the District Court in *Nack*.

correct, the Eighth Circuit later reversed. *Nack v. Walburg*, 715 F. 3d 680 (8th Cir. 2013), *cert. denied,* --- U.S.---, 134 S. Ct. 1539 (2014). With respect to whether the regulation on its face applied to faxes sent with permission, the Court stated:

> Setting aside any concerns regarding the validity of 47 C.F.R. §64.1200(a)[4](iv) or the scope of the private right of action, we believe that the regulation as written requires the senders of fax advertisements to employ the above-described opt-out language even if the sender received prior express permission to send the fax. This plain-language interpretation of the regulation is consistent with the FCC's proffered interpretation of its own regulation . . . ."

715 F.3d at 685.

With respect to whether a private right of action exists based on purported deficiencies in the opt-out language prescribed in the regulation, the Eighth Circuit stated:

> The private right of action authorized by 47 U.S.C. § 227(b)(3) extends to violations of § 227 and also to "the regulations prescribed under" § 227(b). Walburg argues correctly that if the agency's promulgation of the regulation was *ultra vires* or was pursuant *exclusively* to some statutory authority other than § 227(b), the private right of action could not reach violations of the regulation. *See, e.g., Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.,* 550 U.S. 45, 47–48, 127 S.Ct. 1513, 167 L.Ed.2d 422 (2007) (holding that Congress rather than the FCC creates the private right of action, but in linking that right of action to a regulation, Congress created a right that extends to lawfully enacted regulations as well); *Alexander v. Sandoval,* 532 U.S. 275, 290–93, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) (holding that the scope of a private right of action is limited to the scope set forth in the statutory language creating the private right of action and that no private right exists to enforce regulations promulgated under a different statutory section for which Congress did not create such a right). We hold that, on the facts of the present case, these arguments are, in effect, impermissible challenges to the regulation.
>
> For reasons that require no further elaboration, it is clear that the *ultra vires* argument is wholly indistinguishable from a direct challenge. A challenge that concedes the regulation's validity but asserts that the regulation was not promulgated pursuant to § 227(b) is distinct. Such a challenge, however, involves the same need for deference to the agency and nationally uniform determinations as a direct, Hobbs Act challenge. The rationale for the regulation, as set forth in the 2006 Order and as discussed in the FCC's amicus brief, arguably brings the regulation within range of what § 227(b) authorized the FCC to regulate. We do not believe that, in this circumstance, it is possible or prudent for our court to resolve this issue without the benefit of full participation by the agency. *See, e.g., Fla. Power & Light Co. v. Lorion,* 470 U.S. 729, 743, 105 S.Ct. 1598, 84 L.Ed.2d 643 (1985) ("In the absence of

> specific evidence of contrary congressional intent, however, ... review of orders resolving issues preliminary or ancillary to the core issue in a proceeding should be reviewed in the same forum as the final order resolving the core issue.”).

715 F.3d at 686-87.

In ruling on HDIC’s Amended Motion for Summary Judgment, this Court followed the Eighth Circuit’s decision in *Nack* (which, as this Court noted, was decided “since the parties briefed HDIC’s motion” for summary judgment)[7] and upheld the viability of a private right of action based on the receipt of a solicited fax where the fax did not contain the precise opt-out language required by the FCC regulation:

> While the decision [*Nack*] is not binding on this Court, that court’s reasoning and analysis is persuasive, and this Court will follow it.

(Mem Op. at 23.) On that basis, this Court rejected HDIC’s argument that it was entitled to summary judgment because plaintiff had consented to the fax.

In this motion, HDIC seeks certification of this Court’s Order and Memorandum Opinion under 28 U.S.C. § 1292(b) for the purpose of seeking interlocutory review of two controlling questions of law that were addressed by the Eighth Circuit in *Nack*, and which served as this Court’s basis for denying HDIC’s Amended Motion for Summary Judgment: (1) whether 47 C.F.R. §64.1200(a)(4), construed as a whole, applies to faxes sent with the permission of the recipient (or “solicited faxes”); and (2) whether a private right of action exists under 42 U.S.C. § 227(b) for the transmission of a fax sent with the permission of the recipient, where the fax does not contain the specific opt-out language set forth in 47 C.F.R. § 64.1200(a)(4)(iii).

II. ARGUMENT

A. Applicable Standard To Motions For Certification.

28 U.S.C. § 1292(b) provides the statutory basis for an interlocutory appeal:

[7] (Mem. Op, p. 22).

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order . . .

The Seventh Circuit has held that in order to grant a section 1292(b) petition there must be a controlling question of law, it must be contestable, and its resolution must promise to advance the termination of the litigation. *Ahrenholz v. Bd. of Trustees of the Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000). HDIC submits that the questions of law set forth above satisfy these requirements.

B. This Court Should Certify Its Order and Memorandum Opinion To Allow Interlocutory Review Of the Question Whether 47 C.F.R. § 64.1200(a)(4), Construed As A Whole, Applies To Faxes Sent With The Permission Of The Recipient.

(1) The Question Is Controlling.

The question whether 47 C.F.R. §64.1200(a)(4), construed as a whole, applies to faxes sent with the permission of the recipient, is clearly controlling. "A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996). In the instant case, if it is determined that the regulation does not apply to solicited faxes, and if it is determined that plaintiff did not revoke the permission he had extended to Humana companies to receive faxes,[8] then HDIC is entitled to

[8] HDIC established in its Amended Motion for Summary Judgment that plaintiff in fact had consented to the receipt of faxes from Humana companies in his Group Producing Agent or Agency Contract. (SOF ¶8; HDIC's Memorandum in Support of Amended Motion for Summary Judgment, Doc No. 130, pp. 12-13.) This Court held, however, that a question of fact existed as to whether plaintiff had revoked that consent in a purported telephone call. (Mem. Op. 23.) HDIC submits that, at trial, it is highly unlikely plaintiff can satisfy his burden of proving by a preponderance of the evidence that he specifically advised HDIC that he was revoking his permission to receive faxes. *See* HDIC's Reply in Support of Amended Motion for Summary Judgment, Doc. No. 160, pp. 10-11; HDIC's Response to Plaintiff's Surreply, Doc. No. 167, pp. 1-3.

judgment in its favor on plaintiff's TCPA claim. Clearly then, the question whether 47 C.F.R. § 64.1200(a)(4), construed as a whole, applies faxes sent with the permission of the recipient is more than likely to affect the outcome of this litigation, and is therefore "controlling" within the meaning of 28 U.S.C. § 1292(b).

(2) There Is A Substantial Ground For Difference Of Opinion.

There is also a substantial ground for difference of opinion as to whether the regulation, construed as a whole, purports to apply to faxes sent with the permission of the recipient. The requirement that there be a substantial ground for difference of opinion is satisfied when the issue is difficult and of first impression. *Ga. State Conference of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 952 F. Supp. 2d 1360, 1362 (N.D. Ga. 2013). The Seventh Circuit has not squarely addressed the question whether the regulation applies to solicited faxes; the issue is therefore clearly a question of first impression in this Circuit. Moreover, there is clearly a substantial ground for difference of opinion as demonstrated by the *Nack* District Court's carefully reasoned explanation for its conclusion that the regulation, on its face, does not apply to solicited faxes, compared to the Eighth Circuit's relatively terse pronouncement. *Compare Nack*, 2011 WL 310249, at *4 *with Nack*, 715 F.3d at 685.

(3) *Certification Will Materially Advance the Termination of the Litigation.*

Under this Court's ruling as it now stands, whether plaintiff consented to the faxes at issue has no bearing on the necessity for the opt-out language referenced in the FCC regulation. Plaintiff therefore may seek to certify a class of recipients without regard to whether they consented to the faxes. In the event such a class is certified (and HDIC does not concede that such certification would be proper), and if on appeal the Seventh Circuit holds that 47 C.F.R. § 64.1200(a)(4), construed as a whole, does *not* apply to faxes sent with the permission of the

recipient (as the *Nack* District Court held), HDIC submits the class certification order would be subject to vacatur – as the class will have included individuals who consented to the faxes and manifestly cannot have a TCPA claim regardless of the content of the opt-out language. (Indeed, there may very well be no class members at all, even if a proper representative exists, since the faxes were sent to agents and brokers who had contracts with the Humana that likely included language authorizing the receipt of fax communications). Moreover, plaintiff himself would have no claim under the TCPA in light of his consent to the faxes, which would negate his ability to serve as a class representative, similarly requiring vacatur of a potential class certification order. That lengthy, circuitous process can be avoided if this Court grants HDIC's Motion for Certification. Assuming the Seventh Circuit accepts the interlocutory appeal, HDIC submits the Court of Appeals will reverse and conclude that the regulation does not apply to solicited faxes, in which case plaintiff, having consented to the fax, would have no claim under the TCPA, and the Amended Complaint would be dismissed. The termination of the litigation thus would be materially advanced.

Moreover, early in this litigation, HDIC had offered plaintiff full relief for his individual claims and thereafter moved to dismiss on the basis of mootness. (Doc. No. 14.) This Court denied HDIC's motion on the basis that a Motion to Certify had been filed in a prior action before HDIC extended its offer. (Doc. Nos. 22, 32.) If the Seventh Circuit is afforded the opportunity to consider the issue and holds that the FCC regulation does not apply to solicited faxes, as explained above, plaintiff will not be able to serve as class representative, and there would likely be no class in any event because the faxes were sent to agents and brokers who had contracts with Humana. The Motion to Certify — the only obstacle this Court found to a finding of mootness — will be rendered irrelevant, and plaintiff's individual claim will be required to be

dismissed on that additional ground. HDIC submits that the termination of this litigation will be materially advanced if this Court certifies its Order and Memorandum Opinion and allows the Seventh Circuit to address the certified question of law now.

C. This Court Should Certify Its Order and Memorandum Opinion To Allow Interlocutory Review Of The Question Whether A Private Right Of Action Exists Under 42 U.S.C. §227(b) For The Transmission Of A Fax Sent With The Permission Of The Recipient, Where The Fax Does Not Contain The Specific Opt-Out Language Set Forth In 47 C.F.R. § 64.1200(a)(4)(iii).

(1) The Question Is Controlling.

As in the case of the first issue, if it is determined that no private right of action exists under 42 U.S.C. § 227(b) for the transmission of faxes that do not contain the specific opt-out language set forth in 47 C.F.R. § 64.1200(a)(4)(iii), and if it is determined (as is highly likely) that plaintiff did not revoke the permission he had extended to Humana companies to receive faxes, then HDIC is entitled to judgment in its favor on plaintiff's TCPA claim now. This issue is obviously likely to affect the outcome of this litigation, and is therefore "controlling" within the meaning of 28 U.S.C. § 1292(b).

(2) There Is A Substantial Ground For Difference Of Opinion.

There is also a substantial ground for difference of opinion as to whether a private right action exists for the transmission of faxes that do not contain the opt-out language set forth in 47 C.F.R. § 64.1200(a)(4)(iii) – an issue with which the Seventh Circuit has not been presented.

The Eighth Circuit in *Nack* — which this Court followed — essentially held that the argument that no private right of action existed was the functional equivalent of a direct challenge to the validity of the regulation, which the court reasoned could only be brought under the procedures set forth in the Administrative Orders Review Act, 28 U.S.C. § 2341 *et seq.* (the "Hobbs Act"). The Eighth Circuit found such equivalence for essentially three reasons. First,

the Court stated that the "private right of action" argument "involves the same need for deference to the agency . . . as a direct, Hobbs Act challenge." 715 F.3d at 687. Second, the Court stated that the argument "involves the same need for . . . nationally uniform determinations" as a Hobbs Act challenge. *Id*. Finally, the Court stated that "[t]he rationale for the regulation . . . arguably brings the regulation within the range of what § 227(b) authorized the FCC to regulate." *Id*.

HDIC respectfully submits that the Eighth Circuit's reasoning is not persuasive. First, the Court did not explain *why* deference to the FCC is required in this context. The "private right of action" argument does not challenge the FCC's authority to enact the regulation or argue that the FCC exceeded its bounds. It merely calls for an analysis of *which statutes* support the regulation. In this case, HDIC contends that, to the extent the regulation purports to apply to solicited faxes, it cannot have been based on 47 U.S.C. § 227(b) (which, in (b)(3), authorizes private right of actions) because the statute clearly applies only to unsolicited faxes. It could have been based, however, on other statutes, such as 47 U.S.C. § 303(r), which deals with the FCC's general authority but does not discuss private rights of action. *See* HDIC's Response to Plaintiff's Surreply, Doc. No. 167, p. 4, n.4. But to the extent the regulation purports to apply to faxes sent with permission, it could not have been prescribed under subsection 227(b), so plaintiff cannot have a private right of action under subsection 227(b)(3) for alleged deficiencies in the opt-out language.

Second, the Court's reference to a purported need for "nationally uniform determinations" is unpersuasive. At worst, a conflict among the Circuits might arise as to whether a private right of action exists for fax advertisements sent with permission but without requisite opt-out language. At the risk of stating the obvious, such inconsistencies occur on a regular basis (and are subject to remediation by the United States Supreme Court). The prospect

of such inconsistencies should not preclude a court from ruling on an otherwise justiciable issue.

Third, the Court's conclusion that "[t]he rationale for the regulation . . . arguably brings the regulation within the range of what § 227(b) authorized the FCC to regulate," is clearly subject to debate. For example, in *Raitport v. Harbour Capital Corp.*, No. 09-cv-156, 2013 WL 4883765, at *1 (D.N.H. Sept. 12, 2013), the court noted the opposite: "Congress surely intended to protect citizens from the impositions associated with unwanted, unwelcome, 'unsolicited' facsimile advertisements, but likely did not think it necessary to protected citizens from 'solicited' facsimile advertisements – ones they invited and affirmatively wished to receive"). *See also Physicians Healthsource, Inc. v. Purdue Pharma L.P.*, No. 3:12-cv-1208, 2014 WL 518992, at *2 (D. Conn. Feb. 3, 2014) ("I am inclined to agree with the defendants that the FCC lacks authority to regulate solicited faxes pursuant to 227(b) of the TCPA and am not entirely persuaded . . . that the Hobbs Act bars me from reaching this conclusion"); *Kaye v. Merck & Co., Inc.*, No. 3:10-cv-1546, 2014 WL 2002447, at *2 (D. Conn. May 15, 2014) (quoting same language from *Physicians Healthsource, Inc.*).[9]

Clearly, there is a substantial ground for difference of opinion as to the soundness of the Eighth Circuit's rejection of the "private right of action" argument and its conclusion that the plaintiff in *Nack* therefore was free to pursue a private right of action based on a solicited fax. This prong of the certification requirements of 28 U.S.C. § 1292(b) is thus easily satisfied.

(3) Certification Will Materially Advance The Termination Of The Litigation.

The same considerations discussed above with respect to the first issue apply to the "private right of action" issue as well. HDIC submits it is highly likely the Seventh Circuit will

[9] Interestingly, the Eighth Circuit suggested to the *Nack* defendants the possibility of pursuing an administrative remedy asking the FCC to repeal the regulation. 715 F.3d at 686, n. 2. This quite arguably suggests that the Eighth Circuit itself may have harbored some doubts as to whether 47 U.S.C. § 227 indeed was a sound basis for the regulation insofar as it purported to apply to solicited faxes.

conclude that plaintiff has no private right of action for a fax advertisement to which he consented. The interests of judicial economy will be served if that issue is resolved now, before the issue of class certification is litigated and a possible appeal taken. The termination of the litigation will be materially advanced if these questions are certified and HDIC's position is sustained. In that event this entire litigation will terminate prior to lengthy class certification litigation.

D. Further Proceedings Should Be Stayed In This Court.

In light of the considerable amount of time and expense that undoubtedly will be incurred by the parties in connection with discovery and certification-related motions during the next phase of this litigation, HDIC respectfully requests that this Court stay further proceedings in this Court pending disposition by the United States Court of Appeals for the Seventh Circuit of HDIC's application for interlocutory appeal under the procedures set forth in 28 U.S.C. § 1292(b) and on the merits of its substantive arguments in the interlocutory appeal. HDIC submits that Plaintiff will not be prejudiced by this temporary and relatively short delay, particular in light of the small amount of damages that are recoverable for the claims alleged in the Complaint.

III. CONCLUSION

For the foregoing reasons, Defendant HumanaDental Insurance Company requests that this Court certify its Memorandum Opinion and Order dated June 12, 2014, for immediate appeal pursuant to 28 U.S.C. § 1292(b) for the purpose of seeking interlocutory review of the questions of law described herein. In addition, Defendant HumanaDental Insurance Company requests that this Court stay all proceedings in this Court pending disposition by the United States Court of Appeals for the Seventh Circuit of HDIC's application for interlocutory appeal under the

procedures set forth in 28 U.S.C. § 1292(b) and on the merits of its substantive arguments in the interlocutory appeal.

Respectfully submitted,

HUMANADENTAL INSURANCE COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2014, I electronically filed the foregoing Memorandum in Support of Its Motion to Certify Pursuant to 28 U.S.C. §1292(b), with the Clerk of the U.S. District Court, Northern District of Illinois, Eastern Division, using the CM/ECF system which sent notification of such filing to the following CM/ECF registered participants:

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EXHIBIT J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE S. BRODSKY, individually and as the representative of a class of similarly-situated persons,	)	
Plaintiff,	)	No. 1:10-cv-03233
v.	)	
HUMANADENTAL INSURANCE COMPANY d/b/a HUMANA SPECIALTY BENEFITS,	)	
Defendant.	)	

PLAINTIFF'S MOTION FOR
CLASS CERTIFICATION

Plaintiff, Lawrence Brodsky ("Plaintiff"), individually and on behalf of all others similarly situated, hereby moves the Court for class certification pursuant to Fed. R. Civ. P. 23(a) and (b)(3) and states the following in support:

1. This case arises out Defendant HumanaDental Insurance Company's ("HDIC") custom and practice of sending faxes advertising insurance products. HDIC sent at least nineteen different faxes advertising its insurance products.

2. On May 14, 2008, Plaintiff received two such fax advertisements (hereafter, "GN-Fax 4/08"), and brought this lawsuit alleging that the faxes violated the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227.

3. HDIC has stipulated it sent the GN-Fax 4/08 to 19,931 others in this particular fax blast. HDIC has further stipulated it successfully sent three other separate faxes (Fl-Fax 4/08, NC-Fax 4/08, and WV-Fax 4/08) to an additional 5,301 others. In addition, HDIC has sent fifteen other faxes advertising its insurance products that are the subject of this Motion.

Precise Relief Requested

4. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff seeks an Order from this Court certifying the following class:

> All persons or entities who were successfully sent one or more faxes during the period from May 2007 through September 2008 that: (1) named "Humana Specialty Benefits" or "HumanaDental" on the bottom of the fax; (2) referred to, referenced, or discussed "HumanaDental" dental plans; (3) contained one of the following designations: FL-Fax 4/08, GN-Fax 4/08, NC-Fax 4/08, WV-Fax 4/08, AK-Fax 9/07, GN-Fax 9/07, KS-Fax 9/07, NC-Fax 9/07, TX-Fax 9/07, VA-Fax 9/07, CO/NM-Fax 10/07, GA-Fax 10/07, OK-Fax 10/07, IL/MS/LA/MN-Fax 12/07, KY-Fax 12/07, WV-Fax 12/07, MD-Fax 2/08, CA-Fax 2/08, NV-Fax 7/08; and (4) contained an "opt out" notice stating, "If you don't want us to contact you by fax, please call 1-800-U-CAN-ASK," or "If you don't want us to contact you by fax, please call 1-888-4-ASSIST."

5. Plaintiff also seeks an Order from the Court appointing Plaintiff as class representative and appointing the law firms of Anderson + Wanca and Bock & Hatch as class counsel.

Basis of the Relief Requested

6. As explained in Plaintiff's Memorandum of Law, Plaintiff easily satisfies the requirements of Federal Rule of Civil Procedure 23(a), as well as all of the Rule 23(b)(3) requirements, and the Class is ascertainable. Plaintiff seeks to certify a class of all those persons who were sent some or all of the nineteen faxes in violation of the TCPA and its implementing regulations. This Court has already denied HDIC's motion for summary judgment as to Plaintiff's TCPA claim and HDIC's motion to reconsider that denial, holding that Plaintiff has standing as a matter of law, that the opt-out notice contained on the GN-Fax 4/08 (and thus all other faxes attached hereto as Exhibits 1 through 19) is non-compliant with FCC regulations as a matter of law (thereby precluding the defenses of prior express permission of invitation and existing business relationship (EBR)), and that HDIC failed to demonstrate the absence of a genuine issue of material

fact as to whether the GN-Fax 4/08 is an advertisement and whether HDIC was a "sender" of GN-Fax 4/08.

7. Finally, Plaintiff submits that its counsel, the law firms of Anderson + Wanca and Bock & Hatch, are highly experienced in TCPA class-action litigation and should be appointed class counsel under Rule 23(g), and Plaintiff should be appointed class representative, as it has no conflicts and will actively and adequately prosecute this action.

Respectfully submitted,

LAWRENCE S. BRODSKY, individually and as the representative of a class of similarly-situated persons

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

s/ Wallace C. Solberg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE S. BRODSKY, individually and as the representative of a class of similarly-situated persons,	)	
Plaintiff,	)	No. 1:10-cv-03233
v.	)	
HUMANADENTAL INSURANCE COMPANY d/b/a HUMANA SPECIALTY BENEFITS,	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF CLASS CERTIFICATION

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Plaintiff, Lawrence Brodsky ("Plaintiff"), submits this Memorandum of Law in Support of his Motion for Class Certification, pursuant to Fed. R. Civ. P. 23(a) and (b)(3), and states the following in support:

INTRODUCTION

The Telephone Consumer Protection Act of 1991 ("TCPA" or "Act"), 47 U.S.C. § 227(b)(1)(C), forbids the use of "any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement," unless certain exceptions are met. The TCPA defines an "unsolicited advertisement" as "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, in writing or otherwise." *Id.* § 227(a)(5). The TCPA creates a private right of action for any person or entity that receives an advertisement in violation of the Act and provides for statutory damages in the amount of $500 for each violation as well as injunctive relief against future violations. *Id.* § 227(b)(3)(A)–(B). Additionally, the TCPA provides treble damages may be assessed if in the Court's discretion the defendant "willfully or knowingly" violated the act. *Id.* § 227(b)(3).

The Federal Communications Commission ("FCC") has authority to prescribe regulations to implement the TCPA. *Id.* § 227(b)(2); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012) (the Act directs the FCC to prescribe implementing regulations). The regulations define "sender" as "[T]he person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement." 47 C.F.R. § 64.1200(f)(10). Thus, "sender" under the regulations is not limited to the person or entity that physically transmits a fax, but extends to include the person or entity on whose behalf

the fax is sent or whose goods or services are advertised or promoted in the fax. *Id.* In addition, the FCC has issued regulations requiring specific "opt-out" language on fax advertisements in order to advise recipients of how to stop receiving such faxes. 47 C.F.R. § 64.1200(a)(4)(iii). The FCC's regulations regarding opt-out language are clear – fax advertisements sent pursuant to an existing business relationship ("EBR"), or pursuant to "prior express invitation or permission," must contain the proper opt-out language. *Id.* § 64.1200(a)(4)(ii) & (iv).

Defendant HumanaDental Insurance Company ("HDIC") had a custom and practice of sending fax advertisements (HDIC calls them "communications") to insurance producers and agents extolling them to sell HDIC (and other) insurance products. On May 14, 2008, Plaintiff received two such fax advertisements (hereafter, "GN-Fax 4/08"), as did 19,931 others in this particular fax blast. Plaintiff filed a Class Action Complaint for violation of the TCPA, alleging that HDIC "faxed the same and similar advertisements to Plaintiff [and] other recipients . . . ." (Doc. 33 at ¶ 13).[1]

This Court has already denied HDIC's motion for summary judgment on Plaintiff's TCPA claim and HDIC's motion to reconsider that denial, holding that Plaintiff has standing as a matter of law, that the opt-out notice contained on the GN-Fax 4/08 (and thus all other faxes attached hereto as Exhibits 1 through 19) is non-compliant with FCC regulations as a matter of law (thereby precluding the defenses of "prior express invitation or permission" or "established business relationship" (EBR)), and that HDIC failed to demonstrate the absence of a genuine issue of material fact as to whether the GN-Fax 4/08 is an advertisement and whether HDIC was a "sender" of GN-Fax 4/08.

Plaintiff seeks to certify the following class:

[1] Plaintiff also brought suit for conversion and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/2. Only the TCPA claim is currently pending.

> All persons or entities who were successfully sent one or more faxes during the period from May 2007 through September 2008 that: (1) named "Humana Specialty Benefits" or "HumanaDental" on the bottom of the fax; (2) referred to, referenced, or discussed "HumanaDental" dental plans; (3) contained one of the following designations: FL-Fax 4/08, GN-Fax 4/08, NC-Fax 4/08, WV-Fax 4/08, AK-Fax 9/07, GN-Fax 9/07, KS-Fax 9/07, NC-Fax 9/07, TX-Fax 9/07, VA-Fax 9/07, CO/NM-Fax 10/07, GA-Fax 10/07, OK-Fax 10/07, IL/MS/LA/MN-Fax 12/07, KY-Fax 12/07, WV-Fax 12/07, MD-Fax 2/08, CA-Fax 2/08, NV-Fax 7/08; and (4) contained an "opt out" notice stating, "If you don't want us to contact you by fax, please call 1-800-U-CAN-ASK," or "If you don't want us to contact you by fax, please call 1-888-4-ASSIST."

There are three class-wide questions remaining to be decided on the merits:

(1) whether the faxes are "advertisements" as defined by the TCPA, 47 U.S.C. § 227(a)(5), and the FCC regulations, 47 C.F.R. § 64.1200(f)(1);[2]

(2) whether HDIC is a "sender" of the faxes pursuant to FCC regulations, 47 C.F.R. § 64.1200(f)(10); and

(3) whether HDIC "willfully or knowingly" violated the TCPA, allowing the Court to increase statutory damages from the automatic $500 per violation to $1,500 per violation and the scope of injunctive relief.

The Court need not, and in fact should not, decide these questions now. It need only determine whether the "*answers*" to these questions are "apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). As argued below, these questions can *only* be answered classwide, and doing so will resolve the entire case. That is why "[c]lass certification is normal" under the TCPA: "because the main questions, such as whether a given fax is an advertisement, are common to all recipients." *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 683 (7th Cir. 2013).

PROCEDURAL HISTORY AND BACKGROUND FACTS

[2] The regulations define "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services." 47 C.F.R. § 64.1200(f)(1)

A. Judge Holderman denies HDIC's motion to dismiss, motion to reconsider, and motion for interlocutory appeal under 28 U.S.C. § 1292(b).

Plaintiff filed the original Complaint and Motion for Class Certification on March 18, 2010, which HDIC removed to this Court on May 26, 2010. (Doc. 1). In the original Complaint, Plaintiff alleged HDIC sent two fax advertisements to Plaintiff on or about May 14, 2008, without prior express permission of invitation and which did not contain a proper opt out notice. (Doc. 1-2 ¶¶ 10-12). Plaintiff also filed a Motion for Class Certification at the time he filed the original Class Action Complaint. (Doc. 1-3 at 2).

On June 23, 2010, HDIC filed a motion to dismiss pursuant to Rules 12(b)(1), 12(h)(3), and 12(b)(6) (Doc. 14, 16), which Judge Holderman denied February 8, 2011. (Doc. 22, at 1). On March 2, 2011, HDIC filed a motion to reconsider the denial of the motion to dismiss (Doc. 28), which Judge Holderman denied July 25, 2011. (Doc. 32). On March 5, 2011, Plaintiff filed his Amended Complaint, again alleging HDIC sent two fax advertisements to Plaintiff on or about May 14, 2008 without prior express permission and which did not contain proper opt out notice. (Doc. 1-2 ¶¶ 10-12). On August 30, 2011, HDIC filed a motion to certify questions for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), based on the denial of its Rule 12(b)(1) and 12(h)(3) motion to dismiss premised on its attempt to "pick off" Plaintiff (Doc 36), which Judge Holderman denied October 12, 2011. (Doc. 46).

B. Judge Durkin denies HDIC's motion for summary judgment (as to the TCPA claim), motion to reconsider, and motion for interlocutory appeal under 28 U.S.C. § 1292(b).

On July 16, 2012, notwithstanding the parties' Planning Report, which provided discovery would be bifurcated and that following Rule 23 discovery (and a ruling on class certification), the parties would submit another discovery schedule pertaining to the merits, (Doc. 39), and Judge Holderman's Scheduling Order, which provided for Rule 23 discovery only (Doc.

41), HDIC filed a motion for summary judgment. (Doc. 90-93). Plaintiff was given leave to conduct discovery as to the issues raised in HDIC's motion for summary judgment. (Doc. 95). Plaintiff filed its response to HDIC's motion for summary judgment on January 29, 2013 (Docs. 142, 144, 145, 146), and its sur-reply on March 15, 2013 (Doc. 166).

On January 24, 2013, HDIC filed a motion to stay briefing and ruling on Plaintiff's Rule 23 class certification motion, *see* Doc. 140, variously stating summary judgment was "highly likely," that HDIC "has a complete defenses on the merits," and that "should this Court grant class certification only to later conclude that Plaintiff's individual claims fail as a matter of law, depending on the ultimate timing additional resources may be needlessly expended in notifying members of the ill-fated class." (Doc. 140, at 2, 7, 8). In the interests of judicial economy, Plaintiff did not oppose the motion to stay but instead focused its efforts on opposing HDIC's motion for summary judgment.

On June 12, 2014, Judge Thomas M. Durkin denied HDIC's motion for summary judgment as to the TCPA claim. *Brodsky v. HumanaDental Ins. Co.* ("*Brodsky I*"), 2014 WL 2780089 (N.D. Ill. June 12, 2014). HDIC argued it was entitled to summary judgment on the grounds that it was not a "sender" of GN-Fax 4/08 and that the GN-Fax 4/08 was not an "advertisement." Judge Durkin disagreed. First, Judge Durkin held there was an issue of fact as to whether HDIC was a "sender" under the regulatory definition, 47 C.F.R. § 64.1200(f)(10), ruling that although HDIC claimed three products specifically listed on the GN-Fax 4/08 – Dental DHMO ("DHMO"), Advantage Plus dental plan, and HumanaVision VCP options – were not insured by HDIC, there was a question of fact as to whether the GN-Fax 4/08 could be interpreted as promoting or offering information as to *only* those three products or instead listed those products as examples and really promoting any product related to Humana Specialty

Benefits, which would include HDIC products, making HDIC a sender of the Fax. *Id*. at *6. Judge Durkin noted HDIC produced certain dental brochures "that seem to indicate that there is a closer relationship between HumanaDental and HDIC than HDIC admits." *Id*. at *7. Judge Durkin pointed out the dental brochures produced by HDIC[3] for Florida, Alabama, Indiana, Illinois, Ohio, Missouri, Tennessee, Kentucky, Kansas, Georgia, and Texas provided that "A.M. Best rates HumanaDental Insurance Company as 'excellent,'" and "Our national PPO dental network has more than 106,000 dentist location." *Id.* at *7 (emphasis added). Judge Durkin held that "if 'HumanaDental' plans were promoted or described in some type of communication where HDIC was explicitly listed as an insurance company, it is at least plausible that the Marketing Department was also trying to promote HDIC products in the faxes at issue here." *Id*.

Second, Judge Durkin held GN-Fax 4/08 could be an advertisement. *Id*. In particular, Judge Durkin noted GN-Fax 4/08 states: "Our portfolio of specialty benefits products now include[s]," and then discusses certain products and the advantages and conveniences of them. *Id.* Judge Durkin stated the fax could be a "sales pitch," stating:

> The faxes provide, "We've made it even easier for them and you to do business with us, providing a single source for a quote, application, enrollment and bill," and, "Sell HumanaDental and HumanaVision plans and earn credits towards Humana's Leader's Club trip to Maui in 2009." These are open invitations to do business with Humana, not merely the promotion of research studies or trials.

Id.

Third, Judge Durkin held HDIC admitted its opt out notice did not comply with FCC requirements and that "this admission that the notice provided in the faxes sent to Brodsky's fax machine was deficient as a matter of law and will be binding on HDIC should the case go to

[3] The brochures were attached to Plaintiff's memorandum in opposition to HDIC's motion for summary judgment. *See* Doc. 146-5 through 146-15.

trial." *Id*. at *9. Based on this finding, Judge Durkin held any claimed prior express permission or invitation defense failed as a matter of law. *Id*. at *9-10.

Thereafter, HDIC filed a motion to reconsider as to Judge Durkin's holdings in *Brodsky I* regarding whether Plaintiff had standing, whether GN-Fax 4/08 was an advertisement, and the holding that the lack of a proper opt out barred HDIC's permission defense. *Brodsky v. HumanaDental Ins. Co.* ("*Brodsky II*"), 2014 WL 48113147, at *1 (N.D. Ill. Sept. 29, 2014). On September 29, 2014, Judge Durkin denied HDIC's motion to reconsider whether GN-Fax 4/08 was an advertisement, and further held Plaintiff had standing as a matter of law. *Id*. at *2-3. Next, relying on the Seventh Circuit's decision in *Holtzman v. Turza*, 728 F.3d 682, 683-84 (7th Cir. 2013), Judge Durkin denied HDIC's motion for interlocutory appeal as to two questions, one of which was whether 47 C.F.R. § 64.1200(a)(4) applies to faxes sent with permission. *Id*. at *4. In short, HDIC's permission defense fails as a matter of law for lack of a compliant opt out, as does an EBR defense, which similarly requires a compliant opt out.

C. Humana, Inc. and HDIC had a custom and practice of sending faxes advertising the availability and quality of HDIC products.

HDIC stated in its summary judgment papers that there was a custom and practice of creating faxes (or as HDIC states, "producer communications"), then creating spreadsheets based on the geographic location of producing agents and agencies, and then transmitting the faxes to those agents/agencies. HDIC does not have its own marketing department; Humana, Inc. ("Humana") does the advertising and marketing for HDIC. (*See* Doc. 156, HDIC Resp. to Pl.'s Rule 56.1(b) SOAF, at ¶¶ 41, 42). As to GN-Fax 4/08, Melanie Buehler ("Buehler"), who has been variously employed by HDIC, Humana, and Humana Insurance Company, directed Humana's Marketing Department to write and design GN-Fax 4/08, which she stated was done "in the course of [their] regularly conducted business activity," and further, that preparing faxes

was "the regular practice of the Marketing Department." (Buehler Decl., Doc. 224-6, Page ID 6760, at ¶¶ 3, 4; McCartney Dep. Tr., relevant portions attached as Ex. 22, at 11, 12, 38-39, 41, 61). The marketing department also created Exhibits 5 through 19, with input from Buehler. (Ex. 22, McCartney Dep. Tr. at 61-72).

Thereafter, and again in accordance with "usual business procedures," the Marketing Department obtained from Humana's Information Management group a spreadsheet containing the targets for the faxes, based on the producing agents' geographic location. (*Id*., Page ID 6760-61, at ¶ 5). Buehler stated it was the "regular practice" of the Information Management Group to create such spreadsheets. (*Id*.) The Marketing Department then provided the fax and spreadsheet to the Humana Information Technology Group. (*Id.* at ¶ 6). The Humana Information Technology group sent the fax to all the fax numbers on the spreadsheet using Rightfax desktop faxing software. (Neta Aff., Doc. 224-6, Page ID 6782-83, at ¶¶ 4, 6, 10). Ana Neta, who worked for the Humana Information Technology group, testified that she would receive from the Marketing Department an email containing the fax and the spreadsheet. (Neta Dep. Tr., Doc. 224-7, Page ID 6788, at 9-10). Neta would then remove duplicates and, after receiving approval from her manager, would then send the faxes via RightFax. (*Id*., Page ID 6789-90, 6792, at 16-17, 25; Neta Decl., Doc. 224-6, Page ID 6782-83, at ¶ 4). Neta testified that in 2008 she was sending fax broadcasts two to three times a week, although the number "varied," and in 2007, she sent such fax broadcasts "lots of times." (Neta Dep. Tr., Doc. 224-7, Page ID 6790, 6795, at 17-18, 39). Buehler testified that while at Humana, she has been involved in "probably" more than 20 producer communications (faxes). (Buehler Dep. Tr., Doc. 224-6, Page ID 6768, at 16). In the normal course of business, Exhibits 5 through 19 would be faxed based on the designation in the bottom right-hand corner of the fax. (Ex. 22, McCartney Dep. Tr. at 61-72).

D. Plaintiff's First and Second Motions to Compel and Objection to this Court regarding Order on Second Motion to Compel.

On April 5, 2012, Plaintiff filed its first Motion to Compel discovery against HDIC. (Doc. 60). Plaintiff sought to compel, *inter alia*, a response to Request to Produce No. 1, seeking all fax advertisements sent during the "Relevant Time Period," *i.e.*, four years prior to the filing of the Complaint; Request to Produce No. 16, seeking documents indicating how many faxes identified in response to by Request No. 1 were transmitted "by or on behalf of Defendant to telephone numbers during the Relevant Time Period;" Request Nos. 25 and 26, seeking all documents identifying the recipients of the GN-Fax 4/08, and the fax numbers to which GN-Fax 4/08 was sent. (Doc. 60 at Page ID 1115-17). Plaintiff also sought to compel a response to Interrogatory No. 2, which asked HDIC whether it or any entity acting on its behalf sent faxes during the relevant time period advertising or promoting any of HDIC's products, goods, and services, and Interrogatory No. 3, which asked HDIC to state whether any fax transmissions identified in Interrogatory No. 2 were sent to Plaintiff's fax number 847-991-0152. (*Id*. at Page ID 1119-20).

In denying Plaintiff's Motion to Compel as to Request Nos. 25 and 26, Magistrate Judge Mason noted HDIC represented that "neither HumanaDental, nor any other entity on its behalf, sent the faxes that are attached to the Complaint in this matter," and that:

> The issue of whether defendant was the "sender" under the TCPA is one for the District Court to resolve at a later date (and perhaps, depending on the outcome, Rule 23 discovery will need to be revisited). For now, if defendant claims that it did not send the faxes and that it does not have any responsive documents, it is entitled to state as much, and we cannot order defendant to produce documents that it claims it does not have.

(Doc. 73 at Page ID 1336). In denying Plaintiff's Request No. 16 for all fax advertisements sent during the class period, Magistrate Judge Mason stated that "if defendant is not the sender of the Fax that plaintiff received, it appears to us that this is a fishing expedition in an effort to find out

whether defendant violated the TCPA on other occasions," and that "only those faxes that are the same as the Fax plaintiff received are relevant." (*Id*. at Page ID 1337).

However, Magistrate Judge Mason ordered HDIC to answer Interrogatory No. 3, which asked: "State whether any facsimile transmissions identified in Interrogatory No. 2 were sent to telephone number 847-991-0152 during the Relevant Time Period and state the dates such transmissions were sent." (*Id*. at Page ID 1338). Magistrate Judge Mason stated:

> In Interrogatory Nos. 3, 5, and 12, however, plaintiff requests information about any fax that defendant sent to plaintiff's fax number. Despite defendant's objections, we find that this information is relevant to plaintiff's claims. If defendant sent plaintiff any advertisements by fax in violation of the TCPA, plaintiff is entitled to discovery regarding these faxes. Defendant is directed to respond to these interrogatories by 5/25/12.

(*Id*.).

On October 24, 2012, HDIC in its amended response to Interrogatory No. 3, stating in part that Humana stopped sending fax advertisements of the type attached to the Complaint in September 2008, and further stating the only time period that "could possibly be relevant to Plaintiff's claim under any set of facts is the period of May 14, 2007 to September, 2008." (*See* Doc. 224-7, at Page ID 6819-20). HDIC then stated:

> With respect to the time period May 14, 2007 to September 2008, and without waiving any of the foregoing objections, HDIC states that it did not send any facsimiles in violation of the TCPA and that it is unknown whether any facsimile transmissions were sent to the telephone number 847-991-0152.

(*Id*. at Page ID 6820).

On September 30, 2014, following his decision in *Brodsky II*, Judge Durkin sent the case back to the Magistrate Judge for completion of discovery. (Doc. 213). Magistrate Judge Mason ordered any additional discovery in the case be served by November 21, 2014. (Doc. 216). Thereafter, Plaintiff timely sought discovery as to the nineteen faxes attached hereto, and further noticed a Rule 30(b)(6) witness from HDIC and/or Humana (the topics were identical) and fact

witness depositions. On December 16, 2014, after HDIC and Humana refused to produce any documents or witnesses, Plaintiff filed his Second Motion to Compel. (Doc. 224, 224-1).

On February 24, 2015, Magistrate Judge Mason granted in part and denied in part Plaintiff's Second Motion to Compel. (Doc. 236). Magistrate Judge Mason ordered HDIC to provide responsive documents and a Rule 30(b)(6) witness as to Exhibits 1 through 4 (attached hereto), as well as provide an image of the hard drive used to send Exhibits 1 through 4, based on his finding that Exhibits 1, 3, and 4 were "very" similar to Exhibit 2 (GN-Fax 4/08, the fax attached to the Complaint). Magistrate Judge Mason denied the motion to compel as to Exhibits 5 through 19, finding that discovery as to these faxes was Rule 23 discovery (which had already closed), and further that he was "not inclined" to open up discovery on additional faxes because the parties have been litigating over one fax for nearly five years. (Doc. 236 at Page ID 7137-38). Magistrate Judge Mason stated:

> [W]e agree with plaintiff that because defendant denied that it is the "sender" of the faxes and that the faxes constitute "advertisements," defendant has opened the door to these issues. As a result, plaintiff should be allowed discovery into whose products are being referenced and/or advertised in the faxes, the identification of the brochures related to the products referenced in the faxes and the identity of the insurer for the plans referenced in the faxes. These are the very issues that the District Court identified as issues of fact in the denial of defendant's motion for summary judgment on the TCPA claim. Accordingly, plaintiff's motion to compel is granted with respect to his Third Requests 1-4, which reference the faxes identified as Exhibits 1-4. The motion to compel responses to Requests 5-19 is denied.

(*Id.*)

On March 10, 2015, Plaintiff filed a partial Objection to Magistrate Judge Mason's ruling as to Plaintiff's Second Motion to Compel, arguing to this Court that Magistrate Judge Mason's finding that Exhibits 5 through 19 were not the same or similar to Exhibits 1 through 4 was clearly erroneous. (Doc. 238 at Page ID 7151). Among other things, Plaintiff compared Exhibit 1, FL-Fax 4/08, which had already been held been held by Judge Mason to be the same or similar

to GN Fax 4/08, to Exhibits 5 through 19, including a chart of the similarities between FL-Fax 1 and Exhibits 5 through 19. (*Id.* at Page ID 7151 to 7154). In particular, Plaintiff pointed out that at least one or more of the HDIC-insured products on Exhibit 1 – Traditional Preferred, PPO, and Preventative Plus plans – appeared on Exhibits 5 through 19, and further, the opt-out notice was identical as to Exhibits 5 through 18, and substantially similar as to Exhibit 19.

Plaintiff also objected to Magistrate Judge Mason's Order in that it did not compel HDIC/Humana to identify any other faxes sent to Plaintiff's fax line, as requested in Interrogatory No. 3, *id*. at Page ID 7154-55, and as previously ordered by Judge Mason in his Order on Plaintiff's First Motion to Compel (Doc. 73, Page ID 1338). Plaintiff identified for HDIC Exhibits 1 and 3 through 19; HDIC only had to state whether any of these faxes were sent to Plaintiff's fax line, *see* Doc. 224-1 at 12, and Doc. 234, at 5, 6, but Magistrate Judge Mason's Order failed to address the request. (Doc. 236).

On March 12, 2015, the Court overruled Plaintiff's objection to the ruling that HDIC/Humana did not have to produce documents or present a Rule 30(b)(6) witness regarding Exhibits 5 through 19, finding that Magistrate Judge Mason carefully scrutinized all 19 faxes and found that only Exhibits 1, 3, and 4 were "the same or similar to" Exhibit 2 (GN-Fax 4/08). (Doc. 244). The Court did not address Plaintiff's objection that HDIC should be ordered to identify whether Exhibits 1 and 3 through 19 were sent to Plaintiff's fax number. (*Id.*)

E. HDIC's production of documents regarding FLA-Fax 4/08, GN-Fax 4/08, NC-Fax 4/08 and WV-Fax 4/08 and the parties' stipulations regarding same.

On June 22, 2015, Plaintiff filed his Motion for Entry of Protective Order Regarding Electronic Discovery, which addressed issues the parties had been unable to agree upon relative to Magistrate Judge Mason's Order requiring HDIC to produce an image of the hard drive used to send Exhibits 1 through 4. (Doc. 258-1). On July 10, 2015, during the pendency of briefing on

that motion, HDIC/Humana (the documents were labeled with a Humana designation) produced "RightFax" documents regarding FL-Fax 4/08 (Ex. 1), GN-Fax 4/08 (Ex. 2), NC-FAX 4/08 (Ex. 3), and WV-FAX 4/08 (Ex. 4). (July 10, 2015 email from Terrizzi to Solberg, attached as Exhibit 20). The documents produced contained spreadsheets with the target recipients' name and fax number as to Exhibits 1 through 4, as well as a document denoting failed transmission attempts.[4]

The parties thereafter entered into a Stipulation, attached as Exhibit 21, regarding these "RightFax" documents and Exhibits 1 through 4 (and other matters). The parties have stipulated to the following:

FL-Fax 4/08 (Ex. 1): The document designated FL-Fax 4/08, labeled HU 00266, is a true and accurate copy of a document sent by facsimile on or about May 13, 2008; "FL" refers to the state (Florida) for which the fax is intended, "Fax" is the method of delivery, and "4/08" is the date the fax was created; for FL-Fax 4/08, there were 4,908 attempted transmissions (HU 01238 to HU 01340), of which 713 were unsuccessful (HU 01377 to HU 01368), resulting in **4,195** (4,908-713) completed error-free transmissions of FL-Fax 4/08. (Ex. 21, Stipulation, at ¶¶ 1, 2, 19).

GN-Fax 4/08 (Ex. 2): The document designated GN-Fax 4/08, labeled HU 00267, is a true and accurate copy of a document sent by facsimile on or about May 14, 2008; "GN" means this was a generic or general fax meant for multiple states, "Fax" is the method of delivery, and "4/08" is the date the fax was created; for GN-Fax 4/08, there were 22,683 attempted transmissions (HU 00774 to HU 01237), of which 2,752 were unsuccessful (HU 01388 to HU 01422), resulting in **19,931** (22,683-2,752) completed error-free transmissions of GN-Fax 4/08.

[4] The RightFax documents produced on July 10, 2015, were designated "Confidential" by Humana/HDIC and will therefore be filed under seal pursuant to the Protective Order entered in this case. (Doc. 257). Plaintiff will present a motion for leave to file these documents under seal contemporaneously with the filing of this motion for class certification. These Exhibits will be designated Exhibits 25 through 29.

(Ex. 21, Stipulation, at ¶¶ 5, 6, 20).

NC-Fax 4/08 (Ex. 3): The document designated NC-Fax 4/08, labeled HU 00269, is a true and accurate copy of a document sent by facsimile on or about May 13, 2008; in NC-Fax 4/08, "NC" refers to the state (North Carolina) for which the fax is intended, "Fax" is the method of delivery, and "4/08" is the date the fax was created; for NC-Fax 4/08, there were 1,232 attempted transmissions (HU 01341 to HU 01366), of which 155 were unsuccessful transmissions (Exhibit 13, HU 01377 to HU 01368), resulting in **1,077** (1,232-155) completed error-free transmissions of NC-Fax 4/08. (Ex. 21, Stipulation, at ¶¶ 9, 10, 21).

WV-Fax 4/08 (Ex. 4): The document designated WV-Fax 4/08, labeled HU 00270, is a true and accurate copy of a document sent by facsimile on or about May 12, 2008; in WV-Fax 4/08, "WV" refers to the state (West Virginia) for which the fax is intended, "Fax" is the method of delivery, and "4/08" is the date the fax was created; for WV-Fax 4/08, there were 31 attempted transmissions (HU 01366) of which 2 were unsuccessful (HU 01368), resulting in **29** (31-2) completed error-free transmissions of WV-Fax 4/08. (Ex. 21, Stipulation, at ¶¶ 13, 14, 22).

ARGUMENT

I. Standards for class certification in a TCPA fax case.

"Class certification is normal" under the TCPA "because the main questions, such as whether a given fax is an advertisement, are common to all recipients." *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 683 (7th Cir. 2013). These cases typically involve thousands of identical violations, with statutory damages too small to incentivize individual suits, and present "an archetypical example of a case in which the class action mechanism is superior to that of individual litigation of each claim." *Hazel's Cup & Saucer, LLC v. Around The Globe Travel,*

Inc., 86 Mass. App. Ct. 164, 166 (2014). Judges within this Circuit have certified numerous classes in junk fax TCPA cases.[5]

A party seeking to certify a class action must demonstrate that Rule 23(a)'s four prerequisites are satisfied: (1) that the proposed class is so numerous that joinder of all members is impracticable; (2) that there are questions of law or fact common to the class; (3) that the claims of the representative party are typical of the claims of the class; and (4) that the representative party will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a); *Chicago Teachers Union, Local 1 v. Board of Educ.*, 797 F.3d 426, 433 (7th Cir. 2015).

In addition to satisfying the requirements of Rule 23(a), the plaintiff must satisfy one of the subsections of Rule 23(b). Fed. R. Civ. P. 23(b); *Bell v. PNC Bank, Nat'l Assoc.*, --- F.3d ---, 2015 WL 5093052, at *10 (7th Cir. Aug. 31, 2015). Here, Plaintiff seeks certification under Rule 23(b)(3), which requires a finding that "questions of law or fact common to class members

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[5] *Holtzman v. Turza*, 2009 WL 3334909 (N.D. Ill. Oct. 14, 2009) (Gettleman, J.), *aff'd*, 728 F.3d 682, 683 (7th Cir. 2013); *Chapman v. Wagener Equities, Inc.*, 2014 WL 540250 (N.D. Ill. Feb. 11, 2014) (Tharpe, J.), *app. denied*, No. 14-8004, 2014 WL 1272786 (7th Cir. Mar. 31, 2014) (Posner, J.); *Bridgeview Health Care Ctr., Ltd., v. Clark*, 2011 WL 4628744 (N.D. Ill. 2011) (Valdez, J.); *CE Design, Ltd. v. Cy's Crabhouse N., Inc.*, 259 F.R.D. 135 (N.D. Ill. 2009) (Kennelly, J.); *Creative Montessori Learning Ctrs. v. Ashford Gear, LLC,* No. 09 CV 3963, 2011 WL 3273078 (N.D. Ill. July 27, 2011) (Gettleman, J.) (certifying class), 662 F.3d 913 (7th Cir. 2011) (vacated and remanded), 2012 WL 3961307 (N.D. Ill. Sept. 10, 2012) (certifying class) (Gettleman, J.), *app. denied*, 12-8036, Order (October 11, 2012); *G.M. Sign, Inc. v. Finish Thompson, Inc.*, 2009 WL 2581324 (N.D. Ill. Aug. 20, 2009) (Kendall, J.); *G.M. Sign, Inc. v. Group C Commc'ns, Inc.*, 2010 WL 744262, (N.D. Ill., Feb. 25, 2010) (Darrah, J.); *G.M. Sign, Inc. v. Franklin Bank*, 2008 WL 2410427, (N.D. Ill. Aug. 20, 2008) (Kocoras, J.); *Green v. Serv. Master on Location Servs. Corp.*, 2009 WL 1810769 (N.D. Ill. June 22, 2009) (Hibbler, J.); *Hinman v. M & M Rental Center, Inc.*, 545 F. Supp. 2d 802 (N.D. Ill. 2008) (Bucklo, J.), *app. denied* (08-8012) (7th Cir. Jun 13, 2008); *Paldo Sign v. Topsail*, 2010 WL 4931001 (N.D. Ill. Nov. 29, 2010) (Kennelly, J.); *Reliable Money Order, Inc., v. McKnight Sales Co., Inc.*, 281 F.R.D. 327 (E.D. Wis. 2012), *aff'd,* 704 F.3d 489 (Jan. 9, 2013); *Sadowski v. Med1 Online, LLC*, 2008 WL 2224892 (N.D. Ill. May 27, 2008) (Aspen, J.); *Targin Sign Sys., Inc. v. Preferred Chiropractic Ctr., Ltd.*, 679 F. Supp. 2d 894 (N.D. Ill. 2010) (Shadur, J.); *The Savanna Group v. Truan*, 2013 WL 626981 (N.D. Ill. Feb. 20, 2013) and 2013 WL 66181 (N. D. Ill. Jan. 4, 2013) (St. Eve, J.)

predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Id*.

As discussed below, the Rule 23(a) requirements—numerosity, commonality, typicality, and adequacy—are easily met. The Rule 23(b)(3) requirements of "predominance" and "superiority" are also satisfied. The common legal issues (such as whether the faxes are "advertisements" under the TCPA and whether HDIC is a sender of the faxes) "predominate," and there will be no class-member-specific issues for the Court to decide. A class action is clearly "superior" because it would make no economic sense to bring an individual lawsuit for $500 to $1,500 in statutory damages. In addition, the proposed class is ascertainable. For these reasons, as argued below, the Court should grant class certification.

A. The class is "ascertainable."

In *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015), the Seventh Circuit clarified the law regarding class "ascertainability," holding this requirement is "focused on the adequacy of the class definition itself," asking whether the class is "defined clearly and based on objective criteria." The Seventh Circuit held ascertainability does *not* concern whether "it would be difficult to identify particular members of the class" and refused to require a "reliable and administratively feasible way to identify all who fall within the class definition." *Id.* (rejecting *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013)). The Seventh Circuit held "[n]othing in Rule 23 mentions or implies this heightened requirement" and the "existing requirements already address the balance of interests that Rule 23 is designed to protect." *Id.* at 658.

The Seventh Circuit held class-member identification—for giving the "best notice practicable" and distributing any recovery—relates to "superiority" under Rule 23(b)(3), particularity "manageability," with the understanding that "a class action has to be unwieldy

indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all." *Id.* (quoting *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 760 (7th Cir. 2014)). The Seventh Circuit ultimately affirmed a class of "purchasers" of a dietary supplement as "ascertainable" because it was (1) not "vague," (2) not based on subjective criteria "such as a person's state of mind," and (3) not a "fail-safe class." *Id.* at 660–61.

In this case, the proposed class for which Plaintiff seeks certification is contained on page 3 of this Memorandum. Plaintiff's proposed class definition is ascertainable. The definition is not vague, but rather "identifies a particular group of individuals . . . harmed in a particular way . . . during a specific period . . . ." *Mullins*, 795 F.3d at 660–61. The definition is not based on any person's "state of mind," but rather by whether the person was successfully sent one or more of the identified faxes. *Id.* And the definition does not propose a "fail-safe" class, since it does not entail any conclusions about the merits of the case. *Id.*

Plaintiff anticipates HDIC will argue that only Exhibits 1 through 4—FLA-Fax 4/08, GN-Fax 4/08, NC-Fax 4/08, and WV-Fax 4/08—should be included in the class definition based on Magistrate Judge Mason's denial of Plaintiff's Second Motion to Compel regarding additional production of documents and Rule 30(b)(6) testimony as to Exhibits 5 through 19, and this Court's decision overruling Plaintiff's objection as to Magistrate Judge Mason's Order.

First, as set forth in Plaintiff's Motion for Class Certification filed March 18, 2010, this case has always been addressed to all fax advertisements sent by HDIC in the preceding four years prior to the filing of the original Complaint. (Doc. 1-3 at 2).

Second, Magistrate Judge Mason's denial of Plaintiff's Request No. 1 was premised on HDIC's claim that it was not a "sender" of GN-Fax 4/08 (pursuant to 47 C.F.R. §

64.1200(f)(10)), and that if HDIC "is not the sender of the Fax that Plaintiff received, it appears to us that that this is a fishing expedition in an effort to find out whether defendant violated the TCPA on other occasions." (Doc. 73 at Page ID 1337). However, Magistrate Judge Mason also recognized that "the issue of whether defendant was the 'sender' under the TCPA is one for the District Court to resolve at a later date (and perhaps, depending on the outcome, Rule 23 discovery will need to be revisited)." (*Id*. at 1336).

In his ruling on the Second Motion to Compel, Magistrate Judge Mason expressly recognized that "because defendant denied that it is the "sender" of the faxes and that the faxes constitute 'advertisements,' defendant has opened the door to these issues."[6] (Doc. 236, at 4). Plaintiff respectfully submits that Exhibits 5 through 19 are properly within the class definition. Moreover, Plaintiff does not need additional discovery as to these faxes – Plaintiff contends that the faxes are advertisements under the TCPA on their face (particularly in light of the unavailability of a permission or EBR defense). Should the Court certify the proposed class, all HDIC (or Humana) need do is provide the documentation as to Exhibits 5 through 19 that it provided as to Exhibits 1 through 4. As these documents were not provided until July 10, 2015, the source of documents should still be available.

Third, even if the Court is inclined to exclude Exhibits 5 through 19 from the class definition, Plaintiff requests the Court include GN-Fax 9/07 (Exhibit 6) and IL/MS/LA/MN-Fax 12/07 (Exhibit 14). HDIC was ordered by Magistrate Judge Mason to identify any faxes sent to

[6] An examination of Exhibits 5 through 19, each of which mention the availability and/or quality of HDIC insurance products, and all of which contain the name HumanaDental on the bottom (except Ex. 19), makes HDIC's claim that it is not a "sender" difficult to fathom. The "sender" of a fax advertisement is "the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement." 47 C.F.R. § 64.1200(f)(1); *Imhoff Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627, 634 (6th Cir. 2015) (holding "under the TCPA direct liability attaches to the entity whose goods are advertised"). The Court need not decide this issue on the merits at this stage; it need only certify as a class issue whether HDIC is a "sender" as defined by the regulation.

Plaintiff – "If defendant sent plaintiff any advertisements by fax in violation of the TCPA, plaintiff is entitled to discovery regarding these faxes." (Doc. 73 at 4). GN-Fax 9/07 contains the same designation, "GN," as the fax attached to the Complaint, GN-Fax 4/08. The "IL" designation in Exhibit 14 designates Illinois. (McCartney Dep. Tr. at 64-65). HDIC/Humana's custom and practice was to send fax advertisements based on geographic location. It is undisputed that Brodsky is licensed in Illinois, and it is undisputed that GN-Fax 4/08 was successfully transmitted to Brodsky's fax number and fax machine. In short, GN-Fax 9/07 and IL/MS/LA/MN-Fax 12/07 should be included in the class definition as Plaintiff submits it is entitled to the inference these faxes were sent to Plaintiff and are thus within Magistrate Judge Mason's May 18, 2012 Order.

B. Numerosity.

The numerosity requirement of Rule 23(a)(1) is satisfied where "the class is so numerous that joinder of all members [of the Class] is impracticable." "[A] class of forty is generally sufficient." *McCabe v. Crawford & Co.*, 210 F.R.D. 631, 643 (N.D. Ill. 2002). Here, HDIC has stipulated that 25,232 faxes were transmitted error-free. (Ex. 21, Stipulation, at ¶¶ 19-22). Therefore, Rule 23(a)(1)'s numerosity requirement is easily satisfied.

C. Commonality.

To satisfy the commonality requirement, a movant must show there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The claims must depend upon a common contention that is capable of class-wide resolution. *Bell*, 2015 WL 5093052, at *10; *Chicago Teachers Union*, 797 F.3d at 434. In this context, "class-wide resolution means that determining the truth or falsity of the common contention will resolve an issue that is central to the validity of each claim." *Id.*; *Bell*, 2015 WL 5093052, at *10.

This case arises out of a common nucleus of fact because HDIC sent the same faxes advertising its products to all class members. The common legal issues to be determined on a classwide basis are: (1) whether the faxes are "advertisements" as defined by 47 U.S.C. § 227(a)(5), and 47 C.F.R. § 64.1200(f)(1); (2) whether Defendants are "senders," defined as any "person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted," 47 C.F.R. § 64.1200(f)(10); and (3) whether Defendants "willfully or knowingly" violated the TCPA and FCC regulations, giving the Court discretion to increase the minimum statutory damages of $500 per violation to $1,500 per violation, and the scope of injunctive relief.

The Court has already held that as to HDIC's motion for summary judgment, there were genuine issues of material fact as to whether HDIC was the sender of GN-Fax 4/07 and whether GN-Fax 4/07 was an advertisement. *See supra* at 5-8. Plaintiff submits Exhibits 1 and 3 through 19 also present the same common legal issues, namely, whether these faxes are advertisements and whether HDIC is the sender. While Plaintiff submits the answer to these questions is yes, all that is required at this point in the proceedings is that these questions be common to the class. Clearly, they are. Accordingly, the commonality requirement is easily satisfied in this case.

D. Typicality.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." As to typicality, "there must be enough congruence between the named representative's claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group." *Stampley v. Altom Transp., Inc.*, 2015 WL 5675095, at *5 (N.D. Ill. Sept. 24, 2015) (citing *Spano v. The Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011)). Typicality addresses separate concerns that a representative's

claims may fail on unique grounds, dooming the meritorious claims of absent class members, or that a representative's claims may prevail on unique grounds, thus failing to adequately represent alternative grounds under which unnamed class members could prevail on their own claims. *Id.*

Here, Plaintiff is a member of the class and his claims are typical of the other members. HDIC acted consistently toward the entire class and all claims, including Plaintiff's, are based on the same legal theory, *i.e.*, transmission of faxes in violation of the TCPA. Furthermore, the Court has already determined Plaintiff has standing as a matter of law. The typicality requirement is satisfied.

E. Adequacy of representation.

Rule 23(a)'s final requirement is that the class representative must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy is composed of two parts: "adequacy of the named plaintiff's counsel, and the adequacy of representation provided in protecting the different, separate, and distinct interest of the class members." *Stampley*, 2015 WL 5675095, at *5 (quoting *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993)). "Adequacy" is met when the representative's interests are not antagonistic to or in conflict with those of the class. *Uhl v. Thoroughbred Tech. & Telecom.*, 309 F.3d 978, 985 (7th Cir. 2002). "The burden of showing interest is relatively modest." *Redmon v. Uncle Julio's of Illinois, Inc.*, 2008 WL 656075 at *4 (N.D. Ill. Mar. 7, 2008). The Seventh Circuit "has made clear that the bar for a named plaintiff's adequacy is not set high." *Stampley*, 2015 WL 5675095, at *5 (citing *Phillips v. Asset Acceptance*, LLC, 736 F.3d 1076, 1080 (7th Cir. 2013)).

Here, Plaintiff prepared for his deposition by, among other things, reviewing the Complaint and his interrogatory responses, and was deposed on April 26, 2012. (Brodsky Dep. Tr., Doc. 146-1). Plaintiff testified that GN-Fax 4/08 is an advertisement, *id.*, Page ID 5056-57,

at 32, 33, that he understands the nature of this lawsuit (the unauthorized sending of fax advertisements), *id*., Page ID 5070, at 85, that he understands his responsibilities as class representative, and that he brought this lawsuit because "someone's got to do it . . . this was not the correct thing to be happening, and it's not just me receiving a fax. It's thousands of people receiving unsolicited advertisements," *id*., at 96. Plaintiff is an adequate class representative.

Plaintiff's class counsel are highly qualified. (*See* Firm Resumes of Anderson + Wanca and Bock & Hatch, attached hereto as Exhibits 23 and 24, respectively). Plaintiff's counsel have been appointed lead or co-lead counsel in many contested class actions, including but not limited to TCPA cases, and have recovered substantial monies for class members. They have been litigating TCPA claims since 2003 and have prosecuted dozens of such cases to successful resolution, including many class-wide settlements. Plaintiff's counsel will continue to commit adequate resources, both staffing and monetary, to ensure the Class is well represented.[7]

F. The Rule 23(b)(3) Requirements are Satisfied.

To certify a class, a plaintiff must also satisfy one of the subsections of Rule 23(b). Here, Plaintiff seeks certification under Rule 23(b)(3), which requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

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[7] *See, e.g.*, *CE Design Ltd. v. Cy's Crabhouse N., Inc.*, 259 F.R.D. 135, 142 (N.D. Ill. 2009) (finding "plaintiff's counsel's experience in TCPA class action demonstrates that counsel is adequate"); *G.M. Sign, Inc. v. Finish Thompson, Inc.*, 2009 WL 2581324, *6 (N.D. Ill. Aug. 20, 2009); *Targin*, 679 F. Supp. 2d at 894; *Hinman*, 545 F. Supp. 2d at 804; *Holtzman v. Turza*, No. 08 C 2014, 2009 WL 3334909 (N.D. Ill. Oct. 14, 2009); *G.M. Sign, Inc. v. Group C Commc'ns., Inc.*, 2010 WL 744262 (N.D. Ill. Feb. 25, 2010); *Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC*, 2014 WL 7366255, at *6 (S.D. Fla. Dec. 24, 2014) ("Anderson & Wanca is one of very few firms that specialize in TCPA class actions and so is knowledgeable of the applicable law and experienced in litigating TCPA classes.").

1. Predominance.

The predominance inquiry of Rule 23(b)(3) is more demanding than Rule 23(a)'s commonality and typicality requirements. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623-34 (1997). "Rule 23(b)(3)'s predominance requirement is satisfied when common questions represent a significant aspect of a case and can be resolved for all members of a class in a single adjudication." *Stampley*, 2015 WL 5675095, at *6. "Or, to put it another way, common questions can be predominate if a common nucleus of operative fact and issues underlie the claims brought by the proposed class." *Id*.

Common questions predominate in this case. The three main questions are (1) whether the faxes are advertisements, (2) whether HDIC is a "sender" as defined by FCC regulation, and (3) what statutory damages are appropriate. The answers to these questions will not vary from class member to class member. There are *no* individualized issues

2. Superiority.

A class action is routinely recognized as the superior method of adjudicating mass TCPA violations. *Doctor Diabetic*, 2014 WL 7366255, at *9 ("Congress expressly created the TCPA as a 'bounty' statute to increase the incentives for private plaintiffs to enforce the law."); *Jay Clogg Realty Grp., Inc. v. Burger King Corp.*, 298 F.R.D. 304, 310 (D. Md. 2014) (class treatment more likely to eliminate a "scourge on our society" than individual enforcement); *Hinman*, 545 F. Supp. 2d at 807 ("[R]esolution of the issues on a classwide basis, rather than in thousands of individual lawsuits (which in fact may never be brought because of their relatively small individual value), would be an efficient use of both judicial and party resources."); *Critchfield Physical Therapy v. Taranto Grp., Inc.*, 263 P.3d 767, 778 (Kan. 2011) ("While the defendant in such [a small claims] action might benefit if only a small number of plaintiffs found it worth

their while to bring suit or were aware of their rights under the TCPA, this small turnout would serve only to frustrate the intent of the TCPA and to protect junk fax advertisers from liability.”).

Class enforcement is the only practical means to hold HDIC accountable. Only by aggregating their claims can consumers and businesses impacted by HDIC’s junk faxes effectively challenge HDIC’s defiance of federal law. *See Chapman v. Wagener Equities, Inc.*, 2014 WL 540250 *16 (N.D. Ill. Feb. 11, 2014) (holding $500 statutory recovery gives individual plaintiffs “a low incentive to bring a lawsuit on their own behalf”); *Mussat v. Global Healthcare Res., LLC*, 2013 WL 1087551, at *7 (N.D. Ill. Mar. 13, 2013) (holding TCPA fax class superior given “fairly small potential for individual recovery”); *Savanna Group v. Trynex, Inc.*, 2013 WL 66181, at *16 (N.D. Ill. Jan. 4, 2013) (“small potential recovery in individual actions” under the TCPA “weighs in favor of class-wide resolution”). As the Seventh Circuit has stressed, “[a] class action, like litigation in general, has a deterrent as well as a compensatory objective.” *Hughes v. Kore of Ind. Enters., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013); *see also Turza*, 728 F.3d at 688 (holding the TCPA’s private right of action exists so “recipients need not depend on the FCC” for enforcement); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 515 (3d Cir. 1998) (class-action remedy gives TCPA its “teeth”), *abrogated on other grounds by Mims*, 132 S. Ct. 740. If “only a small number of plaintiffs found it worth their while to bring suit or were aware of their rights under the TCPA, this small turnout would serve only to frustrate the intent of the TCPA and to protect junk fax advertisers from liability.” *Critchfield Physical Therapy*, 263 P.3d at 780.

CONCLUSION

This case is ideally suited for class treatment. The proposed class is “ascertainable,” since it is defined by objective criteria. The class is sufficiently numerous, with claims too small to warrant individual prosecution. Common questions of fact and law predominate. Plaintiff’s

claims are identical to those of the other class members, and he has retained counsel who are well qualified and willing to commit the necessary resources. The class will be manageable, given that the parties' have stipulated to the fax numbers, recipients, and faxes transmitted error free as to Exhibits 1 through 4, and Plaintiff submits such evidence is also available for Exhibits 5 through 19. As a practical matter, a class action is the only way members will ever obtain relief, and judicial economy and uniformity will be served by certifying this class.

Respectfully submitted,

LAWRENCE S. BRODSKY, individually and as the representative of a class of similarly-situated persons

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EXHIBIT K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE S. BRODSKY, Individually and as the representative of a class of similarly-situated persons	)	
Plaintiff,	)	
v.	)	
	)	**No.: 1:10-cv-03233**
HUMANADENTAL INSURANCE COMPANY,	)	
Defendant.	)	

HUMANADENTAL INSURANCE COMPANY'S MOTION TO STAY

HumanaDental Insurance Company, defendant herein ("HDIC"), respectfully requests that this Court enter an Order staying this case pending: (1) a determination on HDIC's Petition to the Federal Communications Commission for Waiver; (2) a ruling by the United States Court of Appeals for the District of Columbia Circuit on the "Opt-Out Notice Rule;" (3) a ruling by the United States Supreme Court concerning whether a settlement proposal offering a litigant complete relief moots his claims; and (4) this Court's ruling on HDIC's motion to add certain Affirmative Defenses. In support of this Motion, HDIC states:

I. INTRODUCTION

1. HDIC requests a stay of this litigation brought under the Telephone Consumer Protection Act of 1991, 47 U.S.C. §227 ("TCPA" or "Act"), pending: (a) a ruling on HDIC's Petition before the Federal Communications Commission ("FCC") for a waiver of the applicability of the "Opt-Out Notice Rule" contained in 47 C.F.R. §64.1200(a)(4)(v), which purports to require certain opt-out language in faxes sent with the permission of the recipient; (b) a ruling by the United States Court of Appeals for the District of Columbia Circuit in *Bais Yaakov of Spring Valley*

v. Federal Communications Commission and United States of America,[1] in which the petitioners contend the FCC acted contrary to law in determining that it had the statutory authority to adopt the "Opt-Out Notice Rule" contained in 47 C.F.R. §64.1200(a)(4)(v); (c) a ruling by the United States Supreme Court in *Campbell-Ewald Co. v. Gomez*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S.Ct. 2311 (May 18, 2015), a case involving a defendant's offer of judgment and whether it rendered a plaintiff's TCPA action moot; and (d) a ruling by this Court on HDIC's Motion for Leave to File Eighth and Ninth Affirmative Defenses.

2. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Pfizer Inc. v. Apotex Inc.*, 640 F. Supp. 2d 1006, 1007 (N.D. Ill. 2009), quoting *Landis v. North American Co.,* 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936). "In deciding whether to enter such a stay, courts consider the following factors: (i) whether a stay will unduly prejudice or tactically disadvantage the non-moving party, (ii) whether a stay will simplify the issues in question and streamline the trial, and (iii) whether a stay will reduce the burden of litigation on the parties and on the court." *Id.* In situations analogous to the one here, courts have stayed litigation in a TCPA case while a defendant awaits word from the FCC on a petition for waiver. *Bondhus v. Henry Schein, Inc.*, 14-22982-CIV, 2015 WL 1968841 (S.D. Fla. Apr. 20, 2015).

II. PLAINTIFF'S CLAIMS

3. Plaintiff, as the purported representative of a class sued HDIC based on two identical, single-page faxes he allegedly received from HDIC on May 14, 2008. His three-count Amended Complaint asserts claims under the TCPA, a common law conversion theory, and the

[1] Consolidated Nos. 14-1234, 14-1235, 14-1239, 14-1243, 14-1270, 14-1279, 14-1292, 14-1293, 14-1294, 14-1295, 14-1297, 14-1299, and 14-1302.

Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505/1 *et seq.* ("ICFA"). HDIC previously obtained summary judgment on the common law and ICFA counts; thus, only the TCPA claim remains.

4. Plaintiff is an insurance producer.[2] At the time the subject fax was transmitted, Plaintiff held a "Group Producing Contract or Agency Contract" ("Plaintiff's Contract") with "Humana Insurance Company, Humana Health Plan, Inc., and all of their affiliates."[3]

5. Plaintiff's Contract contains a provision in which he expressly consented to facsimile communications with the Humana companies:

> **H. GPA[4] understands and agrees that the Company and GPA through the established business relationship by this agreement may choose to communicate with GPA through the use of mail, email or facsimile to the address(es) and facsimile number(s) of the GPA. In addition, Company may begin immediately using any changes to such contact information.[5]**

6. Plaintiff allegedly revoked his permission by telephone prior to the subject faxes' transmission.[6] HDIC denies that plaintiff revoked his permission.

7. Plaintiff also contends that, even if he did not revoke his permission, the fax did not contain sufficient opt-out language as purportedly required by 47 C.F.R. §64.1200(a)(4)(v).[7] HDIC contends, *inter alia*, that the regulation does not, and cannot validly, require the specific

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[2] See HDIC's Statement of Material Facts previously filed in this litigation in support of its Amended Motion for Summary Judgment, Doc. 122, at ¶5.

[3] *Id*. at ¶6.

[4] The "GPA" is defined in the contract as the Group Producing Agent, in this case, Plaintiff.

[5] HDIC's Statement of Material Facts, Doc. 122, at ¶¶6-9 (emphasis added).

[6] Plaintiff's Memorandum in Opposition to HDIC's Amended Motion for Summary Judgment, Doc. 142, at p. 15 (Page ID 4992).

[7] *Id*. at pp. 15-16 (Page ID 4992-93). The fax contained opt-out language, but Plaintiff contends that it was not sufficient under the language of the FCC regulation.

opt-out language described in the regulation on faxes transmitted with permission. HDIC also contends that, to the extent the regulation validly requires such language on faxes transmitted with permission, there is no private right of action in favor of a recipient if another sends a fax without the opt-out language because the requirement for such language to be included on faxes sent with permission cannot have been based on the TCPA, 47 U.S.C. §227 (which by its terms deals only with unsolicited faxes). HDIC also contends that, in any event, the opt-out language on the faxes substantially complied with the purported requirements of the regulation.

8. In ruling on HDIC's Amended Motion for Summary Judgment, Judge Durkin held that 47 C.F.R. §64.1200(a)(4)(v) requires specific opt-out language on faxes, even if they are sent with the express permission of the recipient, and that the regulation is valid. (Doc. 189, pp. 21-23.)

9. HDIC contends its offer to settle this matter by providing Plaintiff all of the relief he sought under his TCPA claim mooted any case or controversy between the parties, and therefore removed those claims from this Court's jurisdiction under Article III of the United States Constitution.[8]

The Telephone Consumer Protection Act

10. The TCPA prohibits the use of any telephone facsimile machine, computer or other device to transmit an "unsolicited advertisement" to a telephone fax machine. 47 U.S.C. § 227(b)(1).

11. The Act defines an "unsolicited advertisement" as "any material advertising the

[8] HDIC asserts several other defenses to Plaintiff's claim. For example, HDIC denies it sent the fax to Plaintiff, or that the fax was sent on HDIC's behalf, and contends that the fax actually was sent by another Humana company. HDIC also denies that the faxes were sent to Plaintiff, but asserts they were sent to two entities Plaintiff had allowed to use his fax number and machine. HDIC also denies that the faxes constitute advertisements within the meaning of the TCPA.

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, in writing or otherwise." 47 U.S.C. § 227(a)(5).

12. The TCPA also created a private right of action for persons or entities to whom unsolicited fax advertisements were sent in violation of the Act or its implementing regulations. Litigants could bring actions to enjoin those violations and to "recover actual monetary loss from such violation[s], or … $500 in damages for each such violation, whichever is greater." 47 U.S.C. § 227(b)(3).[9]

The FCC's "Opt-Out Notice Rule"

13. The TCPA contains an exception to its prohibition on sending unsolicited fax advertisements. If such a fax is sent pursuant to an "established business relationship"[10] ("EBR"), it does not violate the Act, so long as it, *inter alia*, contains an "opt-out" notice meeting the requirements set forth in the statute. 47 U.S.C. § 227(b)(1). Congress directed the FCC to adopt regulations implementing the Act's opt-out notice requirement for unsolicited fax advertisements sent pursuant to an EBR. 47 U.S.C. § 227(b)(2)(D).

14. In 2006, the FCC adopted rules specifying the opt-out language that must be included in unsolicited fax advertisements sent pursuant to an EBR. 47 C.F.R. § 64.1200(a)(4)(iii) and (v); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket No. 02-278, 05-338, Report and Order and Third

[9] If the sender violated the Act willfully or knowingly, a court could triple the amount of those damages. 47 U.S.C. § 227(b)(3).

[10] There is a difference between an unsolicited fax advertisement sent pursuant to an EBR and a fax advertisement sent pursuant to a recipient's prior express invitation or permission. Fax advertisements sent pursuant to a recipient's permission are not "unsolicited" and, therefore, do not fall within the specific statutory provisions of the TCPA. In contrast, fax advertisements sent pursuant to an EBR (and without the recipient's prior express permission) are "unsolicited fax advertisements" that violate the Act unless they meet the requirements that bring them within the Act's exception.

Order on Reconsideration, 21 FCC Rcd 3787, 3801 para. 24. (2006) ("*Junk Fax Order*").

15. At the same time, the FCC adopted a rule purportedly extending the opt-out-notice requirement to "solicited" fax advertisements, *i.e.,* fax advertisements sent pursuant to a recipient's prior express invitation and/or permission (the "Opt-Out Notice Rule"). 47 C.F.R. § 64.1200(a)(4)(v). Thus, under the FCC's interpretation of the Opt-Out Notice Rule, a recipient's prior express invitation or permission to send fax advertisements is irrelevant if the opt-out notice is deficient, and if a fax lacks the specific opt-out language called for by the Rule, the regulation is violated.

FCC's Retroactive Waivers of the Opt-Out Notice Rule

16. Recently, several parties petitioned the FCC seeking retroactive waivers of the Opt-Out Notice Rule. Those parties argued conflicting statements in the Commission's 2006 *Junk Fax Order* created confusion over whether faxes sent pursuant to recipients' prior express permission were required to include opt-out notices. *See Petition 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, 29 FCC Rcd 13998 ¶¶ 22-28 (2014) ("*October 30 Order*") (Exhibit A hereto).

17. In an October 30, 2014 Order, the FCC determined good cause existed to grant the petitioners a retroactive waiver of the Opt-Out Notice Rule.[11] *October 30 Order*, ¶¶ 26-28.

18. The FCC acknowledged that a footnote in the *Junk Fax Order* contradicted the Opt-Out Notice Rule[12] and created confusion over whether solicited faxes had to include opt-out notice

[11] The Commission made clear that "the granting of such waivers [should not] be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action." *October 30 Order*, ¶ 31.

[12] The footnote stated "the op-out notice only applies to communications that constitute *unsolicited* advertisements." *October 30 Order*, ¶ 24 (citing *Junk Fax Order*, ¶ 42 n.154) (emphasis added).

language. *October 30 Order*, ¶ 24.

19. The FCC further observed that its notice of intent to adopt the Rule – while legally valid – was arguably deficient. *October 30 Order*, ¶ 25. Taken together, those factors constituted good cause to grant petitioners a retroactive waiver of the Opt-Out Notice Rule. *October 30 Order*, ¶¶ 26-28.

20. The FCC invited similarly situated parties to submit petitions seeking a retroactive waiver of the Opt-Out Notice Rule. *October 30 Order*, ¶¶ 2, 30.

21. On August 28, 2015, the FCC granted retroactive waivers of the Opt-Out Notice Rule to 117 additional petitioners who sent faxes pursuant to recipients' invitations or permission, but without the required opt-out language. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al.*, CG Docket 02-278, 05-338, Order, DA 15-976, 30 FCC Rcd 8598 para. 11 (2015) ("*August 28 Order*").

22. Pursuant to the FCC's invitation, HDIC has filed a petition requesting a retroactive waiver of the Opt-Out Notice Rule for the faxes at issue in this lawsuit.

D.C. Circuit Court's Review of the Opt-Out Notice Rule

23. Several of the petitioners who received retroactive waivers under the *October 30 Order* challenged the FCC's adoption of the Opt-Out Notice Rule. *October 30 Order*, ¶ 10. Specifically, the petitioners sought a declaration that the Rule was not promulgated under 47 U.S.C. § 227(b) because, by its terms, the TCPA concerns only *unsolicited* faxes and, thus, could not be the statutory basis for promulgating a rule concerning *solicited* faxes.[13] The petitioners

[13] Notably, if the FCC had made the requested declaration, the failure to provide the required opt-out notice would not be actionable under a private right of action. *See October 30 Order, Statement of Commissioner Ajit Pai, Concurring in Part and Dissenting in Part*, p. 21 n.21 ("[O]nly a violation of rules promulgated under section 227(b)(2) would give recipients a private right of action, which is why [the petitioners] only asked that the Commission declare that section 227(b)(2) was not the authority for applying a detailed opt-out notice to solicited faxes.").

further sought "a declaratory ruling that a fax advertisement that 'complies substantially' with [the Opt-Out Notice Rule] does not violate any regulation promulgated under the Act, even if the opt-out notice does not conform to the specific requirements of that rule." *October 30 Order*, ¶ 10. The petitioners' challenges were a necessary first step under a Hobbs Act[14] challenge to the Commission's authority to adopt the Rule.

24. The FCC rejected those challenges and the petitioners have appealed that determination to the D.C. Circuit Court. *See Bais Yaakov of Spring Valley v. Federal Communications Commission and United States of America*, *supra*. Briefing by the parties and amicus will be completed in March 2016, but dates for oral argument have not been set. *Id.*

III. THE SUPREME COURT'S REVIEW OF *GOMEZ* AND MOOTNESS

25. The Supreme Court recently heard arguments in *Campbell-Ewald Co. v. Gomez*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S.Ct. 2311 (May 18, 2015), on the question of whether a defendant's offer to settle a plaintiff's claim for the full amount of the damages and other relief available under the law mooted the plaintiff's claim. *See* http://www.nytimes.com/2015/10/15/business/justices-delve-into-electricity-markets-and-class-action-demands.html?_r=0 (last visited on 12/15/2015).

26. The Court's decision on that issue bears directly on HDIC's argument that its settlement offer mooted Plaintiff's claims. If the Supreme Court concludes a defendant's offer of complete relief moots a plaintiff's claims, then Plaintiff's claims in this case are moot and must be dismissed for lack of jurisdiction under Article III of the United States Constitution.[15]

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[14] The Hobbs Act grants the United States Court of Appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1).

[15] This Court previously denied HDIC's Motion to Dismiss which was brought, in part, on the basis of the mootness issue. See Doc. 22 and 32 (on reconsideration).

IV. A STAY IS APPROPRIATE

27. Staying this matter pending court rulings on the status of the law concerning HDIC's mootness defense, the enforceability of the Opt-Out Notice Rule, and HDIC's waiver request unquestionably would simplify the substantive and class certification issues in this case.

28. In the absence of a stay, the parties will complete their briefing on Plaintiff's Motion for Class Certification before the courts and the FCC resolve the matters mentioned above. Because one or more of those decisions are likely to affect several class-related issues in connection with Plaintiff's Motion, the parties would require substantial supplemental briefing on those issues before this Court could decide the class certification issue. A stay would result in greater efficiencies and reduce the burdens of litigation on the parties and this Court by allowing the parties to address all class-certification issues at one time and with the benefit of the authorities' decisions.

29. The mootness question presently pending before the Supreme Court is likely to be resolved in few months and has a direct bearing on HDIC's mootness defense. The viability of that defense affects Plaintiffs' Motion for Class Certification, namely, whether Plaintiff is typical of the class he proposes to represent and whether he can be an adequate class representative in light of this defense that uniquely applies to him. Assuming the Court decides the issues presented by *Gomez*, it will be deciding a previously unresolved question of law, meaning the class certification arguments the parties make now would need to be supplemented (or possibly revised) to address that change.

30. The same is true for the D.C. Circuit's ruling on the validity of the Opt-Out Notice Rule and HDIC's waiver petition. If the D.C. Circuit strikes down the Rule or the FCC grants HDIC's petition, the faxes at issue in this case that were sent to the putative class members would

not violate the TCPA, because these recipients were Humana agents who held contracts containing language in which they extended their permission for fax transmissions. That would be a significant change in the law related to Plaintiff's claims and would give rise to questions of permission not presently before the court under the law as previously articulated by Judge Durkin in ruling on HDIC's Motion for Summary Judgment*: e.g.,* whether the individual class members gave HDIC permission to communicate by fax, and whether they ever revoked that permission. Answering those questions for each of the purported class members creates obvious concerns about the manageability of the proposed class and whether individual issues would predominate over common questions.

31. Also, because the putative class members gave HDIC prior express permission to send them fax advertisements, Plaintiff might no longer be typical of the purported class, having revoked (according to him) any permission HDIC had to send him faxes. Depending on whether (or to what extent) Plaintiff could establish the existence of class members who similarly revoked the permission they gave HDIC to send them faxes, supplemental briefing would likely be needed to address Rule 23's numerosity and superiority requirements.

32. A stay would simplify arguments over HDIC's mootness defense and whether Plaintiff is typical of the members of the proposed class. Without a stay, the parties will be forced to argue class certification issues using multiple hypotheticals; e.g., "if the Supreme Court finds a defendant's offer of judgment moots a plaintiff's claim, then …" and "if the Court finds an offer of judgment does not moot a plaintiff's claim, then …." Similarly, without a stay to learn whether the FCC will grant HDIC a waiver of the Opt-Out Notice Rule, the parties would need to address the effect of both contingencies in the class certification briefs and in any summary judgment or trial proceedings. Staying the proceedings, on the other hand, will give the courts and the FCC

time to resolve the issues before them, which will simplify the briefing and bring focus to the class certification issues the parties and the court will need to address.

33. Staying this matter would not prejudice or tactically disadvantage the Plaintiff. HDIC seeks a stay in this matter to clarify the status of the law with respect to the parties' claims and defenses. The simple fact is none of the class-certification issues discussed herein will be truly resolved until the Supreme Court, D.C. Circuit, and FCC render their decisions. Thus, any benefit Plaintiff would obtain in the short term by not staying this matter may only be temporary if the courts and the FCC resolve the relevant legal issues in HDIC's favor.

34. For instance, if the court were to forego a stay and decide the pending class certification questions in Plaintiff's favor in the near term, only to see the relevant legal and factual issues resolved in HDIC's favor in a few months' time, HDIC would be entitled to seek reconsideration of the court's previous decision. Any substantive or tactical advantage Plaintiff might have enjoyed from an early determination, therefore, would ultimately be reversed. If, on the other hand, a stay is granted and the legal and factual issues are resolved in Plaintiff's favor, Plaintiff would be no better or worse off because of the stay.

V. HDIC'S MOTION FOR LEAVE TO ASSERT ADDITIONAL AFFIRMATIVE DEFENSES

35. HDIC recently sought to amend its pleadings to add affirmative defenses of waiver and estoppel, arising out of HDIC's offer to settle Plaintiff's claims. HDIC sought to add those defenses in response to a recent decision by the Seventh Circuit in *Chapman v. First Index, Inc.,* 2015 WL 4652878 (7th Cir, August 6, 2015). The *Chapman* Court held that an offer of judgment did not moot a plaintiff's claims, but that the claims might be subject to waiver or estoppel defenses.

36. HDIC's motion to amend was the subject of extensive briefing. This Court's

determination as to whether HDIC can assert those defenses impacts whether Plaintiff is typical of the class he seeks to represent, and whether he is an adequate class representative in light of the unique applicability of the waiver and estoppel defenses to him.

WHEREFORE, HumanaDental Insurance Company respectfully requests that this Court enter an Order staying this case pending:

1) a determination on HDIC's Petition to the Federal Communications Commission for Waiver;

2) a ruling by the United States Court of Appeals for the District of Columbia on the "Opt-Out Notice Rule;"

3) a ruling by the United States Supreme Court concerning whether a settlement proposal offering a litigant complete relief moots his claims; and

4) this Court's ruling on HDIC's request for leave to assert additional affirmative defenses.

HDIC further requests that this Court suspend briefing on Plaintiff's Motion for Class Certification pending a ruling on this Motion, or alternatively, that the due date for HDIC's Response to the Motion for Class Certification be extended to January 31, 2016.

Respectfully submitted,

HUMANADENTAL INSURANCE COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2015, I electronically filed the foregoing HUMANADENTAL INSURANCE COMPANY'S MOTION TO STAY with the Clerk of the U.S. District Court, Northern District of Illinois, Eastern Division, using the CM/ECF system which sent notification of such filing to the following CM/ECF registered participants:

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EXHIBIT L

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6,1
Eastern Division

Lawrence S. Brodsky
Plaintiff,
v.
Case No.: 1:10−cv−03233
Honorable John Robert Blakey

HumanaDental Insurance Company
Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Tuesday, December 22, 2015:

MINUTE entry before the Honorable John Robert Blakey: The Court's previous minute order is amended as follows: Motion hearing held on 12/22/2015. Defendant's motion to stay [311] is denied without prejudice. Defendant's oral motion to extend time is granted. Defendant shall file its response to the motion for class certification by 1/14/16 and plaintiff shall file its reply by 2/15/16. Status hearing date of 2/16/2016 at 9:45 a.m. in Courtroom 1725, to stand. Mailed notice(gel,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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EXHIBIT M

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE S. BRODSKY, Individually and as the representative of a class of similarly-situated persons,	)	
Plaintiff,	)	**Civil Action No.: 1:10-cv-03233**
vs.	)	
HUMANADENTAL INSURANCE COMPANY d/b/a HUMANA SPECIALTY BENEFITS,	)	**Hon. John R. Blakey** **Magistrate: Hon. Michael T. Mason**
Defendant.	)	

DEFENDANT HUMANADENTAL INSURANCE COMPANY'S MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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Class Certification in the Age of Aggregate Proof,
84 N.Y.U.L.Rev. 97, 132 (2009) 18

HumanaDental Insurance Company ("HDIC"), defendant herein, states as follows for its Memorandum in Opposition to Plaintiff's Motion for Class Certification:

I. INTRODUCTION

Plaintiff is an insurance producer who held a Group Producing Agency Contract with Humana companies. (SOF ¶5.)[1] In his Amended Complaint, he alleges that on May 14, 2008, (while his contract was in effect), HDIC transmitted two identical faxes -- literally 21 seconds apart -- to a fax machine he owned. The purpose of the faxes was to educate brokers and agents of Humana companies concerning products they were authorized to market to their own customers pursuant to their contracts with Humana. (SOF ¶44.)[2] Based on these faxes, plaintiff seeks relief against HDIC under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"),[3] and now seeks certification of a purported class of recipients of any of nineteen different faxes -- even though plaintiff has identified only one fax that was received at his fax machine.

Plaintiff's Motion for Class Certification must be denied. It would be virtually impossible to identify persons or entities who fall within the class definition. For this reason alone, a class action is not a superior method of adjudicating the purported disputes in question, and class certification must be denied. In the alternative, plaintiff's contention that the class should include recipients of eighteen faxes other than the one he received is flawed because those faxes have

[1] Certain factual assertions in this Memorandum are supported in HDIC's Statement of Facts previously filed in support of its Amended Motion for Summary Judgment (Doc. 122). Rather than again attach the sources to this Memorandum, HDIC incorporates herein citations to the Statement of Facts.

[2] Because the faxes facilitated agents' and brokers' performance under their agency contracts with Humana companies, HDIC contends that the faxes were not "advertisements" within the meaning of the TCPA, but were "transactional" or "informational" communications. *See* HDIC's Memorandum in Support of its Amended Motion for Summary Judgment, Doc. No. 120-1, pp. 8-13.

[3] Plaintiff also sought recovery under a common-law conversion theory and under the Illinois Consumer Fraud and Deceptive Trade Practices Act, 815 ILCS 505/2. Judge Durkin entered summary judgment in favor of HDIC on those two counts on June 12, 2014. (Doc. No. 189.)

never been the subject of this protracted litigation. Moreover, plaintiff's claim is not typical of the potential claims of recipients of such other faxes. Also in the alternative, the class cannot include recipients who are parties to amended and restated Producer Contracts with Humana companies because, in those contracts, they have waived any right to bring a TCPA claim against Humana companies, waived any right to participate in a class action against the companies, and agreed to arbitrate any claims they have not waived. In addition, certain purported common questions of fact or law are not "common questions" at all, because under the circumstances of this case they are not capable of a common answer. Plaintiff's claim is not typical of those of the class, regardless of how the class is defined, because he is subject to unique defenses. For that same reason, plaintiff is not an adequate class representative. There are also a multitude of individual questions that must be decided for each class member, no matter how the class is defined, to the point that any purported common questions of law or fact simply do not predominate. For all of these reasons, a class action is clearly not a superior method for adjudicating the purported disputes compared to individual suits by persons who wish to pursue a TCPA claim.

II. ARGUMENT

A. Plaintiff's Request For Class Certification Is Subject To A Strict Burden of Proof

"Plaintiff bears the burden of proving that the proposed class meets the requirements for certification under Rule 23." *Holmes v. Godinez*, 2015 WL 5920750, at *26 (N.D. Ill. October 8, 2015) (citing *Comcast Corp. v. Behrend,* —— U.S. ——, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515 (2013); *Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011)). "A class may only be certified if the trial court is satisfied, *after a rigorous analysis,* that the prerequisites of Rule 23(a) have been satisfied." *C.E. Design, Ltd. v. King Architectural Metals,*

Inc., 637 F.3d 721, 723 (7th Cir. 2011) (quoting *General Telephone Co. v. Falcon,* 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (emphasis added)).

B. Because It Would Be Virtually Impossible To Identify Who Falls Within The Class, Regardless Of Its Scope, A Class Action Is Not A Superior Method of Adjudication.

(1) Persons Who Retrieved Or Read The Faxes Must Be Included In The Class Certification Analysis.

Plaintiff seeks to certify a class he defines as follows:

> All persons or entities who were successfully sent one or more faxes during the period from May 2007 through September 2008 that: (1) named "Humana Specialty Benefits" or "HumanaDental" on the bottom of the fax; (2) referred to, referenced, or discussed "HumanaDental" dental plans; (3) contained one of the following designations: FL-Fax 4/08, GN-Fax 4/08, NC-Fax 4/08, WV-Fax 4/08, AK-Fax 9/07, GN-Fax 9/07, KS-Fax 9/07, NC-Fax 9/07, TX-Fax 9/07, VA-Fax 9/07, CO/NM-Fax 10/07, GA-Fax 10/07, OK-Fax 10/07, IL/MS/LA/MN-Fax 12/07, KY-Fax 12/07, WV-Fax 12/07, MD-Fax 2/08, CA-Fax 2/08, NV-Fax 7/08; and (4) contained an "opt out" notice stating, "If you don't want us to contact you by fax, please call 1-800-U-CAN-ASK," or "If you don't want us to contact you by fax, please call 1-888-4-ASSIST."

(Plaintiff's Memorandum, Doc. 285-1, p. 3.) Plaintiff's proposed class definition is fatally flawed for a number of reasons, however.

Initially, under Rule 23 of the Federal Rules of Civil Procedure, courts "require that classes be defined clearly and based on objective criteria." *Mullins v. Direct Digital, LLC,* 795 F.3d 654, 659 (7th Cir. 2015). Plaintiff's proposed class definition centers around "[a]ll persons or entities who were successfully sent one or more faxes . . . ." But that same class definition was found wanting in another TCPA case, *APB Associates, Inc. v. Bronco's Saloon, Inc*., 297 F.R.D. 312 (E.D. Mich. 2013). In that case, the court stated:

> Here, the proposed class definitions include all "persons who were sent" certain fax advertisements. It is entirely unclear who that includes. This is especially so given that the expert reports and listings provided by Plaintiffs indicate that the vast majority, if not all, of the fax ads at issue in these cases were sent to municipal or corporate entities—not individuals. [Citation.] As was the case in *Critchfield,* under those ambiguous class definitions, "there is the possibility of multiple plaintiffs

> stemming from one fax transmission—all individuals at a home or employed by a corporate entity, or any person who happens to 'intercept' a fax advertisement by picking it up." *Critchfield,* 293 Kan. at 308, 263 P.3d 767. The proposed class definitions are imprecise and amorphous.

297 F.R.D. at 319. Likewise, plaintiff's proposed class definition herein is vague and imprecise in that it is not clear whether plaintiff is referring only to individuals and entities that owned the fax machines in question, or whether it includes non-owners such as employees or persons who "happened to intercept" an incoming fax whom plaintiff thinks may have standing to bring a claim.

Notwithstanding the ambiguity in plaintiff's proposed class definition, it is clear that under this Court's interpretation of the law as set forth in its ruling on HDIC's Amended Motion for Summary Judgment, persons other than fax machine owners may have standing to bring a claim under the TCPA and that the class cannot properly be limited to owners.[4] Specifically, this Court held that not only fax machine owners may have standing, but non-owner users who retrieved and read the faxes and experienced "inconvenience [or] distraction" also may have a claim. (Doc. 212, p. 8.) This Court based its holding on *Chapman v. Wagener Equities, Inc*., 747 F.3d 489, 491-92 (7th Cir. 2014), a TCPA case in which the Seventh Circuit stated:

> Whether or not the user of a fax machine is an owner, he may be annoyed, distracted, or otherwise inconvenienced if his use of the machine is interrupted by unsolicited faxes to it, or if the machine wears out prematurely because of overuse attributable to junk faxes. . . . Anyway it would be arbitrary to limit relief under the junk-fax provision of the Telephone Consumer Protection Act to owners of fax machines, and there is no suggestion of such a limitation in the statute.

As more fully explained below, HDIC contends that it is improper for plaintiff to attempt to extend a class to faxes other than the one particular fax he identified as having been received at his machine (GN-Fax 4/08). But whether the proposed class definition concerns only one fax or includes eighteen other faxes plaintiff did not receive, it is clear that if plaintiff wishes to proceed

[4] HDIC does not concede that persons or entities other than fax machine owners can bring a claim under the TCPA; nevertheless, that is the legal interpretation under which this case currently proceeds.

as the representative of a purported class, under this Court's current pronouncement of the law, the class necessarily includes certain persons and entities other than owners – it includes potential "retrievers and readers" of the fax who, at some level, were "annoyed, distracted, or otherwise inconvenienced" by the fax.

These "retrievers/readers" cannot legitimately be excluded from the proposed class definition. Underinclusive classes that exclude potential claimants are clearly disfavored by the courts in Rule 23(b)(3) class actions. *See, e.g., Sherman v. Yahoo! Inc.*, 2015 WL 5604400, at 10 (S.D. Cal. Sept. 23, 2015); *Driver v. AppleIllinois, LLC*, 265 F.R.D. 293, 307 (N.D. Ill. 2010). Moreover, if fax machine owners are proper parties to the litigation, then "retrievers/readers" are necessary parties. This Court previously held in ruling on HDIC's Amended Motion for Summary Judgment that a fax machine owner *and* additional fax "retriever/readers" may all be able to assert claims under the TCPA, and in that event they are required to split the $500 statutory recovery in some fashion. (Doc. 212, p. 7.) Thus, a fax machine owner and additional qualified "retriever/reader" share a "stake" in the $500 recovery. If a class is certified including fax machine owners but excluding "retriever/readers," the owner would take the full $500 recovery. That raises serious concerns under Rule 19(a)(i)(B)(i) of the Federal Rules of Civil Procedure: the "retriever/reader" is a necessary party because, as a practical matter, his ability to protect his interest in the $500 award is impeded if he is not included in the litigation. FED. R. CIV. P. 19(a)(1)(B)(i). And, assuming *arguendo* excluded retriever/readers can file their own individual claims even if another class member has collected the full $500 recovery for that fax (which HDIC denies is permissible), the exclusion of retriever/readers from the class would run afoul of Rule 19(a)(i)(B)(ii) because HDIC could be subject to "double, multiple, or otherwise inconsistent obligations." FED. R. CIV. P. 19(a)(1)(B)(ii).

(2) It Would Be Virtually Impossible To Identify Members Of The Class.

Thus, under the law articulated by this Court (and under which this case currently proceeds), if a class is to proceed at all (and HDIC denies that it can) the class must be defined for purposes of analysis to include owners and "retriever/readers" as they may potentially have a TCPA claim and their exclusion would be problematic under Rule 19. But even though the class must include "retriever/readers," that very definition, though required, renders a class action *unmaintainable* because of the complexities it entails: For *every* fax that was transmitted, an investigation would be required to determine who else, other than the owner of the fax machine, may have retrieved and read the fax and been "annoyed, distracted, or otherwise inconvenienced" as a result. Moreover, once that "retriever/reader" is identified, it must be determined if he or she was acting as an agent or employee of a corporate or other entity. If the "retriever/reader" was acting as the agent or employee of the entity that owned the fax machine, a determination must be made as to whether that person has an individual TCPA claim *in addition* to the claim of the corporate owner of the equipment (in which case the corporate owner and "reader" would split the $500 statutory recovery in some fashion), or whether that potential claim is subsumed into the corporate owner's claim. If the "retriever/reader" was acting as the agent or employee of an entity other than the owner but whom the owner allowed to use the fax machine (as occurred in the instant case), a determination must be made as to whether the "retriever/reader" has an individual claim or whether the claim must be brought by the corporate entity on whose behalf the reader viewed the fax. (There appears to be virtually no case law on this issue; thus, this Court would be resolving questions of first impression for every "retriever/reader" of the fax that might be identified.)

There are other major obstacles to determining who, or what entities, are members of the class. The faxes in question were sent in the summer of 2008. For the "GN-Fax 4/08" fax that

was sent to plaintiff's fax number, a spreadsheet has been produced in discovery listing the name of the agency to which each fax was intended to be transmitted as well as the fax number the agency provided to Humana.[5] But that agency may not necessarily own the machine. (Indeed, in the instant case, the names of two other agencies appear on the fax transmission spreadsheet with plaintiff's fax number. These are the agencies plaintiff allowed to use his fax machine and to which the faxes attached to plaintiff's Amended Complaint were transmitted. Those two agencies did not own the fax machine; plaintiff did.) Thus, for each agency and fax number listed on the fax transmission spreadsheet, an investigation must be made into whether that agency actually owned the fax machine at that time. If not, the owner needs to be identified – because according to this Court's rulings the owner has a potential TCPA claim.

All of these complications make it virtually impossible, as a practical matter, to ascertain who is in the class, no matter how clear the class definition may appear on paper. In *Sandusky Wellness Center LLC v. Medtox Scientific, Inc.,* 2014 WL 3846037 (D. Minn. Aug. 5, 2014), the court addressed a similar situation. In *Sandusky*, the plaintiff had allowed an individual named Dr. Montgomery to see patients at the Sandusky office, and Dr. Montgomery therefore used Sandusky's fax machine. The defendant transmitted a fax to Dr. Montgomery, to the Sandusky fax machine. Sandusky then filed a TCPA claim. Plaintiff moved to certify a class of "all persons who . . . were sent telephone facsimile messages regarding" services offered by the defendant. *Id*. at *3. In addressing the motion, the court observed that, under the class definition, both Sandusky

[5] Humana Inc., the owner of the equipment used to transmit the fax, retained this information since plaintiff filed a TCPA claim against it in the Western Division in 2008 based on that fax. See p. 2, *supra*. Fortuitously, Humana Inc. also has information concerning the names of the agencies and fax numbers to which the faxes identified as "FL-Fax 4/08," "NC-Fax 4/08," and "WV-Fax 4/08" were sent. As explained *infra*, the other 15 faxes were never the subject of the prior litigation or this litigation, and were never sought by plaintiff until he propounded discovery in late 2014 in the instant case. Magistrate Judge Mason upheld Humana Inc.'s and HDIC's objections to plaintiff's attempted discovery regarding those 15 faxes, and this Court overruled plaintiff's objections to that ruling. Transmission information for those 15 faxes – which were never the subject of the prior litigation or current litigation -- is not believed to be extant.

and Dr. Montgomery may be class members. *Id*. It also noted that "[i]n order to determine to whom each fax was sent – and thus, who was injured – the parties and the court would need to delve into the unique circumstances of each fax transmission." *Id*. at *4. The court held that, consequently:

> . . . Sandusky's class definition is untenable because it would take individualized discovery to determine the threshold issue of who was 'sent' each of the thousands of faxes at issue. *See Brey Corp. v. LQ Mgmt.,* No. 11-718, 2014 WL 943445, at *1 (D. Md. Jan. 30, 2014) (declining to certify TCPA class because 'the members of the putative class have standing to assert a claim against defendant only of they received an unsolicited fax . . . [and] [t]here are no objective criteria that establish that a putative class member in fact obtained an unsolicited fax); *Compressor Eng'g Corp. v. Mfrs. Fin. Corp*., 292 F.R.D. 433, 450 (E. D. Mich. 2013) (finding nearly identical class definition impermissibly imprecise and amorphous); *Forman v. Data Transfer, Inc*., 164 F.R.D. 400, 403 (E.D. Pa. 1995) (rejecting TCPA class because '[d]etermining a membership in the class would essentially require a mini-hearing on the merits of each case).

Id. at *4. The court therefore held that proposed class was not ascertainable – which the court viewed as a threshold requirement to be met before undertaking an analysis of the Rule 23 factors -- and denied the motion for class certification. *Id*.

(3) Because Of The Virtual Impossibility Of Identifying Class Members, A Class Action Is Not A Superior Method Of Adjudicating The Purported Disputes.

In the Seventh Circuit, "ascertainability" is not necessarily viewed as an element to be considered separate and apart from the Rule 23 analysis. Rather, questions of ascertainability are addressed in the context of the "superiority" requirement of Rule 23(b)(3). *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015). A key component of the "superiority" analysis is a consideration of "the likely difficulties in managing a class action." FED. R. CIV. P. 23(b)(3)(D). "[T]his consideration encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle and Jacquelin,* 417 U.S. 156, 164 (1974). In light of the administrative quagmire that would be encountered in attempting to

identify the members of the class, a class action is clearly *not* superior to individually brought suits. Even for agencies listed on the fax spreadsheet, separate inquiries must be made to determine if that entity was the owner of the fax machine at the time; if not, the owner must be identified as it may also have a TCPA claim. *See Sandusky Wellness Center LLC v. Medtox Scientific, Inc.*, 2014 WL 3846037, at *3-4. Undoubtedly, many of the fax numbers will no longer be in use, and for those intended recipients on the fax transmission spreadsheet who are no longer Humana agents,[6] further inquiry will be needed to locate them – if they still exist. (Many agencies in the form of corporations, limited liability companies or partnership may no longer be in business.[7]) An individual investigation of each transmission to determine the identity of "retriever/readers" who were "annoyed, distracted, or otherwise inconvenienced" must be undertaken. When individuals are identified, it must be determined whether they received or viewed the fax in their individual capacities, or as representative of a corporate or other business entity. Identifying persons and entities who are class members is thus a virtually unsolvable task in this case. Class litigation, and the practically insurmountable difficulties it presents, is simply not a superior method of resolving disputes compared to the simple, straightforward approach of allowing individuals to pursue their own TCPA claims.[8]

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[6] As explained below, entities or persons listed on the fax transmission spreadsheet who were Humana agents as of August 2015 must be excluded from the class in any event.

[7] The outdated nature of such information contributed to the court's determination that class litigation of TCPA claims was not superior to individual actions in *Sherman v. Yahoo! Inc*., 2015 WL 5604400, *6 (S.D. Cal. Sept. 23, 2015.

[8] In his Memorandum, plaintiff cites other TCPA cases in which classes were certified. See Plaintiff's Memorandum in Support of Class Certification, Doc. 285-1, p.15, n.5. All of those cases were decided before the Seventh Circuit's pronouncement in *Chapman v. Wagener Equities, Inc.,* 747 F.3d 489, 491-92 (7th Cir. 2014) that non-owner users of fax machines who were "annoyed, distracted, or otherwise inconvenienced" may have claims under the TCPA. The Seventh Circuit's expansion of potential TCPA claimants has substantially complicated the question of class certification in TCPA cases. Plaintiff has avoided addressing this issue in his motion and cites no cases that have dealt with the effect of the Seventh Circuit's holding on the problem of identifying such users as members of a class.

C. Alternatively, The Class Cannot Be Extended To Include 18 Additional Faxes That Plaintiff Has Not Identified As Having Been Received At His Machine.

Apart from the fact that class litigation is clearly not superior under the circumstances in this case, plaintiff's contention that some *eighteen* other faxes (in addition to the one he alleges he received) are pertinent for class certification is simply wrong. A review of the history of this matter demonstrates that this litigation has always concerned *one* fax form – the fax plaintiff claims to have received at his machine and attached to his pleading – and not any of 18 other fax forms plaintiff now seeks to interject into this litigation, and which plaintiff has never identified as having been received at his machine.

(1) The Subject Matter Of This Litigation Has Been Limited To The Fax Plaintiff Claims He Received, Not Eighteen Other Forms Of Faxes. [9]

The current litigation is nearly identical to an earlier TCPA suit plaintiff filed on July 23, 2008 against *Humana Inc.* That litigation was removed to the United States District Court, Northern District of Illinois, Western Division (Rockford), as cause no. 3:08-cv-50188 (the "Western Division case"). The complaints in both the Western Division case and the current litigation are based on the same fax plaintiff alleges to have been received by his fax machine (two identical copies in succession) on May 14, 2008.

The Western Division case was litigated for 18 months. During that time, the parties conducted written and oral discovery and engaged in extensive motion practice. On August 5, 2009, Humana Inc. moved for summary judgment on several grounds. (Humana Inc. did not contend in its motion, however, that it was not the sender of the subject fax.) The motion was fully briefed.[10] On August 12, 2009 (and again on November 13, 2009), in order to avoid further

[9] The procedural history relevant to this issue is set forth in detail in HDIC's Response to Plaintiff's Second Motion to Compel (Doc. 229, pp. 3-6) and HDIC's Memorandum in Support of Objections Pursuant to Fed. R. Civ. P. 72 (Doc. 241, pp. 2-6). For ease of reference, the essential points are repeated here.
[10] *See* Western Division case docket, no. 3:08-cv-50188, Docs. 47, 49, 50, 57, 73, 74, 75.

litigation costs, Humana, on behalf of all Humana entities, offered plaintiff individually all of the relief he claimed. Based on this offer, Humana Inc. filed a motion pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(3), arguing that plaintiff's claims were moot. This motion also was fully briefed.[11]

At about that same time (on November 10, 2009), plaintiff moved for leave to amend his pleadings to "substitute" HDIC (the defendant in the current litigation) as the sole defendant and voluntarily dismiss Humana Inc. -- nearly a year and half into the litigation and well after the Court's May 20, 2009 deadline for amending pleadings. In his motion, plaintiff oddly stated that he believed Humana Inc. was "the wrong defendant" because it "was not the business" that sent the fax, or on whose behalf it was sent. The Western Division denied plaintiff's motion on November 13, 2009, and plaintiff thereafter moved to reconsider. On December 22, 2009, the Court dismissed the Western Division case *sua sponte* because of Plaintiff's assertion that he had no claim against the sole defendant, Humana Inc.[12] Plaintiff appealed to the United States Court of Appeals for the Seventh Circuit, and the matter was assigned for mandatory mediation. After the unsuccessful mediation, on March 18, 2010, plaintiff filed the current litigation against HDIC in the Circuit Court of Cook County (which HDIC removed to this Court). Plaintiff then voluntarily dismissed his appeal in the Western Division case on March 29, 2010.

HDIC filed an Amended Motion for Summary Judgment in the current litigation in December 2012, seeking summary judgment on plaintiff's individual claim. The motion focused exclusively on the fax plaintiff claims to have received and that he attached to his Amended Complaint. In response, plaintiff never argued that he received any faxes other than that particular

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[11] *See* Western Division case docket, no. 3:08-cv-50188, Docs. 59, 60, 64, 65.

[12] *See* Western Division case docket, no. 3:08-cv-50188, Doc. 83.

fax. (Docs. 142, 166, 176.) The District Court ruled on HDIC's motion on June 12, 2014, granting summary judgment on Counts II and III of the Amended Complaint (for common law conversion and violation of the Illinois Consumer Fraud Act) but denied the motion as to the TCPA claim. (Doc. 189) HDIC's Motion for Reconsideration (Doc. 199) and Motion for Certification under 28 U.S.C. §1292(b) (Doc. 201) were denied on September 29, 2014 (Doc. 212).

At a status hearing thereafter, plaintiff stated that he wished to pursue further discovery, which HDIC opposed. The District Court thus referred the matter to Magistrate Judge Mason for resolution of that issue. (Doc. 213). Magistrate Judge Mason then directed the parties to file a Joint Status Report concerning discovery. In that report filed in October 2014, plaintiff asked Magistrate Judge Mason to allow another seven months of discovery, even though more than two years had passed *after* the close of the original discovery period authorized by this Court. Plaintiff contended such discovery was necessary in light of the Court's recent denial of HDIC's Motion for Summary Judgment on the TCPA claim. (Doc. 215, pp. 2-3.) Magistrate Judge Mason denied plaintiff's request, stating that he did "not see how Judge Durkin's recent rulings on summary judgment . . . alter the landscape with respect to discovery or affect this Court's" prior discovery rulings. (Doc. 216.) Magistrate Judge Mason therefore declined to revive discovery for the extensive period requested by plaintiff but "reopen[ed] discovery for an additional 30 days" from October 21, 2014. (*Id.*)

Plaintiff thereafter served extensive discovery requests including requests concerning 18 *other* faxes that had been produced by Humana Inc. (not HDIC) in the Western Division litigation but which plaintiff does not allege in his Amended Complaint that he received. HDIC and Humana Inc. timely served objections to the new discovery, asserting *inter alia* that discovery into the 18

"other faxes" was completely improper at this late stage of the litigation and in light of the fact that plaintiff does not allege he received them.

Plaintiff filed a motion to compel, seeking an order overruling the objections. (Doc. 224.) Magistrate Judge Mason entered an Order on February 24, 2015, recognizing plaintiff's inexplicable delay in seeking the discovery that was the subject of his motion and acknowledging that Rule 23 discovery "has long been closed."[13] Magistrate Judge Mason nonetheless allowed certain discovery he deemed relevant to the "merits" of plaintiff's TCPA claim, including documents relating to the fax plaintiff attached to his Amended Complaint and three other faxes. (Doc. 236, p. 3.) Magistrate Judge Mason reasoned that the information sought regarding the three other faxes was relevant to two defenses HDIC has raised to plaintiff's claim and argued in its Motion for Summary Judgment: first, that HDIC was not the "sender" of the faxes;[14] and second, that the fax plaintiff alleges he received was not an "advertisement" within the meaning of the TCPA.[15] (Doc. 236, pp. 3-4.) Magistrate Judge Mason did not allow discovery into the 15 other faxes that were the subject of plaintiff's discovery requests.

Both plaintiff and HDIC filed objections to different portions of Magistrate Judge Mason's ruling. (Docs. 238, 241.) In particular, plaintiff objected to the ruling because it did not allow discovery into these other 15 faxes. (Doc. 238, pp. 7-15.) This Court sustained Magistrate Judge Mason's rulings in their entirety. (Doc. 244.)

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[13] Rule 23 fact discovery closed on June 20, 2012. See HDIC's Response to Plaintiff's Second Motion to Compel. Doc. 229, pp. 4-5.

[14] HDIC contends that it was not the "sender" of the fax in light of the fact that the fax was written by personnel employed by other Humana companies, and transmitted by personnel employed by other Humana companies on equipment of other Humana companies. *See* HDIC's Memorandum in Support of Amended Motion for Summary Judgment, Doc. 130, pp. 5-7.

[15] HDIC contends that the fax was not an "advertisement" within the meaning of 47 U.S.C. §227(a)(5), but an informational or "transactional" communication that facilitated performance under agency agreements with Humana companies. *See* HDIC's Memorandum in Support of Amended Motion for Summary Judgment, Doc. 130, pp. 8-13.

In short, plaintiff attached only one fax to his Amended Complaint. Plaintiff did not pursue information concerning any other faxes during the entire period of class discovery. Plaintiff has never identified any other fax as having been received by his machine. Plaintiff did not seek information concerning any faxes other than the one attached to his pleading until late 2014, when Magistrate Judge Mason allowed another 30 days for "clean-up" discovery. Magistrate Judge Mason ultimately sustained HDIC's objections to discovery into 15 of those faxes (AK-Fax 9/07, GN-Fax 9/07, KS-Fax 9/07, NC-Fax 9/07, TX-Fax 9/07, VA-Fax 9/07, CO/NM-Fax 10/07, GA-Fax 10/07, OK-Fax 10/07, IL/MS/LA/MN-Fax 12/07, KY-Fax 12/07, WV-Fax 12/07, MD-Fax 2/08, CA-Fax 2/08, and NV-Fax 7/08). This Court confirmed that ruling. Magistrate Judge Mason allowed further discovery into the fax attached to the Amended Complaint (GN-Fax 4/08) and three other faxes (FL-Fax 4/08, NC-Fax 4/08, and WV-Fax 4/08), but only because he concluded those three faxes could be relevant to the question whether HDIC was the "sender" of the fax plaintiff claims he *received* (GN-Fax 4/08), and the question whether *that* fax was an "advertisement." (Doc. 236, pp. 3-4.) In light of this Court's determination that 15 of the faxes were out-of-bounds for discovery purposes, it clearly would be improper and, indeed, contradictory to include recipients of those faxes within the class.

(2) Plaintiff's Claim Also Is Not Typical Of Potential Claims Of <u>Recipients Of The Other Eighteen Faxes.</u>

Moreover, plaintiff's claim is not typical of the potential claims of the recipients of faxes *other* than the one he has identified as having been received by his fax machine (GN-Fax 4/08). FED. R. CIV. P. 23 (a)(3). Plaintiff's claim is based on his machine's receipt of fax GN-Fax 4/08. The claims of the recipients of the other 18 faxes obviously would be based on different faxes with different content. In *Abby v. Paige*, 282 F.R.D. 576 (S.D. Fla. 2012), the plaintiff brought a claim under the Fair Debt Collections Practices Act, 15 U.S.C. §1692 *et seq*. based *inter alia* on the

allegation that an initial letter from the defendant "fail[ed] to include [the] debt collection warning as required by 15 U.S.C. § 1692e(11) in the initial communication to consumers." *Id*. In ruling on the plaintiff's motion for class certification, the court held that the plaintiff's claim was not typical of those of the class because the record failed to show that class members received the same letter as the plaintiff. *Id*. at 579. Likewise in the instant case, plaintiff has not identified any of the eighteen other faxes as having been received by his machine. His claim is therefore not typical of those of the recipients of the eighteen other faxes. While HDIC contends that no class can be certified in this case, on this additional ground the recipients of faxes other than the one plaintiff identified (GN-Fax 4/08) clearly cannot be part of the class.

D. Alternatively, The Class Cannot Include Agents or Agencies Who Are Parties To A Recent Amended And Restated Contract With Humana Companies.

As established in the certification of Karri Wendt (Ex. A hereto), all agents and agencies who held an agency contract with Humana companies as of August 2015 were issued amended and restated Group Producing Agent or Agency Contracts on June 15, 2015. Those contracts became effective either August 1, 2015, or 30 days after the date the agent was provided notice of the new amended and restated contract, whichever is later.[16] Those contracts all contained the following language:

> Advertising Communications. The Company's use of Contract Information or other communications to Producer may qualify as advertisements under Applicable Laws, including CAN-SPAM Act and the Telephone Consumer Protection Act, 47 U.S.C. §227. Producer consents to receive such communications and advertisements from the Company. Producer's consent remains effective until Producer withdraws Producer's consent in writing and the Company receives Producer's withdrawal. Producer shall not seek damages, file a claim of any sort or become a member of any class action against the Company regarding any such communication or advertisement.

[16] The contracts are between the producer and "Humana Insurance Company, Humana Health Plan, Inc., and all of the insurer or health pan affiliates and subsidiaries." (Ex. A-1, p. 1.)

(Producer Contract § 7.6, Ex. A-1 hereto.) The Producer Contracts also require arbitration:

> Dispute Resolution
>
> (A) Arbitration shall be the exclusive and binding method of dispute resolution. No claims, causes of action, lawsuits, or litigation shall be heard in a court of law other than to enforce an arbitration award.
>
> (B) All disputes arising out of or in any way relating to the Contract or the business relationship of the Parties shall be addressed according to the following procedure:
>
> . . .
>
> (iii) Any dispute not finally resolved through negotiation or mediation shall be subject to arbitration.

(*Id.* at § 15.23(A), (B)). Finally, the Producer Contracts contain a class action waiver:

> CLASS ACTION WAIVER. Producer must bring any Claim in the Producer's individual capacity, and not as a plaintiff or class member in any purported class, collective, representative, multiple plaintiff, or similar proceeding ("Class Action"). There shall be no right or authority for any Claim to be arbitrated on a Class Action basis or on bases involving any Claim brought in a purported representative capacity on behalf of the general public, other producers, or other persons or entities similarly situated. Producer expressly waives any ability to maintain any Class Action in any forum, including arbitration. The arbitrator shall not have the authority to combine or aggregate similar claims or conduct any Class Action nor make any award to any person or entity not a party to the arbitration. Any claim that all or part of this Class Action Waiver is unenforceable, unconscionable, void, or voidable must be determined by a court of law.

(*Id.* at § 15.23(C)).

Of the 22,709 "GN-Fax 4/08" faxes that were attempted to be transmitted, at least 8,772 of the intended recipients are still active Humana agents and thus are parties to the new Producer Contracts. (Wendt Declaration, ¶10.) Pursuant to §7.6 of their contracts, they have waived all claims against Humana companies, both individually and as members for a class, for purported violations of the TCPA. They therefore cannot be members of the class. It is also clear that they

have waived the right to bring or participate in a class action against any Humana company for any claim. (§ 15.23(C).) On this additional basis, they cannot be a part of any class.

Alternatively, Humana agents and agencies who are parties to the new Producer Contracts have agreed to arbitrate any claims they may have against Humana companies. HDIC contends that agents who are parties to the new contracts have waived any TCPA claims they may have and have waived the right to bring any claims against Humana companies as members of a class and therefore cannot be members of a class. But even if that were not the case, it is clear that Sections 15.23(A) and (B) of the amended contracts would require such claims to be arbitrated. Because of this arbitration agreement, agents and agencies who hold such contracts cannot be members of *any* class in this litigation. *See Dienese v. McKenzie Check Advance of Wisconsin, LLC*, 2000 WL 34511333 (E.D. Wis. Dec. 11, 2000); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 n. 15 (11th Cir. 1987), *cert. denied,* 485 U.S. 959 (1987).

E. Plaintiff's Argument Concerning Common Questions of Fact or Law is Flawed. (Rule 23(a)(2))

HDIC has demonstrated above that plaintiff's class definition, or any class definition under the circumstances of this case, is fatally unworkable and therefore not a "superior" method of adjudication under Rule 23(b)(3). On this basis alone, plaintiff's Motion for Class Certification must be denied.

The proposed class fails to meet other requirements of Rule 23 as well. For example, the rule requires the existence of "questions of law or fact common to the class." Plaintiff suggests that one common question is whether the faxes are "advertisements" as defined by 47 U.S.C. §227(a)(5) and 47 C.F.R. §64.1200(f)(1)(2). The "common question" requirement was explained by the Supreme Court explained in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541 (2011):

> "What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

131 S.Ct. at 2551 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.REV. 97, 132 (2009)). The question whether the faxes were "advertisements" within the meaning of the TCPA is not capable of a "common answer" given the Court's rulings in this case. While HDIC contends that, as a matter of law, the faxes facially were not "advertisements," but informational, transactional communications that facilitated the agents' performance under their producer contracts with Humana companies, this Court concluded in ruling on HDIC's Amended Motion for Summary Judgment that a question of fact exists as to whether the faxes were "advertisements." (Doc. 189, p. 18.) Having determined that a question of fact exists, this Court presumably concluded that whether the faxes were advertisements could not be determined from the content of the faxes alone, but also depends upon the circumstances surrounding the transmission of the fax and the context in which it was transmitted and received. HDIC contends that all of the intended recipients held agent contracts with Humana companies and that the faxes were clearly informational or transactional because they provided information that allowed the agents to perform under their contracts. If a fax had been pulled off a fax machine by someone who was permitted to use the machine, but who was not an intended recipient and did not have an agency contract with Humana companies, HDIC anticipates plaintiff may take the position that the fax was not transactional or informational as to those readers of the fax. Again, HDIC contends that the faxes on their face were *not* advertisements,[17] but in light of this Court's conclusion that a

[17] In *Sandusky Wellness Center, LLC v. Medco Health Solutions, I*nc., 788 F.3d 218 (6th Cir. 2015), the Sixth Circuit held that under the TCPA "[a]n advertisement is any material that promotes the sale (typically to the *public*) of any property, goods, or services available to be bought or sold so some entity can profit." *Id*. at 222 (emphasis added). The faxes in question were not intended for, or sent to, the *public*, and did not promote the sale of products, goods or

question of fact exists on the issue, the context of the transmission would come into play. Thus, the question whether the faxes were advertisements is not prone to "generate common answers" given this Court's determination that a question of fact exists on the issue, and given the fact that the "answer" to the "question" now turns on the context of each fax. It is therefore not a "question of law or fact common to the class" under Rule 23(a)(2).

F. The Named Plaintiff's Claim Is Subject To Unique Defenses. His Claim Is Therefore Not Typical Of The Claims Of Other Class Members, and He Is Not An Adequate Class Representative.
(Rule 23(a)(3), (a)(4))

Even limiting the class to "GN-Fax 4/08" and excluding agents and agencies that are parties to the amended and revised agency agreement, it is clear plaintiff's claim is not typical of the claims of other class members and that he is not an adequate representative of *any* class. As the Seventh Circuit stated in another TCPA case, *C.E. Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721 (7th Cir. 2011), "'[t]he presence of even an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representation.'" 637 F.3d at 726 (quoting *J.H. Cohn & Co. v. American Appraisal Associates, Inc.,* 628 F.2d 994, 999 (7th Cir. 1980); *see also, In re Bank of Boston Corp. Securities Litigation*, 762 F. Supp. 1525 (named plaintiff in securities litigation did not satisfy typicality requirement where he was uniquely subject to reliance defense); *Swanson v. Lord & Taylor, LLC*, 278 F.R.D. 36 (D. Mass. 2011) (plaintiff held to be atypical of class in wage claim litigation where he was uniquely subject to exhaustion defense); *Scott v. New York City Dist. Council of Carpenters Pension Plan,* 224 F.R.D. 353

services to the *public*. On their face, they would have had no meaning for members of the "public" who did not hold an agent's contract with Humana companies. HDIC thus contends that, whether a claimant held an agent's contract with Humana companies, or whether the claimant was an unaffiliated "retriever/reader," the faxes were not advertisements.

(S.D.N.Y. 2004) (typicality requirement unmet in ERISA action against employee benefit plan administrators where it was unclear whether named plaintiff had exhausted administrative remedies).

In the instant case, plaintiff is subject to unique defenses that render his claim atypical compared to the claims of the class and nullify his ability to be an adequate class representative. First, plaintiff's claim is subject to a mootness defense based on the fact that he was offered full relief prior to the filing of this litigation.[18] While HDIC's Motion to Dismiss on that basis was denied, that issue remains subject to review by the Seventh Circuit on appeal. Moreover, the United States Supreme Court is now considering *Campbell-Ewald Co. v. Gomez*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S.Ct. 2311 (May 18, 2015), which concerns the question whether a defendant's offer to settle a plaintiff's claim for the full amount of the damages and other relief available under the law mooted the plaintiff's claim. The *Gomez* ruling will likely impact the mootness issues in the instant case. Clearly then, HDIC's mootness defense – which applies uniquely to plaintiff because of the offer previously extended to him – remains very much viable.

Second, plaintiff's claim is subject to the defense that he lacks standing to bring a TCPA claim because the fax was not "sent" to him, but to two other entities that he allowed to use his fax machine. HDIC maintains that, having given permission to others to use his fax machine, he cannot claim an injury in connection with the fax HDIC sent to the two other entities.[19] HDIC recognizes that this Court has held in ruling on its Amended Motion for Summary Judgment that

[18] See HDIC's Memorandum in Support of Motion to Dismiss, Doc. 16-1, pp. 4-6; HDIC's Reply in Support of Motion to Dismiss, Doc. 20, pp. 1-7.

[19] See HDIC's Memorandum in Support of Amended Motion for Summary Judgment, Doc. 120-1, pp. 7-8.

the sole fact that plaintiff was the owner of the fax machine vests him with standing. But this Court's view of the law on that point is subject to change in the near future. The United States Supreme Court has granted *certiorari* in *Spokeo, Inc. v. Robins*,[20] in which the Court will rule on whether the familiar requirement that a plaintiff must have sustained an "injury in fact" in order to have standing applies to the Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq*., or whether a statutory violation in the absence of concrete harm is sufficient (as the Ninth Circuit held in *Robins v. Spokeo, Inc.,* 742 F.3d 409 (9th Cir. 2014)). HDIC submits that the Supreme Court's ruling in *Spokeo* will be highly pertinent to the instant case, as this Court appears to have ruled that plaintiff need not have sustained an injury in fact in order to have standing under the TCPA. In light of the pendency of *Spokeo*, and because the standing issue is subject to review by the Seventh Circuit herein in any event, HDIC's standing defense -- based on the *unique* circumstance of plaintiff's extension of permission to others to use his fax machine – is very much in play.

Because of these defenses that apply uniquely to plaintiff, his claim is not typical of the claims of the class, and he is not an adequate class representative.

G. In Light Of The Multitude Of Individual Questions of Law and Fact, Purported Common Questions Do Not Predominate
(Rule 23(b)(3))

The number of questions affecting individual members in a class of any description in this case is staggering:

- For every fax transmission, an investigation must be made into whether the party to whom it was sent is the fax machine's owner. If not, the owner must be identified because, under the law currently governing this case, owners of fax machines have standing.

[20] 135 S.Ct. 1892 (2015).

- For every fax transmission, an investigation must be made into whether persons other than the owner retrieved and read the fax and were annoyed, distracted and inconvenienced because, under the law currently governing this case, such persons may have a TCPA claim.

- In *Leyse v. Bank of America National Association,* 804 F. 3d 316 (3rd Cir. 2015), the court stated that, under the TCPA's provisions regarding robocalls, "not…all those within earshot of an unwanted robocall are entitled to make a federal case out of it" because they are not within the "protected zone of interests." It follows that, for every person who retrieved and read the fax, and was "annoyed, distracted and inconvenienced," a determination must be made as to whether that person was in the "protected zone of interest" and whether the "annoyance, distraction and inconvenience" reached an actionable level. (Surely at some point, the annoyance, distraction and inconvenience are *de minimis* and not actionable. If a non-owner individual glimpses a fax for one second upon its arrival on the machine, that can hardly be viewed as sufficient to vest one with a federal claim.[21])

- For each owner and retriever/reader, a determination must be made as to whether that person was acting in his or her individual capacity, or on behalf of a corporate or other entity. A determination then must be made as to whether the person, individually, or the corporation is the proper party to assert the claim.

- If two or more persons have a claim for the same fax, this Court has ruled that the $500 recovery must be allocated among them. Thus, for every fax transmission for which two or more persons have a claim, a determination must be made as to how to allocate that sum. (There appears to be no case law offering guidance on how the $500 recovery should be allocated in such cases. An even split is likely not equitable – it would be manifestly unfair for a retriever/reader who

[21] *See, e.g.,* HDIC's Memorandum in Support of Amended Motion for Summary Judgment, Doc. 120-1 pp. 15-19.

glimpsed the fax momentarily and thought nothing of it at the time to share evenly in the recovery with the owner of the fax machine.)

- If HDIC's pending petition with the FCC is granted and HDIC is extended a waiver from the requirement of specific opt-out language on faxes sent with the permission of the recipient, then whether or not the recipient consented to the fax will become a highly relevant issue in this litigation. In that event, for every fax transmitted, a determination will need to be made as to whether the recipient claims to have revoked the permission he extended in his agency contract with Humana companies (as plaintiff apparently contends he did in this case).[22]

- If the United States Court of Appeals for the District of Columbia Circuit rules in *Bais Yaakov of Spring Valley v. FCC*[23] that opt-out language is not required on faxes sent with the permission of the recipient, then again whether or not the recipient consented to the fax will become pertinent. Then, for every fax transmitted, a determination will need to be made as to whether the recipient claims to have revoked the permission he extended in his agency contract with Humana companies.

- If the United States Supreme Court rules in *Spokeo, Inc. v. Robins*[24] that an injury in fact must be sustained for an individual to have a statutory claim under the Fair Credit Reporting Act, then, HDIC submits, that principle will apply to claims brought under the TCPA. Thus, for every fax transmitted, a determination will need to be made as to whether the owner sustained an injury

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[22] It should be noted that in *Leyse v. Bank of America National Association,* 804 F. 3d 316 (3rd Cir. 2015), the court held that if the intended "called party" consented to robocalls, then that consent can be invoked as a defense to a TCPA claim brought by another user of the phone line who has standing to bring a claim. HDIC contends (if the consent issue is revived) that if the party for whom the fax was intended consented to the fax, such consent vitiates all TCPA claims for the fax, including the claims of unintended retrievers/readers.

[23] Consolidated Nos. 14-1234, 14-1235, 14-1239, 14-1243, 14-1270, 14-1279, 14-1292, 14-1293, 14-1294, 14-1295, 14-1297, 14-1299, 14-1302. See HDIC's Motion to Stay, Doc. 131.

[24] 135 S.Ct. 1892 (2015).

in fact, or whether he did not sustain such an injury because he allowed others to use his machine. This Court also will need to determine whether retriever/readers were sufficiently annoyed, distracted, and inconvenienced to the extent they sustained an "injury in fact" sufficient to give them standing to pursue a TCPA claim.

Given this host of individual issues, the meager common questions proffered by plaintiff clearly do not predominate. The proposed class, under any description, thus fails the "predominance" requirement of Rule 23(b)(3).

H. A Class Action Is Not A Superior Method For Fairly And Efficiently Adjudicating The Controversy (Rule 23(b)(3))

The superiority requirement of Rule 23(b)(3) "requires a careful consideration of both necessity and efficiency in each suit." *Turoff v. Union Oil Co. of California, 61 F.R.D. 51, 59 (N.D. Ohio 1973).* HDIC demonstrated above that a class action is not a superior method for fairly and efficiently adjudicating the controversy because of the virtual impossibility of identifying who is a member of the class, whatever its scope. The practical problems encountered in identifying class members "render the class action format inappropriate," particularly in view of the simple, uncomplicated alternative of allowing individuals to file their own actions if they so desire. *Eisen v. Carlisle and Jacquelin,* 417 U.S. at 164.

The additional flaws in plaintiff's request for class certification, discussed above, further demonstrate that a class of any scope fails the superiority test miserably. The multiplicity of individual investigations that would have to be carried out for each transmission, and the number of individual issues that would have to be litigated and decided for each class member, render a class action completely unworkable in this case. Moreover, not only manageability, but judicial economy must be taken into account in the superiority analysis. *Griffin v. Home Depot, Inc*. 168

F.R.D. 187, 191 (E.D. La. 1996). Expending the resources of this Court on the plethora of individual determinations that the proposed class action requires is hardly justifiable when individual claimants can easily and simply pursue their own remedy. While individual recoveries may be relatively small, that does not require this Court to disregard superiority considerations. *See In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir. 1974) (the desirability of allowing small claimants a forum "does not eclipse the problem of manageability"). Moreover, the fact that no other agents have filed TCPA claims over faxes they received from Humana companies containing information to facilitate their performance under their agency contracts is telling. Faced with a similar lack of interest by potential claimants, the court in *Piekowski v. Ralston Purina Co*., 68 F.R.D. 443 (M.D.Ga. 1975) stated:

> In evaluating the superiority requirement, the absence of other actions by class members, as under typicality, is a relevant and significant consideration. If there were a substantial number of actions of a similar nature filed in this or other courts, this would be a factor favoring class certification. However, in the case at bar precisely the opposite is true. This Court is unwilling to breathe the spirit of judicial combat into approximately 6,500 persons who have shown no desire to litigate the contract provisions.

68 F.R.D. at 453.

The manageability and efficiency problems in this case are daunting. Far from being a superior method of adjudicating claims, a class action is clearly inferior to simple, uncomplicated, individual suits for recovery under the TCPA. The purported class action collapses under the weight of the superiority requirement of Rule 23(b)(3) alone.

III. CONCLUSION

For all of these reasons, plaintiff's Motion for Class Certification must be denied.

HUMANADENTAL INSURANCE COMPANY

By: David J. Novotny
One of its attorneys

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2016, I electronically filed the foregoing DEFENDANT HUMANADENTAL INSURANCE COMPANY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION with the Clerk of the U.S. District Court, Northern District of Illinois, Eastern Division, using the CM/ECF system which sent notification of such filing to the following CM/ECF registered participants:

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EXHIBIT N

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CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
CHANCERY DIVISION
CLERK DOROTHY BROWN

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

JT'S FRAMES, INC., an Illinois corporation, individually and as the representative of a class of similarly-situated persons,	)	
Plaintiff,	)	Civil Action No.:
	)	CLASS ACTION
v.	)	
WEINBERG & ASSOCIATES, INC., OHIO NATIONAL FINANCIAL SERVICES, INC., THE OHIO NATIONAL LIFE INSURANCE COMPANY, OHIO NATIONAL LIFE ASSURANCE CORPORATION, OHIO NATIONAL EQUITIES, INC., OHIO NATIONAL MUTUAL HOLDINGS, INC., OHIO NATIONAL INVESTMENTS, INC. and JOHN DOES 1-10,	)	
Defendants.	)	

CLASS ACTION COMPLAINT

Plaintiff, JT'S FRAMES, INC. ("Plaintiff"), brings this action on behalf of itself and all other persons similarly situated, through its attorneys, and except as to those allegations pertaining to Plaintiff or its attorneys, which allegations are based upon personal knowledge, alleges the following upon information and belief against Defendants, WEINBERG & ASSOCIATES, INC., OHIO NATIONAL FINANCIAL SERVICES, INC., THE OHIO NATIONAL LIFE INSURANCE COMPANY, OHIO NATIONAL LIFE ASSURANCE CORPORATION, OHIO NATIONAL EQUITIES, INC., OHIO NATIONAL MUTUAL HOLDINGS, INC., OHIO NATIONAL INVESTMENTS, INC. and JOHN DOES 1-10 ("Defendants"):

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PRELIMINARY STATEMENT

1. This case challenges Defendants' practice of sending unsolicited facsimiles.

2. The federal Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005, 47 USC § 227 ("JFPA" or the "Act"), and the regulations promulgated under the Act, prohibits a person or entity from faxing or having an agent fax advertisements without the recipient's prior express invitation or permission. The JFPA provides a private right of action and provides statutory damages of $500 per violation. Upon information and belief, Defendants have sent facsimile transmissions of unsolicited advertisements to Plaintiff and the Class in violation of the JFPA, including, but not limited to, the facsimile transmission of two unsolicited advertisements on or about May 10, 2013 ("the Fax"), a true and correct copy of which are attached hereto as Exhibit A. The Fax describes the commercial availability or quality of Defendants' goods and services. Plaintiff is informed and believes, and upon such information and belief avers, that Defendants have sent, and may be continuing to send, unsolicited advertisements via facsimile transmission in violation of the JFPA.

3. Unsolicited faxes damage their recipients. A junk fax recipient loses the use of its fax machine, paper, and ink toner. An unsolicited fax wastes the recipient's valuable time that would have been spent on something else. A junk fax interrupts the recipient's privacy. Unsolicited faxes prevent fax machines from receiving authorized faxes, prevent their use for authorized outgoing faxes, cause undue wear and tear on the recipients' fax machines, and require additional labor to attempt to discern the source and purpose of the unsolicited message.

4. On behalf of itself and all others similarly situated, Plaintiff brings this case as a class action asserting claims against Defendants under the TCPA/JFPA, the common law of

conversion and the consumer protection statues forbidding and compensating unfair business practices.

5. Plaintiff is informed and believes, and upon such information and belief avers, that this action is based upon a common nucleus of operative fact because the facsimile transmissions at issue were and are being done in the same or similar manner. This action is based on the same legal theory, namely liability under the JFPA. This action seeks relief expressly authorized by the JFPA: (i) injunctive relief enjoining Defendants, their employees, agents, representatives, contractors, affiliates, and all persons and entities acting in concert with them, from sending unsolicited advertisements in violation of the JFPA; and (ii) an award of statutory damages in the minimum amount of $500 for each violation of the JFPA, and to have such damages trebled, as provided by § 227(b)(3) of the Act.

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JURISDICTION AND VENUE

6. Jurisdiction is conferred by 735 ILCS 5/2-209 in that Defendants have transacted business and committed tortious acts related to the matters complained of herein.

7. Venue is proper in Cook County pursuant to 735 ILCS 5/2-101, et seq. because some of the tortuous acts complained of occurred in Cook County.

8. Plaintiffs' individual claims are worth less than $75,000.00, inclusive of all forms of damages and fees. Plaintiff expressly disclaims any individual recovery in excess of $75,000.00, inclusive of all forms of damages and fees.

PARTIES

9. Plaintiff, JT'S FRAMES, INC., is an Illinois corporation.

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10. On information and belief, Defendant, WEINBERG & ASSOCIATES, INC. ("WEINBERG"), is an Illinois corporation with its principal place of business in Arlington Heights, IL.

11. On information and belief, Defendants, OHIO NATIONAL FINANCIAL SERVICES, INC., THE OHIO NATIONAL LIFE INSURANCE COMPANY, OHIO NATIONAL LIFE ASSURANCE CORPORATION, OHIO NATIONAL EQUITIES, INC., OHIO NATIONAL MUTUAL HOLDINGS, INC. and OHIO NATIONAL INVESTMENTS, INC. (collectively "OHIO NATIONAL"), are Ohio corporations.

12. On information and belief, Defendant WEINBERG was and is an agent for the OHIO NATIONAL Defendants.

13. John Does 1-10 will be identified through discovery, but are not presently known.

FACTS

14. On or about May 10, 2013, Defendants transmitted by telephone facsimile machine an unsolicited fax to Plaintiff. A copy of the facsimile is attached hereto as Exhibit A.

15. Defendants created or made Exhibit A which is a good or product which Defendants distributed to Plaintiff and the other members of the class.

16. Exhibit A is a part of Defendants' work or operations to market Defendants' goods or services which was performed by Defendants and on behalf of Defendants. Therefore, Exhibit A constitutes material furnished in connection with Defendants' work or operations.

17. Plaintiff had not invited or given permission to Defendants to send the facsimile.

18. On information and belief, Defendants sent the same and other unsolicited facsimiles to Plaintiff and more than 39 other recipients without first receiving the recipients' express permission or invitation.

19. There is no reasonable means for Plaintiff (or any other class member) to avoid receiving unauthorized faxes. Fax machines are left on and ready to receive the urgent communications their owners desire to receive.

20. Defendants' advertisements did not display a proper opt out notice as required by 47 C.F.R. 64.1200.

COUNT I
TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227

21. Plaintiff incorporates paragraphs 1 through 20 as and for its paragraph 21 as though fully set forth herein.

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22. In accordance with 735 ILCS 5/2-801, Plaintiff brings Count I pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227, on behalf of the following class of persons:

> All persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising the commercial availability or quality of any property, goods, or services by or on behalf of Defendants, and (3) which Defendants did not have prior express permission or invitation, or (4) which did not display a proper opt-out notice.

Excluded from the Class are Defendants, their employees, agents and members of the Judiciary. Plaintiff reserves the right to amend the class definition upon completion of class certification discovery. Plaintiff reserves the right to amend the class definition upon completion of class certification discovery.

23. A class action is warranted because:

(a) On information and belief, the class includes forty or more persons and is so numerous that joinder of all members is impracticable.

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(b) There are questions of fact or law common to the class predominating over questions affecting only individual class members, including without limitation:

(i) Whether Defendants sent unsolicited fax advertisements;

(ii) Whether Defendants' facsimiles advertised the commercial availability or quality of property, goods, or services;

(iii) The manner and method Defendants used to compile or obtain the list of fax numbers to which they sent Exhibit A and other unsolicited faxed advertisements;

(iv) Whether Defendants faxed advertisements without first obtaining the recipients' express permission or invitation;

(v) Whether Defendants sent the faxed advertisements knowingly;

(vi) Whether Defendants violated the provisions of 47 USC § 227 and the regulations promulgated thereunder;

(vii) Whether Exhibit A and Defendants' other advertisements contain an "opt-out notice" that complies with the requirements of § (b)(1)(C)(iii) of the Act, and the regulations promulgated thereunder, and the effect of the failure to comply with such requirements;

(viii) Whether Defendants should be enjoined from faxing advertisements in the future;

(ix) Whether Plaintiff and the other class members are entitled to statutory damages; and

(x) Whether the Court should award trebled damages.

24. Plaintiff will fairly and adequately protect the interests of the other class members. Plaintiff's counsel are experienced in handling class actions and claims involving unsolicited advertising faxes. Neither Plaintiff nor Plaintiff's counsel has any interests adverse or in conflict with the absent class members.

25. A class action is an appropriate method for adjudicating this controversy fairly and efficiently. The interest of each individual class member in controlling the prosecution of separate claims is small and individual actions are not economically feasible.

The JFPA makes unlawful for any person to "use any telephone facsimile machine, computer or other device to send, to a telephone facsimile machine, an unsolicited advertisement ..." 47 U.S.C. § 227(b)(1)(C).

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26. The JFPA defines "unsolicited advertisement" as "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, in writing or otherwise." 47 U.S.C. § 227 (a) (5).

27. **Opt-Out Notice Requirements.** The JFPA strengthened the prohibitions against the sending of unsolicited advertisements by requiring, in §(b)(1)(C)(iii) of the Act, that senders of faxed advertisements place a clear and conspicuous notice on the first page of the transmission that contains the following among other things (hereinafter collectively the "Opt-Out Notice Requirements"):

1. a statement that the recipient is legally entitled to opt-out of receiving future faxed advertisements – knowing that he or she has the legal right to request an opt-out gives impetus for recipients to make such a request, if desired;

2. a statement that the sender must honor a recipient's opt-out request within 30 days and the sender's failure to do so is unlawful – thereby encouraging recipients to opt-out, if they did not want future faxes, by advising them that their opt-out requests will have legal "teeth";

3. a statement advising the recipient that he or she may opt-out with respect to all of his or her facsimile telephone numbers and not just the ones that receive a faxed advertisement from the sender – thereby instructing a recipient on how to make a valid opt-out request for all of his or her fax machines;

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The requirement of (1) above is incorporated from § (b)(D)(ii) of the Act. The requirement of (2) above is incorporated from § (b)(D)(ii) of the Act and the rules and regulations of the Federal Communications Commission (the "FCC") in ¶31 of its 2006 Report and Order (*In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act, Junk Prevention Act of 2005,* 21 F.C.C.R. 3787, 2006 WL 901720, which rules and regulations took effect on August 1, 2006). The requirements of (3) above are contained in § (b)(2)(E) of the Act and incorporated into the Opt-Out Notice Requirements via § (b)(2)(D)(ii). Compliance with the Opt-Out Notice Requirements is neither difficult nor costly. The Opt-Out Notice Requirements are important consumer protections bestowed by Congress upon the owners of the telephone lines and fax machines giving them the right, and means, to stop unwanted faxed advertisements.

28. **2006 FCC Report and Order.** The JFPA, in § (b)(2) of the Act, directed the FCC to implement regulations regarding the JFPA, including the JFPA's Opt-Out Notice Requirements and the FCC did so in its 2006 Report and Order, which in addition provides among other things:

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A. The definition of, and the requirements for, an established business relationship for purposes of the first of the three prongs of an exemption to liability under § (b)(1)(C)(i) of the Act and provides that the lack of an "established business relationship" precludes the ability to invoke the exemption contained in § (b)(1)(C) of the Act (*See* 2006 Report and Order ¶¶8-12 and 17-20);

B. The required means by which a recipient's facsimile telephone number must be obtained for purposes of the second of the three prongs of the exemption under § (b)(1)(C)(ii) of the Act and provides that the failure to comply with these requirements precludes the ability to invoke the exemption contained in § (b)(1)(C) of the Act (*See* 2006 Report and Order ¶¶13-16);

C. The things that must be done in order to comply with the Opt-Out Notice Requirements for the purposes of the third of the three prongs of the exemption under § (b)(1)(C)(iii) of the Act and provides that the failure to comply with these requirements precludes the ability to invoke the exemption contained in § (b)(1)(C) of the Act (*See* 2006 Report and Order ¶¶24-34);

D. The failure of a sender to comply with the Opt-Out Notice Requirements precludes the sender from claiming that a recipient gave "prior express permission or invitation" to receive the sender's fax (*See* Report and Order ¶48);

As a result thereof, a sender of a faxed advertisement who fails to comply with the Opt-Out Notice Requirements has, by definition, transmitted an unsolicited advertisement under the JFPA. This is because such a sender can neither claim that the recipients of the faxed advertisement gave "prior express permission or invitation" to receive the fax nor can the sender claim the exemption from liability contained in § (b)(C)(1) of the Act.

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29. **The Fax**. Defendants sent the on or about May 10, 2013 advertisement via facsimile transmission from telephone facsimile machines, computers, or other devices to the telephone lines and facsimile machines of Plaintiff and members of the Plaintiff Class. The Fax constituted an advertisement under the Act. Defendants failed to comply with the Opt-Out Requirements in connection with the Fax. The Fax was transmitted to persons or entities without their prior express permission or invitation and/or Defendants are precluded from asserting any prior express permission or invitation because of the failure to comply with the Opt-Out Notice Requirements. By virtue thereof, Defendants violated the JFPA and the regulations promulgated thereunder by sending the Fax via facsimile transmission to Plaintiff and members of the Class.

30. **Defendants' Other Violations.** Plaintiff is informed and believes, and upon such information and belief avers, that during the period preceding four years of the filing of this Complaint and repeatedly thereafter, Defendants have sent via facsimile transmission from telephone facsimile machines, computers, or other devices to telephone lines and telephone facsimile machines of members of the Plaintiff Class faxes that constitute advertisements under the JFPA that were transmitted to persons or entities without their prior express permission or invitation (and/or that Defendants are precluded from asserting any prior express permission or invitation because of the failure to comply with the Opt-Out Notice Requirements in connection with such transmissions). By virtue thereof, Defendants violated the JFPA and the regulations promulgated thereunder. Plaintiff is informed and believes, and upon such information and belief avers, that Defendants are continuing to send unsolicited advertisements via facsimile transmission in violation of the JFPA and the regulations promulgated thereunder, and absent intervention by this Court, will do so in the future.

31. The TCPA/JFPA provides a private right of action to bring this action on behalf

of Plaintiff and the Plaintiff Class to redress Defendants' violations of the Act, and provides for statutory damages. 47 U.S.C. § 227(b)(3). The Act also provides that injunctive relief is appropriate. *Id.*

32. The JFPA is a strict liability statute, so the Defendants are liable to the Plaintiff and the other class members even if their actions were only negligent.

33. The Defendants knew or should have known that (a) the Plaintiff and the other class members had not given express invitation or permission for the Defendants or anybody else to fax advertisements about the Defendants' goods or services; (b) the Plaintiff and the other class members did not have an established business relationship; (c) Defendants transmitted advertisements; (d) the Fax did not contain the required Opt-Out Notice; and (e) Defendants' transmission of advertisements that did not contain the required opt-out notice was unlawful.

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34. The Defendants' actions caused damages to the Plaintiff and the other class members. Receiving the Defendants' junk faxes caused the recipients to lose paper and toner consumed in the printing of the Defendants' faxes. Moreover, the Defendants' faxes used the Plaintiff's fax machine. The Defendants' faxes cost the Plaintiff time, as the Plaintiff and its employees wasted their time receiving, reviewing and routing the Defendants' unauthorized faxes. That time otherwise would have been spent on the Plaintiff's business activities. The Defendants' faxes unlawfully interrupted the Plaintiff's and other class members' privacy interests in being left alone. Finally, the injury and property damage sustained by Plaintiff and the other class members from the sending of Defendants' advertisements occurred outside of Defendants' premises.

35. Even if Defendants did not intend to cause damage to Plaintiff and the other class members, did not intend to violate their privacy, and did not intend to waste the recipients'

valuable time with Defendants' advertisements, those facts are irrelevant because the TCPA is a strict liability statute.

WHEREFORE, Plaintiff, JT'S FRAMES, INC., individually and on behalf of all others similarly situated, demands judgment in its favor and against Defendants, WEINBERG & ASSOCIATES, INC., OHIO NATIONAL FINANCIAL SERVICES, INC., THE OHIO NATIONAL LIFE INSURANCE COMPANY, OHIO NATIONAL LIFE ASSURANCE CORPORATION, OHIO NATIONAL EQUITIES, INC., OHIO NATIONAL MUTUAL HOLDINGS, INC., OHIO NATIONAL INVESTMENTS, INC. and JOHN DOES 1-10, jointly and severally, as follows:

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A. That the Court adjudge and decree that the present case may be properly maintained as a class action, appoint Plaintiff as the representative of the class, and appoint Plaintiff's counsel as counsel for the class;

B. That the Court award $500.00 in damages for each violation of the TCPA;

C. That the Court enter an injunction prohibiting Defendants from engaging in the statutory violations at issue in this action; and

D. That the Court award pre-judgment interest, costs and such further relief as the Court may deem just and proper, but in any event, not more than $75,000.00 per individual, inclusive of all damages and fees.

COUNT II
CONVERSION

36. Plaintiff incorporates paragraphs 1, 3, and 6 through 19 as and for its paragraph 37 as though fully set forth herein.

37. In accordance with 735 ILCS 5/2-801, Plaintiff brings Count II for conversion under the common law for the following class of persons:

> All persons (1) who on or after a date five years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising the commercial availability of any property, goods or services by or on behalf of Defendants.

38. A class action is proper in that:

(a) On information and belief the class consists of forty or more persons and is so numerous that joinder of all members is impracticable.

(b) There are questions of fact or law common to the class predominating over all questions affecting only individual class members, including:

(i) Whether Defendants engaged in a pattern of sending unsolicited facsimiles;

(ii) The manner and method Defendants used to compile or obtain the list of fax numbers to which it sent Exhibit A and other unsolicited facsimiles; and

(iii) Whether Defendants committed the tort of conversion.

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39. Plaintiff will fairly and adequately protect the interests of the other class members. Plaintiff has retained counsel who is experienced in handling class actions and claims involving unlawful business practices. Neither Plaintiff nor Plaintiff's counsel have any interests adverse or in conflict with the class.

40. A class action is an appropriate method for adjudicating this controversy fairly and efficiently. The interest of the individual class members in individually controlling the prosecution of separate claims is small and individual actions are not economically feasible.

41. By sending Plaintiff and the other class members unsolicited faxes, Defendants improperly and unlawfully converted their fax machines, toner and paper to its own use. Defendants also converted Plaintiff's employees' time to Defendants' own use.

42. Immediately prior to the sending of the unsolicited faxes, Plaintiff and the other class members owned an unqualified and immediate right to possession of their fax machines, paper, toner, and employee time.

43. By sending the unsolicited faxes, Defendants permanently misappropriated the class members' fax machines, toner, paper, and employee time to Defendants' own use. Such misappropriation was wrongful and without authorization.

44. Defendants knew or should have known that its misappropriation of paper, toner, and employee time was wrongful and without authorization.

45. Plaintiff and the other class members were deprived of the use of the fax machines, paper, toner, and employee time, which could no longer be used for any other purpose. Plaintiff and each class member thereby suffered damages as a result of their receipt of unsolicited faxes from Defendants.

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46. Each of Defendants' unsolicited fax facsimiles effectively stole Plaintiff's employees' time because multiple persons employed by Plaintiff were involved in receiving, routing, and reviewing Defendants' illegal faxes. Defendants knew or should have known employees' time is valuable to Plaintiff.

47. Defendants' actions caused damages to Plaintiff and the other members of the class because their receipt of Defendants' unsolicited faxes caused them to lose paper and toner as a result. Defendants' actions prevented Plaintiff's fax machines from being used for Plaintiff's business purposes during the time Defendants were using Plaintiff's fax machine for Defendants' illegal purpose. Defendants' actions also cost Plaintiff employee time, as Plaintiff's employees used their time receiving, routing, and reviewing Defendants' illegal faxes, and that time otherwise would have been spent on Plaintiff's business activities.

WHEREFORE, Plaintiff, JT'S FRAMES, INC., individually and on behalf of all others similarly situated, demands judgment in its favor and against Defendants, WEINBERG & ASSOCIATES, INC., OHIO NATIONAL FINANCIAL SERVICES, INC., THE OHIO NATIONAL LIFE INSURANCE COMPANY, OHIO NATIONAL LIFE ASSURANCE CORPORATION, OHIO NATIONAL EQUITIES, INC., OHIO NATIONAL MUTUAL HOLDINGS, INC., OHIO NATIONAL INVESTMENTS, INC. and JOHN DOES 1-10, jointly and severally, as follows:

A. That the Court adjudge and decree that the present case may be properly maintained as a class action, appoint Plaintiff as the representative of the class, and appoint Plaintiff' counsel as counsel for the class;

B. That the Court award appropriate damages;

C. That the Court award costs of suit; and

D. Awarding such further relief as the Court may deem just and proper, but in any event, not more than $75,000.00 to any individual class member.

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COUNT III
ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT
815 ILCS 505/2

48. Plaintiff incorporates paragraphs 1, 3, and 6 through 19 as and for its paragraph 48 as though fully set forth herein.

49. In accordance with 735 ILCS 5/2-801, Plaintiff, on behalf of the following class of persons, bring Count III for Defendants' unfair practice of sending unsolicited and unlawful facsimiles:

> All persons (1) who on or after a date three years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising the commercial availability of any property, goods or services by or on behalf of Defendants.

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50. A class action is proper in that:

(a) On information and belief the class consists of thousands of persons in Illinois and throughout the United States and is so numerous that joinder of all members is impracticable.

(b) There are questions of fact or law common to the class predominating over all questions affecting only individual class members including:

(i) Whether Defendants engaged in a pattern of sending unsolicited fax advertisements;

(ii) The manner and method Defendants used to compile or obtain the list of fax numbers to which it sent Exhibit A and other unsolicited facsimiles;

(iii) Whether Defendants' practice of sending unsolicited facsimiles violates Illinois public policy;

(iv) Whether Defendants' practice of sending unsolicited faxes is an unfair practice under the Consumer Fraud Act; and

(v) Whether Defendants should be enjoined from sending unsolicited facsimiles in the future.

51. Plaintiff will fairly and adequately protect the interests of the other class members. Plaintiff has retained counsel who are experienced in handling class actions and claims involving lawful business practices. Neither Plaintiff nor Plaintiff's counsel have any interests adverse or in conflict with the class.

52. A class action is an appropriate method for adjudicating this controversy fairly and efficiently. The interest of the individual class members in individually controlling the prosecution of separate claims is small and individual actions are not economically feasible.

53. Defendants' unsolicited fax practice is an unfair practice, because it violates public policy, and because it forced Plaintiff and the other class members to incur expense without any consideration in return. Defendants' practice effectively forced Plaintiff and the other class members to pay for Defendants' advertising campaign.

54. Defendants violated the unfairness predicate of the Act by engaging in an unscrupulous business practice and by violating Illinois statutory public policy, which public policy violations in the aggregate caused substantial injury to hundreds of persons.

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55. Defendants' misconduct caused damages to Plaintiff and the other members of the class, including the loss of paper, toner, ink, use of their facsimile machines, and use of their employees' time.

56. Defendants' actions caused damages to Plaintiff and the other class members because their receipt of Defendants' unsolicited faxes caused them to lose paper and toner consumed as a result. Defendants' actions prevented Plaintiff's fax machine from being used for Plaintiff's business purposes during the time Defendants were using Plaintiff's fax machine for Defendants' illegal purpose. Defendants' actions also cost Plaintiff employee time, as Plaintiff's employees used their time receiving, routing, and reviewing Defendants' illegal faxes and that time otherwise would have been spent on Plaintiff's business activities.

WHEREFORE, Plaintiff, JT'S FRAMES, INC., individually and on behalf of all others similarly situated, demands judgment in its favor and against Defendants, WEINBERG & ASSOCIATES, INC., OHIO NATIONAL FINANCIAL SERVICES, INC., THE OHIO

NATIONAL LIFE INSURANCE COMPANY, OHIO NATIONAL LIFE ASSURANCE CORPORATION, OHIO NATIONAL EQUITIES, INC., OHIO NATIONAL MUTUAL HOLDINGS, INC., OHIO NATIONAL INVESTMENTS, INC. and JOHN DOES 1-10, jointly and severally, as follows:

A. That the Court adjudge and decree that the present case may be properly maintained as a class action, appoint Plaintiff as the class representative, and appoint Plaintiff's counsel as counsel for the class;

B. That the Court award damages to Plaintiff and the other class members;

C. That the Court award attorney fees and costs;

D. That the Court enter an injunction prohibiting Defendants from sending unsolicited facsimiles to Illinois consumers; and

E. Awarding such further relief as the Court may deem just and proper, but in any event, not more than $75,000.00 to any individual member.

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Respectfully submitted,

JT'S FRAMES, INC., individually and as the representative of a class of similarly-situated persons

By: s/ Brian J. Wanca
One of Plaintiff's Attorneys

Brian J. Wanca
Ryan M. Kelly
ANDERSON + WANCA
3701 Algonquin Road, Suite 760
Rolling Meadows, IL 60008
Telephone: 847/368-1500
Facsimile: 847/368-1501
Firm ID: 57010

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CALENDAR: 06
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CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
CHANCERY DIVISION
CLERK DOROTHY BROWN

EXHIBIT A

Weinberg & Associates, Inc.
Joseph J. Gillings, Jr.
Sr. Client Specialist
140 West Colonus Drive, Suite 100
Arlington Heights, Illinois 60004
Telephone: 847.870.1700
Fax: 847.870.1771

Ohio National Financial Services.

DATE: May 10, 2013

TO: Larry Turner

FAX: 815/455-9906

FROM: Joe Gillings

PHONE: 847/870-1700 Ext 107

PAGES 1

RE: Appointment

Please let me know your availability.

I have been in the commercial banking/insurance business for over 30 years as a Sr. Executive working with small, medium and large businesses.

I work with my clients to construct "safety nets" to protect their income, assets and retirement plans for their companies, individuals and families.

Joe Gillings
Sr Client Specialist

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EXHIBIT O

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CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
CHANCERY DIVISION
CLERK DOROTHY BROWN

2120 - Served
2220 - Not Served
2320 - Served By Mail
2420 - Served By Publication
☑ SUMMONS

2121 - Served
2221 - Not Served
2321 - Served By Mail
2421 - Served By Publication
☐ ALIAS - SUMMONS

(2/18/11) CCG N001

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY **DIVISION**

JT'S FRAMES, INC.

v.

WEINBERG & ASSOCIATES, INC.

(Name all parties)

No. 2015-CH-11746

Defendant Address:
WEINBERG & ASSOCIATES. INC.
R/A HOWARD C. WEINBERG
220 W. CAMPUS DRIVE
SUIE 100
ARLINGTON HEIGHTS, IL 60004

Summons

To each Defendant: ☑ **SUMMONS** ☐ **ALIAS - SUMMONS**

YOU ARE SUMMONED and required to file an answer to the complaint in this case, a copy of which is hereto attached, or otherwise file your appearance, and pay the required fee, in the Office of the Clerk of this Court at the following location:

☑ **Richard J. Daley Center, 50 W. Washington, Room** 802 **,Chicago, Illinois 60602**

☐ **District 2 - Skokie**
5600 Old Orchard Rd.
Skokie, IL 60077

☐ **District 3 - Rolling Meadows**
2121 Euclid
Rolling Meadows, IL 60008

☐ **District 4 - Maywood**
1500 Maybrook Ave.
Maywood, IL 60153

☐ **District 5 - Bridgeview**
10220 S. 76th Ave.
Bridgeview, IL 60455

☐ **District 6 - Markham**
16501 S. Kedzie Pkwy.
Markham, IL 60426

☐ **Child Support**
28 North Clark St., Room 200
Chicago, Illinois 60602

You must file within 30 days after service of this Summons, not counting the day of service.
IF YOU FAIL TO DO SO, A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE RELIEF REQUESTED IN THE COMPLAINT.

To the officer:

This Summons must be returned by the officer or other person to whom it was given for service, with endorsement of service and fees, if any, immediately after service. If service cannot be made, this Summons shall be returned so endorsed. This Summons may not be served later than 30 days after its date.

Atty. No.: 57010
Name: ANDERSON AND WANCA
Atty. for: JT'S FRAMES, INC.
Address: 3701 ALGONQUIN#760
City/State/Zip: ROLLNG MEADWS, IL 60008
Telephone: (847) 368-1500

WITNESS, Wednesday, 05 August, 2015

/s DOROTHY BROWN
Clerk of Court

CIRCUIT COURT COOK COUNTY ILLINOIS

Date of service: _____, _____
(To be inserted by officer on copy left with defendant or other person)

Service by Facsimile Transmission will be accepted at: _____
(Area Code) **(Facsimile Telephone Number)**

/s DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

AFFIDAVIT OF SPECIAL PROCESS SERVER

CASE NO: 2015-CH-11746 CASE NAME _____

Peggy Ann Pogvara being first duly sworn on oath deposes and says that she was appointed by the court on _____ 20___, to serve process in the above mentioned cause and that she has served the individual named below in the manner and method as stated below:

I INDIVIDUAL DEFENDANT(S) - PERSONAL: That she served the within (summons and a copy of the complaint), (Citation), (Rule), _____ on the within named defendant by leaving a copy of each with the individual defendant personally, as follows:

DEFENDANT _____

ADDRESS OF SERVICE _____

DATE OF SERVICE _____

TIME OF SERVICE _____

DESCRIPTION
(a) Male, Female
(b) Ht _____
(c) Wt _____
(d) Race _____
(e) Age _____
(f) Eyes _____
(g) Hair _____

II INDIVIDUAL DEFENDANT(S) - ABODE: That she served the within (summons and a copy of the complaint), (Citation), (Rule), _____ on the within named defendant by leaving a copy at the usual place of abode of each individual defendant with a person of his/her family, of the age of 13 years or upward, informing that person of its content and also by sending a copy in a sealed envelope with postage fully prepaid, addressed to each individual defendant at his/her usual place of abode as follows:

DEFENDANT _____ PERSON WITH WHOM LEFT _____

ADDRESS OF SERVICE _____

DATE OF SERVICE _____

TIME OF SERVICE _____

DATE OF MAILING _____

DESCRIPTION
(a) Male, Female
(b) Ht _____
(c) Wt _____
(d) Race _____
(e) Age _____
(f) Eyes _____
(g) Hair _____

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III CORPORATE DEFENDANT: By leaving a copy of Summons, Classaction complaint and Motion for Class certification with the registered agent, officer, or agent of the corporation, as follows:

DEFENDANT CORPORATION Weinberg + Associates, Inc.

REGISTERED AGENT, OFFICER, OR AGENT Linda O. Weinburg, Secretary

ADDRESS OF SERVICE 484 Sutcliffe Circle Vernon Hills, IL

DATE OF SERVICE 9/3/15

TIME OF SERVICE 5:05 pm

DESCRIPTION
(a) Male, Female
(b) Ht 5'8"
(c) Wt 180
(d) Race W
(e) Age 58
(f) Eyes
(g) Hair Brown

IV That he was unable to serve defendant _____

Peggy A Pogvara
Peggy Ann Pogvara
ILPD PERC No. 129.2254274
ILPDA License No. 117.001137

SUBSCRIBED and SWORN to before me this 9th day of September, 20 15

Susan C. Pogvara
NOTARY PUBLIC

OFFICIAL SEAL
SUSAN C POGVARA
Notary Public - State of Illinois
My Commission Expires Jun 9, 2019

EXHIBIT P

U.S. District Court for the Northern District Of Illinois
Attorney Appearance Form

Case Title: JT's Frames, Inc. v. Weinberg & Associates, et al.

Case Number: 2015 CV 7923

An appearance is hereby filed by the undersigned as attorney for:
Weinberg & Associates, Inc.

Attorney name (type or print): L. Steven Platt

Firm: Robbins, Salomon and Patt, Ltd.

Street address: 180 N. LaSalle, Suite 3300

City/State/Zip: Chicago IL 60601-2808

Bar ID Number: 3122015
(See item 3 in instructions)

Telephone Number: 312-456-0285

Email Address: lsplatt@rsplaw.com

Are you acting as lead counsel in this case? ☑ Yes ☐ No

Are you acting as local counsel in this case? ☐ Yes ☑ No

Are you a member of the court's trial bar? ☑ Yes ☐ No

If this case reaches trial, will you act as the trial attorney? ☑ Yes ☐ No

If this is a criminal case, check your status.

☐ Retained Counsel

☐ Appointed Counsel
If appointed counsel, are you

☐ Federal Defender

☐ CJA Panel Attorney

In order to appear before this Court an attorney must either be a member in good standing of this Court's general bar or be granted leave to appear *pro hac vice* as provided for by local rules 83.12 through 83.14. I declare under penalty of perjury that the foregoing is true and correct. Under 28 U.S.C.§1746, this statement under perjury has the same force and effect as a sworn statement made under oath.

Executed on 9/13/2015

Attorney signature: S/ L. Steven Platt
(Use electronic signature if the appearance form is filed electronically.)

Revised 8/1/2015

EXHIBIT Q

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JT'S FRAMES, INC., an Illinois corporation, individually and as the representative of a class of similarly-situated persons, Plaintiff, v. WEINBERG & ASSOCIATES, INC., OHIO NATIONAL FINANCIAL SERVICES, INC., THE OHIO NATIONAL LIFE INSURANCE COMPANY, OHIO NATIONAL LIFE ASSURANCE CORPORATION, OHIO NATIONAL EQUITIES, INC., OHIO NATIONAL MUTUAL HOLDINGS, INC., OHIO NATIONAL INVESTMENTS, INC., and JOHN DOES 1-10. Defendants.	Case No.: 15-cv-7923 Hon. Joan B. Gottschall Hon. Magistrate Young B. Kim

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO STAY

Defendants The Ohio National Life Insurance Company ("ONLIC"), Ohio National Life Assurance Corporation, Ohio National Financial Services, Inc., Ohio National Equities Inc., Ohio National Investments, Inc. and Ohio National Mutual Holdings, Inc. (together, the "Ohio National Defendants") hereby seek a stay of the above-captioned action pending a decision on Ohio National Mutual Inc.'s Petition for Retroactive Waiver (the "Petition") (attached hereto as Exhibit A), filed with the Federal Communications Commission (the "Commission") on August 21, 2015. The Petition addresses whether the Commission will waive application of certain of its rules implementing the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (the

"TCPA")—the very rules that Plaintiff JT's Frames, Inc. ("Plaintiff") alleges were violated. Because the Commission has already taken up the issue by issuing a Public Notice (attached hereto as Exhibit B) seeking comments and replies on the Petition in advance of ruling on the Petition, because Plaintiff has already filed its Comment in opposition to the Petition ("Comment") (attached hereto as Exhibit C), and because ***Plaintiff's counsel has previously sought and obtained in another TCPA case the same relief the Ohio National Defendants request here***,[1] this Court should stay this matter pursuant to either the doctrine of primary jurisdiction or its inherent power in order to avoid the substantial risk of inconsistent rulings and to avoid wasting the resources of this Court and the parties while the Commission considers the Petition.

INTRODUCTION

On September 9, 2015, ONLIC removed this matter from the Circuit Court of Cook County, Chancery Division (Dkt. No. 1).[2] In its complaint ("Cmplt."), Plaintiff asserts a claim for violations of the TCPA (along with companion claims under Illinois law for conversion and

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[1] *See* Plaintiff's Motion to Stay Proceedings at 1, *Physicians Healthsource, Inc. v. Anda, Inc.*, No. 12cv60798 (S.D. Fla. Feb. 12, 2014), ECF No. 96 (requesting that "the Court stay the proceedings pending the Federal Communications Commission ('FCC')'s resolution of issues directed at the [opt-out language] regulation involved in this case"); Order Staying Case at 2-3, *Physicians Healthsource, Inc. v. Anda, Inc.*, No. 0:12-60798 (S.D. Fla. May 23, 2014), ECF No. 105 (granting plaintiff's motion).

[2] Plaintiff initially filed a complaint against the same defendants alleging a violation of the TCPA in this Court on August 4, 2015. *See* Complaint, *JT's Frames, Inc. v. Weinberg & Assoc. et al.*, No. 15cv6788 (N.D. Ill. Aug. 4, 2014), ECF No. 1. The day after the action was assigned to District Judge Charles R. Norgle, Sr. and Magistrate Judge Michael T. Mason, Plaintiff filed a notice of voluntary dismissal. *See* Notice of Voluntary Dismissal, *JT's Frames, Inc. v. Weinberg & Assoc. et al.*, No. 15cv6788 (N.D. Ill. Aug. 5, 2015), ECF No. 3. That same day, in what appears to be a blatant act of judge-shopping, Plaintiff filed this nearly identical matter in the Circuit Court of Cook County, Chancery Division. On September 9, 2015, ONLIC removed this matter from state court pursuant to 28 U.S.C. §§ 1331, 1441, and 1446 (Dkt. No. 1), and on September 15, 2015 moved to have this matter referred back to the assignment clerk for mandatory reassignment to Judge Norgle. *See* Dkt. No. 12.

for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act) based on the receipt of a single fax that it claims was "unsolicited." Cmplt. ¶¶ 1-2. Plaintiff asserts a claim for violations of the TCPA on behalf of a putative class of "[a]ll persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising the commercial availability or quality of any property, goods, or services by or on behalf of Defendants, and (3) which Defendants did not have prior express permission or invitation, or (4) which did not display a proper opt-out notice." *Id.* ¶ 22. Plaintiff's class definition therefore encompasses recipients of unsolicited faxes (individuals for whom "Defendants did not have prior express permission or invitation" to send a fax) ***and*** recipients of *solicited* faxes (individuals who, irrespective of whether the fax was unsolicited, received faxes "which did not display a proper opt-out notice"). But the issue of whether a "proper opt-out notice was required by FCC rules on *solicited* faxes sent by or on behalf of the Ohio National Defendants is currently being contested before the FCC and the Commission's ruling will fundamentally shape the contours of this case, including the scope of the purported class.

The Commission has waived the opt-out notice requirement for solicited facsimiles (over the objections of Plaintiff's counsel) for each of the over one hundred parties in the past year that has requested such relief, and expressly invited other parties to petition the Commission for the same relief. *See in re Rules and Regs. Implementing the Tel. Consumer Protection Act of 1991 et al.*, CG Docket Nos. 02-278 & 05-338, FCC 14-164, 29 FCC Rcd. 13998 at 14,011-12 (Oct. 30, 2014) (hereinafter "October 2014 Order"); *in re Rules and Regs. Implementing the Tel. Consumer Protection Act of 1991 et al.*, CG Docket Nos. 02-278 & 05-338, FCC 15-976, 2015 FCC LEXIS 2427, at *20, 32-38 (August 28, 2015) (hereinafter "August 28, 2015 Order") (granting 117 petitions for retroactive waiver). The Ohio National Defendants followed the

Commission's invitation and filed such a petition. The Ohio National Defendants therefore now ask this Court to follow the lead of numerous other courts to address this issue, and stay this matter while the Commission addresses the Petition, which will affect the scope of Plaintiff's case. *See, e.g.*, Memorandum & Order at 3, *St. Louis Heart Center Inc. v. Caremark, LLC*, No 4:12-02151 (E.D. Mo. June 9, 2015), ECF No. 110 (granting motion to stay "until final rulings are issued by the FCC on the petition of Caremark, L.L.C., requesting a retroactive waiver of the FCC's opt-out notice regulations and on any appeals filed in connection with the FCC's rulings"); *Physicians Healthsource, Inc. v. Endo Pharma. Inc.*, No. 2:14-02289, 2015 U.S. Dist. LEXIS 50534, at *3-4 (E.D. Pa. Jan. 5, 2015) (listing granted stays, distinguishing lone denial on the basis that "when the Motion to Stay was filed" in that case, it "had 'already advanced through years of litigation' [and] a class had been certified and cross-motions for summary judgment briefed").[3]

BACKGROUND

The TCPA prohibits only those facsimile advertisements that are "unsolicited." *See* 47 U.S.C. § 227(b)(1)(C). It creates a private right of action for alleged violations of this provision

[3] *See also Beck Simmons, LLC v. Francotyp-Postalia, Inc.*, No 4:14-01161, 2015 U.S. Dist. LEXIS 18661, at *1 (E.D. Mo. Feb. 17, 2015); Order Staying Case at 2-3, *Physicians Healthsource, Inc. v. Anda, Inc.*, No. 0:12-60798 (S.D. Fla. May 23, 2014), ECF No. 105; *Physicians Healthsource, Inc. v. Masimo Corp.*, No. 8:14-00001, 2014 U.S. Dist. LEXIS 183564, at *6-7 (C.D. Cal. May 22, 2014); *Whiteamire Clinic, P.A., Inc. v. Quill Corp.*, No. 1:12-05490, 2014 U.S. Dist. LEXIS 183569, at *5-6 (N.D. Ill. Apr. 9, 2014); Order at 1, *Physicians Healthsource, Inc. v. Cephalon, Inc.*, No. 2:12-03753 (E.D. Pa. Mar. 13, 2014), ECF No. 105; *Physicians Healthsource, Inc. v. Purdue Pharma L.P.*, No. 3:12-1208, 2014 U.S. Dist. LEXIS 183560, at *11 (D. Conn. Feb. 3, 2014); *St. Louis Heart Center, Inc. v. Gilead Palo Alto, Inc.*, No. 4:13-00958, 2013 U.S. Dist. LEXIS 138746, at *4 (E.D. Mo. Sept. 27, 2013); *Raitport v. Harbour Capital Corp.*, No 1:09-00156, 2013 U.S. Dist. LEXIS 130459, at *2 (D.N.H. Sept. 12, 2013); *St. Louis Heart Center, Inc. v. Forest Pharma., Inc.*, No. 4:12-02224, 2013 U.S. Dist. LEXIS 109807, at *1-2 (E.D. Mo. July 17, 2013). In each of these cases, the court ordered the respective stays to remain in effect pending either final resolution of the respective defendant's petition to the Commission for retroactive waiver, or pending final resolution of the specific defendant's original petition to the Commission and any related appeals.

(*id.* at § 227(b)(3)) and directs the Commission to "prescribe regulations to implement the requirements" set forth therein (*id.* at § 227(b)(2)), which includes the mandate that the Commission "shall provide that a notice contained in an *unsolicited* advertisement complies with [certain] requirements." *Id.* at § 227(b)(2)(D) (emphasis added). When the Commission prescribed the regulations governing the opt-out notices, however, it purported to require the opt-out notice on both *un*solicited facsimile transmissions (as authorized in the statute), and *solicited* facsimile transmissions (not addressed in the statute). *See* 47 C.F.R. § 64.1200(a)(4)(iv).

A number of TCPA defendants (the "Original Petitioners") from across the country filed petitions with the Commission in response to this inconsistency, asking the Commission to clarify several issues, including whether opt-out notices are required on both *solicited* and *un*solicited faxes pursuant to 47 C.F.R § 64.1200(a)(4)(iv), and whether the Commission even has the statutory authority to promulgate such requirements with regard to solicited faxes.

While the Commission stated that it did have such authority[4] and confirmed that its regulations did indeed apply to both solicited and unsolicited faxes, it recognized that inconsistencies in its own rules "caused confusion or misplaced confidence regarding the applicability" of the opt-out notice requirement to solicited faxes, and that the notice the Commission provided of its intent to adopt this interpretation "did not make explicit that the

[4] The Commission was not unanimous in this finding. In a vigorous dissent, Commissioner Ajit Pai reviewed the language of the TCPA itself and stated that "the text of the TCPA does not require solicited fax advertisements to contain the same detailed opt-out notice required of unsolicited advertisements. Nor could it be construed otherwise." October 2014 Order at 14,016 (Pai, concurring in part and dissenting in part). Commissioner Michael O'Rielly similarly dissented, stating that "on its face, the provision and the related opt-out notice requirement do not apply to solicited fax advertisements . . . ." *Id.* at 14,021 (O'Rielly, concurring in part and dissenting in part).

Commission contemplated an opt-out requirement on [solicited] fax[es] . . . ." October 2014 Order at 14,009-10.[5]

The Commission's solution to these problems was to do something that courts cannot—waive the applicability of the Commission's own opt-out notice requirement for solicited facsimiles. Noting that pursuant to 47 C.F.R. § 1.3, "[t]he Commission may waive any of its rules for good cause shown," the Commission held that a waiver of the opt-out notice requirement was justified because "special circumstances" warranted a deviation from the opt-out notice requirement, and waiver would "better serve the public interest than would application of the rule." October 2014 Order at 14,008. As such, the Commission granted retroactive waivers of the opt-out notice requirement to the Original Petitioners. *Id.* at 13,998. Significantly for purposes of this motion, the Commission took the additional step of inviting "similarly situated parties" to file their own petitions for retroactive waiver for relief "from any past obligation to provide the opt-out notice to [recipients of solicited facsimile transmissions] required by our rules." *Id.* On August 28, 2015, the Commission granted each of the 117 petitions requesting that relief. August 28, 2015 Order at *20, 32-38.

On August 21, 2015, Ohio National Mutual, Inc. filed its retroactive waiver petition. Exhibit A. On August 28, the Commission issued a Public Notice requesting comments to the Petition by September 11, and replies by September 18, 2015. Exhibit B. Plaintiff filed a comment in response to the Petition on September 11, 2015 (the "Comment"). Exhibit C.

[5] Multiple parties have appealed the October 2014 Order, and those appeals are ongoing. *See, e.g.*, *Bais Yaakov v. FCC*, No. 14-1234 (D.C. Cir. Nov. 10, 2014) (consolidation of thirteen appeals of the October 2014 Order).

ARGUMENT

I. THE COURT SHOULD STAY THIS CASE PENDING A RULING ON THE PETITION PURSUANT TO THE DOCTRINE OF PRIMARY JURISDICTION.

Primary jurisdiction is "a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decision[-]making responsibility should be performed by the relevant agency rather than the courts." *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002). It "requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme" (*United States v. Phila. Nat'l Bank*, 374 U.S. 321, 353 (1963)) and "comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views." *Pennington v. ZionSolutions LLC*, 742 F.3d 715, 719-20 (7th Cir. 2014). The Seventh Circuit has been particularly mindful of the importance of the doctrine with regard to the Commission, reversing district courts on multiple occasions for failing to defer to the Commission. *See, e.g.*, *In re StarNet, Inc.*, 355 F.3d 634, 639 (7th Cir. 2004) (reversing the district court and granting motion to stay pending Commission action); *City of Peoria v. Gen. Elec. Cablevision Corp. (GECCO)*, 690 F.2d 116, 120 (7th Cir. 1982) (same).

While there is no strict test for determining whether a case should be stayed based on primary jurisdiction grounds, courts generally look to the following four factors: (i) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise; (ii) whether the question at issue is particularly within the agency's discretion; (iii) whether there exists a substantial danger of inconsistent rulings; and (iv) whether a prior application to the agency has

been made. *See United States v. DISH Network, L.L.C.,* No. 09cv3073, 2011 U.S. Dist. LEXIS 10943, at *6 (C.D. Ill. Feb. 4, 2011) (granting motion to stay pursuant to doctrine of primary jurisdiction pending ruling from the Commission regarding scope of TCPA). Those factors are satisfied here.

A. The Waiver Request in the Petition Plainly Involves Technical and Policy Considerations Within the Commission's Particular Field of Expertise and Discretion.

The first two factors justifying a stay are met here because (1) the issues raised in the Petition involve technical and policy considerations uniquely within the Commission's expertise and (2) Congress has committed those issues to the Commission's discretion.

First, Congress recognized that the regulation of facsimile communications is within the Commission's "field of expertise" when it expressly directed the Commission to "prescribe [such] regulations to implement the requirements" of the TCPA. 47 U.S.C. § 227(b)(2); *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 643 (7th Cir. 2012) ("Several parts of the [Telephone Consumer Protection] Act require or permit the FCC to issue regulations . . . ."). As the Sixth Circuit has explained, "Congress vested the FCC with considerable authority to implement the [TCPA]. . . . The [Commission], no surprise, is familiar with the regulations *it* prescribed, and possesses expertise over the statute *it* implements." *Charvat v. Echostar Satellite, LLC*, 630 F.3d 459, 466-67 (6th Cir. 2010) (invoking doctrine of primary jurisdiction to refer interpretation of the TCPA to the Commission) (internal citations omitted, emphasis in original).

Second, the issue presented in the Petition (whether the Commission should waive the application of its own rules regarding opt-out notices on facsimile transmissions) is plainly within the particular "discretion" of the Commission because (i) the Commission has exclusive authority to waive *any* of its rules if it finds there is "good cause" to do so (47 C.F.R. § 1.3), and (ii) it previously invoked this very authority when it granted petitions seeking waivers of the very

opt-out notice requirement at issue in the Petition. *See* October 2014 Order at 14,008; August 28, 2015 Order at *21-24. Indeed, Plaintiff acknowledges these facts at the outset of its Comment, noting that the Commission previously granted "'retroactive waivers' intended to relieve the covered TCPA defendants of liability in private TCPA actions for violations of § 64.1200(a)(4)(iv)" and that the Commission "invited 'similarly situated' parties" (such as the Ohio National Defendants) to seek the same relief via the same mechanism—petition to the Commission. Exhibit C at 2. The Ohio National Defendants thus filed a Petition in response to the Commission's *express invitation* for "similarly situated parties" to "seek waivers such as those granted in [the October 2014 Order]." October 2014 Order at 14,011-12.

B. <u>There is Substantial Risk of Inconsistent Rulings Absent A Stay Because the Commission is Already Considering the Petition.</u>

The third and fourth factors justifying a stay are also met here because (3) the Petition has already been submitted and the Commission is considering it, and (4) without a stay there would be a substantial risk of inconsistent rulings. On August 28, 2015, the Commission issued a Public Notice seeking comment on the Petition, which is part of the process "known as 'notice and comment' rulemaking" whereby the Commission "gives the public notice that it is considering adopting or modifying rules on a particular subject and seeks the public's comment. The Commission considers the comments received in developing final rules." Rulemaking Process at the FCC, https://www.fcc.gov/encyclopedia/rulemaking-process-fcc (last visited September 16, 2015) ("Rulemaking Process at the FCC"); *see also* 5 U.S.C. § 553 (authorizing rulemaking by federal agencies); 47 C.F.R. § 1.399-1.430 (explaining Commission rulemaking process). Those "final rules" are binding on the district courts. *See CE Design, Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443, 446 n.3 (7th Cir. 2010).

While the Commission generally will allow at least thirty days for comment along with additional time for replies (*see* "Rulemaking Process at the FCC"), in this case the Commission entered an expedited briefing schedule: the comment period was fourteen days (comments were due September 11), and the reply period is only seven days (replies are due September 18). Exhibit B at 1. Thus, the Commission has not only taken up the issue of whether an opt-out notice was required in this matter, but it has also signaled that it intends to rule promptly. As Plaintiff's counsel previously argued when requesting a stay pending the Commission's decision on a defendant's petition regarding 47 C.F.R. § 64.1200(a)(4)(iv), "[be]cause the FCC has requested comments on the issue, it appears to be moving quickly toward resolution of Defendant's arguments against the regulation, and, therefore, a stay of proceedings is warranted." Plaintiff's Motion to Stay Proceedings at 2, *Physicians Healthsource, Inc. v. Anda, Inc.*, No. 0:12-60798 (S.D. Fla. Feb. 12, 2014), ECF No. 96.

II. IN THE ALTERNATIVE, THE COURT SHOULD STAY THIS CASE PURSUANT TO ITS INHERENT POWER TO CONTROL ITS DOCKET.

"'[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with the economy of time and effort for itself, for counsel, and for litigants.'" *Pfizer Inc. v. Apotex Inc.*, 640 F. Supp. 2d 1006, 1007 (N.D. Ill. 2009) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). When deciding whether to issue a stay, courts in this district balance the following factors: "(i) whether a stay will unduly prejudice or tactically disadvantage the non-moving party, (ii) whether a stay will simplify the issues in question and streamline the trial, and (iii) whether a stay will reduce the burden of litigation on the parties and on the court." *Id.* Each of these factors weighs in favor of a stay of this action pending the Commission's ruling on the Petition.

First, a stay will not unduly prejudice or tactically disadvantage Plaintiff. The action was recently filed, and, as Plaintiff notes in its Comment, the Ohio National Defendants have not yet answered the Complaint and discovery has not yet begun. Exhibit C at 5. A short stay until the Commission rules on the Petition (which the Commission has signaled it will do shortly) will not prejudice Plaintiff. The second and third factors are also plainly satisfied: if the Commission grants the Petition, Plaintiff's proposed class definition (which currently covers both solicited and unsolicited faxes) will be narrowed along with the scope of the lawsuit, which will conserve the resources of both the parties and this Court, which would otherwise be needlessly wasted by litigating issues currently being decided by the Commission.

CONCLUSION

For the foregoing reasons, this Court should stay this matter pursuant to the doctrine of primary jurisdiction or its inherent power to control its docket pending a ruling on the Petition and the resolution of any appeals therefrom.

Dated: September 16, 2015

Respectfully Submitted,

/s/ Justin O. Kay

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2015, I caused a true and correct copy of the foregoing **MOTION TO STAY** and accompanying **MEMORANDUM OF LAW IN SUPPORT** thereof and supporting documents to be filed on the Court's CM/ECF system, which served notice of the filing on all counsel of record in this matter.

/s/ Justin O. Kay
Justin O. Kay

EXHIBIT R

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6,1
Eastern Division

JT's Frames, Inc.
Plaintiff,
v.
Case No.: 1:15−cv−07923
Honorable Charles R. Norgle Sr.

Weinberg & Associates, Inc., et al.
Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, October 1, 2015:

MINUTE entry before the Honorable Charles R. Norgle:Motion to stay [19] is granted. The parties are not required to appear before the court on Friday, October 2, 2015. Mailed notice(ewf,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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