

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

In the Matter of

Petition of Educational Testing Service  
For Retroactive Waiver of 47 C.F.R.  
§ 64.1200(a)(4)(iv)

CG Docket No. 02-278

CG Docket No. 05-338

**PETITION FOR RETROACTIVE WAIVER**

Pursuant to 47 C.F.R. § 1.3 and the order styled *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278, 05-338, FCC 14-164 (Oct. 30, 2014) (“October 2014 Order”), Petitioner Educational Testing Service (“Petitioner” or “ETS”) respectfully requests that the Commission grant ETS a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) for fax advertisements concerning an ETS product that were allegedly sent prior to April 30, 2015 with the recipients’ prior express invitation or permission. ETS seeks this waiver after being added as a defendant to a federal class action lawsuit involving the *very same facsimile* for which the Commission has previously granted a waiver to the party that sent the facsimile. Accordingly, although ETS reserves its right to rely on the Commission’s prior waiver related to the same facsimile, ETS for the sake of good order seeks a formal waiver on its own behalf.

**I. BACKGROUND**

ETS is a nonprofit organization dedicated to advancing the quality and equity in education for all people. It provides innovative and meaningful measurement solutions that improve teaching and learning, expand educational opportunities, and inform public policy.

ETS' products include well-known tests such as the GRE and TOEFL as well as products like Criterion, an online writing evaluation service and instructor-led writing tool that helps improve students' outcomes in writing.

ETS was recently added as a defendant in a putative class action lawsuit captioned *Bais Yaakov of Spring Valley v. Houghton Mifflin Harcourt Publishers, Inc.*, No. 13-cv-4577 (S.D.N.Y.). The lawsuit was originally filed in July 2013 against Defendants Houghton Mifflin Harcourt Publishers, Inc., and one of its employees, Laurel Kaczor. Defendant Houghton Mifflin Harcourt Publishing Company (collectively with Houghton Mifflin Harcourt Publishers, Inc., "HMH"), a wholly-owned subsidiary of Houghton Mifflin Harcourt Publishers, Inc., was eventually added as an additional defendant to the lawsuit. *Bais Yaakov*, No. 13-cv-4577, First Am. Compl. [Dkt. No. 55] (S.D.N.Y. Nov. 2, 2014). The lawsuit alleged that HMH sent or caused to be sent a single fax advertisement on or about November 15, 2012, that allegedly did not contain a properly worded opt-out notice (the "Criterion Fax"). *See id.* ¶ 11. The facsimile HMH sent contained an ETS logo because it concerned "Criterion," a product ETS developed but for which HMH had distribution rights. The lawsuit further alleged that HMH "jointly and severally caused to be sent out over seventeen thousand (17,000) unsolicited *and solicited* fax advertisements for goods and/or services without proper opt-out notices to persons throughout the United States." *Id.* ¶ 2 (emphasis added). The plaintiff in the lawsuit is a religious school in New York and a *customer* of HMH. *See id.* ¶ 6; *Petition of Houghton Mifflin Harcourt Publishers, Inc., et al., for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278 and 05-338, at 3 (Jan. 20, 2015) ("HMH Petition").

On January 20, 2015, HMH petitioned the Commission for the same retroactive waiver that ETS now seeks. *See generally* HMH Petition. On August 28, 2015, the Commission

granted HMH’s petition along with similar petitions filed by several other parties. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al.*, CG Docket Nos. 02-278, 05-338, DA 15-976, Order ¶¶ 1, 24 (Aug. 28, 2015) (“August 2015 Order”). In the meantime, however, HMH successfully moved to compel arbitration of Bais Yaakov’s claims against HMH in a single-plaintiff posture, with no class claims. *See Bais Yaakov*, No. 13-cv-4577, Order [Dkt. No. 78] (S.D.N.Y. July 15, 2015) and HMH Defs.’ Mot. to Compel Arbitration [Dkt. Nos. 56-57] (S.D.N.Y. Nov. 3, 2014). Having failed in its efforts to pursue a putative class action against the HMH Defendants, Plaintiff Bais Yaakov then added ETS to the case in August 2015, more than two years after the case was originally filed. *See Bais Yaakov*, No. 13-cv-4577, 2d Am. Compl. [Dkt. No. 79] (S.D.N.Y. Aug. 5, 2015). A true and correct copy of the Second Amended Complaint (the operative complaint) adding ETS to the lawsuit is attached hereto as Exhibit 1.

In Bais Yaakov’s latest iteration of its Complaint—which now asserts the same individual and class claims against ETS that Bais Yaakov previously lodged against HMH—Bais Yaakov seeks to represent several putative classes to whom ETS allegedly “sent or caused to be sent” fax advertisements that allegedly did not contain a fully compliant opt-out notice, whether the fax was solicited or unsolicited. *See* Ex. 1, 2d Am. Compl. ¶¶ 18-20, 22, 37. ETS denies that it is liable under either the Telephone Consumer Protection Act (“TCPA”) or New York law because, among other defenses, ETS understands that the Criterion Fax was solicited by plaintiff and other putative class members. *See* HMH Petition at 4; *Bais Yaakov*, No. 13-cv-4577, Ans. of Houghton Mifflin Harcourt Defs. to First Am. Compl. at 11 (Sixth Defense) [Dkt. No. 62] (S.D.N.Y. Nov. 20, 2014) (“HMH Answer”).

Shortly after ETS was added as a Defendant in the case, on November 13, 2015, the Court stayed the case pending the United States Supreme Court’s decision in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (Jan. 20, 2016), which had the potential to dispose of all of the claims in the case. The stay was recently lifted after the Supreme Court’s January 20, 2016 decision in *Campbell-Ewald*, and Bais Yaakov’s litigation is now proceeding. Thus, like so many other petitioners previously before the Commission, ETS now finds it necessary to seek a waiver in light of the opportunistic litigation Bais Yaakov has filed against it.

## **II. RETROACTIVE WAIVERS UNDER THE COMMISSION’S PRIOR ORDERS**

On October 30, 2014, the Commission issued an order clarifying that the opt-out notice requirement under the TCPA, 47 U.S.C. § 227(b)(1)(C), (2)(D), and its implementing regulation, 47 C.F.R § 64.1200(a)(4)(iv), applies to solicited fax advertisements. October 2014 Order ¶ 1. The parties to the proceeding had requested retroactive waivers of the opt-out notice requirement if the Commission were to so conclude. *See id.* ¶ 11. Noting that those “who have sent fax ads with the recipient’s prior express permission may have reasonably been uncertain about whether [the] requirement for opt-out notices applied to them,” the Commission found “good cause” to waive the requirement and granted retroactive waivers to *all* the parties to the proceeding. *See id.* ¶¶ 1, 15, 36.

The Commission found “good cause” for waiving the opt-out notice requirement because “(1) special circumstances warrant[ed] deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.” *Id.* ¶ 23. With regard to the “special circumstances” prong, the Commission identified “two grounds” leading to “confusion” or “misplaced confidence” about the inapplicability of the opt-out notice requirement to solicited faxes. *Id.* ¶ 24. First, a footnote contained in a prior order of the Commission “caused confusion or misplaced confidence” by stating that the “opt-out notice requirement only applies to

communications that constitute *unsolicited* advertisements.” *Id.* (quoting *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd. 3787, 3810 n.154 (2006) (emphasis added) (hereinafter the “2006 Fax Order”)). Second, the Commission recognized that the notice of its intent to adopt the implementing regulation “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.” *Id.* ¶ 25.

With regard to the “public interest” prong, the Commission balanced “legitimate business and consumer interests.” *Id.* ¶ 27. It determined that subjecting businesses to “significant damage awards under the TCPA’s private right of action or possible Commission enforcement” would be “unjust or inequitable” given the confusion and the misplaced confidence about the rule’s inapplicability caused, in part, by the footnote in the 2006 Fax Order. *Id.* ¶¶ 27, 28. On balance, therefore, the Commission concluded that a waiver would better serve the public interest than a strict application of the rule. *See id.* ¶¶ 27-29.

Having determined that retroactive waivers were appropriate under these circumstances, the Commission invited “similarly situated parties” to seek retroactive waivers for solicited fax advertisements. *See id.* ¶ 2. Although the Commission stated its expectation that “parties making similar waiver requests” would “make every effort to file within six months of the release of this Order,” i.e., by April 30, 2015, the Commission also “note[d] that future waiver requests will be adjudicated on a case-by-case basis” and refused to “prejudge the outcome of future waiver requests.” *Id.* ¶ 30, n. 102.

Several similarly situated entities subsequently sought retroactive waivers. On August 28, 2015, the Commission granted waivers to an additional 117 petitioners, including HMH. August

2015 Order ¶¶ 1, 11 & n.2. Applying the same two-part analysis for “good cause” as it did in its October 2014 Order, the Commission once again found “that good cause exists to grant individual retroactive waivers of section 64.1200(a)(4)(iv),” because the new petitioners had demonstrated that they were “similarly-situated to the initial waiver recipients.” *Id.* ¶¶ 11, 14. *First*, the new petitioners had sent fax advertisements that arguably lacked a fully compliant opt-out notice; *second*, the petitioners had referenced the 2006 Fax Order’s “confusing, contradictory language” concerning the inapplicability of the opt-out requirement for solicited faxes. *Id.* at ¶¶ 13-17. Although a few of the petitioners had petitioned for waivers “in May and June [of 2015], after the six-month (April 30, 2015) date referenced in the [October 2014 Order],” the Commission nevertheless granted their petitions, finding that “granting waivers to these parties does not contradict the purpose or intent of the initial waiver order as the parties are similarly situated to the initial waiver recipients.” *Id.* ¶ 20.

Three months ago, the Commission granted an additional five retroactive waivers to petitioners who were similarly situated to the original waiver recipients. *Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission’s Opt-Out Notice Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order ¶ 2 (Dec. 9, 2015). All five of those petitions were filed outside of the six-month window referenced in the October 2014 Order. *See id.* ¶ 1, n.1.

### **III. GOOD CAUSE EXISTS TO GRANT ETS A RETROACTIVE WAIVER BECAUSE ETS IS SIMILARLY SITUATED TO THE RECIPIENTS OF WAIVERS PREVIOUSLY GRANTED BY THE COMMISSION.**

The Commission may waive any provision of its rules “if good cause therefore is shown.” 47 C.F.R. § 1.3. A waiver may be granted if “(1) special circumstances warrant deviation from the general rule and (2) the waiver would better serve the public interest than would application

of the rule.” October 2014 Order ¶ 23. The same considerations that led the Commission to find that good cause warranted granting the previous petitions for retroactive waiver applies equally here.

First, the same “special circumstances” that warranted granting previous waiver requests also demonstrate that ETS is entitled to a waiver. Namely, those “special circumstances” include: (1) the “confusion” or “misplaced confidence” about the inapplicability of the opt-out notice requirement to solicited faxes that was caused by the footnote in the 2006 Fax Order, *id.* ¶ 24, and (2) the Commission’s adoption of its implementing regulations without making “explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient,” *id.* ¶ 25.

Second, the “public interest” will also be promoted by granting a waiver to ETS. The Commission has already determined that subjecting businesses to “significant damage awards under the TCPA’s private right of action” would be “unjust or inequitable” given the confusion and misplaced confidence about the opt-out requirement’s inapplicability to solicited faxes. *Id.* ¶¶ 27, 28. As discussed above, ETS has been sued on behalf of a putative class of persons who were allegedly sent unsolicited *and solicited* fax advertisements. The lawsuit against ETS seeks minimum statutory damages of \$500 (with trebling sought up to \$1,500) for each solicited fax that allegedly did not contain a proper opt-out notice sent by or on behalf of ETS over a multi-year period since July 2009. *See* Ex. 1, 2d Am. Compl. ¶¶ 18, 22, 37-39 and p. 14. This exposure to potentially millions of dollars in damages, including putative damages, would be unjust and inequitable based on the Commission’s prior findings. *See* October 2014 Order ¶¶ 27-28. Further, ETS is worthy of being granted a retroactive waiver here. Its involvement in sending the fax advertisement at issue was attenuated and tangential at best. As explained above,

ETS understands that the fax that was sent was both solicited and included opt-out information. And a waiver has already been granted to HMH, the party that composed the fax and caused it to be sent.

Furthermore, because ETS is similarly situated to the previous petitioners who were granted waivers, there is also good cause to waive section 64.1200(a)(4)(iv) for any solicited fax advertisements sent by or on behalf of ETS. August 2015 Order ¶¶ 11, 13-17. Like many of the recipients of waivers previously granted by the Commission, ETS is the subject of a putative class action lawsuit claiming violations of the TCPA for solicited fax advertisements that allegedly contained an inadequate opt-out notice.<sup>1</sup> See 2d Am. Compl. ¶¶ 18, 37. And, like those parties, ETS has been targeted by a plaintiff (Bais Yaakov), that is far from an aggrieved individual consumer, and its counsel (Bellin & Associates LLC), who have brought numerous “gotcha” class action lawsuits over alleged fax advertisements with technically noncompliant opt-out notices.<sup>2</sup> Further, like the faxes allegedly sent by the previous petitioners,<sup>3</sup> ETS understands that the Criterion Fax was sent pursuant to the recipients’ prior express invitation or permission.<sup>4</sup> See HMH Petition at 4; HMH Answer at 11 (Sixth Defense). Finally, like the

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<sup>1</sup> See HMH Petition at 3-4; see also CARFAX Petition at 3, CG Docket Nos. 02-278, 05-338 (filed July 11, 2014); All Granite Petition at 5, CG Docket Nos. 02-278, 05-338 (filed Oct. 28, 2013); Gilead Sciences Petition at 3, CG Docket Nos. 02-278, 05-338 (filed Aug. 9, 2013); Forest Pharmaceuticals Petition at 3, CG Docket No. 05-338 (filed July 24, 2013).

<sup>2</sup> See, e.g., *Bais Yaakov of Spring Valley v. Varitronics, LLC.*, No. 14-CV-05008 (D. Minn. Dec. 18, 2014); *Bais Yaakov of Spring Valley v. Graduation Source, LLC*, No. 7:14-CV-03232 (S.D.N.Y. May 5, 2014); *Bais Yaakov of Spring Valley v. Varitronics, LLC*, No. 7:14-CV-03083 (S.D.N.Y. May 1, 2014); *Bais Yaakov of Spring Valley v. Alloy, Inc.*, No. 7:12-cv-00581 (S.D.N.Y. Dec. 6, 2013); *Bais Yaakov of Spring Valley v. Richmond, The Am. Int’l Univ. in London, Inc.*, No. 7:13-cv-04564 (S.D.N.Y. July 1, 2013); *Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 4:12-cv-40088 (D. Mass. July 30, 2012), *on appeal*, Nos. 14-01789 & 14-08005 (1st Cir.); *Bais Yaakov of Spring Valley v. Tek Indus., Inc.*, No. 8:11-cv-218 (D. Neb. June 16, 2011); *Bais Yaakov of Spring Valley v. Peterson’s Nelnets, LLC*, No. 11-CV-00011 (D.N.J. Jan. 3, 2011), *on appeal*, No. 13-08025 (3d Cir.).

<sup>3</sup> See CARFAX Petition at 3; All Granite Petition at 2, 5; Gilead Petition at 4, 5; Forest Petition at 4.

<sup>4</sup> The factual determination as to whether ETS was a “sender” of the Criterion Fax or any other fax advertisement, see 47 C.F.R. § 64.1200(f)(10), and whether any such fax advertisement was in fact solicited or

facsimiles sent by waiver recipients Forest Pharmaceuticals, Inc. and Gilead Sciences, Inc.,<sup>5</sup> the fax at issue here did not omit an opt-out notice altogether. Rather, it provided the recipients with a way to opt out through a notice that substantially complied with the TCPA's requirements. *See id.* Moreover, the Criterion Fax at the heart of Plaintiff Bais Yaakov's claims is the *very same facsimile* that was sent by prior petitioner HMH, who received a waiver from the Commission on August 28, 2015.

#### IV. RELIEF SOUGHT

In sum, good cause exists to warrant waiving Section 64.1200(a)(4)(iv) for any solicited fax advertisements sent by or on behalf of ETS prior to April 30, 2015. Furthermore, given Petitioner's similar situation to the parties that received waivers on October 30, 2014, August 28, 2015, and December 9, 2015, the Commission should grant a retroactive waiver to ETS to the extent that any solicited faxes were sent by or on behalf of ETS. Therefore, ETS respectfully requests that the Commission grant a retroactive waiver of the opt-out notice requirement under 47 C.F.R. § 64.1200(a)(4)(iv) insofar as any fax advertisements were sent by or on behalf of ETS prior to April 30, 2015 with the recipients' prior express invitation or permission.<sup>6</sup>

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(continued...)

unsolicited belongs to the appropriate adjudicator in the federal lawsuit currently pending against ETS. The Commission may nevertheless grant retroactive waivers for those faxes that are ultimately found to be solicited, provided there is "good cause." *See* August 2015 Order ¶ 17 ("[W]e decline to conduct a factual analysis to determine whether the petitioners actually obtained consent. . . . We reiterate the Commission's statement that the granting of a waiver does not confirm or deny whether the petitioners had the prior express permission of the recipients to send the faxes. That remains a question for triers of fact in the private litigation.").

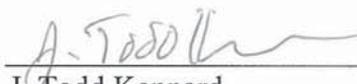
<sup>5</sup> *See* Gilead Petition at 4; Forest Petition at 4-5.

<sup>6</sup> ETS respectfully believes that the Commission should issue a declaratory ruling clarifying that Section § 64.1200(a)(4)(iv) does not apply to solicited faxes because applying opt-out requirements to faxes sent with the prior express invitation or permission of the recipient (i) is inconsistent with the plain language of the TCPA, *see* 47 U.S.C. § 227(b); (ii) exceeds the Commission's authority, *see* 47 U.S.C. § 227(b); and (iii) raises significant First Amendment concerns. ETS recognizes that these arguments were previously rejected by the Commission, *see* October 2014 Order ¶ 3; August 2015 Order ¶ 2, and are currently under review by the United States Court of Appeals for the District of Columbia Circuit, *see Bais Yaakov of Spring Valley, et al. v. Fed. Comm. Comm'n, et al.*,

Dated: March 16, 2016

Respectfully submitted,

JONES DAY



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No. 14-1234 (D.C. Cir. Nov. 10, 2014). Nevertheless, ETS raises its position here in the interest of preserving its rights.

# **Exhibit 1**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiff,

-vs.-

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

Defendants.

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Second Amended Complaint

Class Action

Jury Demanded

**SECOND AMENDED COMPLAINT**

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

**INTRODUCTION**

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

prohibit the sending of unsolicited as well as solicited fax advertisements that do not contain properly worded opt-out notices. The New York legislature enacted GBL § 396-aa for similar purposes.

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

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

### **JURISDICTION AND VENUE**

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

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

**THE PARTIES**

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

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

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

9. Upon information and belief ETS is a New York Corporation with its principal place of business located at 660 Rosedale Road, Princeton, NJ 08541.

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

**DEFENDANTS' ILLEGAL JUNK FAXES**

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

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

into this Complaint.

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

14. The Fax Advertisement contains a notice (the “Opt-Out Notice”) that provides in full: “If you do not wish to receive faxes from Houghton Mifflin Harcourt in the future, and/or if you would prefer to receive communication via email, please contact your representative. Upon your request, we will remove you from our fax transmissions within 30 days.”

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

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

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

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

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

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

(F) fails to state that a recipient’s opt-out request will be effective so long as that person does not, subsequent to making such request, provide express

invitation or permission to the sender, in writing or otherwise, to send such advertisements.

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

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

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

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

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

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

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

Advertisement sent to Plaintiff.

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

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

### **CLASS ALLEGATIONS**

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

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

Class A: All persons from July 2, 2009 through the date of the filing of

this Second Amended Complaint in this action to whom Defendants, individually or collectively, sent or caused to be sent at least one *solicited or unsolicited* facsimile advertisement advertising the commercial availability or quality of any property, goods, or services that contained a notice identical or substantially similar to the Opt-Out Notice in the Fax Advertisement sent to Plaintiff.

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

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

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

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

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

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

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

the Class C members' express permission or invitation, at least one fax advertisement advertising the commercial availability or quality of any property, goods, or services that contained a notice identical or substantially similar to the Opt-Out Notice in the Fax Advertisement that Defendants sent or caused to be sent to Plaintiff.

28. Common Questions of Fact and Law: There is a well-defined community of common questions of fact and law affecting the Plaintiff and members of the Classes.

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

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

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

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

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

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

(a) Whether Defendants' sending and/or causing to be sent to Plaintiff and the members of Class B, without Plaintiff's or the Class B members' express invitation or permission, by facsimile, computer or other device, fax advertisements advertising the commercial availability or quality of any property, goods, or services that contained a notice identical or substantially similar to the Opt-Out Notice in the Fax Advertisement, violated 47 U.S.C. § 227(b) and the regulations thereunder;

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

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

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

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

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

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

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

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

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

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

with respect to Classes A and B.

**FIRST CLAIM FOR VIOLATION OF THE TCPA**

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

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

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

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

**SECOND CLAIM FOR VIOLATION OF THE TCPA**

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

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

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

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

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

### **THIRD CLAIM FOR INJUNCTIVE RELIEF**

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

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

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

### **FOURTH CLAIM FOR VIOLATION OF GBL § 396-aa**

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

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

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

### **REQUEST FOR RELIEF**

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

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

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

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

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

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

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

**JURY DEMAND**

Plaintiff demands a trial by jury.

Dated: White Plains, New York  
November 3, 2014

**BAIS YAAKOV OF SPRING VALLEY  
ON BEHALF OF ITSELF AND ALL  
OTHERS SIMILARLY SITUATED**

By: \_\_\_\_\_ /s/

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**EXHIBIT A**

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