

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

In the Matter of)	
)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 02-278
)	
Petitions for Declaratory Ruling and 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 No. 05-338 DA 16-317

**BAIS YAAKOV OF SPRING VALLEY’S COMMENTS ON
EDUCATIONAL TESTING SERVICE’S PETITION SEEKING
RETROACTIVE WAIVER OF THE COMMISSION’S RULE
REQUIRING OPT-OUT NOTICES ON FAX ADVERTISEMENTS SENT
WITH PERMISSION**

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INTRODUCTION

Bais Yaakov of Spring Valley (“Bais Yaakov”) is a plaintiff in a pending TCPA class-action litigation in which it has asserted claims for violations of the 47 C.F.R. § 64.1200(a)(4)(iv) (the “Opt-Out Regulation”) against ETS. That litigation is styled as *Bais Yaakov of Spring Valley v. Houghton Mifflin Harcourt Publishers, Inc. et al.*, 7:13 CV 4577 (S.D.N.Y.). A copy of the Second Amended Complaint in that case in which ETS is named as a defendant is attached to the hereto as Exhibit A. Contrary to ETS’s assertion, ETS was added as a defendant in this case on July 15, 2015, *see* Order attached hereto as Exhibit B, and was served with the Second Amended Complaint on August 18, 2015. *See* Affidavit of Service Attached hereto as Exhibit C.

Bais Yaakov submits these comments in response to the Petition (“Petition”) of Educational Testing Service (“ETS”), filed on March 16, 2016, for a retroactive waiver of 47 C.F.R § 64.1200(a)(4)(iv). The Consumer and Governmental Affairs Bureau (“the Bureau”) sought Comments on the Petition on March 25, 2016. For the reasons stated below, the Petition should be denied.

SUMMARY OF PRIOR PROCEEDINGS

A. Commission Proceedings

Over the course of several years, a variety of parties filed 25 petitions challenging the FCC’s authority to issue the Opt-Out Regulation and, in the alternative, seeking retroactive waivers of the Opt-Out Regulation’s application to them. The openly admitted objective of those parties was to thwart various plaintiffs in then pending litigations from prevailing on claims against them for violation of the Opt-Out Regulation, which constitutes a violation of the TCPA itself. 47 U.S.C. § 227(b)(3).

On October 30, 2014, the Commission issued its Waiver Ruling, reconfirming its authority to issue the Opt-Out Regulation, but granting the waiver requests then before it – and thereby purported to retroactively and prospectively waive almost nine years of violations of the Opt-Out Regulation, from its August 6, 2006 effective date through April 30, 2015, for those who had sought waivers. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 29 F.C.C.R. 13998, 14011 ¶¶ 1-3 (Rel. Oct. 30, 2014) (“*Waiver Ruling*”) ¶¶ 1-3. In support of its grant of waivers, the Commission found that a notice of proposed rulemaking it had issued back in 2005 (the “NPRM”) and a footnote (footnote 154) in its 2006 implementing order issuing the final Opt-Out Regulation (the “Implementing Order”) “led to confusion or misplaced confidence on the part of petitioners,” and that this “confusion or misplaced confidence” justified a waiver of the Regulation. *Id.*, ¶ 26.

The Commission’s Waiver Ruling also invited others to file additional waiver requests until April 30, 2015: “Other, similarly situated parties may also seek waivers such as those granted in this Order. . . . We expect parties making similar waiver requests to file within six months of the release of this Order.” *Waiver Ruling*, ¶¶ 30. The Commission explicitly stated, however, that “all future waiver requests will be adjudicated on a case-by-case basis,” and that it was “not prejudg[ing] the outcome of future waiver requests in this Order.” *Id.*, ¶ 30, n.102.

B. ETS’s Petition for Waiver

On March 16, 2016, more than 1 year and 5 months after the FCC issued the Waiver Ruling, more than 8 months after ETS was added as a Defendant in this case, about 7 months after ETS was served with the Second Amended Complaint, and more than 10½ months past the April 30, 2015 deadline for waiver applications set by the FCC, *Waiver Ruling*, ¶ 30, ETS filed a petition for waiver of the Opt-Out Regulation. In that Petition, ETS argued that there was “good

cause” to grant ETS a waiver based on the same considerations contained in the *Waiver Ruling* described above. Petition at 6-7 (citing *Waiver Ruling*, ¶¶ 24-25). Nowhere in the Petition did ETS claim that it had ever read footnote 154 of the *Implementing Order*, nor did it ever claim that it had been actually confused by footnote 154 or anything else as to its obligation to place opt-out notices on permission-based fax advertisements. In addition, nowhere in the Petition did ETS claim that it had ever read the NPRM, nor did it ever claim that it had been actually confused by the NPRM.

ETS contended that the public interest would be promoted by granting ETS a retroactive waiver of the Opt-Out Regulation because otherwise it would be “expos[ed] to potentially millions of dollars in damages.” Petition at 7. Moreover, without any elaborating or submitting any proof, ETS conclusorily asserted that it was entitled to a retroactive waiver of the Opt-Out regulation because “[i]ts involvement in sending the fax advertisement at issue was attenuated and tenuous at best,” and a waiver had already been granted to a dismissed co-Defendant in the case who ETS, conclusorily and without submitting any proof, claimed was “the party that composed the fax and caused it to be sent.” *Id.* at 8.

In addition, ETS claimed that it was entitled to an retroactive waiver of the Opt-Out Regulation because it was similarly situated to other parties who had been granted such waivers by the FCC, because the fax at issue “did not omit an opt-out notice altogether” but allegedly “substantially complied with the TCPA’s requirements, and because the FCC granted a retroactive waiver to two previously dismissed co-defendant in the same lawsuit in which ETS is being sued, who ETS referred to collectively as HMM. *Id.* at 8-9.

Finally, in a footnote, and without any legal argument, ETS requested that the Commission issue a declaratory ruling stating that the Opt-out regulation (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. *Id.* at 9 ETS recognized that the Commission had previously rejected these arguments. *Id.*¹

ARGUMENT

I. BECAUSE ETS FAILED TO FILE THIS PETITION IN A TIMELY MANNER, AND FAILED TO PROVIDE ANY JUSTIFICATION FOR THAT FAILURE, THE PETITION SHOULD BE DENIED

As noted above, ETS filed this Petition on March 16, 2016, more than 1 year and 5 months after the FCC issued the Waiver Ruling, more than 8 months after ETS was added as a defendant in the class action case described above, about 7 months after ETS was served with the Second Amended Complaint naming it as a defendant, and more than 10½ months past the April 30, 2015 deadline for waiver applications set by the FCC, *Waiver Ruling*, ¶ 30. ETS has failed to provide any justification for its blatant disregard of the time frame set by the Commission for requesting a waiver. For this reason alone, ETS’s petition must be denied.

In the *Waiver Ruling*, the Commission explicitly stated: “We expect parties making similar waiver requests to make every effort to file within six months of the release of this Order,” i.e., October 30, 2014. *Waiver Ruling*, ¶ 30. ETS, which is a very large and sophisticated company, no doubt with highly skilled in-house and outside counsel, did not request a waiver by April 30, 2015. This is so, even though the underlying class action concerning a fax advertising its own service was pending against ETS’s sole distributor had been pending since July 2, 2013. ETS was no doubt aware of that lawsuit, and nevertheless did not seek a waiver by the April 30, 2015 deadline.

¹ For the reasons stated by the Commission in the *Waiver Order*, which are incorporated herein by reference, the Bureau should reject these arguments that were cursorily raised by ETS in a footnote.

Even assuming that ETS did not know about the lawsuit until ETS was served with the Second Amended Complaint naming ETS as a defendant on August 18, 2015, ETS still did not seek any waiver until about 7 months later on March 16, 2016. ETS's failure to request a waiver shortly after being served with the Second Amended Complaint on August 18, 2015 is especially egregious because it was no later than the end of August 2015 that ETS was, and still is, represented in that lawsuit by the law firm of Jones Day, which is one of the finest and most sophisticated law firms in the United States. In fact, the instant Petition was drafted by J. Todd Kennard, a partner at Jones Day experienced in TCPA litigation,² as well as an associate, Brandy Hutton Ranjan, who is also experienced in TCPA matters.³ Moreover, Mr. Kennard is one of eight Jones Day attorneys listed as an author of a November, 2014 article on the Jones Day website that specifically discusses the *Waiver Ruling*, and also is the author of other articles on the TCPA.⁴ Thus, there can be no doubt that ETS and its counsel knew about the Waiver Ruling, its significance, and its deadlines no later than the end of August 2015. Yet, ETS and its counsel still chose not to file a request for a waiver until almost 7 months later. It should therefore be no surprise that ETS and its counsel have provided no justification for why they took so long to do so. Under these circumstances, to entertain the Petition now would make a mockery of the six month deadline for Waiver Applications contained in the *Waiver Ruling*, and would render that deadline a dead letter. This, the Bureau should not — and, indeed, may not — do.

² See Firm Profile of J. Todd Kennard, located at <http://www.jonesday.com/jtkennard/>

³ See Firm Profile of Brandy Hutton Ranjan, located at <http://www.jonesday.com/branjan/>

⁴ See TCPA Reform Heats Up: Opt-Out Required for Solicited Faxes, and a Court Decision Pulls Back on Autodialers, located at <http://www.jonesday.com/tcpa-reform-heats-up-opt-out-required-for-solicited-faxes-and-a-court-decision-pulls-back-on-autodialers-11-03-2014/>; List of Publications of J. Todd Kennard, located at <http://www.jonesday.com/jtkennard/?section=Publications>.

ETS appears to contend that because the Bureau in a December 9, 2015 Order granted waivers to entities that submitted requests for such waivers after April 30, 2015, 30 F.C.C.R. 14057, ¶¶ 1 n.1, 22, ETS is entitled to a waiver here as well. However, those entities submitted their petitions from June through September, 2015. Here, ETS submitted its Petition almost six months *after* the last petitioner granted a waiver in the December 9, 2015 Bureau Order had submitted its petition.

ETS also appears to contend that it should be granted a waiver because HMH was granted a waiver. However, contrary to what ETS did, HMH made its request for a waiver on January 20, 2015, 30 F.C.C.R. 8598, ¶ 1 n.2, well within the April 30, 2015 deadline set by the Commission in the *Waiver Ruling*. Accordingly, the fact that the Bureau granted HMH a waiver on its timely petition for waiver is not a basis to ignore ETS's abject failure to file a timely petition here.⁵

II. THE COMMISSION LACKS AUTHORITY TO RETROACTIVELY WAIVE PRE-EXISTING STATUTORY CAUSES OF ACTION FOR VIOLATION OF THE OPT-OUT REGULATION

The Commission does not have the power to retroactively waive statutorily created causes of action under the TCPA. Therefore to the extent that ETS is requesting that the Commission waive the Opt-Out regulation in order to absolve ETS of liability under the class action brought against it by Bais Yaakov, the Bureau must deny that waiver.

The TCPA's private right of action based on violation of the Commission's regulations is authorized in the TCPA – a statute enacted by Congress. *See* 47 U.S.C. § 227(b)(3)(A) & (B).

⁵ In any event, a number of Applications for Full Commission Review of the waivers granted by the Bureau in its August 28, 2015 Order are still pending. *See, e.g.*, Application for Full Commission Review submitted by Bais Yaakov of Spring Valley, Roger H. Kaye and Roger H. Kaye, MD PC on September 25, 2015.

That section of the TCPA does not provide the Commission with any authority to waive or otherwise impair a private cause of action that arises under it.

Moreover, none of the TCPA's other provisions that do delegate authority to the Commission gives the Commission any right to impair that congressionally created private right of action. 47 U.S.C. § 227(b)(2)(B)-(G). Nor can the Commission claim any implied delegation of such authority. *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) (“Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental ‘that an agency may not bootstrap itself into an area in which it has no jurisdiction’”). Nor can the Bureau find any authority for impairing that private right of action in 47 C.F.R. § 1.3, which generally enables the Commission to waive the requirements of a *regulation*, but not a cause of action already accrued under a *statute* for violation of a regulation. *E.g., National Ass’n of Broadcasters v. F.C.C.*, 569 F.3d 416, 426 (D.C. Cir. 2009) (“the Commission has authority under its rules, *see* 47 C.F.R. § 1.3, to waive requirements *not mandated by statute* where strict compliance would not be in the public interest. . . .” [emphasis added]).⁶

Where, as is the case with the TCPA, a statute, creates a private right of action and does not give an agency any authority to impair it, the Courts have been vigilant about preventing an agency from overstepping its authority. *E.g., Natural Resources Defense Council v. E.P.A.*, 749 F.3d 1055, 1063 (D.C. Cir. 2014) (EPA lacked authority to create affirmative defense to private right of action established by Clean Air Act); *Adams Fruit, supra*, 494 U.S. 638, 649-50 (1990).

⁶ Nor would any effort to cast the requested waiver as simply an “interpretation” of the TCPA entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), be correct. *E.g., Brown v. Gardner*, 513 U.S. 115, 116-121 (1994) (because agency’s regulation required higher standard of proof than statute to collect benefits, regulation was not entitled to *Chevron* deference and was invalidated: “the text and reasonable inferences from the statute give a clear answer against the Government ‘agency’s regulation’”) (citations omitted).

A waiver of the Opt-out Regulation would violate this well settled precedent because the Commission lacks any authority to impair the private right of action asserted by Bais Yaakov against ETS.

As a result, the Commission has no authority to grant a retroactive waiver of the Opt-Out Regulation to ETS, and therefore, ETS's request for a retroactive waiver should be denied.

III. 1 U.S.C. § 109 ALSO PRECLUDES CONGRESS AND THE COMMISSION FROM RETROACTIVELY EXTINGUISHING LIABILITIES CREATED UNDER THE TCPA'S PRIVATE RIGHT OF ACTION IN THE ABSENCE OF EXPRESS CONGRESSIONAL AUTHORITY TO DO SO

1 U.S.C. § 109 provides in pertinent part that the repeal of any statute does not retroactively extinguish liabilities previously accrued under the statute unless the statute expressly, or by plain import, provides for such extinguishment. Accordingly, if Congress had desired to allow itself or the Commission to retroactively extinguish private causes of action created by the TCPA, Congress would have had to do so explicitly in the TCPA. *E.g.*, *Washington Metropolitan Area Transit Authority v. Beynum*, 145 F.3d 371, 372-73 (D.C. Cir. 1998) (claim for compensation for injury incurred before repeal of workers' compensation law should be decided under repealed law because new workers' compensation law did not retroactively extinguish such liability under old statute, as required by 1 U.S.C. § 109).

Because Congress did not explicitly state that the private right of action under the TCPA for violation of the Commission's regulations could be retroactively repealed by Congress, much less that that private right of action could be abrogated by an administrative agency such as the Commission, any attempt by the Commission to extinguish private plaintiffs' right of action to pursue TCPA claims for past violations of the Opt-Out Regulation conflicts with 1 U.S.C. § 109 and the caselaw construing it. Accordingly, the Commission may not grant the retroactive waiver requested by ETS.

IV. A GRANT OF THE WAIVER REQUESTED BY ETS WOULD VIOLATE TWO SEPARATION OF POWERS PRINCIPLES

Any ruling purporting to retroactively waive preexisting private parties' liability for TCPA claims asserted in pending litigations violates separation of powers principles. Granting such a retroactive waiver does not interpret the TCPA, but effectively nullifies a statute creating a private right of action. Moreover, issuing retroactive waivers is not just defining the scope of when and how the Commission's rules apply, but instead is attempting to retroactively constrict the scope of a private right of action which the Commission lacks any authority to constrict. Accordingly, the retroactive waiver requested by ETS plainly implicates separation of powers concerns.

Any grant of a retroactive waiver to ETS would violate two separation of powers dividing lines: between the Commission and Congress, and between the Commission and the Judiciary. First, by issuing a Waiver Order that would purport to categorically extinguish preexisting liability incurred by ETS and other parties who filed waiver petitions, the Commission would improperly intrude into Congress's power to enact and repeal legislation creating private rights of action. *E.g., Utility Air Regulatory Group v. E.P.A.*, 134 S. Ct. 2427, 2445 (2014) ("Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers. Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them.").

Second, because granting such a retroactive waiver to ETS would impair TCPA claims that Bais Yaakov has already have asserted in pending judicial proceedings, such a retroactive waiver would improperly intrude upon the province of the Judiciary. *Adams Fruit, supra*, 494 U.S. at 650 (rejecting Secretary of Labor's position limiting liability under statute "because Congress has expressly established the Judiciary and not the Department of Labor as the

adjudicatory of private rights of action arising under the statute”).⁷

Accordingly, the grant of the retroactive waiver requested by ETS would conflict with constitutional separation of powers principles and the caselaw construing them. Accordingly, the Commission does not have the power to grant such a waiver.

V. IT WOULD BE IMPROPER TO ISSUE A RETROACTIVE WAIVER TO ETS BECAUSE TO DO SO WOULD BE ISSUING A LEGISLATIVE RULE THAT LACKS CONGRESSIONAL AUTHORIZATION

As a matter of administrative law, the grant of a retroactive waiver to ETS would be the equivalent of a “legislative rule” that repeals an existing rule. That is because, the only support ETS cites to justify its request are two “legislative facts” – the NPRM and the Implementing Order – which ETS argues caused “confusion” warranting blanket waivers. Those facts are legislative because they apply equally to everyone, not to specific parties in a specific factual context. Consistent with the legislative nature of its request, the ETS did not cite or provide any individual evidence as to why it is entitled to a retroactive waiver. Indeed, ETS did not even see any need to provide any evidence that it was even aware of the NPRM or footnote 154 in the Implementing Order, much less relied on those items.

Further, the fact that the Bureau has sought comments from the public on ETS’s retroactive waiver request further confirms that this proceeding concerns a request for a retroactive legislative repeal of the Opt-Out Regulation.

Because ETS’s request for a retroactive waiver is requesting a legislative rule, the Commission may not grant such a waiver as it would retroactively to impair Bais Yaakov’s

⁷ See also *City of Arlington, Texas v. F.C.C.*, 133 S. Ct. 1863, 1871 n.3 (2013) (reaffirming that “*Adams Fruit* stands for the modest proposition that the judiciary, not any executive agency, determines ‘the scope’ — including the available remedies — ‘of judicial power vested by’ statutes establishing private rights of action.”).

“vested right,” to causes of action under the TCPA against ETS, which would be contrary to the U.S. Supreme Court’s decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (“a statutory grant of legislative rulemaking authority will not, as a general matter be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms”); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

Accordingly, ETS’s request for a retroactive waiver of the Opt-Out regulation should be denied.

VI. EVEN IF THE GRANT OF A WAIVER WERE DEEMED AN ADJUDICATORY RULE, IT COULD NOT BE APPLIED RETROACTIVELY BECAUSE IT WOULD NOT SATISFY THE *RETAIL, WHOLESALE* TEST

Even if the retroactive waiver requested by ETS could alternatively be considered an adjudicatory rule, granting the waiver would also be improper because ETS would not have satisfied the requirements for retroactive applications of adjudicatory rules. As the D.C. Circuit held in *Retail, Wholesale and Department Store Union, AFL-CIO v. N.L.R.B.*, 466 F.2d 380, 390 (D.C. Cir. 1972):

“[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. . . .”
.....

Among the considerations that enter into the resolution of the problem are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party; and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

See also Williams Natural Gas Co. v. F.E.R.C., 3 F.3d 1544, 1554 (D.C. Cir. 1993) (citations omitted) (where an adjudicatory rule “substitu[tes] new law for old law that was reasonable

clear. . . . it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule.”).

ETS’s request for a retroactive waiver of the opt-Out regulation constitutes a “case of first impression” because the that request is asking that, after nine-plus years of having the Opt-Out Regulation on the books, the Opt-Out Regulation should be deemed effectively a nullity for those nine years. For the same reason, the granting of such a restorative waiver would represent “an abrupt departure from well established practice.” In addition, the parties “against whom the new rule is applied” — Bais Yaakov and other plaintiffs in TCPA litigations who have asserted claims against those seeking waivers – have plainly “relied on the former rule” by pursuing litigation claims based on that former rule. Further, because Bais Yaakov and others have spent years extensively litigating those TCPA claims in complex litigation, the “degree of burden” the grant of the requested retroactive waiver would impose upon them, by undermining important claims in those cases, is unquestionably severe. Finally, the “statutory interest in applying a new rule” – in this case the abrogation of an existing rule – is nonexistent. To the contrary, granting a retroactive waiver of the Opt-Out Regulation would discourage private parties from enforcing the TCPA and increase the burden on the Commission to police junk fax advertising.

Accordingly, even if the granting of a retroactive waiver of the Opt-Out Regulation were deemed to announce an adjudicatory rule, it would fail to satisfy each and every one of the five factors in the *Retail, Wholesale* test, and thus could not apply retroactively as ETS requests. As a result, ETS’s request for a retroactive waiver of the Opt-Out Regulation should be denied.

VII. ETS HAS FAILED TO DEMONSTRATE GOOD CAUSE FOR A WAIVER BY FAILING TO PLEAD WITH PARTICULARITY THE FACTS AND CIRCUMSTANCE WHICH WARRANT A WAIVER, AND BY FAILING TO ADDUCE CONCRETE SUPPORT OF SPECIAL CIRCUMSTANCES

WARANTING A WAIVER

The Commission's rules generally provide that "[a]ny provision of the [Commission's] rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown." 47 C.F.R. § 1.3. To demonstrate good cause, a person requesting a waiver of a Commission rule "must plead with particularity the facts and circumstances which warrant" a waiver instead of making "generalized pleas." *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 & n.9 (D.C. Cir. 1969). The person requesting a waiver must "adduce concrete support, preferably documentary," of "special circumstances" warranting a waiver. *Id.*; *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 127 (D.C. Cir. 2008).

To grant a waiver, the Commission must first "articulate a relevant standard" it is following. *WAIT Radio, supra*, 418 F.2d at 1159. Second, the Commission must make a specific finding of "special circumstances." *Northeast Cellular Telephone Co., L.P. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). And third, the Commission must find that the waiver "will serve the public interest." *Id.*

Nowhere in its request for a waiver has ETS articulated a "relevant standard" for determining when the Commission should or should not grant a waiver.⁸ Nor has ETS brought

⁸ While the Bureau has refused to grant a few waivers where it found that the entities requesting them had no knowledge of the TCPA, 30 F.C.C.R. 14057, ¶¶ 2, 20 (December 9, 2015), that refusal was completely inconsistent with the Bureau's previous grant of waivers to entities such as Amicus Mediation & Arbitration Group, Inc. in an August 28, 2015 Order, 30 F.C.C.R. 8598 (August 28, 2015), where the parties opposing the waiver had proven by record evidence that the entity requesting the waiver had no knowledge of the TCPA when it sent out its fax advertisements. *See December 12, 2014 Comments of Bais Yaakov of Spring Valley, Roger H. Kaye and Roger H. Kaye MD, PC*, at 3 & Exhibit A at 85-86; *December 15, 2014 Corrected Comments of Bais Yaakov of Spring Valley, Roger H. Kaye and Roger H. Kaye MD, PC*, at 3 & Exhibit A at 85-86. The Bureau's refusal to grant these waivers was also inconsistent with the full Commission's Waiver Ruling, which, when granting waivers, never distinguished between parties that had knowledge of the TCPA and those that did not. Thus, the denial of waivers by the Bureau did not set any "relevant standard" for waivers as required by the caselaw. Rather, it

forth any individualized evidence of “special circumstances.” Nor could ETS do so because ETS has not provided any specific facts upon which to make such findings. Instead, ETS has simply concluded that the existence of the NPRM and footnote 154 of the Implementing Order, by themselves, create a “presumption” of confusion about the existence and nature of the Opt-Out Regulation that constitutes special circumstances for the purpose of the waiver requests the Bureau granted. However, those two legislative “facts,” by themselves, are woefully insufficient to demonstrate special circumstances for numerous reasons.

First, ETS has not shown that it actually read, much less relied on, the NPRM or footnote 154 of the Implementing Order in coming to the conclusion that no regulation requires that opt-out notices appear on permission-based fax ads. Second, and more to the ultimate issue, ETS has

was an attempt, as part of the Commission’s litigation strategy in connection with the current appeal of the *Waiver Ruling* before the D.C. Circuit, to make it appear that the Commission was setting a relevant standard, even though the Commission knew that that supposed “relevant standard” was completely inconsistent with the full Commission’s and the Bureau’s previous rulings.

In any event, if the Bureau had set such a relevant standard, it would have been ETS’s burden in this Petition, as the party requesting a waiver, to come forward with concrete evidence that its personnel involved in the sending of the fax advertisements in this case met that standard, i.e., that those personnel had knowledge of the TCPA before the faxes at issue were sent. ETS has provided no such evidence, and therefore, even under the Bureau’s alleged “standard,” ETS has failed to come forward with evidence justifying the grant of a retroactive waiver.

Any argument that ETS’s relevant personnel should be “presumed” to have known of the TCPA before the fax advertisements at issue were sent would be improper as inconsistent with the requirement that it is entity seeking a waiver that has the heavy burden of demonstrating with concrete, particular and individualized evidence, good cause for a waiver. In addition, indulging in such a presumption would violate due process as Bais Yaakov has not been given an opportunity in this proceeding to depose ETS on this issue or to examine or cross-examine ETS on this issue at a hearing. *See McClelland v. Andrus*, 606 F.2d 1278, 1285-1286 (D.C. Cir. 1979)(holding that failure of agency to allow discovery of a report prior to an administrative hearing could violate of due process). If the Bureau intends to improperly make such a presumption, Bais Yaakov specifically requests an opportunity to depose ETS on this issue, or to have a hearing on this issue at which it can examine or cross-examine ETS, so that Bais Yaakov can attempt to rebut this presumption before the Bureau renders a decision on ETS’s Petition.

not shown that it actually was confused about the existence and nature of the Opt-Out Regulation. Third, ETS cannot credibly show that it actually was confused about the nature of the Opt-Out Regulation because the Regulation itself requires, in abundantly clear text, that fax ads sent to recipients who have agreed to receive them “must include an opt-out notice” 47 C.F.R. § 64.1200(a)(4)(iv); *Nack v. Walburg*, 715 F.3d 680, 683 (ruling that the Opt-Out Regulation, “read most naturally and according to its plain language, extends the opt-out notice requirement to solicited as well as unsolicited fax advertisements”), *cert. denied*, 134 S. Ct. 1539 (2014).

Fourth, any ruling that the NPRM and Implementing Order create a “presumption” of confusion, requiring that the parties opposing waivers come forward with evidence rebutting such a presumption, would improperly water down ETS’s proof requirements articulated in *WAIT Radio*, which mandate that a party *seeking* a waiver – not the party opposing a waiver – satisfy a “high hurdle even at the starting gate” and submit individualized “concrete support” to support the waiver. 418 F.2d at 1157 & n.9.

Finally, there is no evidence that granting ETS a waiver would be in the public interest. Nor, even though ETS contended that the public interest requires that they be shielded from ruinous liability, is there any underlying factual proof in the record to show such consequences if ETS is held liable for violating the TCPA, as *WAIT Radio* requires. Moreover, there is significant public interest in enforcing the Opt-Out Regulation – that the TCPA itself requires that it be enforced for the benefit of persons who receive millions of unwanted fax ads from ETS and others who are seeking waivers; that persons who receive purportedly permission-based fax ads should be instructed on how to follow the specific steps that the TCPA requires for opting out of receiving future unwanted fax ads; and that fax advertisers may erroneously or

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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.

7:13 CV 4577 (KMK)(LMS)

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/

Aytan Y. Bellin
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EXHIBIT A

RIVERSIDE PUBLISHING



Criterion

HOUGHTON MIFFLIN HARCOURT

ATTENTION: English/Language Arts Dept. Chair, Curriculum Coordinator, and Reading/Literacy Specialist

Student progress you can prove

How do you know if the school programs you spend money on really work? Would you be interested in a writing program that could prove you've made a difference in your district?

The **Criterion® Online Writing Evaluation** service for grades 4–12 can provide you proof of your district's progress. This web-based, comprehensive instructional tool helps students plan, write, and revise essays.

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- Offers a wide variety of reports that allow you to quickly assess performance for your district, schools, classes, and students
- Is successfully used in more than 1,500 districts nationwide, with over 1 million subscriptions sold

See how it works with a 9-minute demo at www.riversidepublishing.com/criteriondemo, or fax this form back to me at 1-800-854-2401 for a personalized online demonstration.

I would also be happy to conduct an online demonstration for any of your staff.

Regards,

Laurel Kaczor
877-212-7562 x5835
Laurel.Kaczor@hmhpub.com

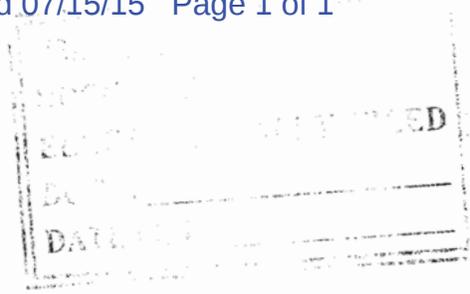
Your Name: _____ School Name: _____
 Address: _____ City, State, Zip: _____
 Phone: _____ Email: _____
 Best time to call: _____

**Fax this form to 1-800-854-2401
PLEASE COPY AND SHARE**

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.

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



BAIS YAAKOV OF SPRING VALLEY,

Plaintiff,

-v-

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

Defendants.

Case No. 13-CV-4577 (KMK)

ORDER

KENNETH M. KARAS, District Judge:

For the reasons stated on the record at oral argument held on July 14, 2015, the Court grants Plaintiff's Motion to Amend, (Dkt. No. 59), and grants Defendants' Motion to Compel Arbitration, (Dkt. No. 56). The case will remain stayed pending arbitration. The Clerk of Court is respectfully requested to terminate the pending Motions. (See Dkt. Nos. 56, 59.)

SO ORDERED.

Dated: White Plains, New York
July 15, 2015

KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE

EXHIBIT C



20150817162833

AO 440 (Rev. 10/93) Summons in a Civil Action

RETURN OF SERVICE

SERVICE OF: SUMMONS AND SECOND AMENDED COMPLAINT, EXHIBITS, NOTICE OF MOTION FOR CLASS
EFFECTED (1) BY ME: CERTIFICATION & FOR STAY OF A PORTION OF THAT MOTION, DECLARATION OF ROGER FURMAN,
TITLE: REDACTED, MEMORANDUM
Steven Matarazzo
PROCESS SERVER

DATE: August 18, 2015 @ 3:00pm

CHECK ONE BOX BELOW TO INDICATE APPROPRIATE METHOD OF SERVICE:

Served personally upon the defendant Michelle Taylor, Administrative Assistant

EDUCATIONAL TESTING SERVICE, INC., C/O CORP. SERVICE COMPANY

Place where served:

50 WESTON STREET HARTFORD CT 06120

Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein. Name of person with whom the summons and complaint were left:

Relationship to defendant _____

Description of Person Accepting Service:

SEX: F AGE: 55 HEIGHT: 5'6" WEIGHT: 160 SKIN: Black HAIR: Gray OTHER: _____

To the best of my knowledge, said person was not engaged in the U.S. Military at the time of service

STATEMENT OF SERVER

TRAVEL \$ _____

SERVICES \$ _____

TOTAL \$ _____

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in this Return of Service and Statement of Server is true and correct.

DATE: 8/19/2015

 L.S.
SIGNATURE OF Steven Matarazzo
GUARANTEED SUBPOENA SERVICE, INC.
2009 MORRIS AVENUE
UNION, NJ 07083

ATTORNEY: AYTAN Y. BELLIN, ESQ.
PLAINTIFF: BAIS YAAKOV OF SPRING VALLEY, ON BEHALF OF ITSELF AND ALL OTHERS
DEFENDANT: SIMILARLY SITUATED
VENUE: HOUGHTON MIFFLIN HARCOURT PUBLISHER, INC., ET AL
DOCKET: DISTRICT
COMMENT: 7 13 CV 04577 KMK LMS