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December 5, 2013

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Notification of Ex Parte Presentation, CG Docket Nos. 02-278, 05-338

Dear Ms. Dortch:

On December 3, 2013, the following parties met with Maria Kirby and Daniel Alvarez, Legal Advisors to Chairman Wheeler; Kris Monteith, Acting Chief of the Consumer & Governmental Affairs Bureau; and Suzanne Tetreault, Deputy General Counsel, regarding several pending petitions seeking declaratory and other relief in connection with Section 64.1200(a)(4)(iv) of the Commission's rules: Anda, Inc., represented by Albert Paonessa, James Fenton, Ashlie Van Meter, and John Duff (by telephone) of the company and Matthew Murchison and the undersigned of Latham & Watkins LLP; Douglas Walburg, represented by Samuel Feder and Leah Tulin of Jenner & Block LLP, and Timothy Wolf of Brown & James PC; Richie Enterprises, LLC, represented by Dawn Boyter of the company and Mr. Feder, Ms. Tulin, and Mr. Wolf; Forest Pharmaceuticals, Inc., represented by Ryan Coletti of the company and Yaron Dori and Michael Beder of Covington & Burling LLP; Gilead Sciences, Inc., represented by Christopher Golis of the company (by telephone) and Messrs. Dori and Beder; Staples, Inc., represented by Helgi Walker of Gibson, Dunn & Crutcher LLP and Thomas McCarthy of Wiley Rein LLP, and Quill Corp., represented by Ms. Walker and Mr. McCarthy.

We explained that each party represented at the meeting is a defendant in putative class action lawsuits seeking multi-millions of dollars in statutory damages premised on alleged violations of Section 64.1200(a)(4)(iv). These lawsuits allege that the companies transmitted faxes to their customers or potential customers with the recipients' express consent, but allegedly without an opt-out notice that complies with the requirements of Section 64.1200(a)(4). And these lawsuits uniformly seek statutory damages under 47 U.S.C. § 227(b)(3), which authorizes a private right of action for violations of Section 227(b) and the regulations "prescribed"

thereunder.¹ If certified and resolved in favor of the plaintiffs, these cases could result in damages in the millions, tens of millions, or even hundreds of millions of dollars, amounts that could cripple or even bankrupt some of the defendant companies. We thus urged the Commission to clarify that such claims cannot give rise to a private right of action under Section 227(b)(3). The Commission should do so in response to Anda's Application for Review of the Bureau order dismissing Anda's November 2010 Petition for Declaratory Ruling,² as well as in response to the more recent petitions filed by the other parties attending the meeting.³

In support of such declaratory and other relief, we argued that Section 227(b) of the Act, which imposes various restrictions on senders of *unsolicited* faxes, could not support a rule regulating *solicited* faxes. We explained that not only does a straightforward reading of Section 227(b) support the positions of the parties, but that a contrary ruling would run afoul of the First Amendment. Construing the statute to require senders of solicited faxes to include a mandatory opt-out notice and to expose such entities to unlimited liability for any failures to comply would raise grave constitutional concerns, because (1) there is no legitimate governmental interest in interfering with consensual communications between businesses and customers that expressly request information via fax, and (2) allowing class action lawsuits that could result in tens or hundreds of millions of dollars in damages for consensual communications would severely burden speech in a manner that is grossly disproportionate to whatever interest assertedly underlies the rule. We noted that, whereas courts have upheld Section 227's requirements for *unsolicited* faxes against First Amendment challenges based on the finding that the government has a "substantial interest in . . . prevent[ing] the cost shifting and interference such *unwanted* advertising places on the recipient," and because advertisers remained free to "obtain consent for

¹ 47 U.S.C. § 227(b)(3) (authorizing a private right of action only to the extent "based on a violation of this subsection or the regulations prescribed under this subsection").

² See *Junk Fax Prevention Act; Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent*, Order, 27 FCC Rcd 4912 (CGB 2012); see also Anda, Inc. Petition for Declaratory Ruling, CG Docket No. 05-338 (filed Nov. 30, 2010) ("Anda Petition"); Anda, Inc. Application for Review, CG Docket No. 05-338 (filed May 14, 2012).

³ See Forest Pharmaceuticals Petition for Declaratory Ruling and/or Waiver, CG Docket No. 05-338 (filed June 27, 2013) ("Forest Petition"); Petition of Staples, Inc. and Quill Corp. for Rulemaking and Declaratory Ruling, CG Docket Nos. 02-278, 05-338 (filed July 19, 2013) ("Staples/Quill Petition"); Gilead Sciences Petition for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278, 05-338 (filed Aug. 9, 2013) ("Gilead Petition"); Petition of Douglas Paul Walburg and Richie Enterprises, LLC, for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278, 05-338 (filed Aug. 19, 2013) ("Walburg/Richie Petition"); Petition of Futuredontics, Inc. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278, 05-338 (filed Oct. 18, 2013) ("Futuredontics Petition"); Petition of All Granite and Marble Corp. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278, 05-338 (filed Oct. 28, 2013) ("All Granite and Marble Petition").

their faxes,”⁴ these justifications vanish where the recipient *has* provided express consent to receive information via fax.⁵

As explained in the parties’ petitions, the Commission has several options for providing relief from the abusive class action lawsuits premised on Section 64.1200(a)(4)(iv) of its rules.

First, in light of the absence of statutory authority under Section 227 and the serious First Amendment problems associated with the imposition of penalties for violations of Section 64.1200(a)(4)(iv), the Commission should consider declaring that the rule was *ultra vires* when adopted and cannot be enforced by the courts or the Commission. Notably, the Commission on its own initiative has invalidated certain obligations as inconsistent with the First Amendment, such as when it abandoned the Fairness Doctrine,⁶ and there is no reason it cannot do so here.

Second, the Commission could determine that although Section 64.1200(a)(4)(iv) could not have been prescribed under Section 227(b) of the Act, it was validly adopted pursuant to some other grant of authority, such as Section 4(i) or 303(r) of the Act.⁷ As a result, the rule would remain enforceable by the Commission but would not give rise to liability for damages through private civil actions.

Third, the Commission could interpret Section 64.1200(a)(4)(iv) to apply only to unsolicited faxes. Such a ruling would reflect the fact that the text of the rule and the order adopting it are unclear regarding the provision’s scope, and that excluding solicited faxes best

⁴ *Missouri v. AM Blast Fax*, 323 F.3d 649, 655, 659 (8th Cir. 2003) (emphasis added); *see also Destination Ventures v. FCC*, 46 F.3d 54, 56, 57 (9th Cir. 1995) (articulating “the government’s substantial interest in preventing the shifting of advertising costs to consumers” and finding that “*unsolicited* fax advertisements shift significant advertising costs to consumers”) (emphasis added).

⁵ We also explained that Section 64.1200(a)(4) was not promulgated in a manner consistent with the Administrative Procedure Act because the Commission’s Notice of Proposed Rulemaking never even mentioned, much less solicited comment on, extending the opt-out notice requirement to fax advertisements sent with the recipient’s express permission. *See generally Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, Notice of Proposed Rulemaking and Order, 20 FCC Rcd 19758 (2005). Accordingly, regulated entities could not have known in 2006 that they might potentially be subject to class-action lawsuits for failure to include opt-out notices in purely consensual fax communications.

⁶ *Inquiry into Alternatives to the General Fairness Obligations of Broadcast Licensees*, Report, 102 FCC 2d 145 (1985), *aff’d*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

⁷ *See* Anda Petition at 14-15; *see also* Walburg/Richie Petition at 12-13; Forest Petition at 15; Gilead Petition at 15; Futuredontics Petition at 11-13; All Granite and Marble Petition at 9.

comports with the text and legislative history of the Telephone Consumer Protection Act, and would avoid violating the First Amendment.⁸

Fourth, if the Commission declines to grant declaratory relief along the lines suggested above, it should issue retroactive waivers of Section 64.1200(a)(4)(iv) for fax advertisements for which the sender obtained prior express consent, dating back to the effective date of the rule.⁹

Finally, in addition to (but not in lieu of) granting such retrospective relief, the Commission should consider adopting a Notice of Proposed Rulemaking proposing a prospective repeal of Section 64.1200(a)(4)(iv).¹⁰ The Commission has repealed its rules on other occasions, and it would be appropriate to do so here given the view that it lacked authority to promulgate the rule in the first place. Although such a repeal would not ameliorate the threat of unwarranted liability for violations of the rule alleged in pending class actions, it would appropriately reflect the absence of any congressional directive to regulate *solicited* fax communications.

Although the parties urged the Commission to grant one or more forms of relief, as outlined above, we argued that any order denying relief should squarely address the merits of the petitioners' statutory and constitutional arguments, rather than sidestepping the merits as occurred in the Bureau order dismissing Anda's Petition for Declaratory Ruling. Indeed, given that the Commission successfully argued before the Eighth Circuit Court of Appeals that the Commission alone has jurisdiction to initially adjudicate the statutory authority and constitutional questions presented by the pending petitions,¹¹ it would not only be grossly unfair but unlawful for the Commission now to refuse to address the merits of those issues. The Eighth Circuit's explicit statement that it would be "questionable" to conclude that Section 64.1200(a)(4)(iv) was validly prescribed under Section 227(b) would make it arbitrary and capricious for the Commission to endorse the conclusion that Anda and the other petitioners have

⁸ See Walburg/Richie Petition at 7-12.

⁹ See *id.* at 13 & n.37 (citing *United Telephone Co. of Kansas et al.*, Order, 25 FCC Rcd 1648, 1650, ¶ 5 (2010) (retroactive waiver may be issued as long as prior effective date of the waiver is specified); *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order on Reconsideration, 20 FCC Rcd 5433 (2005)). Under certain circumstances, where some form of opt-out notice has been provided, the Commission separately could find that the notice substantially complied with the Commission's rules and thus cannot form the basis for a private right of action. See Forest Petition at 7-12; Gilead Petition at 7-12.

¹⁰ See Staples/Quill Petition at 7-16.

¹¹ See Amicus Br. for the Federal Communications Commission Urging Reversal, *Nack v. Walburg*, No. 11-1460 (8th Cir. Feb. 24, 2012); Supplemental Amicus Brief for the Federal Communications Commission Urging Reversal, *Nack v. Walburg*, No. 11-1460 (8th Cir. Aug. 21, 2012); *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013) (agreeing with the Commission that the Hobbs Act precludes defendants in civil actions from challenging the validity of Section 64.1200(a)(4)(iv), whether facially or as applied in the District Court) (petition for certiorari pending).

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failed to identify any legitimate uncertainty or controversy that requires resolution. Bedrock due process principles require that such parties be able to assert defenses to alleged violations of a rule that can give rise to crushing liability—if not in the trial courts where such allegations have been raised, then at least before the agency that asserts the exclusive power to first adjudicate the merits of all statutory and constitutional defenses.

Please contact the undersigned if you have any questions regarding these issues.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill
Counsel for Anda, Inc.

cc: Daniel Alvarez
Maria Kirby
Kris Monteith
Suzanne Tetreault