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Executive Summary

Purdue Pharma L.P., Purdue Pharma Inc., and Purdue Products L.P. (collectively, “Purdue”), respectfully request that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of the Commission’s rules — which purports to impose detailed opt-out notice requirements on faxes transmitted pursuant to the recipient’s prior express invitation or permission — was not promulgated pursuant to Section 227(b) of the Communications Act. The plain language and scope of Section 227(b) is expressly limited to *unsolicited* faxes, which the statute expressly defines to *exclude* solicited faxes. Thus, no regulation adopted under Section 227(b) properly could extend to solicited faxes.

Should the Commission decline to issue such a ruling, the Commission at least should clarify that a fax that (1) is transmitted pursuant to the prior express invitation or permission of a fax recipient, (2) is related to ongoing interactions that form the basis of an established business relationship between the sender and the fax recipient, and (3) includes an effective opt-out notice on the first page of the fax, does not violate any Commission regulation promulgated pursuant to Section 227(b)(2)(D) or another provision of the Communications Act.

Faxes meeting these criteria fulfill the purposes of the TCPA: protecting consumers and businesses from unsolicited faxes and ensuring that fax advertisers provide effective opt-out mechanisms. Punishing entities that have sent solicited faxes to parties with whom they have established business relationships does nothing to protect consumers while exposing legitimate enterprises who acted in good faith to potentially staggering levels of statutory damages. In the absence of such a ruling, Purdue respectfully requests that the Commission grant Purdue a waiver of Sections 64.1200(a)(4)(iii) and (iv) with respect to faxes that have been transmitted by or on behalf of Purdue under the above-described circumstances.

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

In the Matter of)	
)	
Petition for Declaratory Ruling Regarding the Statutory Basis for the Commission’s Opt-Out Notice Rule with Respect to Solicited Faxes, and/or Regarding Substantial Compliance with Section 64.1200(a)(4)(iii) and (iv) of the Commission’s Rules)	CG Docket No. 02-278
)	
)	CG Docket No. 05-338
)	
)	

PETITION FOR DECLARATORY RULING AND/OR WAIVER

Pursuant to Section 1.2 of the Commission’s rules, Purdue Pharma L.P., Purdue Pharma Inc., and Purdue Products L.P. (collectively, “Purdue”), respectfully request that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of the Commission’s rules — which purports to impose detailed opt-out notice requirements on faxes transmitted pursuant to the recipient’s prior express invitation or permission — was not promulgated pursuant to Section 227(b) of the Communications Act. The plain language and scope of Section 227(b) is expressly limited to *unsolicited* faxes, which the statute expressly defines to *exclude* solicited faxes. Thus, no regulation adopted under Section 227(b) properly could extend to solicited faxes.

Should the Commission decline to clarify the statutory basis for its rule as described above, the Commission should issue a declaratory ruling clarifying that a fax that (1) is transmitted pursuant to the prior express invitation or permission of a fax recipient, (2) is related to ongoing interactions that form the basis of an established business relationship between the sender and the fax recipient, and (3) includes an effective opt-out notice on the first page of the fax, does not violate any Commission regulation promulgated pursuant to Section 227(b)(2)(D) or another provision of the Communications Act. In the absence of such a ruling, Purdue

respectfully requests that, pursuant to Section 1.3 of the Commission’s rules, the Commission grant Purdue a waiver of Sections 64.1200(a)(4)(iii) and (iv) with respect to faxes that have been transmitted by or on behalf of Purdue under the above-described circumstances.

Introduction & Background

The Growth of Abusive TCPA Litigation

Congress enacted the commercial fax provisions of the Telephone Consumer Protection Act of 1991,¹ as amended by the Junk Fax Prevention Act of 2005² (together, the “TCPA”), to afford protection against the nuisance and expense of unsolicited advertisements cluttering fax machines. The TCPA was not intended to become a vehicle for parties (or their counsel) to cash in on faxes the recipients themselves consented to receive. However, as demonstrated by the growing number of petitions seeking relief in this docket,³ the Commission’s TCPA regulations — as they purportedly apply to solicited faxes — have spawned a cottage industry specializing in precisely that form of abusive litigation.

It is imperative that the Commission grant the relief requested herein. In recent years, plaintiffs’ attorneys have filed a countless number of putative class action lawsuits against

¹ Pub. L. No. 102-243, 105 Stat. 2394, § 3(a) (1991), *codified at* 47 U.S.C. § 227.

² Pub. L. No. 109-21, 119 Stat. 359 (2005), *codified at* 47 U.S.C. § 227.

³ *See, e.g.*, Petition of All Granite & Marble Corp. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver, CG Docket Nos. 02-278 & 05-338 (filed Oct. 28, 2013); Petition of Douglas Paul Walburg and Richie Enterprises, LLC for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver, CG Docket Nos. 02-278 & 05-338 (filed Aug. 19, 2013); Petition for Declaratory Ruling and/or Waiver of Gilead Sciences, Inc., and Gilead Palo Alto, Inc., CG Docket Nos. 02-278 & 05-338 (filed Aug. 1, 2013); Forest Pharmaceuticals, Inc., Petition for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed June 27, 2013); 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, Application for Review, CG Docket No. 05-338 (filed May 14, 2012).

companies such as Purdue for alleged violations of the TCPA’s fax provisions and related Commission regulations. It is not uncommon for plaintiffs to seek millions of dollars or more in statutory damages for these alleged violations.

This abuse of the TCPA’s fax provisions is vividly illustrated by a lawsuit currently pending against Purdue in the U.S. District Court for the District of Connecticut.⁴ In that case, Purdue is a defendant in a putative class action lawsuit filed by Physicians Healthsource, Inc. (“PHI”), a serial TCPA plaintiff represented by a serial TCPA plaintiffs’ counsel.⁵ PHI’s initial complaint alleged that Purdue had violated the TCPA by sending PHI unsolicited fax advertisements. However, faced with uncontroverted evidence of consents provided by PHI fax recipients — and Purdue’s established business relationships with PHI physicians and other healthcare professionals — PHI abandoned those allegations and amended its Connecticut complaint to allege only that the opt-out notice Purdue included on the faxes at

⁴ *Physicians Healthsource, Inc. v. Purdue Pharma L.P., et al.*, No.: 3:12-cv-01208 (D. Conn. filed Aug. 17, 2012) (“*Purdue PHI Suit*”).

⁵ See, e.g., *Physicians Healthsource, Inc. v. Formedic Comms. Ltd.*, No. 3:12cv5087 (D.N.J., filed Aug. 13, 2012) (*hereinafter* plaintiff is referred to as “PHI” in case cites); *PHI v. Stryker Sales Corp.*, No. 1:12cv729 (W.D. Mich., filed July 16, 2012); *PHI v. Cephalon, Inc.*, No. 2:12cv3753 (E.D. Penn., filed July 3, 2012); *PHI v. A-S Med. Solutions, LLC*, No. 1:12cv5105 (N.D. Ill., removed to federal court June 26, 2012); *PHI v. Alma Lasers, Inc.*, No. 1:12cv4978 (N.D. Ill., removed to federal court June 22, 2012); *PHI v. Doctor Diabetic Supply, LLC*, No. 1:12cv22330 (S.D. Fla., filed June 22, 2012); *PHI v. Reliant Tech., Inc.*, No. 1:12cv2180 (N.D. Cal., filed May 1, 2012); *PHI v. Allscripts-Misy’s Healthcare Solutions, Inc.*, No. 1:12cv3233 (N.D. Ill., filed May 1, 2012); *PHI v. Anda, Inc.*, No. 0:12cv60798 (S.D. Fla. May 1, 2012); *PHI v. Janssen Pharma., Inc.*, No. 3:12cv2132 (D.N.J., filed Apr. 5, 2012). Since filing PHI’s complaint against Purdue, PHI’s class counsel Brian Wanca has again sued co-defendant The Peer Group, Inc., in Missouri. See *St. Louis Heart Ctr., Inc. v. Forest Pharmaceuticals, Inc.*, Case No. 4:12-CV-02224 (E.D. Mo.) (filed in state court on October 4, 2012, and subsequently removed on November 30, 2012). Forest Pharmaceuticals has filed a petition in this docket seeking relief similar to the relief requested in this Petition. See *supra* at n.3.

issue, however effective, was technically insufficient.⁶ In other words, even though faxes were transmitted with the prior invitation or permission of PHI health care providers, even though Purdue had a long-standing, documented, and well-established business relationship with these providers, and even though these faxes contained a clear opt-out notice on the first page, PHI asserts that the failure to include every technical detail described in Section 64.1200(a)(4)(iii) of the Commission’s rules entitles PHI — and every other recipient — to statutory damages of at least \$500 per fax. PHI’s argument is that any such deviations, no matter how minor, immaterial or technical, amount to cognizable “violations” of a Commission regulation prescribed under Section 227(b) of the Communications Act for the purpose of the private right of action set forth in Section 227(b)(3).⁷

PHI in no way resembles the sort of aggrieved consumer either Congress or the Commission sought to protect when they respectively enacted and implemented the TCPA. The windfall PHI seeks is absurd, contrary to public policy, and manifestly unjust. PHI’s argument converts an opt-out mechanism designed to shield recipients from unsolicited faxes into a sword

⁶ On November 26, 2013, PHI filed yet another putative class action suit, this time in the U.S. District Court for the Northern District of California, again alleging that Purdue and others transmitted unsolicited fax advertisements without the allegedly required opt-out notice. *See Physicians Healthsource, Inc. v. Transcept Pharma, Inc., et al.*, No.: 3:13-cv-05490 (N.D. Cal. filed Nov. 26, 2013). The California suit is based on a different set of faxes, sent in coordination with a different vendor, than the faxes at issue in the Connecticut litigation. Purdue currently is assessing the facts alleged by PHI’s California complaint. However, these allegations are irrelevant to the principal ruling sought by this Petition.

⁷ 47 U.S.C. § 227(b)(3) (“A person or entity may . . . bring in an appropriate court of that State— (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to . . . receive \$500 in damages for each such violation . . . , or (C) both such actions”). Section 227(b)(3) goes on to state that “[i]f the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award” available under Section 227(b)(3)(B) by three times, so up to \$1,500 for each violation.

allowing savvy recipients of solicited faxes to extract massive damages on the basis of nonexistent injuries.

Administrative Relief

Through this Petition, Purdue seeks administrative relief from the Commission to ensure that the District Court — and, if necessary, the Second Circuit or another appropriate appeals court — can decide the merits of Purdue’s defense. Purdue also has asked the District Court to stay PHI’s case against Purdue pending final merits disposition, including any appeal, of this Petition.⁸

This approach comports with the protocol set forth by the Eighth Circuit in a similar case, *Nack v. Walburg*.⁹ In that case, the defendant transmitted to the plaintiff a single *solicited* fax that did not contain opt-out language that the plaintiff claimed was prescribed by the Commission’s regulations.¹⁰ The defendant argued that the opt-out requirement set forth in the Commission’s rules applied only to *unsolicited* faxes based on the plain language of the authorizing statute, the TCPA.¹¹ The trial court agreed, interpreting the regulation as not covering solicited faxes, and granted the defendant summary judgment.¹² The Eighth Circuit, for its part, was skeptical that the Commission possessed the authority to prescribe an opt-out requirement for solicited faxes, but it ultimately reversed the trial court because it determined

⁸ *Purdue PHI Suit*, Motion to Stay (D. Conn. filed Nov. 26, 2013).

⁹ *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013), *petition for cert. filed*, Oct. 17, 2013 (No. 13-486).

¹⁰ *Nack*, 715 F.3d at 682.

¹¹ *Id.*

¹² *Nack v. Walburg*, 2011 WL 310249, at *5 (E.D. Mo. Jan. 28, 2011), *rev’d and remanded*, 715 F.3d 680 (8th Cir. 2013).

that the Administrative Orders Review Act (“Hobbs Act”)¹³ limited its ability to rule on the merits of the defendant’s position.¹⁴ But the Eighth Circuit also appeared to recognize that this outcome placed the defendant in an untenable position, and thus suggested that the more appropriate course for securing a merits ruling on this question would be to first seek an administrative ruling from the Commission and then, if necessary, seek judicial review of that ruling on the merits.¹⁵

Purdue has argued — and maintains — that the Eighth Circuit’s Hobbs Act analysis — which has yet to be adopted by the Second Circuit, where PHI’s Connecticut litigation against Purdue is pending — was incorrect, and that a District Court adjudicating a private suit for money damages has full jurisdiction to decide the purely legal question of whether the Commission’s attempted regulation of solicited faxes falls within the class of claims for which the TCPA creates a private right of action. Nonetheless, given that both PHI and the Commission have asserted that parties such as Purdue must seek relief from the Commission in the first instance, Purdue files the instant Petition in order to eliminate any doubts as to Purdue’s entitlement to a ruling on the merits, either by the Commission or by the courts.

Section 227(b) addresses only “unsolicited advertisements,” which are defined by the plain language of the statute to *exclude* faxes that are transmitted with a person’s “prior express invitation or permission, in writing or otherwise.” 47 U.S.C. § 227(a)(5). Nowhere does Section 227(b) regulate the transmission of *solicited* faxes or confer that authority on the Commission. Although Sections 227(b)(1)(C) and (2)(D) of the Communications Act together

¹³ 28 U.S.C. § 2342 *et seq.*

¹⁴ *Nack*, 715 F.3d at 682.

¹⁵ *Id.* at 687.

prescribe what information must be included in an opt-out notice on the first page of an *unsolicited* fax, they impose no similar requirement for *solicited* faxes. Accordingly, Purdue respectfully requests that the Commission issue a declaratory ruling to clarify on the basis of the plain language of the TCPA that the Commission's regulations regarding *solicited* faxes cannot and do not rely on the TCPA for their statutory authority. The Commission has had an opportunity to make this finding in the past, but thus far has refused to address its merits. Due process, sound public policy, and a commitment to reasoned decision making require the Commission to address this issue squarely and promptly. The Commission should exercise its declaratory ruling authority to relieve Purdue and similarly situated defendants of the costs of defending themselves against this abusive litigation. At a minimum, the Commission must allow these companies to present a meaningful defense on the merits, both to the Commission and, if necessary, to the courts.

Even if the Commission maintains that it has authority under Section 227(b) to impose opt-out notice obligations on solicited faxes, the statutory language forecloses any argument that such requirements are *mandated* by the statute. Consequently, assuming the Commission has any authority to adopt solicited-fax requirements on its own initiative, it necessarily also must possess the authority to conclude that an opt-out notice on the first page of a *solicited* fax that is in substantial compliance with the requirements of Section 64.1200(a)(4)(iii) does not violate a Commission regulation promulgated pursuant to Section 227(b)(2)(D) or another provision of the Communications Act. This Petition asks the Commission to also make this finding — either in the form of a declaratory ruling or waiver — based on the facts and circumstances described herein.

Argument

I. The Commission Should Clarify that the Requirements It Imposed on Solicited Faxes Were Not, and Could Not Have Been, Promulgated Under Section 227(b) of the Communications Act.

The Commission should clarify that its rule requiring solicited faxes to include the same opt-out notice as unsolicited faxes was not promulgated under Section 227(b) of the Communications Act. Imposing an opt-out notice requirement on consensual communications between fax senders and recipients raises serious First Amendment concerns. In addition, assessing massive statutory damages based on alleged technical deficiencies in such notices, under circumstances where the recipient has expressly invited or consented to the fax, raises substantial Due Process concerns. In any case, even if an opt-out notice requirement could in theory be imposed on solicited faxes consistent with these Constitutional principles, such a requirement exceeds any authority granted to the Commission under Section 227(b).

Section 227(b)(1) of the Communications Act makes it unlawful for any person “to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an *unsolicited advertisement*” unless certain requirements are met, including that the sender has an established business relationship with the recipient and the fax displays an opt-out notice meeting the statutory criteria.¹⁶ The Act explicitly defines an “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person *without that person’s prior express invitation or permission*, in writing or otherwise.”¹⁷ By its terms, then, the statutory

¹⁶ 47 U.S.C. § 227(b)(1)(C) (emphasis added).

¹⁷ § 227(a)(5) (emphasis added).

restrictions — including the opt-out-notice requirement — do not apply to any faxes sent *with* the recipient’s prior express invitation or permission.

Yet Section 64.1200(a)(4)(iv) of the Commissions’ rules purports to impose an opt-out notice requirement on any fax advertisement “that is sent to a recipient that has provided prior express invitation or permission.”¹⁸ The order adopting this rule offered inconsistent explanations of the rule’s scope, stating first that “the opt-out notice requirement only applies to communications that constitute *unsolicited advertisements*,”¹⁹ while later making the contradictory assertion that “entities that send facsimile advertisements to consumers *from whom they obtained permission*[] must include on the advertisements their opt-out notice and contact information.”²⁰ Though the former explanation is more consistent with the TCPA’s text and legislative history, the Commission since has taken the position that the rule does indeed require opt-out notices on solicited faxes.

It is at best questionable whether Congress or the Commission could validly impose such a requirement on solicited faxes consistent with the First Amendment. It is well established that in order to burden truthful commercial speech, the government must show its proposed restrictions serve “a substantial interest,” that the restrictions “directly advance the state interest involved,” and that the asserted interest could not “be served as well by a more limited restriction on commercial speech.”²¹ It is difficult to imagine that the detailed opt-out notice required on *unsolicited* faxes would pass muster under this standard as the most limited

¹⁸ 47 C.F.R. § 64.1200(a)(4)(iv).

¹⁹ *Junk Fax Order*, 21 FCC Rcd at 3810 n.154 (emphasis added).

²⁰ *Id.* at 3812 (emphasis added).

²¹ *Central Hudson Gas & Elec. Corp. v. Public Servo Comm’n*, 447 U.S. 557, 564 (1980)

means available to address any substantial state interest in regulating *solicited* faxes. Indeed, the Eighth Circuit recently expressed skepticism over precisely this point in *Nack*. The court noted that, although it previously found “the TCPA provisions regarding unsolicited fax advertisements were not an unconstitutional restriction upon commercial speech” under the *Central Hudson* test, that analysis and conclusion “would not necessarily be the same if applied to the agency’s extension of authority over solicited advertisements.”²²

Faxes sent pursuant to the recipient’s express permission or invitation certainly implicate no state interest in “protecting the public from the cost shifting and interference caused by *unwanted* fax advertisements,”²³ and the Commission has never identified any other state interest sufficient to justify regulations dictating the contents of consensual communications between commercial entities. Moreover, applying these detailed opt-out requirements to solicited faxes between entities with an established business relationship, particularly under circumstances where the recipient clearly knows how to submit an effective opt-out request, would be sufficiently arbitrary and capricious so as to raise serious due process concerns under the Fifth Amendment. These due process concerns are amplified if the rules governing solicited faxes under such circumstances purportedly were promulgated under a statutory authority that could expose fax senders to excessive statutory damages that are radically disproportionate to the *de minimis* actual damages, if any, sustained by recipients.²⁴

²² *Nack*, 715 F.3d at 687 (declining to consider constitutional challenge raised for the first time on appeal).

²³ *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 660 (2003) (emphasis added).

²⁴ *See, e.g., Sony BMG Music Entm't v. Tenenbaum*, 719 F.3d 67, 70, 71 (1st Cir. 2013) (statutory damage award may violate due process “where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable” in light (continued...))

However, even assuming that imposing an opt-out notice requirement on solicited faxes could be constitutional in the abstract, the scope of Commission rules adopted pursuant to a statutory provision cannot be broader than the authority conferred by the statute itself.²⁵ Section 227 of the Act expressly excludes solicited faxes from its scope. Thus, if the Commission had authority to regulate the opt-out notices provided on solicited faxes, such authority must derive from some statutory provision *other than* Section 227(b). If that is the case, then alleged violations of the Commission’s rules governing solicited faxes cannot be the basis for a private suit brought under the TCPA.²⁶ The Commission therefore should issue a declaratory ruling clarifying that the statutory provision the Commission relied on in promulgating Section 64.1200(a)(4)(iv) of its rules was *not* Section 227(b) of the Communications Act.

The Consumer & Governmental Affairs Bureau failed to address the legitimate controversy at issue here when it dismissed a petition seeking precisely this clarification. The Bureau concluded that there was “no issue of controversy or uncertainty” because “[t]he *Junk Fax Order* cited the statutory provisions, including section 227 of the Act, that provide the

of “the purpose of statutory damages under” the relevant statute); *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (in “sufficiently serious case,” potential statutory damages may be “so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages” imposed on the basis of strict liability, triggering due process concerns).

²⁵ See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (“The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.”); *Am. Library Ass’n. v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005) (“It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.”).

²⁶ See 47 U.S.C. § 227(b)(3).

Commission authority for the rules adopted in that Order.”²⁷ But the Bureau’s answer — which is under review by the full Commission — evaded the point of the question before it.²⁸ The paragraph of the *Junk Fax Order* the Bureau referred to cited 11 separate statutory provisions — including Section 227 — as authority for the rules adopted in the *Order*. The *Junk Fax Order* never stated that *every* specific rule adopted in the *Order* was adopted under the authority of *every* provision cited at the end of the *Order*, or even that *every* rule was adopted under the authority of Section 227. If the Commission believes either of those propositions to be the case, it should say so clearly and be willing to defend that view before a reviewing court.²⁹

Whatever the Commission’s ultimate determination on the merits, it is demonstrably incorrect that the question is free of controversy or uncertainty. In its recent opinion addressing precisely this question in *Nack*, the Eighth Circuit concluded that it is “questionable whether the regulation at issue [as interpreted by the FCC] properly could have

²⁷ *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, CG Docket No. 05-338, DA 12-697, at ¶ 5 (CG May 2, 2005) (citing *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, 3788 at ¶ 64 (2006)).

²⁸ *See 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, CG Docket No. 05-338, Application for Review, filed May 14, 2012.

²⁹ The Eighth Circuit’s recent panel decision in *Nack* held that the Hobbs Act generally precludes a civil defendant from mounting “a defense that a private enforcement action is based upon an invalid agency order” except by presenting its argument for an administrative determination by the agency and, if necessary, judicial review of that determination pursuant to the Hobbs Act. *Nack*, 715 F.3d at 685-86. If that holding is correct, it only underscores the Commission’s obligation to address Purdue’s petition on the merits.

been promulgated under the statutory section that authorizes a private cause of action.”³⁰ At most, the court concluded, the Commission’s rationale for these regulations only “arguably brings the regulation within range of what § 227(b) authorized the FCC to regulate.”³¹ The Eighth Circuit concluded that under the circumstances it would not be “possible or prudent for our court to resolve this issue without the benefit of full participation by the agency,” while specifically noting that the District Court on remand “may entertain any requests to stay proceedings for pursuit of administrative determination of the issues raised herein.”³² Purdue brings this Petition to seek precisely such an administrative determination.

II. The Commission Should Confirm that Substantially Compliant Opt-Out Notices on Solicited Faxes Satisfy Sections 64.1200(a)(4)(iii) and (iv) of the Commission’s Rules.

Even if the Commission maintains that it has authority under Section 227(b) to regulate solicited faxes, the Commission should recognize that strict compliance with the notice requirements specified for *unsolicited* faxes is not necessary for faxes expressly invited or consented to by the recipient, particularly where the sender and recipient have an established business relationship. When Congress enacted the TCPA, one of its purposes was to establish restrictions on the use of fax machines to transmit “unsolicited advertisements” — that is, “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in

³⁰ *Nack*, 715 F.3d at 682.

³¹ *Id.* at 687.

³² *Id.* The District Court subsequently granted Forest’s request to stay its case pending the resolution of Forest’s pending petition in this docket. *See St. Louis Heart Ctr., Inc. v. Forest Pharm., Inc.*, No. 4:12cv2224, 2013 WL 3988671, at * 1 (E.D. Mo. July 17, 2013).

writing or otherwise.”³³ Among other topics, Section 64.1200 of the Commission’s rules sets out various requirements for companies that transmit unsolicited faxes, including authority to transmit unsolicited faxes to parties with whom the sender has an established business relationship, provided the faxes include an opt-out notice and comply with other requirements.³⁴

The Purdue faxes at issue in the Connecticut litigation are far different from the unsolicited advertisements Congress sought to restrict. In the first place, the faxes at issue are invitations to educational interactive web conferences, co-sponsored by Purdue, featuring “a clinical presentation and discussion with your peers on considerations in the appropriate use of a long-acting opioid in the management of moderate to severe pain.” Nothing on the face of the faxes promotes the commercial availability or quality of any good or service; nor do the faxes contain the name of any commercially available product.

Assuming *arguendo* that these faxes constituted “advertisements,” even PHI has (belatedly) dropped its claim that these faxes were “unsolicited.” The Peer Group, Inc. (“Peer”) co-sponsored the programs, maintained the contact database, secured recipients’ consent, managed contact and opt-out preferences, and faxed the invitations. The faxes referenced in the complaint were sent to physicians or other health care professionals who had provided a fax number — on an individual basis — to Purdue or Peer.³⁵

As noted above, Purdue had a well-established business relationship with PHI health care providers. Purdue’s sales representatives frequently called and visited PHI’s health

³³ 47 U.S.C. § 227(a)(5).

³⁴ 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(4)

³⁵ *Purdue PHI Suit*, Defendants’ Local Rule 56(a)1 Statement, at 2 (D. Conn. filed Oct. 22, 2012).

care providers, both before and after the faxes at issue in PHI's complaint were transmitted.³⁶ As part of the normal course of its business, Purdue maintains records related to those contacts, and those records show that Purdue's sales representatives visited or spoke with PHI health care providers hundreds of times during the relevant period.³⁷ On several occasions, PHI health care providers attended Purdue-hosted lunches held at PHI and expressed interest in other Purdue-sponsored educational programs.³⁸ These repeated interactions demonstrate that PHI and its health care providers had an established business relationship with Purdue, including in relation to the subject of the faxes referenced in the complaint, and knew how to reach Purdue if they wanted Purdue to stop sending faxes.

The *solicited* faxes Purdue sent that are being challenged in the Connecticut litigation satisfied or were in substantial compliance with the Commission's rules governing unsolicited faxes. As discussed above, PHI consented to receive faxes from Purdue and Peer and voluntarily provided its fax number. PHI had an established business relationship with Purdue,³⁹ and each fax also contained a clear and conspicuous opt-out notice on the first page with all the necessary information to effect a cost-free opt-out.⁴⁰ Specifically, the notice stated: "If you do not wish to be contacted with future fax offers from The Peer Group, please call 888-733-7321

³⁶ See *Purdue PHI Suit*, Supplemental Filing In Support Of Defendants' Motion For Summary Judgment, at 2-6 (D. Conn. filed Jan. 22, 2013); *Purdue PHI Suit*, First Amended Class Action Complaint, at 3 (D. Conn. filed Feb. 8, 2013).

³⁷ *Purdue PHI Suit*, Supplemental Filing In Support Of Defendants' Motion For Summary Judgment, at 2-6

³⁸ *Id.*

³⁹ See 47 C.F.R. § 64.1200(a)(4)(i), (ii)(A).

⁴⁰ See § 64.1200(a)(4)(iii).

or fax at 800-929-8290.” Both opt-out numbers were cost-free and available 24 hours a day, 7 days a week.⁴¹

Despite these facts, PHI persists in claiming that the subject faxes were unlawful because the opt-out notice on the first page of each fax did not specify that opt-out requests must be honored within 30 days or set forth the specific information recipients would need to provide when submitting opt-out requests.⁴² However, in Purdue’s case it is clear that any such deviations were immaterial. There is no question PHI was well aware of how to submit an opt-out request, and PHI has never even alleged that that it asked to opt out of receiving the faxes or that it did not know how to opt out.

In the absence of the broader declaratory ruling requested herein, the Commission should at least clarify that a fax sent pursuant to the recipient’s prior express invitation or permission, by a sender with whom the recipient had an established business relationship, and that includes a demonstrably effective opt-out notice on the first page of the fax, complies substantially with 47 C.F.R. § 64.1200, whether or not the opt-out notice is in perfect conformity with the opt-out notice required for *unsolicited* faxes. This would not require a novel undertaking. The Commission itself recognized in the *Junk Fax Order* that it was unnecessary to specify minutiae such as “the font type, size and wording of the notice,” and that doing so “might interfere with fax senders’ ability to design notices that serve their customers.”⁴³ In other

⁴¹ See § 64.1200(a)(4)(iii)(D)(2), (E).

⁴² See § 64.1200(a)(4)(iii)(B), (C).

⁴³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket No. 02-278 *et al.*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3801 (2006) (“*Junk Fax Order*”). Cf. *Facilitating the Deployment of Text-to-911 & Other Next Generation 911 Applications*, PS Docket No. 11-153 *et al.*, Report and Order, 28 (continued...)

contexts, the Commission has recognized that “absolute compliance with each component of the rules may not always be necessary to fulfill the purposes of the statute.”⁴⁴ Here, the opt-out notice provided in the faxes that are the subject of the Connecticut litigation fulfilled the purposes of the TCPA: protecting consumers and businesses from unsolicited faxes and ensuring that fax advertisers provide effective opt-out mechanisms. In this case, requiring “absolute compliance with each component of the rules” — to the extent the opt-out notice rules even require inclusion of the technical details as PHI alleges — does nothing to protect consumers; instead, such a rigid interpretation exposes legitimate enterprises who acted in good faith to potentially staggering levels of statutory damages based on minor technical faults.

In the alternative, PHI asks the Commission to waive strict compliance with Sections 64.1200(a)(4)(iii) and (iv) with respect to the faxes in question, pursuant to the Commission’s authority under Section 1.3 of its rules.⁴⁵ The Commission may waive any

FCC Rcd 7556, 7581 (2013) (declining to require specific wording in text providers’ bounce-back messages informing consumers when text-to-911 is not available, in order to “afford[] covered text providers with the necessary guidance and flexibility to create bounce-back messages that are understood by their particular consumer base”); *Implementation of Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information et al.*, CG Docket No. 96-115 *et al.*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 F.C.C.R. 14860, 14907 (2002) (declining “to mandate specific language” carriers must use when describing consequences of customer’s denying carrier access to CPNI, based on conclusion that rules “provide carriers with sufficient guidance to formulate scripts that inform customers in a neutral manner of significant consequences, without unduly restricting carrier flexibility in delivering the message”).

⁴⁴ *Provision of Improved Telecommunications Relay Services and Speech-To-Speech Services for Individuals with Hearing and Speech Disabilities*, 20 FCC Rcd 5433, 5445 (2005) (internal quotations omitted) (noting a TRS provider may be eligible for TRS Fund reimbursement “if it has substantially complied with Section 64.604”).

⁴⁵ 47 C.F.R. § 1.3.

provision of its rules “for good cause shown”⁴⁶ when it concludes that a waiver would serve the public interest, considering all relevant factors.⁴⁷ For the reasons discussed above, a limited waiver with respect to the faxes described herein would serve the public interest by avoiding an abuse of the private right of action created by the TCPA. There is no public interest in subjecting Purdue to massive liability on the basis of faxes sent pursuant to the recipients’ prior express invitation or permission, by a sender with whom PHI had an established business relationship, each of which included a demonstrably effective opt-out notice on the first page describing cost-free opt-out mechanisms. It serves neither the statutory purposes nor the interests of justice to elevate form over substance by awarding a windfall to plaintiffs like PHI — and their attorneys — based on overwrought complaints about alleged minor technical defects.

In other contexts, the Commission has retroactively waived similarly minor violations of its rules. For instance, the Commission granted a conditional retroactive waiver to a manufacturer of improperly labeled emergency telephones for elevators, in part based on its conclusion that, under the circumstances, no harm to the Public Switched Telephone Network had occurred or was likely to occur, and affected purchasers “have actual knowledge of the manufacturer’s identity, and thus have not been harmed by the improper labeling.”⁴⁸ Similar logic supports the waiver requested here: the use of an effective opt-out notice on certain fax messages that were expressly invited or permitted by the recipient, with whom Purdue had an

⁴⁶ *Id.*

⁴⁷ See *Rath Microtech Complaint Regarding Electronic Micro Systems, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 16710, 16714 (Network Servs. Div. 2005) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and *FPC v. Texaco Inc.*, 377 U.S. 33, 39 (1964))

⁴⁸ *Rath Microtech Complaint*, 16 FCC Rcd at 16713 & n.18, 16715.

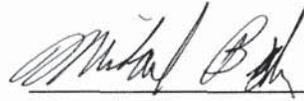
established business relationship, caused no harm to PHI or to the public interest. Given the draconian consequences that could attach to such minor failures under PHI's theory of the scope of the TCPA private right of action, there is good cause for the Commission to waive these defects to the extent the Commission does not find Purdue was in substantial compliance with Sections 64.1200(a)(4)(iii) and (iv) of the rules.

Conclusion

For the reasons stated above, the Commission should issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of the Commission's rules — which purports to impose detailed opt-out notice requirements on faxes transmitted pursuant to the recipient's prior express invitation or permission — was not promulgated pursuant to Section 227(b) of the Communications Act, because the plain language and scope of Section 227(b) is expressly limited to *unsolicited* faxes, which the statute expressly defines to *exclude* solicited faxes. If the Commission is unwilling to make such a ruling, the Commission should at a minimum clarify that a fax that (1) is transmitted pursuant to the prior express invitation or permission of a fax recipient, (2) is related to ongoing interactions that form the basis of an established business relationship between the sender and the fax recipient, and (3) includes an opt-out notice on the first page of the fax that complies substantially with Section 64.1200(a)(4)(iii) of the Commission's rules, does not violate a Commission regulation promulgated pursuant to Section 227(b)(2)(D) or another provision of the Communications Act. In the absence of such a ruling, the Commission should grant Purdue a waiver of Sections 64.1200(a)(4)(iii) and (iv) of the Commission's rules under the circumstances described herein.

Respectfully submitted,

PURDUE PHARMA L.P.,
PURDUE PHARMA INC., AND
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Dated: December 12, 2013

Its Attorneys

Declaration of Richard W. Silbert

I have read the foregoing Petition, and I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief, formed after reasonable inquiry.

Executed on December 12, 2013

A handwritten signature in blue ink, appearing to read "Richard W. Silbert", positioned above a horizontal line.

Richard W. Silbert
Vice President, Associate General Counsel
Purdue Pharma L.P.