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December 16, 2013

*Via ECFS*

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

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

Dear Ms. Dortch:

On December 12, 2013, the following parties met with Mark Stone, Deputy Chief of the Consumer & Governmental Affairs Bureau; Aaron Garza, Legal Advisor in the Office of the Chief of the Consumer & Governmental Affairs Bureau; Kurt Schroeder, Chief of the Consumer & Governmental Affairs Bureau's Consumer Policy Division; Nancy Stevenson, Deputy Chief of the Consumer Policy Division; and Richard Smith (by telephone), of the Consumer & Governmental Affairs Bureau, 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 Matthew A. Brill and Matthew Murchison of Latham & Watkins LLP; Douglas Walburg, Richie Enterprises, LLC, and Futuredontics, Inc., represented by Samuel Feder of Jenner & Block LLP; and Forest Pharmaceuticals, Inc., and Gilead Sciences, Inc., represented by the undersigned and Michael Beder of Covington & Burling LLP.

During the meeting, we explained the factual and legal underpinnings of the Petitions for Declaratory Ruling and other relief filed by the parties in the above-referenced proceedings. These Petitions ask the Commission to provide declaratory relief in connection with its regulation governing the inclusion of an opt-out notice in solicited faxes. We reiterated, among other things, that the plain text of Section 227(b) of the Act, which imposes various restrictions on senders of *unsolicited* faxes, could not support a rule regulating *solicited* faxes, and that any such rule purporting to impose meaningful liability on parties who fail to include detailed, mandatory opt-out notices on consensual communications would, among other things, be *ultra vires* and run afoul of the First Amendment.

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We also reviewed the various ways the Commission could provide the relief requested, which previously were described in an *ex parte* submission filed on behalf of the parties on December 5, 2013.<sup>1</sup> For example, the Commission could acknowledge in a declaratory ruling that the rule was *ultra vires* when adopted or, alternatively, could interpret the rule not to apply to solicited faxes. Another option would be for the Commission to declare that Section 64.1200(a)(4)(iv) was not “prescribed under” Section 227(b) and thus cannot give rise to a private right of action under Section 227(b)(3), but rather was adopted pursuant to one of the other statutory authorities cited in the adopting order, such as pursuant to the Commission’s ancillary authority under Section 4(i) of the Act.<sup>2</sup> We also suggested that, with respect to consensual faxes that included some meaningful form of opt-out notice, a retroactive waiver or a finding of substantial compliance with the opt-out notice rules would be appropriate.<sup>3</sup>

We emphasized, however, that, whatever approach the Commission chooses, it must act expeditiously and issue a ruling on the merits. The issues raised by the parties first were presented to the Commission more than three years ago, and each of the parties currently is defending itself in a lawsuit that requires this issue to be addressed by the Commission expeditiously.

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

Respectfully submitted,

*/s/ Yaron Dori*

Yaron Dori  
*Counsel for Forest Pharmaceuticals,  
Inc., and Gilead Sciences, Inc.*

cc: Mark Stone

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<sup>1</sup> See Letter from Matthew Brill, Counsel for Anda, Inc., to Marlene Dortch, FCC, CG Docket Nos. 02-278 and 05-338, filed Dec. 5, 2013.

<sup>2</sup> See Anda, Inc. Petition for Declaratory Ruling, CG Docket No. 05-338, at 14-15 (filed Nov. 30, 2010); see also Petition of Douglas Paul Walburg and Richie Enterprises, LLC, for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278, 05-338, at 12-13 (filed Aug. 19, 2013) (“Walburg/Richie Petition”); Forest Pharmaceuticals Petition for Declaratory Ruling and/or Waiver, CG Docket No. 05-338, at 15 (filed June 27, 2013) (“Forest Petition”); Gilead Sciences Petition for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278, 05-338, at 15 (filed Aug. 9, 2013) (“Gilead Petition”); Petition of Futuredontics, Inc. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278, 05-338, at 11-13 (filed Oct. 18, 2013).

<sup>3</sup> See Walburg/Richie Petition at 13 & n.37; Forest Petition at 7-12; Gilead Petition at 7-12.

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Richard Smith