

December 23, 2013

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FILED ELECTRONICALLY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

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

Dear Ms. Dortch:

On December 20, 2013, the following parties met with Acting General Counsel Jonathan Sallet and Suzanne Tetreault, Jacob Lewis, Diane Griffin Holland, and Marcus Maher of the Office of General Counsel: Anda, Inc., represented by Matthew A. Brill and Matthew Murchison of Latham & Watkins LLP; Forest Pharmaceuticals, Inc., Gilead Sciences, Inc., Purdue Pharma L.P., Purdue Pharma Inc., and Purdue Products L.P. represented by Yaron Dori and Michael Beder of Covington & Burling LLP; and Douglas Walburg, Richie Enterprises, LLC, and Futuredontics, Inc., represented by the undersigned.

During the meeting, we discussed the parties' petitions for declaratory ruling and other relief concerning application of 47 C.F.R. § 64.1200(a)(4)(iv) to solicited faxes. We reiterated, among other things, that the plain text of Section 227(b) of the Communications Act, which imposes various restrictions on senders of *unsolicited* faxes, could not support a rule regulating *solicited* faxes, and that any rule purporting to impose liability on parties who fail to include mandatory opt-out notices on solicited faxes would, among other things, be *ultra vires* and run afoul of the First Amendment. We also discussed the status of the pending petition for certiorari to the Supreme Court in *Nack v. Walburg*.¹

In addition, we 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, 2013.² For example, the Commission could acknowledge in a declaratory ruling that Section 64.1200(a)(4)(iv) 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

¹ *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013), *petition for cert. filed*, Oct. 17, 2013 (No. 13-486).

² 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.

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adopting order, such as Section 4(i) of the Communications Act.³ We also argued that a retroactive waiver of Section 64.1200(a)(4)(iv) with respect to consensual faxes would be appropriate.⁴

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 one or more lawsuits that requires this issue to be addressed.

Please contact me if you have any questions regarding this meeting.

Sincerely,

/s/ Samuel L. Feder

Samuel L. Feder

cc: Jonathan Sallet
Suzanne Tetreault
Jacob Lewis
Diane Griffin Holland
Marcus Maher

³ 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); *Petition of Purdue Pharma L.P., Purdue Pharma Inc., and Purdue Products L.P. for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338, at 8-13 (filed Dec. 12, 2013) (“Purdue Petition”).

⁴ See, e.g., *Walburg/Richie Petition* at 13 & n.37; *Forest Petition* at 7-12; *Gilead Petition* at 7-12; *Purdue Petition* at 17-19.