

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of: Petition of Crown Mortgage)	
Company for Declaratory Ruling to Clarify)	CG Docket No. 05-338
Scope and/or Statutory Basis for Rule)	
64.1200(a)(3)(iv))	CG Docket No. 02-278
and/or for Waiver)	
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**PETITION OF CROWN MORTGAGE COMPANY FOR DECLARATORY RULINGS
AND/OR WAIVER OF THE "OPT OUT" REQUIREMENT**

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In the Matter of: Petition of Crown Mortgage Company for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver)	CG Docket No. 05-338
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**PETITION OF CROWN MORTGAGE COMPANY FOR DECLARATORY RULINGS
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Pursuant to Section 1.2 of the Federal Communications Commission (Commission) rules, 47 C.F.R. § 1.2, Crown Mortgage Company ("Crown "), requests that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(3)(iv) of the Commission's rules which codifies so-called "opt out" language" does not apply to fax advertisements sent with the prior express consent or permission of the recipient. Crown respectfully submits that faxes sent with the prior express consent or permission of the recipient constituted "solicited" faxes and consistent with the purpose behind the enactment of the Telephone Consumer Protection Act ("TCPA"), "solicited" faxes are not required to include the opt-out notices.¹

Alternatively, Crown requests that the Commission clarify that the statutory basis for Section 64.1200(a)(3)(iv) is not 47 U.S.C. § 227(b). Alternatively, if the Commission declines the above relief and confirms that solicited faxes must contain opt out language, the Commission

¹ Although commentators like Robert Biggerstaff object to the use of the term "solicited faxes", Crown's Petition utilizes the term "solicited" because the underlying facts demonstrate that a vast majority of the faxes were sent at the request of the recipient. Accordingly, Crown believes that a faxed sent at the request of the recipient (a so-called "solicited fax") more strongly demonstrates consent to transmit a fax than consent that flows from the TCPA's use of the phrase "express invitation or *permission*." (emphasis supplied).

should issue Crown a retroactive waiver pursuant to 47 C.F.R. § 1.3 for its unintentional transmission of solicited faxes which did not contain opt out language.

INTRODUCTION

Crown, established in 1975, is the Chicago land area's oldest privately owned residential mortgage bank. It is one of the largest Veterans Administration mortgage lenders in the Chicago land area. Crown sent faxes promoting its mortgage-based products to Lanciloti Law Office and Irish Sisters, Inc. on August 21 and 28, 2008, respectively. Lanciloti and Irish Sisters filed separate class action suits against Crown which alleged that Crown sent the facsimiles without Plaintiffs' express consent. While no evidence has been uncovered to suggest that Lanciloti or Irish Sisters provided "express invitation or permission" to receive a mortgage services based facsimile (or otherwise "solicited" such a fax), it is undisputed that both of the putative class representatives transacted real estate at various points in time. Crown believes, but it cannot prove, that it had a prior business relationship with each putative class representative.

The two suits were eventually consolidated. During class certification briefing, Crown argued that it had existing business relationships with a vast majority of the proposed class members. Notably, unlike most so-called "junk fax" cases, Crown did not purchase a list of *potential* customers and send out a bulk "blast fax." Instead, the vast majority of the putative class members who were sent facsimiles identifying Crown's mortgage services after the recipients (actual or prospective clients of Crown) "solicited" (or otherwise provided "express invitation or permission" for) the subject faxes. Furthermore, unlike the typical "junk fax", the subject faxes were sent by one or two Crown employees who entered the telephone numbers (digit-by-digit) into a stand-alone fax machine (not a computer). Accordingly, no bulk, computer based fax blasting took place.

In their class certification reply brief, the putative class representatives argued that a class should be certified because none of the subject faxes contained statutory opt out language.² Essentially, the putative class representatives' amended class certification definition sought to avoid the fact that Crown had existing business relations with a majority of the putative class members. And notably, the original complaints filed by both plaintiffs never even mentioned the lack of opt out language. Crown objected to the putative class representatives' attempt to create a new class definition in their reply brief by filing a motion to strike.

On July 20, 2011, Judge Carolyn Quinn of the Circuit Court of Cook County, Illinois, denied Crown's motion to strike and certified the following class:

All persons who were sent one or more facsimiles from Crown Mortgage Company: (1) during the period from March 9, 2005 until July 8, 2005, promoting the commercial availability of Crown Mortgage Company's property, goods or services, without their prior express invitation or permission and without any prior established business relationship with Crown Mortgage Company; or (2) during the period from July 9, 2005 until March 2, 2011, promoting the commercial availability of Crown Mortgage Company's services, [a] without having given their prior express invitation or permission and [b] without an opt-out notice.

See July 20, 2011, Order, pp., 1, 5, 2011 WL 4433665. Exhibit A. The order held that “[w]hile it is true that the evidence shows that Defendant had a previous business relationship with some of the recipients, Defendant did not include the ‘opt-out’ notice required by the TCPA.” *Id.* at p. 4. Judge Quinn went on to conclude that “[w]here a defendant fails to include the required ‘opt-out’ notice, the defendant is liable for violation of the TCPA regardless of the existence of an established business relationship.” *Id.* at p. 5. The case was then transferred to Judge Peter Flynn.

² When the faxes were sent, nobody at Crown was aware of the TCPA, let alone the TCPA's so-called "opt out language."

Crown eventually moved to decertify, relying on the district court's decision in *Nack v. Walburg* which held that the TCPA's opt out language did not apply to a vast majority of the faxes at issue because recipients (actual or prospective clients of Crown) provided asked for or solicited the transmission of the faxes. *Nack v. Walburg*, 2011 U.S. Dist. LEXIS 8266, at *11 (E.D. Mo. Jan. 28, 2011). During decertification briefing, the Eighth Circuit reversed the district court, relying on the position that the Commission adopted in its amicus brief. *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2012). Judge Flynn denied Crown's motion to decertify, in part, holding that he felt compelled to follow the Eight Circuit's decision. Exhibit B, transcript of hearing.

Crown is facing a class action which seeks millions of dollars in damages for sending faxes to clients *who expressly asked to receive them* simply because these "solicited" faxes do not contain statutory opt out language . Section 64.1200(a)(3)(iv) requires that opt-out language appear on faxes. As discussed below, a 2006 Commission Regulation interpreting this Section is unclear as part of the rule expressly limits its reach to *unsolicited* faxes, while also referencing recipients that have *agreed* to receive such faxes. This has led to a cottage industry of litigation for the plaintiffs' class action bar.

Again, Crown faces millions of dollars in liability, not because it blast-faxed prospective customers purchased from the internet, but because it did not place opt out language on the faxes that it sent to current and potential customers who had specifically asked to be sent faxes containing information regarding Crown's mortgage based products. Under these circumstances, Crown may go bankrupt, not because it violated the TCPA by blast-faxing individuals, but because of a seemingly "technical violation" of the TCPA.

Accordingly, Crown requests that the Commission resolve this uncertainty by declaring that Section 64.1200(a)(3)(iv)'s ambiguous language should be limited to unsolicited faxes, as

that reading best accords with the TCPA's language and legislative history, and avoids an interpretation that would render the rule unlawful under basic principles of administrative law and the First Amendment. Alternatively, Crown requests that the Commission clarify that the statutory basis for Section 64.1200(a)(3)(iv) is not the TCPA. Through either of these actions, the Commission can ensure that its rules are consistent with Congress' intent, in addition to providing much needed guidance to courts and litigants.

If the Commission declines to issue either declaratory ruling, and holds that the Commission and Congress intended persons sending faxes to place opt out language on all advertising faxes (regardless of whether the fax was solicited), the Commission should provide Crown with a waiver, excusing it from liability. As discussed below, a waiver is appropriate given the fact that the Commission only recently clarified its position when it filed an amicus in the *Nack* case.

BACKGROUND

A. The TCPA Was Enacted to Prohibit Unsolicited Fax Advertisements

The TCPA prevents the use of a telephone facsimile machine to send an "unsolicited advertisement" to another fax machine. 47 U.S.C. §§ 227(a)(5) & (b)(1)(C). The TCPA 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.*" § 227(a)(5) (emphasis added). This definition necessarily excludes the regulation of fax advertisements sent *with* the recipient's "prior express invitation or permission." Put another way, the TCPA does not apply to solicited fax advertisements.

B. *The TCPA is Amended by the Junk Fax Prevention Act of 2005*

Although the TCPA initially required the recipient's express consent, Congress amended the TCPA in 2005 in two ways through the Junk Fax Prevention Act of 2005 (the "JFPA"). First, the JFPA amended the TCPA to permit the transmission of *unsolicited* faxes to persons with whom the sender has an "established business relationship" ("EBR"). Second, the JFPA amended the TCPA to provide that unsolicited faxes sent to EBRs must contain a "opt-out" notice which would provide an easy and free mechanism to allow recipients to opt out of future faxes. § 227(b)(1)(C)(i)-(iii).

C. *The Commission's 2006 Order*

After passing the JFPA, the Commission sought comment on proposed implementing regulations and, in 2006, issued a final order ("JFPA Order") that "amend[ed] the Commission's rules on unsolicited facsimile advertisements." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) ("JFPA Order"). Despite the TCPA's express limitation to *unsolicited* faxes, one of the rules adopted by the Commission, Section 64.1200(a)(3)(iv), references opt-out notices for faxes "sent to a recipient that has provided prior express invitation or permission." 47 C.F.R. § 64.1200(a)(4)(iv) (emphasis added). The scope of that provision is unclear, however, as it is confusingly worded as part of a rule that also references *unsolicited* faxes. *Id.* The JFPA Order also contains contradictory language regarding the scope of Section 64.1200(a)(3)(iv), simultaneously explaining that "the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements" and that an opt-out notice is required for solicited faxes "to allow consumers to

stop unwanted faxes in the future." *JFPA Order*, 21 FCC Rcd at 3810, 3812, ¶¶ 42 n.154, 48 (emphasis added).

Unfortunately, the administrative record sheds no light on the scope of the rule because the Commission never sought comment on applying the TCPA to solicited faxes. Although the Office of General Counsel has argued that Section 64.1200(a)(3)(iv) should be read to apply to solicited faxes, the Commission itself has yet to opine on the issue.³

D. Nack v. Walburg

Litigation regarding the Commission's 2006 Order came to a head in the case of *Nack v. Walburg*. In *Nack*, the defendant initially won before the circuit court, which concluded that the TCPA did not provide a basis for liability under those circumstances. The Eighth Circuit Court of Appeals addressed the issue of whether the TCPA provides a basis for liability where, as here, the plaintiffs expressly agreed to receive the fax advertisements. *Nack*, 715 F.3d at 682. The Eighth Circuit agreed with the Office of General Counsel that Section 64.1200(a)(4)(iv) should be read to apply to solicited faxes and overruled the district court's decision. *Id.* at 687. Importantly, the questioning the Office of General Counsel's interpretation, the court indicated that the defendant should seek a stay and obtain relief from the Commission. *Id.* ("On remand, the district court may entertain any requests to stay proceedings for pursuit of administrative determination of the issues raised herein.").

E. The Commission's 2006 Order Has Led to Unjust Results

As a result of the Commission's 2006 Order, Section 64.1200(a)(3)(iv) has had unintended and unjust consequences, subjecting Crown and numerous other companies to lawsuits seeking damages for engaging in authorized communications with their customers or

³ See Amicus Brief for the Federal Communications Commission Urging Reversal at 13-14, *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2012), 2012 WL 725733.

potential customers that are entirely permissible under the TCPA. Lawyers for plaintiffs suffering no actual harm have seized upon Section 64.1200(a)(3)(iv)'s reference to solicited faxes to bring class action lawsuits under Section 227(b) of the TCPA, which authorizes a private right of action to recover statutory damages based on a violation of "this subsection or the regulations prescribed under this subsection." 47 U.S.C. § 227(b)(3)(A)-(B).

Like the present lawsuit against Crown, many of these lawsuits are premised solely on the fact that the fax advertisements at issue do not contain opt-out notices or contain opt-out notices that the plaintiffs deem inadequate. Many defendants have filed similar petitions which seek identical relief.⁴

F. The Commission's January 31, 2014 Public Notice

This issues raised in this Petition are significant as evidence by the fact that the Commission issued a Public Notice seeking public comment on whether the *See Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, DA 14-120 (rel. Jan. 31, 2014) (the "Public Notice"). The Public Notice states in relevant part:

Several petitions have been filed seeking a declaratory ruling, rulemaking, and/or waiver concerning section 64.1200(a)(4)(iv) of the

⁴ See, e.g., Petition of Douglas Paul Walburg and Richie Enterprises, LLC for Declaratory Ruling and/or Waiver, *In re 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* (hereinafter "Walburg Petition"); Anda, Inc. Petition For Declaratory Ruling at 2, *In re 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*, CG Docket No. 05-338 (FCC Nov. 30, 2010) (hereinafter "Anda Petition"); Petition of Staples, Inc. and Quill Corporation For Rulemaking and Declaratory Ruling at 6, *In re Petition of Staples, Inc. and Quill Corporation for a Rulemaking to Repeal Rule 64.1200(a)(3)(iv) and for a Declaratory Ruling to Interpret Rule 64.1200(a)(3)(iv)*, CG Docket No. 05-338 (FCC July 19, 2013) (hereinafter "Staples Petition").

Commission’s rules, which requires fax advertisements sent to a consumer who has provided prior express invitation or permission to include an opt-out notice. With this Public Notice, we seek comment on these petitions as described below.

* * *

All the petitioners request a declaratory ruling that the Commission lacked the statutory authority to adopt the rule or, alternatively, that section 227 of the Communications Act of 1934, as amended, was not the rule’s statutory basis. We seek comment on these requests.

* * *

We seek comment on whether these individual waiver requests should be granted and whether, alternatively, a broader waiver should be granted to all affected parties and, if so, on what basis.

Finally, Staples requests that the Commission initiate a rulemaking to repeal section 64.1200(a)(3)(iv), arguing that it reflects “poor policy that unfairly threatens companies and individuals with massive liability for the transmission of solicited fax ads” and “plainly exceeds the agency’s statutory authority.”

Public Notice, pp. 1-2.

Against this backdrop, Crown has moved to stay the lawsuit that is pending against in the Circuit Court of Cook County, Illinois, to allow the Commission to address the present Petition.

ARGUMENT

I. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING TO ELIMINATE UNCERTAINTY REGARDING THE SCOPE OF AND STATUTORY BASIS FOR SECTION 64.1200(A)(3)(IV).

Congress has granted to the Commission the “sound discretion” to issue a declaratory ruling in order to “terminate a controversy or remove uncertainty.”⁵ *See, e.g., In re Southwestern Bell Mobile Sys., Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 19,898, 19,900 ¶ 5 (1999)

⁵ 5 U.S.C. § 554(e); *see* 47 C.F.R. § 1.2(a) (“The Commission may . . . on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”).

(agreeing to issue declaratory ruling where there was “substantial uncertainty whether and to what extent” pending class action lawsuits were precluded by the Communications Act, as evidenced – in part – by “extensive comments . . . filed by interested parties” in response to Southwestern’s petition). Here, there is both controversy and uncertainty over the scope of and statutory basis for Section 64.1200(a)(3)(iv). That uncertainty is confirmed both by the flood of lawsuits across the country involving solicited faxes and the numerous petitions that have been filed with the Commission.

Accordingly, the Commission should issue a declaratory ruling to clarify that fax advertisements transmitted after express consent was obtained from the recipient are not required to contain an opt-out notice, or, in the alternative, that the statutory basis for Section 64.1200(a)(3)(iv) is not 47 U.S.C. § 227(b).

A. The Commission should clarify that Section 64.1200(a)(3)(iv) does not apply to Solicited Faxes.

The Commission should interpret the opt out requirement set forth in Section 64.1200(a)(3)(iv) to apply only to *unsolicited* faxes for at least three reasons. First, the plain language of the rule, and the order promulgating that rule, is unclear on the provision’s scope, and *excluding* solicited faxes best comports with the text and legislative history of the TCPA. Second, interpreting Section 64.1200(a)(3)(iv) to apply to solicited faxes would exceed the Commission’s statutory authority under the Act. Third, applying the opt out provision to apply to solicited faxes violates the First Amendment.

1. Section 64.1200(a)(3)(iv) applies only to unsolicited faxes because the language of the rule is unclear in its scope, and excluding solicited faxes best comports with Congress’s intent to regulate unsolicited faxes.

Section 64.1200(a)(3)(iv) provides in relevant part:

(a) No person or entity may:

(3) Use a telephone facsimile machine, computer, or other device to send an *unsolicited advertisement* to a telephone facsimile machine, unless –

(iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(3)(iii) of this section.

47 C.F.R. § 64.1200(a)(3)(iv) (emphasis supplied).

The text of Section 64.1200(a)(3)(iv) is confusing. The rule contains references to both unsolicited faxes and faxes sent with express permission making it impossible to tell from the text alone whether the opt-out notice must be included in solicited as well as unsolicited faxes.

The JFPA Order is equally confusing. The Order consists of just one brief paragraph mentioning the new rule and provides no explanation or discussion of the basis for that rule, other than that an opt-out notice is required “to allow consumers to stop unwanted faxes in the future.” *JFPA Order* ¶ 48. Significantly, the Commission never provided notice, in its notice of proposed rulemaking or elsewhere, that it was even considering applying any regulations to *solicited* faxes. And as the Eighth Circuit recognized, the JFPA Order is internally contradictory, because elsewhere the Commission explained that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.” *Nack*, 715 F.3d at 684.

Given these ambiguities, it is entirely unclear whether Section 64.1200(a)(3)(iv) applies to solicited faxes. *See, e.g., Nack v. Walburg*, 2011 U.S. Dist. LEXIS 8266, at *11 (E.D. Mo. Jan. 28, 2011) (“Reviewing the regulation as a whole, the provision in question . . . purports, on its face, to apply only to unsolicited faxes.”), *overruled by* 715 F.3d 680 (8th Cir. 2013).

The legislative history of the original TCPA enactment makes clear that the purpose of the Act was to address the problem of “unsolicited” fax advertisements.⁶ Notably, the legislative history of the JFPA is no different, showing that Congress meant only to “[c]reate a limited [EBR] statutory exception to the current prohibition against the faxing of unsolicited advertisements,” and for those “unsolicited advertisements,” to require “notice of a recipient’s ability to opt out of receiving any future faxes containing unsolicited advertisements.”⁷ There is no indication whatsoever that Congress was concerned about communications between businesses and their consenting customers.⁸ Rather, Congress intended for the opt-out requirement to address a narrow issue—the possibility that implied consent based on an EBR would result in unwanted faxes. Due to this possibility, Congress required fax advertisements sent pursuant to the EBR exception to include detailed notice on how to opt out. Because Congress never intended for the TCPA to restrict transmission of solicited faxes, the Commission never provided notice to the public that it was even considering applying any regulations to solicited faxes.

The Commission should end this uncertainty and declare that Section 64.1200(a)(3)(iv) does not apply to fax advertisements that were sent with the prior express invitation or permission of the recipient (or here, where the faxes were specifically “solicited”), as this interpretation best accords with the text and history of the TCPA. See, 47 U.S.C. § 227(b)(1)&(2); *id.* § 227(a)(5). Accordingly, the Commission should interpret Section

⁶ 5 S. Rep. No. 102-178 at 3 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1970 (“The bill as introduced proposed to ban artificial or prerecorded messages to residential consumers and to emergency lines, and to place restrictions on unsolicited advertisements delivered via fax machine.”).

⁷ S. Rep. No. 109-76 at 1 (2005), reprinted in 2005 U.S.C.C.A.N. 319, 319.

⁸ See *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 654-55 (8th Cir. 2003) (reviewing legislative history).

64.1200(a)(3)(iv) to apply only to unsolicited faxes, and not, as here, where the faxes were "solicited" by the putative class members.

2. Interpreting Section 64.1200(a)(3)(iv) to apply to solicited faxes would render that regulation unlawful because Section 227(b) of the Communications Act is limited to unsolicited advertisements.

By excluding solicited faxes from the reach of Section 227(b), Congress has limited the Commission's regulatory jurisdiction to unsolicited fax advertisements. *See, e.g., Am. Library Ass'n v. FCC*, 406 F.3d 689, 715 (D.C. Cir. 2005) ("[T]he Commission can only issue regulations on subjects over which it has been delegated authority by Congress."); *ACLU v. FCC*, 823 F.2d 1554, 1571 (D.C. Cir. 1987) (where Congress has addressed a question with a "specific statutory provision," the Commission lacks the authority to "weigh in" with a contrary regulation on the same subject). The Commission itself has recognized – in the JFPA Order and elsewhere – that the TCPA is limited to unsolicited fax advertisements. *JFPA Order*, 21 FCC Rcd at 3788-89, 3791, ¶¶ 1-3, 7 (referring multiple times to Commission "rules on unsolicited facsimile advertisements"); 21 FCC Rcd at 3810, ¶ 42 n.154 (opt-out requirements apply only to "communications that constitute unsolicited advertisements"); *JFPA NPRM*, FCC Rcd at 19,758, ¶ 1 (announcing "propose[d] modifications to the Commission's rules on unsolicited facsimile advertisements").

If Section 64.1200(a)(3)(iv) were nevertheless applied to solicited faxes, then the rule must be invalidated as *ultra vires* because the TCPA does not grant the Commission authority to regulate faxes transmitted with the prior express consent of the recipient. *See, e.g., Nack*, 715 F.3d at 682 (expressing doubt as to whether "the regulation at issue [if interpreted to apply to solicited faxes] properly could have been promulgated" under Section 227(b)); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013) (explaining that administrative agencies' "power to act and how they are to act is authoritatively prescribed by Congress, so that when they act

improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires”); *id.* at 1871 (“[T]he question in every case is, simply, whether the statutory text forecloses the agency’s assertion of authority . . .”).

Against this backdrop, interpreting Section 64.1200(a)(3)(iv) of the Commission’s rules to apply only to unsolicited fax advertisements is thus the only proper reading of the rule.

3. Applying Section 64.1200(a)(3)(iv) to faxes sent with prior express consent would violate the First Amendment.

The First Amendment provides an independent basis to interpret the Section 64.1200(a)(3)(iv) as applying only to unsolicited fax advertisements. Under well-established Supreme Court precedent, truthful commercial speech may be burdened only where the government can show that the proposed restriction directly advances a substantial government interest and that the regulation “is not more extensive than is necessary to serve that interest.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

As the Eighth Circuit suggested, and other petitions to the Commission have explained, the balancing of interests regarding unsolicited faxes (the regulation of which has withstood First Amendment scrutiny) and solicited faxes (which the Commission has never attempted to defend) is different. *Nack*, 715 F.3d at 687 (“Suffice it to say, the analysis and conclusions as set forth in *American Blast Fax* would not necessarily be the same if applied to the agency’s extension of authority over solicited advertisements.”); *Anda Petition* at 11; *Staples Petition* at 14-16.

The Commission has made no attempt to meet its burden of building a record to justify applying Section 64.1200(a)(3)(iv) to solicited advertisements, nor has it articulated how requiring an opt-out notice for solicited faxes directly advances an important government interest or why any such interest could not be addressed by a less restrictive requirement. *See, e.g., Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (careful cost

and benefit analysis required before speech rights can be burdened); *Edgefield v. Fane*, 507 U.S. 761, 770-71 (1993) (government bears burden to develop record sufficient to justify state interest).

Indeed, the government's interest is much weaker where, as here, the recipient expressly consented to receive the facsimile and therefore has a simple and effective method of communicating an opt-out request to the sender. Furthermore, even assuming the same government interest articulated in the context of unsolicited faxes could support the application of Section 64.1200(a)(3)(iv) to the solicited faxes (i.e., the government's interest in preventing advertising cost-shifting from businesses to consumers), the opt-out requirement is irrelevant to that interest.

For these reasons, the Commission should rule that Section 64.1200(a)(3)(iv) does not apply to solicited faxes.

B. Alternatively, the Commission Should Clarify that the Statutory Basis of Section 64.1200(a)(3)(iv) is Not 47 U.S.C. § 227(b).

Alternatively, if the Commission declines to interpret Section 64.1200(a)(3)(iv) to exclude fax advertisements for which the sender has obtained prior express consent, the Commission should at least issue a declaratory ruling that Section 227(b) of the Communications Act is not the statutory basis for its rule. Such a ruling would clarify that solicited faxes sent without the opt-out language described in the Commission's rules cannot form the basis of a private action under the TCPA.

As previously discussed, the statutory basis for Section 64.1200(a)(3)(iv) is not clear.⁹ The Commission cited eleven different statutory provisions in the JFPA Order as authority for

⁹ As explained in other petitions seeking similar relief, the Commission is obligated under the Administrative Procedure Act to state the statutory basis of its rule. See 5 U.S.C. § 553(c); *Anda Petition*

the multiple amendments it made to Section 64.1200, of which Section 64.1200(a)(3)(iv) was only one.¹⁰ The JFPA Order did not identify which of these eleven statutory provisions authorized promulgation of 64.1200(a)(3)(iv). Thus, it is unclear whether the Commission relied on its authority under Section 227 (which contains the private right of action provision) in promulgating Section 64.1200(a)(3)(iv), or on one of the other cited provisions.

A clarification by the Commission that its basis for promulgating Section 64.1200(a)(3)(iv) was some statutory provision other than Section 227(b) would serve both the Commission's interests and promote the public's interest in fairness and justice. *Cf. Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (requiring agencies to articulate the basis for its rules can "assist judicial review" and help to ensure "fair treatment for persons affected by a rule"). By making clear that Section 64.1200(a)(3)(iv) is not grounded in the Commission's authority under Section 227(b), the Commission could assist businesses by removing the threat of massive class-action lawsuits based solely on communications with consumers who expressly consented to receive them. At the same time, articulating a different statutory basis for the rule would preserve the Commission's ability to enforce the rule as appropriate using its broad, flexible enforcement powers.

II. ALTERNATIVELY, CROWN SHOULD BE GRANTED A WAIVER

If the Commission declines to issue a declaratory ruling as discussed above, Crown asks the Commission to provide a retroactive waiver of Section 64.1200(a)(3)(iv) for fax

at 11-15; Forest Pharmaceuticals, Inc. Petition For Declaratory Ruling and/or Waiver at 15-16, *In re Petition for Declaratory Ruling and/or Waiver Regarding Substantial Compliance with Section 64.1200(a)(4)(iii)*, CG Docket No. 05-338 (FCC June 27, 2013); *Walburg Petition* at 12 n.34.

¹⁰ *JFPA Order*, 21 FCC Rcd at 3817, ¶ 64 (adopting order "pursuant to the authority contained in sections 1-4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154, 201, 202, 217, 227, 258, 303(r), and 332; and sections 64.1200 and 64.318 of the Commission's Rules, 47 C.F.R. §§ 64.1200 and 64.318").

advertisements sent where Crown had obtained prior express consent and/or where the recipient had solicited the advertisement. Here, the retroactive date from the effective date of the 2006 Order. A retroactive waiver can be issued as long as prior effective date of the waiver is specified. *In re United Telephone Co. of Kansas et al.*, Order, 25 FCC Rcd 1648, 1650, ¶ 5 (2010). *See also In re 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).

Section 1.3 of the Commission's rules permits the Commission to grant a waiver for good cause shown, and the Commission should grant a waiver if, after considering all relevant factors, a waiver is in the public interest. 47 C.F.R. § 1.3. *See also, In re Rath Microtech Complaint Regarding Electronic Micro Sys., Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 16,710, 16,714, ¶ 15 (2001). A waiver is appropriate where "[t]he underlying purpose of the rule(s) would not be served" or "unique or unusual factual circumstances" mandate a waiver to avoid an application of the rule that would be "inequitable, unduly burdensome or contrary to the public interest." 47 C.F.R. § 1.925(b)(3)(i)-(ii). Here, a waiver is appropriate for both reasons.

First, the only purpose the Commission has articulated for Section 64.1200(a)(3)(iv) is that an opt-out notice is required "to allow consumers to stop unwanted faxes in the future." Crown did not purchase a list of prospective customers and only sent faxes to EBRs. Crown has found proof of EBR status for all but 344 fax recipients. Here, with limited exceptions, Crown sent faxes only to individuals that had expressly asked to be sent the subject fax. Thus, even assuming that the goal of Section 64.1200(a)(3)(iv) is to allow consumers "to stop unwanted faxes in the future", that goal would not be served where the vast majority of the subject faxes were sent as a result of the direct *solicitation* as opposed to an EBR based fax. An EBR based

fax is different to the extent that it is being sent because of a *prior* or existing business relationship. Here, the vast majority of subject faxes were sent as a result of the recipient asking Crown to send him or her an informational fax. The distinction is significant as a person receiving an unsolicited fax based upon an EBR is far different than a person specifically asking (soliciting) to receive an advertising fax. With the case of the EBR based fax, there should be a statutory mechanism to say "stop sending me faxes." Why should Crown be required to include information about stopping unwanted faxes when the subject fax is being sent in response to the request of the recipient?¹¹

While other petitioners may have sent out EBR based faxes, the vast majority of the faxes in this case were sent in response to direct requests and/or solicitations.

Second, requiring strict compliance with Section 64.1200(a)(3)(iv) with respect to solicited faxes in these circumstances would be inequitable, unduly burdensome, and contrary to the public interest. Crown is embroiled in a million-dollar-plus class action lawsuit for an alleged failure to include appropriate opt-out notices on faxes sent to class members *who asked to be sent faxes*. As a result, the class members have suffered no actual harm. Where, as here, recipients of faxes explicitly requested or agreed to receive them and never expressed any interest or desire to opt out, requiring strict compliance with Section 64.1200(a)(3)(iv) would be both tremendously burdensome and inequitable. It would also be contrary to the public interest, as exposing Crown to massive class action liability for engaging in consensual communications with its customers would work an economic injustice on a local business that is providing a valuable service to its clients – both lawyers and real estate agents.

¹¹ Crown adopts the comments submitted by Anda, Inc., on February 14, 2014, at pages 11-14 of its comments.

Robert Biggerstaff's February 14, 2014, comments suggest that there is no basis to issue a waiver because other companies have utilized opt out language. What Mr. Biggerstaff ignores is that under those circumstances the faxes were sent as a result of EBRs. Under those circumstances, it was natural to include opt out language because the TCPA regulates unsolicited faxes. There would be no reason to include opt out language when a customer *asks* to be sent a fax – as is the case here. Moreover, Mr. Biggerstaff ignores the fact that it was only when the Eight Circuit addressed the scope of opt out language in Nack that the Commission commented that opt out language applies to all faxes. Accordingly, until the Eight Circuit ruled, Crown had not reason to believe that opt out language is required for "solicited" faxes – or where the faxes were sent at with the express invitation and/or permission of the recipient. Because the law was (and still is) less than clear, Crown should be provided with a waiver.

CONCLUSION

For the reasons stated above, the Commission should issue a declaratory ruling clarifying (1) that Section 64.1200(a)(3)(iv) of the Commission's rules applies only to unsolicited fax advertisements and/or (2) that Section 227(b) of the TCPA is not the statutory basis for Section 64.1200(a)(3)(iv) of the Commission's rules. Alternatively, the Commission should grant a retroactive waiver of Section 64.1200(a)(3)(iv) for any fax sent by Petitioner with the recipient's prior express consent or where the recipient asked to receive (solicited) the subject fax.

Respectfully submitted,

/s/ James C. Vlahakis

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Attorney for Crown Mortgage Company

Exhibit A

Circuit Court of Illinois,
County Department, Chancery Division.
Cook County
IRISH SISTERS, INC., Plaintiff,
v.
CROWN MORTGAGE CO., Defendant.
Nos. 09 CH 10688, 09 CH 31582.
June 20, 2011.

Memorandum and Order

[Carolyn Quinn](#), Judge.

Plaintiffs **Irish Sisters, Inc.** and Lanciloti Law Offices filed an Amended Motion for Class Certification. Plaintiffs also filed a Motion for Leave to File a Reply Brief in Excess of [illegible text] *Pages, Instantly*. Defendant **Crown Mortgage Company** objected to this motion [illegible text]

I. Background

Plaintiff **Irish Sisters, Inc.** and Plaintiff Lanciloti Law Offices filed separate lawsuits against Defendant **Crown Mortgage Company**. The two lawsuits have been consolidated. Plaintiffs' class action suits are based on Defendant's alleged sending of unsolicited fax advertisements to Plaintiffs and others. Plaintiffs are asserting that Defendant's sending of unsolicited fax advertisements violates the Telephone Consumers Protection Act of 1991 ("TCPA"), [47 U.S.C. §227](#), the Illinois Consumer Fraud Act and Deceptive Practices Act, ("Consumer Fraud Act"), and constitutes common law conversion.

II. Amended Motion for Class Certification

Plaintiffs filed an Amended Motion for Class Certification seeking to certify the following class:

All persons who were sent one or more facsimiles from **Crown Mortgage Company** during the period from March 9, 2005 until March 2, 2011, promoting the commercial availability of property, goods or services, without their prior express invitation or permission and, for faxes sent prior to July 1, 2005, without any prior established relationship with **Crown Mortgage Company**.

Defendant opposes class certification.

A. Plaintiffs' Reply Brief

Plaintiffs moved for leave to file a Reply in excess of eight pages. Plaintiffs' submitted Reply is fifteen pages. Defendant objected arguing that the Reply raised new facts, law and argument. The Reply, however, does not raise new arguments for class certification, but responds to the arguments raised by Defendant in its Response. This is the purpose of a Reply.

Defendant also asserts that Plaintiffs should be required to refile their motion for class certification because they change the proposed class definition in the Reply. The proposed change, however, is based on Defendant's objection in its Response that a six year class period is excessive. (Response at 9). In reply to Defendant's argument, Plaintiffs now

propose the following class definition:

All persons who were sent one or more facsimiles from **Crown Mortgage** Company: (1) during the period from March 9, 2005 until July 8, 2005, promoting the commercial availability of **Crown Mortgage** Company's property, goods or services, without their prior express invitation or permission and without any prior established business relationship with **Crown Mortgage** Company; or (2) during the period from July 9, 2005 until March 2, 2011, promoting the commercial availability of **Crown Mortgage** Company's services, without having given their prior express invitation or permission and without an opt-out notice.

Plaintiffs are allowed to file their fifteen page Reply.

B. Section 2-801

The certification of class actions is governed by [section 2-801 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-801](#). To certify a class action, this Court must find:

- (1) The class is so numerous that joinder of all members is impracticable.
- (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
- (3) The representative parties will fairly and adequately protect the interest of the class.
- (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

[735 ILCS 5/2-801](#). Because of the relationship between [section 2-801](#) and Federal Rule of Civil Procedure 23 (“[Rule 23](#)”), federal decisions interpreting [Rule 23](#) are considered persuasive authority in interpreting and applying [section 2-801](#). [Avery v. State Farm Mut. Auto. Ins. Co., 216 Ill. 2d 100, 125 \(2005\)](#). A party seeking class certification has the burden of establishing all the prerequisites of [section 2-801](#) before a class can be certified. [Aguilar v. Safeway Ins. Co., 221 Ill. App. 3d 1095, 1102 \(1st Dist. 1991\)](#).

C. Numerosity

If a class has more than forty individuals, numerosity is satisfied. [Wood River Area Development Corp. v. Germania Federal Savings & Loan Ass'n, 198 Ill. App. 3d 445, 450 \(5th Dist. 1990\)](#)(citation omitted). Courts have held that it is not necessary to know the precise number of class members to find that numerosity exists. *E.g.*, [In re Alcoholic Beverages Litigation, 95 F.R.D. 321, 324 \(E.D.N.Y. 1982\)](#)(numerosity may be established through estimates); [Evans v. U.S. Pipe & Foundry, 696 F.2d 925, 930 \(11th Cir. 1983\)](#)(a plaintiff need not show precise number of class members to establish numerosity). Furthermore, it is not necessary that a class representative name the specific persons who are possible members of the class. [Hayna v. Arby's, Inc., 99 Ill. App. 3d 700, 710-11 \(1st Dist. 1981\)](#).

Defendant has admitted that they sent more than 2,500 fax advertisements during the four-year period prior to the filing of the **Irish** Sisters complaint. (Am. Motion, Ex. E, Requests to Admit No. 31). Defendant argues, however, that Plaintiffs have no realistic means of identifying the class members.

In this case, Defendant did not use a third-party to send fax advertisements. Defendant's employees sent out the faxes at issue. (Mirowski's Dep. at 40-42; Allen's Dep. at 37, 53). The fax numbers were obtained from a database created by Defendant of its repeat business contacts and the Illinois Association of Realtors website. (Allen's Dep. at 25, 85-86; Mirowski's Dep. at 14-15, 21-22, 71). Through subpoenas, Plaintiffs have obtained call detail records (“CDRs”) for Defendant's telephone lines during the relevant time periods. According to the CDRs, from January 31, 2006 to December 8, 2008, there were 143 outgoing calls from Defendant's main fax number. (Reply, Ex. L). From June 27, 2008 to October 24, 2009, there were 8,498 outgoing calls including calls to Plaintiffs. (Reply, Ex. N, Line 1101 and Line 2725). From November 1, 2005 to December 18, 2008, there were 8,957 outgoing calls from Defendant's main fax number including calls to Plaintiffs. (Reply, Ex. O, Line 1738 and Line 2741). Given that Defendant used only two sources of information for the recipients of its fax advertisements, Defendant's admission of mass faxing and the

information from the CDRs, which can be analyzed for an expert to identify the periods of mass faxing, it appears that Plaintiffs will be able to identify the members of the class. Therefore, numerosity is satisfied.

D. Predominance of Common Issues of Fact and Law

“The purpose of the predominance requirement is to ensure that the proposed class is sufficiently cohesive to warrant adjudication by representation, and it is a far more demanding requirement than the commonality requirement of [Rule 23\(a\)\(2\)](#).” *Smith v. Illinois Central R.R.*, 223 Ill. 2d 441, 448 (2006). “The test for predominance is not whether the common issues outnumber the individual ones, but whether common or individual issues will be the object of most of the efforts of the litigants and the court.” *Id.* at 448-49. In determining whether common issues will predominate over individual issues, the court must identify the substantive issues of the case and “look beyond the pleadings to understand the claims, defenses, relevant facts and, applicable substantive law.” *Id.* at 449. “Satisfaction of [Section 2-801](#)'s predominance requirement necessitates a showing that ‘successful adjudication of the purported class representatives’ individual claims will establish a right of recovery or resolve a central issue on behalf of the class members.’ ” *Id.*, quoting *Avery*, 216 Ill. 2d at 128. “The fact that the class members’ recovery may be in varying amounts which must be determined separately does not necessarily mean that there is no predominate common question.” *McCarthy v. La-Salle Nat’l Bank & Tr. Co.*, 230 Ill. App. 3d 628, 634 (1st Dist. 1992).

Where a defendant has acted wrongly in the same basic way to all the members of a class, common class questions predominate. *Martin v. Heinold Commodities Inc.*, 139 Ill. App. 3d 1049, 1060 (1st Dist. 1985). Courts have found that where there is a showing of the mass-faxing of advertisements without obtaining prior consent, common issues of fact and law exist supporting class certification. *E.g.*, *Hinman v. M & M Rental Ctr.*, 545 F. Supp. 2d 802, 806 (N.D. Ill. 2008); *Saf-T-Gard International, Inc. v. Wagener Equities, Inc.*, 251 F.R.D. 312, 315 (N.D. Ill. 2008).

1. Permission/Consent

Defendant argues that permission is not a common issue. Defendant concedes that it did not have express permission to send out the fax advertisements received by Plaintiffs. (Response at 2). Defendant argues, however, that permission may be implied.

The TCPA prohibits the sending of unsolicited fax advertisements unless:

- (i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;
- (ii) the sender obtained the number of the telephone facsimile machine through-
 - (I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or
 - (II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution, except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 [enacted July 9, 2005] if the sender possessed the facsimile machine number of the recipient before such date of enactment; and
- (iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D) ***

[47 U.S.C. §227\(b\)\(1\)\(C\)](#). “Unsolicited advertisement” “means 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.” [47 U.S.C. §227\(a\)\(5\)](#).

Defendant contends that Plaintiffs consented to receiving unsolicited fax advertisements by making their fax numbers available on their websites and in public directories (the Illinois Realtors Association website and Sullivan’s Law Directory). Plaintiffs do not deny that their fax numbers were publicly listed, but assert that publication of a fax number does not constitute permission for Defendant to send an unsolicited fax advertisement.

The plain language of the TCPA required Defendant to obtain express permission to send unsolicited fax advertisements to Plaintiff. [47 U.S.C. §227\(a\)\(5\); \(b\)\(1\)\(C\)](#). The FCC has held that the mere distribution or publication of a fax number is not sufficient to establish express consent to receive unsolicited advertisements. [10 FCC Red. 12391, ¶37 \(Aug. 7, 1995\)](#). The FCC has also held that “a company wishing to fax ads to consumers whose numbers are listed in a trade publication or directory must first obtain the express permission of those consumers. Express permission to receive a faxed ad requires that the consumer understand that by providing a fax number, he or she is agreeing to receive faxed advertisements.” [18 FCC Red. 14014, ¶193 \(June 26, 2003\)](#).

Plaintiffs' listing of their fax numbers on their own websites does not provide express permission to receive unsolicited advertisements. Nor does the publication of Plaintiffs' fax numbers in directories constitute express permission to Defendant in the absence of evidence showing that Plaintiffs understood they were agreeing to receive faxed advertisements by providing their fax numbers. *See, e.g., Travel 100, Inc. v. Mediterranean Shipping Co. (USA), Inc.*, 383 Ill. App. 3d 149,158-59 (1st Dist. 2008)(finding that there was express permission because the plaintiff had signed releases agreeing to receive marketing materials from suppliers of travel services). There is nothing before the Court indicating that in allowing their fax numbers to be published by the Illinois Realtors Association and the Sullivan's Law Dictionary that Plaintiffs expressly agreed to receive fax advertisements from mortgage companies or others. Because Defendant has admitted that it was not its custom or practice to call for permission before sending a fax advertisement (Allen's Dep. at 31), and because Defendant used information from only two different directories to send fax advertisements to Plaintiffs and others and there is no evidence that the parties listed in those directories consented to receiving fax advertisements by virtue of being listed, permission/consent is a common issue of fact and law in this case.

2. Established Business Relationship

The evidence before the Court shows that in addition to sending fax advertisements to persons listed in directories, Defendant also sent fax advertisements to persons with whom it previously did business. While it is true that the evidence shows that Defendant had a previous business relationship with some of the recipients, Defendant did not include the “opt-out” notice required by the TCPA. (Allen's Dep. at 66).

As of July 9, 2005, the TCPA has contained the following “opt-out” notice requirements:

(b) Restrictions on use of automated telephone equipment.

(1) Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States-

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D), except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E);

(2) Regulations; exemptions and other provisions. The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if--

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes--

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the

sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; ...

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d); * * *

[47 U.S.C. §227\(b\)\(1\)\(C\)\(iii\)](#) and [\(b\)\(2\)\(D\)](#). Where a defendant fails to include the required “opt-out” notice, the defendant is liable for violation of the TCPA regardless of the existence of an established business relationship. *E.g.*, *Holtzman v. Turza*, 2010 U.S. Dist. LEXIS 80756, *13-15 (Aug. 3, 2010). Therefore, Defendant cannot assert an established business relationship to avoid liability for any faxes sent from July 9, 2005 to March 2, 2011.

With regard to faxes sent prior to July 9, 2005, Defendant bears the burden of establishing the existence of an established business relationship. *E.g.*, [47 C.F.R. 64.1200\(a\)\(3\)](#); [21 FCC Red 3787, 2006 FCC LEXIS 1713, ¶12](#) (an entity which sends a fax advertisement on the basis of an established business relationship has the burden of demonstrating the existence of such relationship). In this case, the evidence shows that Defendant can easily identify those persons with whom it had an existing business relationship because Defendant kept a computer database with this information which it used to send fax advertisements. *E.g.*, *Holtzman v. Turza*, 2009 U.S. Dist. LEXIS 95620, *17-18 (N.D. Ill. Oct. 14, 2009). Common issues predominate.

E. Adequacy of Class Representative

“The test applied to determine adequacy of representation is whether the interests of those who are parties are the same as those who are not joined and whether the litigating parties will fairly represent those interests.” [Miner v. The Gillete Co.](#), 87 Ill. 2d 7, 14 (1981). “The attorney for the representative party ‘must be qualified, experienced and generally able to conduct the proposed litigation.’ ” *Id.* “Additionally, plaintiffs interest must not appear collusive.” *Id.*

It appears that Plaintiffs will fairly represent the interests of the class and that there is no danger of conflicting interests. Plaintiffs' counsel are experienced in class actions involving the TCPA and have achieved numerous class settlements in these cases. Plaintiffs are adequate class representatives. Defendant's assertion that Plaintiffs are not adequate class representatives is just a restatement of its assertion that common issues do not predominate.

F. Appropriate Method for Resolution of Claims

In deciding whether a class action is an appropriate method for the fair and efficient adjudication of the controversy, “a court considers whether a class action: (1) can best secure the economies of time, effort and expense, and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain.” [Gordon v. Boden](#), 224 Ill. App. 3d 195, 203 (1st Dist. 1991).

The common issues in this case and the large number of potential class members demonstrates that a class action is an economical method to adjudicate the claims at issue and will provide uniform results. A class action is an appropriate method of adjudication in this case.

III. Conclusion

Defendant's Motion to Strike All New Arguments From Plaintiffs' Reply is denied. Plaintiffs' Amended Motion for Class Certification is granted and the class certified as defined in the Reply.

Enter: _____

Judge: <<signature>>

Irish Sisters, Inc. v. Crown Mortg. Co.
2011 WL 4433665 (Ill.Cir.) (Trial Order)

END OF DOCUMENT

Exhibit B

STATE OF ILLINOIS)

) SS:

ORIGINAL

COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT - LAW DIVISION

IRISH SISTERS, INC. and)

LANCILOTI LAW OFFICES,)

Individually and as the) No. 09 CH 10688

representative of a)

class of similarly)

situated persons,) Consolidated with

Plaintiffs,) No. 09 CH 31582

vs.)

CROWN MORTGAGE COMPANY,)

Defendant.)

REPORT OF PROCEEDINGS at the hearing
of the above-entitled cause before the Honorable
PETER FLYNN, Judge of said Court, on
October 1, 2013, commencing at 2:14 p.m., and
concluding at 3:26 p.m.

Reported By: Sandra Di Vito, CSR

License No.: 084-004642

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APPEARANCES:

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Representing the Defendant.

1 MR. VLAHAKIS: Good afternoon, your Honor.

2 MR. PIPER: Good morning.

3 MR. VLAHAKIS: Would you prefer us to stand,
4 sit?

5 THE COURT: Whatever works for you.

6 MR. VLAHAKIS: I've been sitting all day long
7 so I don't mind standing.

8 THE COURT: Okay. Whatever you prefer.

9 This is 09 CH 31582, Lanciloti vs.
10 Crown, Irish Sisters vs. Crown. We're here on
11 Defendant's motion to decertify. I've read
12 everything you've given me, but I don't want to
13 stop either side from adding anything you think
14 you should add.

15 MR. VLAHAKIS: Okay. Your Honor,
16 James Vlahakis on behalf of the Defendant.

17 From a housekeeping standpoint, there
18 was a motion up today, Plaintiff filed his cite
19 to a Reliable case, I believe it was --

20 THE COURT: Correct, the Eastern District of
21 Wisconsin case.

22 MR. VLAHAKIS: Yes.

23 THE COURT: I'll grant that motion.

24 MR. VLAHAKIS: Yes, I have no objection to

1 it, I was going to address that in my
2 substantive response.

3 Previously you granted them leave to
4 cite to the case of Holtzman vs. Turza out of
5 the 7th Circuit which came out on August 26th.
6 To summarize, I think you're very familiar with
7 this case, but more for the record if this goes
8 up on appeal, you may recall review of this case
9 around last August and one of the issues we
10 thought we had was a lack of ability to
11 ascertain who the class members were because we
12 could not find the underlying data which shows
13 where the faxes were transmitted to.

14 When we did find those spreadsheets, we
15 were able to go back and identify all but about
16 340 or 344 where we had established business
17 relations with where we believe we should show
18 under our burden of proof that we had permission
19 to send faxes to based on that.

20 However, at the same time, faxes were
21 being sent out, as Mr. Allen set forth in his
22 affidavit, to people that he met at various
23 speaking engagements where in -- in difference
24 to people being sent a fax based on a prior

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1 business relationship, they had done a mortgage
2 with Crown or whatnot, people were saying to
3 this gentleman, please send me your information,
4 please send me your mortgage products, a very
5 large percentage, 85 to 90 percent he believes
6 requested faxes in that manner.

7 Now, as you may recall, the opt-out
8 language is not contained in any of these faxes
9 at all and the opt-out issue came up in
10 Plaintiff's reply in support of class
11 certification that was, eventually, granted.
12 And the way the case sort of came out is, well,
13 even if you can show EBRs, we still have maybe
14 because you don't have the opt-out.

15 This is a very unique case for this
16 because all the cases, even the Nack case that
17 went up to the 8th Circuit and was reversed, did
18 not deal with the exact scenario here of people
19 asking Mr. Allen and various employees of Crown
20 to be sent advertising faxes.

21 It's very clear in the Nack case
22 whether it's been the -- the 8th Circuit's
23 opinion or the District Court's opinion, if you
24 look at it, that fax was sent after an employee

1 of the Defendant asked -- called the Plaintiff
2 in question and said may we send you something
3 and there the Court said, well, that was not a
4 solicited -- unsolicited fax, but it was one
5 granted with permission. And there the Court
6 felt after reviewing the FCC's various orders
7 and amicus from the FCC, that under those
8 circumstances the opt-out language had to be
9 included.

10 Now, as both parties acknowledge the
11 various briefing back and forth, the FCC has
12 been all over the board and what their language
13 means, whether -- what the term, "unsolicited,"
14 means. And it's very important to note under
15 the TCPA it was meant to regulate unsolicited
16 faxes, ones that were sent without anybody
17 asking for or ones that were sent based out of
18 established business relationship.

19 When it's based out of an EBR, it makes
20 sense to have the opt-out. Because at a certain
21 point in time, the recipient may say I'm no
22 longer doing business with you, I'm tired of
23 getting your faxes, please, you know, provide me
24 with some means of opting-out. And that's what

6

1 the FCC did, it put language in there saying
2 that there should be a toll-free method of
3 opting-out.

4 But in contrast where somebody said
5 send me something, why should that fax contain
6 opt-out language when the person's affirmatively
7 telling somebody give me something.

8 I think it's important to note that it
9 wasn't until the 8th Circuit Court asked for a
10 briefing from the FCC that the FCC said, oh, no,
11 no, no, this is what we meant.

12 Now, mind you, the FCC is not ruling on
13 the particular issue we have, somebody asking to
14 receive something. Again, it was simply dealing
15 with the situation where the Plaintiff gave
16 permission in response to a phone call. That's
17 why we think Nack is distinguishable even if the
18 8th Circuit came out the way it did.

19 The issue --

20 THE COURT: Well, but wait.

21 MR. VLAHAKIS: Sure.

22 THE COURT: Nack on -- quotes
23 47 CFR Section 64.1200 A 3 iv, which applies to,
24 "A facsimile advertisement that is sent to a

1 recipient that has provided prior expressed
2 invitation or permission to the sender."

3 I can't -- especially when it's coupled
4 with permission, I can't read invitation as
5 meaning anything other than I invite you to send
6 me something or, please, send me something,
7 which would cover the situation that you're
8 talking about.

9 MR. VLAHAKIS: I would disagree in a sense in
10 that term invitation's never been interpreted to
11 mean somebody asking for the fax, the TCPA --

12 THE COURT: I mean, it's not an uncommon
13 word.

14 MR. VLAHAKIS: I understand that. And in
15 seeing, I thought the same thing --

16 THE COURT: It says, "invitation or
17 permission." I mean, if all they meant is
18 consent, they could have just said permission.

19 MR. VLAHAKIS: I think in response to that,
20 the issue is that it's always been looked at as
21 EBRs, every regulation promulgated by the FCC up
22 until amicus spoke in terms of EBRs, what do you
23 do in terms of an EBR, how do those faxes go.
24 So, here they might be going back to that

8

1 original language in regulation saying, well,
2 invitation, but prior to this point, nobody has
3 ever interpreted and I haven't seen a case
4 that's done it that said when under these exact
5 circumstances where somebody said please send me
6 something, it has to contain the opt-out.

7 THE COURT: Okay. What you're --

8 MR. VLAHAKIS: I understand what you're --

9 THE COURT: -- what you're doing, though, the
10 only way that I can make much headway with your
11 argument is there are two kind of invitations.
12 An EBR could be construed as a sort of a
13 generalized invitation. You're talking, also,
14 about an explicit this-time-only invitation.
15 And one might not unreasonably distinguish
16 between a this-time-only invitation and a
17 generalized EBR-type invitation.

18 I still have a little trouble with the
19 regulation which says, "invitation or
20 permission," and in the EBR situation I have a
21 lot of trouble figuring out how to blend
22 invitation into permission so that the -- the
23 two words, essentially, mean the same thing.
24 But, still, you -- you might distinguish between

1 this day in train only which is what you're
2 talking about and a more generalized invitation.

3 Go ahead.

4 MR. VLAHAKIS: Yeah, what we're dealing with,
5 too, is almost maybe a third approach.
6 Mr. Allen spoke in terms of people telling him
7 please send me information, I want to always be
8 up-to-date with your newest product, that could
9 mean an invitation to continually send faxes, it
10 could mean -- unless we depose that individual,
11 what did you mean, did you mean you just want
12 the latest HUD-related fax.

13 If that's the case, an argument could
14 be made and trying to be reasonable here that
15 that one time fax didn't need to contain the
16 opt-out, but any time thereafter that Crown had
17 to, maybe they did need to contain the opt-out.

18 I do agree that with regard to an EBR
19 which is more of a fluid concept of consent that
20 by doing business together, by shaking hands,
21 the FCC felt that that consummation of business
22 opened the door to an invitation to send further
23 faxes. I've never seen in a case what they --
24 what invitation as you quoted has been

10

1 interpreted to me other than it falls in this
2 category of an EBR, that by virtue of prior
3 business you've acknowledged that you can
4 receive faxes and that has been given, I think,
5 in an effort to help businesses continue to
6 promote their product as long as they contain
7 that opt-out language. And here a majority of
8 the faxes are not just to
9 EBR-handshake-we've-done-business type of fax,
10 majority of them are please send me some
11 information, i.e., a solicitation from Crown.

12 And the TCPA speaks in terms of
13 unsolicited faxes, it never sought to regulate
14 solicited faxes so where the invitation term
15 comes in, it may, in fact, create some confusion
16 or conflict with that because it's adding into
17 the regulation a broader scope of prohibition
18 where the TCPA simply said unsolicited we're
19 coming in, and I remember this back --

20 THE COURT: Okay. But you're not going to
21 get real far with that argument, because I'm
22 unlikely to take on Federal Courts of Appeals
23 with regard to the meaning of a federal statute,
24 that would be above my pay grade.

1 MR. VLAHAKIS: I would disagree in -- to the
2 extent that Nack is determining a statute that
3 has concurrent jurisdiction. It's a federal
4 statute, but States -- the Courts have been very
5 clear about this that a State can -- if you can
6 file in the State Court, that State Courts can
7 interpret that --

8 THE COURT: Sure, it's concurrent
9 jurisdiction --

10 MR. VLAHAKIS: Uh-hum.

11 THE COURT: -- but there's concurrent
12 jurisdiction with regard to State statutes in
13 the Diversity case.

14 MR. VLAHAKIS: True.

15 THE COURT: And the rule in the Federal Court
16 has been since the earth cooled that the Federal
17 Court cannot tell State Court what State
18 statutes means. It works the other way as well,
19 in my view. And even if I thought that the
20 matter were one of some doubt, the Illinois
21 Supreme Court said a couple of times that State
22 Courts are to defer to Federal Courts with
23 regard to the meaning of federal statutes.

24 On -- I've got Holtzman vs. Turza on

12

1 which without question says that the TCPA
2 applies to persons who have consented to receive
3 fax ads and requires the opt-out. Now, whether
4 that's a sensible statute or not is not up to
5 me.

6 MR. VLAHAKIS: Understood.

7 THE COURT: And whether that's the
8 interpretation of the statute is, also, not up
9 to me.

10 MR. VLAHAKIS: I think what's helpful to know
11 about the Turza opinion or Holtzman is that
12 while the District Court did rule that an
13 opt-out language was required for these EBR
14 faxes, it was never an issue up on appeal. The
15 Court is simply I think in dicta saying that
16 they think that it complies to consented to
17 faxes, but --

18 THE COURT: You're not going to tell me that
19 Judge Easterbrook has ever uttered dicta.

20 MR. VLAHAKIS: Oh, I've heard him say that
21 before in other arguments where he -- he comes
22 around, with all due respect to him, where, oh,
23 we didn't mean that there. It's been a fun
24 dance in the realm of consumer litigation.

1 THE COURT: I think I better let him say
2 that.

3 MR. VLAHAKIS: Fair enough. But I think I
4 can say legitimately that the appeal did not
5 involve the opt-out language, the propriety of
6 the opt-out language, it's simply he's making a
7 mention of it, and I think that's a very fair
8 statement to make.

9 If you want me to provide you with the
10 briefs, I meant to bring them today, the briefs
11 do not discuss this issue, it's not the issue on
12 appeal.

13 THE COURT: Well, the language that I'm
14 looking at here, I may as well make it part of
15 the record, on -- is as follows: It appears on
16 at the beginning of the opinion all I have is
17 the Lexis numbers which would be Star 1 and
18 Star 2, "Even when the act permits fax ads as it
19 does to persons who have consented to receive
20 them or to those who have established business
21 relations with the sender, the fax must tell the
22 recipient how to stop receiving future
23 messages," then the statutory cite. "Turza's
24 faxes did not contain opt-out information, so if

14

1 they are properly understood as advertising,
2 then they violate the act whether or not the
3 recipients were among Turza's clients."

4 Now, the language is quite clear,
5 whether it's inadvertent, I don't know, but the
6 language is quite clear.

7 MR. VLAHAKIS: To the extent it discusses
8 consented to, again, I believe the distinction
9 is that a request is different than a consented
10 to fax. Faxes can be consented to by providing
11 your number to somebody, that is one form of
12 consent. Obviously, the EBR is one we're very
13 familiar with. But in Turza, it never dealt
14 with the issue of somebody either calling
15 somebody up or exchanging business cards and
16 asking for information.

17 I believe in Holtzman, Turza and
18 Holtzman are the same case, the attorney used
19 lists to contact people which is completely
20 different than what we did here, he was more
21 engaged in a traditional blast faxing campaign
22 as opposed to going out in the community and
23 giving a speech and getting people to say please
24 give me your information as Mr. Allen did. So,

1 we're consented to.

2 It's, again, the facts of that case why
3 he may have said that and I still believe it's
4 dicta and it wasn't up on appeal as to the
5 propriety of that ruling, it never went up, I'm
6 surprised it didn't. That isn't speaking to the
7 circumstances we have here. And I think if, you
8 know, the 7th Circuit, you know, they've had a
9 lot of TCPA cases and I think this might be the
10 one circumstance where whether it's before this
11 Court or another Court where somebody's asking
12 for that fax, then the TCPA should not be
13 applying that opt-out language where it will be
14 doing harm to, essentially, handshake deals or
15 discussions where people say send me some
16 information. It clearly would, you know,
17 concede the EBRs needed that opt-out and we
18 don't have that, but there's only a small
19 percentage of solely based on EBR.

20 In terms of what the Court in the 7th
21 Circuit is saying, I still think in terms of
22 going back to the Nack case that this Court
23 doesn't have to accept the Nack opinion in light
24 of Chevron analysis that this Court can

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1 independently do to determine whether or not the
2 FCC should have rendered an opinion in a form of
3 an amicus at that case at that point, is the
4 regulation contrary to ambiguous language, is
5 the interpretation clearly erroneous or
6 inconsistent, is the application arbitrary and
7 capricious.

8 And I think what's notable in the Nack
9 case it's not the FCC issuing a new regulation
10 after taking public comment which I've dealt
11 with this law before where people will file
12 letters and it's either from the Plaintiffs'
13 bar, it's from Plaintiffs who have filed
14 numerous lawsuits, they speak on this, the FCC
15 takes everybody's opinion, the defense bar comes
16 in, people who help sell facsimile services
17 chime in. It's happening more and more in cell
18 phone calls which the TCPA governs as well. But
19 here the FCC --

20 THE COURT: Not well enough.

21 MR. VLAHAKIS: Pardon?

22 THE COURT: Not well enough.

23 MR. VLAHAKIS: Right.

24 THE COURT: Go ahead.

1 MR. VLAHAKIS: Understood.

2 In terms of this, though, this
3 dovetails into the issue where that I think Nack
4 said we're handcuffed by the Hobbs Act, that we
5 can't really tell the FCC we think you're wrong
6 which I kind of -- I feel some sense of
7 you're -- you're saying that to me here that you
8 may not understand the best approach that the
9 FCCs taking, but you're handcuffed.

10 I don't think you are because we're not
11 asking you to nullify a regulation issued by the
12 FCC, a rule promulgated through proper public
13 notice, we're simply saying the Hobbs Act does
14 not preclude you from analyzing whether you
15 think the amicus brief submitted by the FCC
16 without public comment came out at the proper
17 end of this.

18 So, there's not an issue where Hobbs is
19 saying, nope, you've got to take this at face
20 value, that's happened in other cases, it's
21 happened to the Plaintiffs' bar, it's happened
22 to the defense bar where the FCC has come out
23 and said here's what we mean interpreting a cell
24 phone provision, and under those circumstances

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1 where public comment had been made ad nauseam,
2 when they come out and speak as to something we
3 have to take that for what it's worth.

4 But here it's very unique. Nack came
5 out in a case that is distinguishable from
6 Holtzman to the extent it dealt with attempting
7 to gain permission in getting it and came out
8 and said no, we think our regulations although
9 confusing mean something else. And even the 8th
10 Circuit said -- I think it's very clear that
11 they thought it was confusing and might not
12 agree, might not think that justice was being
13 deserved, but they did what the FCC told them to
14 do.

15 This dovetails into my -- my last
16 argument on the Nack issues, the retroactive
17 application of that Nack decision I think would
18 be improper. There's cases that we've cited in
19 our reply that say where, you know, it's a
20 regulation you may be able to have that, but
21 here in the context of an amicus brief where
22 it's sort of ruling on long ago conduct saying
23 this is something, well, now we're going to say
24 very clearly is illegal, that that can't come

1 back to sort of rubber stamp the impropriety of
2 my client's conduct.

3 I think both sides would agree that
4 this isn't the situation of blast faxer. Mike
5 Allen and his assistant, they didn't know about
6 the TCP, they didn't know about the opt-out
7 language, they weren't trying to be clever and
8 sneak around and --

9 THE COURT: Ignorance were a defense to the
10 TCPA that they knew something would to have a
11 considerably easier life, I think.

12 MR. VLAHAKIS: True. But my attempt, and I
13 apologize to you, attempt to convey that issue
14 that their ignorance of it, they're not the type
15 of taking on the type of task of blasting people
16 where I think it would be very difficult to
17 claim ignorance where you're buying a list --

18 THE COURT: Well, look, you know, I
19 understand your point.

20 MR. VLAHAKIS: Sure.

21 THE COURT: And you understand that I get
22 lots of motions on my calendar with language at
23 the bottom that says, "This is in attempt to
24 collect a debt." You know, I think that that's

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1 just way over the top, but I understand why
2 lawyers do that because they've been terrorized
3 by a generation of decisions under the Fair Debt
4 Collection Practices Act and they're afraid to
5 leave that off anything. These statutes are
6 unforgiving to say the least.

7 It is -- it's a little surprising, in
8 fact, that in case after case, our Supreme
9 Court, the Federal Appellate Courts, and the
10 Federal District Courts decline the invitation
11 to cutback on them. Instead, they push forward.
12 But there it is and there's not much I can do
13 about it.

14 MR. VLAHAKIS: I mean, I understand that I've
15 seen, you know, judges in Federal Court have
16 told me, I just got one of these annoying robo
17 calls myself and it's -- it's a real statute
18 that impacts people and it's there to protect
19 people and stop this unsolicited calling without
20 the permission. But I do think that here that
21 you could, based on what we put in the briefs,
22 have pause, review the retroactive application
23 of the FCC's ruling.

24 If this was something that had been in

1 paper by the FCC long ago, we wouldn't be making
2 this argument, but the way this case came
3 together, I looked at it after certification had
4 been granted, looked at the issue, saw the Nack
5 decision came to a different result, and that
6 Nack decision then while we were briefing this
7 gets reversed by the 8th Circuit. But still on
8 those unique facts, no pun intended, where the
9 permission was granted based on a phone
10 conference, may we send you something, and I
11 think there, potentially, the FCC got it right,
12 that an opt-out should be put on that type of
13 fax where you the sender -- the sender is
14 attempting to send it to somebody and you better
15 get your -- line your ducks up under those
16 circumstances. But here where some businessman
17 is telling one businessman let's make a deal,
18 send me something, under those circumstances, I
19 can't see how anybody would be put on notice to
20 require an opt-out there.

21 I'm not saying ignorance of the law as
22 a defense, but under those unique facts I've
23 still not seen a case -- this would be, and I've
24 researched this to death, the first case where a

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1 requested fax, i.e., a fax solicited by the
2 recipient, not unsolicited, would render
3 somebody liable into the TCPA even where we have
4 EBRs on a vast majority of the people.

5 So, I think in a way the -- the opt-out
6 language is used as a secondary argument for
7 many Plaintiffs in this case as when they're
8 confronted with the lack of blasting, oh, you
9 have the opt-out, you got the EBRs lined up, you
10 don't have the opt-out. Here this came up and
11 under, again, a reply brief, there had never
12 been an amended class cert, an amended
13 complaint, I took your comments well earlier on
14 when you said, well, liberal amendments can be
15 applied so if they wanted to go back and do this
16 the right way and amend the class cert motion to
17 contain the opt-out language then they could do
18 so. But I think the way this case sort of came
19 together when the opt-outs are identified in the
20 response to that original class cert motion --
21 I'm sorry, the EBRs were identified in response
22 to the original motion, then the opt-out kind of
23 reared it's head and the judge who originally
24 ruled on this didn't have the benefit of all

1 these arguments back and forth.

2 And I still think, I don't want to take
3 anymore of the Court's time, but the fact that
4 the amicus brief being filed by the FCC shows
5 that there was a need to clarify something
6 distinguishes this case from any other case in
7 the sense that nobody knew. The 8th Circuit
8 even said we don't know what's going on, please,
9 you tell us FCC. And, then, the 8th Circuit
10 took the approach of, well, guess we got to do
11 what they say. They didn't even perform a
12 Chevron analysis which would have laid out, they
13 felt that they were handcuffed by Hobbs, which I
14 explained why they aren't or why this Court
15 isn't.

16 So, I -- I do believe that coupled with
17 retroactivity is enough reason to decertify this
18 case or -- and maybe if the denial -- if it's
19 denied, then take this up to the next level in
20 light of the enormous amount of liability we
21 have. This is something we could be able to
22 payoff rather easily we wouldn't be having this
23 argument, but this is a crippling liability.

24 If you'd like me to discuss the other

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1 issue as to how we demonstrate the existence of
2 the request, I can go into that as well, but I
3 don't know if you're ready for that -- for me to
4 go to that hurtle, at this point.

5 THE COURT: Well, I don't have a motion for
6 summary judgement before me, I just have a
7 motion to decertify.

8 MR. VLAHAKIS: Correct. In terms of the
9 evidence, Mr. Allen did, I think, fairly
10 admitted that he went through a lot of the faze,
11 and when somebody would request a facsimile he
12 testified that he would put it on the card, hand
13 the card to his assistant or write it on a
14 post-it note, and that information would then
15 not be transmitted into the underlying loan file
16 and to be able to identify this defense which
17 the Reliable case and other cases have said it's
18 a Defendants' affirmative defense that we would
19 then show -- would have to depose all these
20 individuals and ask them do you recall meeting
21 Mr. Allen on a certain date and asking for his
22 information.

23 I mean, the Reliable case is
24 interesting as it speaks as to the burden of

1 proof on a Defendant for, I believe, EBR and for
2 requested solicited facsimile -- solicited
3 facsimiles as they're calling it, but that is I
4 think the first time I've seen a burden of proof
5 on solicitation. But even if that's the case,
6 we can still demonstrate that but that is going
7 to be an individualized issue among thousands of
8 people, many of which he knows he's done work
9 with, but he couldn't point and say, yeah, on
10 this particular date he gave me a letter saying
11 please send me some information.

12 He did identify particular individual
13 he's been doing business with for years that
14 would have been one of those individuals and I
15 think the individualized issues of defense would
16 warrant decertification because it's contrary to
17 the typical junk fax case which would be did you
18 buy a list, did you lack consent, those are --
19 those are the elements, that's an easy case for
20 somebody to win cert on, but here where you then
21 have to come forth and defend yourself and say
22 no, for all these thousands of faxes we can
23 prove that we had a prior business relationship
24 or we can prove that we had permission and a

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1 request, then that I think undermines the
2 efficacy of a class action.

3 And the cases we've cited to in our
4 original motion I think speak to that, I think
5 that's a fairly unremarkable proposition of law,
6 but here it's a remarkable case in the sense
7 that we can go back and point to all of this
8 information.

9 THE COURT: Well, let me hear from the
10 Plaintiff.

11 MR. PIPER: Well, your Honor, the first
12 couple of pages of my argument were things that
13 you've already quoted. This is not simply about
14 an amicus brief. The amicus brief is simply
15 saying the regulation we passed several years
16 ago means what it says, so this is not about --

17 THE COURT: Means what we now say it says.

18 MR. PIPER: Well, it means what it says, you
19 read the regulation, it's says consent or
20 invitation, it's not very ambiguous that the
21 opt-out applies even in those situations, they
22 just didn't back away from it.

23 I'd, also, point out on the equitable
24 arguments, this is a regulated business, a

1 mortgage lender. It's not like this is one of
2 the cases where it's a pizza shop that sent out
3 faxes. These people are in the business of
4 trying to comply with the law, hopefully. And
5 if you go to the FCC's website, their little
6 four-page brochure on fax advertising says you
7 have to have an opt-out notice even in
8 situations of consent or EBR.

9 I guess -- you've always got better
10 questions than I can think of, so if there's
11 something troubling you on our position or that
12 you'd like me to address, that's probably what
13 I'd like to do.

14 THE COURT: What's the size of the class
15 here?

16 MR. VLAHAKIS: Believe it's over 10 -- over
17 10,000.

18 MR. PIPER: But the EBRs are excluded, so
19 what I'm -- the reason I'm hesitating to answer
20 is we have to determine what's left of the class
21 once they come forward with any EBRs that
22 they're claiming which would be excluded from
23 the class.

24 MR. VLAHAKIS: I think that doesn't -- and I

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1 apologize for interrupting, that wouldn't matter
2 if we're still saying you lack an opt-out, we're
3 still stuck with the amount of people we sent
4 faxes to where there's no opt-out, correct?

5 THE COURT: Well, from March 9 to July 8th,
6 2005, the class would be people who were sent
7 faxes without their prior expressed invitation
8 or permission and without any prior established
9 relationship, that's a relatively short period.

10 Then for the period from July 9th,
11 2005, until March 2, 2011, anybody who got an ad
12 without having given a prior expressed
13 invitation or permission and without an
14 opt-out -- without an opt-out notice, doesn't
15 say or without an opt-out notice.

16 MR. PIPER: Right, right.

17 THE COURT: So, the -- some Class 2 would
18 apply to -- the way I read it would apply to
19 anybody who didn't get an opt-out notice. You
20 don't read it that way?

21 MR. PIPER: No, I think you're right,
22 actually, I think I misread it the first time
23 around.

24 And what the Defendant has admitted is

1 they sent out more than 2,500 fax advertisements
2 within the statute of limitations period.

3 MR. VLAHAKIS: And that statement was, again,
4 coming in late in this case, but I understood
5 that that was the most that they at the time
6 period by answering the Request to Admit could
7 identify that they had sent out under their
8 interpretation of what the faxed advertisement
9 meant. I believe the number could be even
10 larger than that based on the records we're now
11 seeing that we've been able to discover since
12 last August in terms of the amount of people
13 that we sent it to.

14 THE COURT: Well, it's your client's records,
15 right?

16 MR. VLAHAKIS: I understand, yes. But the
17 problem is that, I guess, we have to sort
18 through, too, is while we have been provided
19 with these response to subpoena, CDRs are
20 contained in all outbound faxes from the subject
21 fax machine, it was like a standalone machine
22 that somebody would input numbers in throughout
23 the course of the day to send out faxes. Since
24 it wasn't a blast that was done by third-party

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1 provider, we still have to go through those CDRs
2 to try to interpret which ones were sent a
3 one-page facsimile promoting goods and services
4 who can exclude the faxes of three pages which
5 may be some other document that was sent such
6 as, you know, closing papers or some appraisal.

7 But we still have to sort through how
8 many faxes there truly were and the number could
9 be higher than 2,500, I don't want to
10 misrepresent anything to the extent that that's
11 the final number because that's what the Request
12 to Admit admitted to. Discovery comes out that
13 shows that there's more there might be more.

14 Now, to the extend there's not an or in
15 the class notice, I do see the point that if we
16 have an EBR but we lacked an opt-out --

17 THE COURT: Judge Quinn is explicit about
18 that. But what is less explicit but,
19 nevertheless, seems to be the logical
20 consequence of the wording during the period
21 after July 9, 2005, if an ad goes out, then
22 Judge Quinn says the recipient is a member of
23 the class if an opt-out notice wasn't provided.

24 And because of the use of the word,

1 "and," I think that would be true even if the
2 recipient had given a prior expressed invitation
3 or permission, which means that the question of
4 she has already written off, if you will, the
5 prior expressed invitation or permission defense
6 and said no matter what it is an opt-out notice
7 is required.

8 MR. VLAHAKIS: I think that's the correct
9 interpretation of the law, yes.

10 THE COURT: Okay. And she said that in 2011,
11 before Nack and Turza came to the same
12 conclusion.

13 MR. VLAHAKIS: Different conclusion, I
14 believe, your Honor. Where we're sending them
15 on out on the EBR because we've done business
16 with somebody, there are -- there would be a
17 small percentage where that is just an EBR-based
18 defense.

19 Mr. Allen has said, though, of the,
20 let's start off with 2,500, of the 2,500, he's
21 testified that 85 to 90 percent would have been
22 sent at the expressed permission or expressed
23 request of the --

24 THE COURT: Okay. But, see, that's exactly

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1 what Sub 2 of her class definition addresses.
2 Without having given their prior expressed
3 invitation or permission and without an opt-out
4 notice.

5 Now, if she had said without having
6 given their prior expressed invitation or
7 permission or without an opt-out notice, that
8 would imply that in her view, the opt-out notice
9 is not required in a case where the recipient
10 had provided prior expressed invitation or
11 permission. But by using the term, "and," the
12 only way I can read that is to say that the
13 opt-out notice is required even if the recipient
14 had given prior expressed invitation or
15 permission. Not so?

16 MR. VLAHAKIS: The issue of people asking for
17 a facsimile was never briefed before to
18 Judge Quinn, at that time, because this is,
19 again, an issue that came up on the reply where
20 we never had the opportunity of saying, well,
21 wait a second, this opt-out should not apply in
22 a scenario where somebody is saying please send
23 me the fax.

24 So, her use of prior expressed

1 invitation was never briefed and understood.

2 THE COURT: Well, you know, in fact, it --
3 looking back at it, I'm misreading the language,
4 because it -- in each instance it begins with
5 the word, "without," which makes a difference.

6 A person is a member of the class post
7 July 9th, 2005, if the person gets an ad and the
8 person didn't give a prior expressed invitation
9 or permission and the person didn't get an
10 opt-out notice. If the person did give a prior
11 expressed invitation or permission, then the
12 person isn't a member of the class and if the
13 person did get an opt-out notice then the person
14 isn't a member of the class.

15 MR. PIPER: That's my understanding.

16 THE COURT: Okay. So, there's --

17 MR. PIPER: That doesn't mean she --

18 THE COURT: -- two without's in there.

19 MR. PIPER: It doesn't mean she held they
20 wouldn't have a claim if they didn't give the
21 permission, but she's taking them out of the
22 case.

23 THE COURT: But if she's taking them --

24 MR. PIPER: Which could impact the size of

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1 the class.

2 THE COURT: Even if she's taking them out of
3 the case for purposes of the class definition,
4 we still have to figure out who they are.

5 MR. PIPER: Right, which could mean it's less
6 than the 2,500 at the end of the day.

7 MR. VLAHAKIS: A lot less. And that's the
8 difficulty we have in terms of going forth and
9 demonstrating all this because we do have -- we
10 could demonstrate an EBR simply because there
11 are ongoing business relationships, we've shown
12 that of all but 344. But to show the other
13 issue of expressed request solicitation, we
14 believe of the 2,500 we can show that of almost
15 a vast majority but that would be oral-based
16 discovery.

17 THE COURT: Okay. But if it's going to be
18 difficult, that doesn't mean it's impossible and
19 it doesn't mean it doesn't have to happen.

20 MR. VLAHAKIS: That's true.

21 THE COURT: The -- what makes me
22 uncomfortable about this motion, and it somewhat
23 resembles a larger case that I dealt with this
24 morning in terms of the class notice and a

1 motion to decertify or vacate the
2 decertification, the certification or
3 decertification is in principle not meant to be
4 an adjudication of liability.

5 It can't be separated from liability
6 issues, but that's not because of legal theory
7 so much -- or there is a legal theory element in
8 the -- the named class representative has to be
9 a liability proxy for the class or you can't
10 have the class action, we know that, but that's
11 not where I'm getting at. If we use the
12 certification or decertification avenue as a
13 method for determining the underlying legal
14 liability issues, what we're doing is addressing
15 the legal liability issues in a context which is
16 not only somewhat abstract, but also which
17 misses the point of the class action analysis in
18 the first place.

19 The point of the class action analysis
20 in the first place is to me real simple. If a
21 class action works, that is to say if it is --
22 it's practically feasible to adjudicate all of
23 these separate claims in one go, well, then do
24 it. That's what the class action's for, it's

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1 jointer on steroids. If the class action
2 doesn't work, you shouldn't do it.

3 And a reason to focus carefully on the
4 class definition is that it is acutely painful
5 as a practical matter to find out at the back
6 end of the case that the class action device
7 isn't going to work, because everybody spent a
8 whole lot of money and time and then now what do
9 they do, they can't hold the party because they
10 can't figure out who the guests are or something
11 like that. You'd rather deal with things like
12 that sooner than later, which is why the class
13 action determination is supposed to be made
14 early and is explicitly under the code on
15 subject to revision if need be.

16 Now, I could without doing violence to
17 either the class action rules or the TCPA case
18 law, as I understand the two of them, say, okay,
19 I think the Defendant is free to prove as to any
20 member or members of the class that that member
21 or members of the class explicitly requested the
22 sending of the fax and that that's a defense.
23 That by itself doesn't either support or oppose
24 class certification, it simply addresses the

1 question of how then do you work through the
2 process.

3 I think we ought not to define the
4 class as consisting only of those who win, and
5 there's case law that says we shouldn't do that,
6 because if you do that, you haven't solved
7 anything, you've just kicked the can down the
8 road, you still have to figure out who's in the
9 class and who's not.

10 MR. VLAHAKIS: You're referring to, like, a
11 failsafe class, correct? That's the way I've
12 heard the term defining who's going to win as
13 the failsafe class.

14 THE COURT: Okay. Call it that if you want,
15 but it's -- you still have to figure out who's
16 in and who's out. And the idea defining a class
17 is that it ought to be something -- membership
18 in the class by itself ought to be objectively
19 and easily ascertainable so that you know who to
20 send notice to and you know how to move forward
21 from there, then whether they're liable or not
22 is another question and you can add subclasses
23 and some people can be subject to a defense and
24 others not.

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1 If I look at this that way, I'm really
2 not inclined to decertify the class because what
3 we're talking about is not so much whether the
4 class is a wrong class as how do we deal with
5 sorting out who is able to recover and who is
6 not able to recover within the defined class.
7 The notion that there should be a class in TCPA
8 litigation is by now so well settled that I'd be
9 swimming up a stream if I tried to argue
10 otherwise.

11 So, what we're talking about here in a
12 real way is not a class certification issue, it
13 is rather whether Crown's defense that it issued
14 a -- or that it was requested to send a fax to
15 Mr. X is in truth a defense. The Plaintiff says
16 no, based on Nack and Turza and the FCC regs.
17 The Defendant says I should ignore Nack and
18 Turza and take on the Fed's interpretation of
19 its own language because, apparently, I'm in a
20 position of power which is not equal by the
21 Federal Courts of Appeals, a notion I find
22 counterintuitive but intriguing. I'm -- I
23 think, frankly, that I am bound by the Federal
24 Courts of Appeals consistent interpretation of

1 federal law, just as they would be bound by the
2 Illinois Courts consistent interpretation of
3 Illinois law.

4 If these two cases, Nack and Turza,
5 were opposed to each other or if there were a
6 substantial body of opposed case law in the
7 Federal Courts of Appeals, that would be
8 something else again and then we'd have to go
9 figure it out for ourselves, but that's not the
10 case. So, I think I am bound to follow the 8th
11 and 7th Circuits. And if I follow the 8th and
12 7th Circuits, then unless I can construe my way
13 out of reading those opinions as requiring
14 opt-outs across the board, I have to -- I have
15 to do that.

16 Crown makes the point that it is a
17 little ironic or untoward to construe the
18 absence of opt-out language to result in the
19 same liability in an EBR or invitation case as
20 in a case where --

21 MR. VLAHAKIS: Blasting.

22 THE COURT: -- blasting, I was trying to
23 couple the -- Kevin Trudeau, that's his name, as
24 in a case where Kevin Trudeau chose to purchase

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1 a list off the internet. It is true that that
2 is not a consequence that a statutory craftsman,
3 one would hope, would think in terms of.

4 Although, with the current congress
5 when they doubt whether that is true, it's,
6 also, true back in the days when truth and
7 lending class actions were a big deal that a lot
8 of inadvertent errors in drafting truth and
9 lending forms resulted in the same liability as
10 unscrupulous lenders who were deliberately
11 misstating their annual percentage rates. And
12 that was, I suppose, put into the category of
13 collateral damage before the statute was amended
14 to -- to limit liability in a number of
15 respects.

16 It is puzzling to me, but nevertheless
17 something that I have to recognize that both the
18 Illinois Supreme Court and the Federal Courts of
19 Appeals have tended to interpret vigorously and
20 broadly the requirements of the TCPA. And the
21 language of Judge Easterbrook in Turza which I
22 quoted earlier on is really pretty
23 uncompromising. Even if somebody has consented
24 to receive a faxed ad, not just established a

1 business relation but consented to receive the
2 faxed ad, the fax must still tell the recipient
3 how to stop receiving future messages. And the
4 regulation quoted in that explicitly uses the
5 term, "invitation," as well as, "permission."

6 An invitation is -- the word is not
7 difficult, an invitation is closer to a
8 solicitation, a permission is passive. Okay,
9 you can do that if you want to. An invitation
10 is a request that you do something. I gather
11 from television that any vampire knows the
12 difference when it comes to can I come into your
13 house.

14 So, I can't accept Crown's reading of
15 the case law on the statute as exempting people
16 who have requested faxes if the faxes are
17 themselves advertisements. I can see a point to
18 refusing to make that distinction, moreover, for
19 example, and this is just the simplest one that
20 I can think of, let's suppose I say please send
21 me a fax about your bathtubs, so I get a fax
22 about the bathtubs and next month I get another
23 one and next month I get another one. At some
24 point, I don't want to get these things anymore,

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1 but how does one determine without something
2 explicit that my invitation has been revoked.
3 The statute clearly does not have in mind that I
4 have to step up and say, no, don't do that
5 anymore, unless I am given an expressed option
6 to say, no, don't do that anymore, hence, the
7 statutory opt-out. And based on that reasoning,
8 it's not crazy to suggest that the opt-out
9 should be required across the board.

10 Does that potentially result in
11 imposing the same liability on people who are
12 not in the same category of Defendant, yeah, it
13 does. But that may be the only practical way to
14 get the job done, I don't know.

15 That -- all of that aside, I have some
16 question, and I don't know that any of these
17 cases really answers it unless I simply say,
18 okay, I am supposed to stop looking at the facts
19 and simply apply the grade line rule. If I say
20 to somebody please fax me your stuff, and they
21 fax me their stuff, and that only happens once,
22 is that an ad or is it something else. I'm not
23 entirely clear about the answer to that or I
24 wouldn't have been until Holtzman vs. Turza came

1 down when the 7th Circuit in effect said if it
2 goes to more than one person, it must be an ad.
3 It's almost the only way I can interpret Turza.

4 I would like to leave some room in here
5 for Crown's defense that a lot of the -- that
6 this isn't a mass thing, this isn't a blast
7 thing, a lot of these people requested,
8 specifically, that which they got, but I'm not
9 sure how given Nack, Turza, and the regulation I
10 can do that. It's a puzzle and a difficult
11 puzzle.

12 So, I'm going to deny the motion to
13 decertify. Even if I thought that Crown's
14 argument were viable under the current case law,
15 I would still deny the motion to decertify and
16 simply say that we will simply have to find a
17 way to sort that out.

18 A class of 5,000 people is a pain if
19 you have to go through things individually, but
20 there have been worse pains in litigation. At
21 some point, the cost of sorting through 5,000
22 individual claims becomes out of whack with the
23 liability. And I recognize that. I do not much
24 like the notion of presiding over a case that

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1 costs more to defend than it does to pay because
2 it seems to me that that's not how our system is
3 supposed to work, but my hands are, pretty much,
4 tied by the language of the statute and the case
5 law interpreting it.

6 Having said all of that, there may be
7 some room here for argument that a message which
8 is sent to somebody because the person has
9 expressly requested it isn't advertising. And
10 Turza does leave a chink in the door when it
11 says if they are properly understood as
12 advertising then they violate the act if they
13 don't contain opt-out notice -- opt-out
14 language.

15 I can't tell you that I know right now
16 how to put that into practice in this case and
17 it may be that it is more a theoretical defense
18 than an actual one in terms of the ability to
19 actually make it work, but it does allow me to
20 not quite let go of the argument that there's a
21 difference between somebody who has specifically
22 asked for a particular fax and somebody who just
23 gets one.

24 And as to somebody who has specifically

1 asked for a particular fax, for the reasons I've
2 indicated to you, assuming the fax to be an ad,
3 I'm inclined to think that Judge Easterbrook is
4 right that it ought, nevertheless, to have an
5 opt-out. But one can always ask whether it is
6 in truth an ad. It may not be if it's been --
7 if it's a response to a specific request for
8 that information.

9 That's about the best I can do with
10 this in terms of trying to recognize the
11 legitimacy of the issue that Crown is
12 endeavoring to raise, but, nevertheless, fit it
13 into the framework of the case law and the
14 regulations having to do with the act.

15 MR. VLAHAKIS: I think that's -- that's fair
16 and reasonable in a sense that the TCPA does
17 define the term, "unsolicited advertisement,"
18 as, "Any material advertising commercial
19 availability or quality of any property, good,
20 or service just transmitted to any person
21 without that person's prior expressed invitation
22 or permission in writing or otherwise."

23 And here I think we can demonstrate
24 that people are -- that is being sent with their

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1 prior permission, therefore, it's not an
2 unsolicited advertisement, we can go through
3 that on an individual-by-individual basis.

4 I, also, believe, too, a newer
5 argument, but that the recipient may be asked
6 the question at deposition or in interrogatory
7 form it could be done, it could be done via
8 sampling, did you believe this to be an
9 advertisement or are you asking for information.
10 So, in the eyes of the recipient may control the
11 scope and size of this class as well where
12 they're saying no, I clearly asked for it, it
13 was with my permission to send it.

14 THE COURT: That's possible, but you don't
15 want to go too far with that. From the
16 standpoint of the business which would like to
17 survive the litigation, subjecting all of its
18 customers to depositions is probably not a
19 practical way of proceeding. I don't -- I'm not
20 going to foreclose that, if you want to take
21 depositions, you can certainly do it, but it
22 would be nice to come up with something that --
23 that works on a practical level.

24 MR. VLAHAKIS: Third-party interrogatories

1 could go out, that was one thing I've considered
2 and spoken with the client about as well is
3 that -- and, of course, that is --

4 THE COURT: Third-party interrogatories. We
5 don't, actually, have those.

6 MR. VLAHAKIS: I know that, and that's why I
7 think it's somewhat unique, but some type of
8 discovery has to go out. Maybe it's a claim
9 form type issue where somebody has to then say
10 yes, did you solicit, or ask for, or provide
11 permission to Crown. I've seen that done in
12 other cases.

13 And, typically, as you probably know,
14 at the end of the day when we do submit claim
15 forms, say we know there's a blast done and we
16 have the facsimile numbers of people who
17 received the faxes, very few of those were even
18 returned but to the extent here we do want to
19 have some return because we want to have people
20 say, yes, I recall asking for this.

21 THE COURT: Well, but wait, you know, there's
22 no reason that you can't in the context of a
23 claim procedure --

24 MR. VLAHAKIS: Uh-hum.

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1 THE COURT: -- include in the class notice
2 language that says, for instance, if you don't
3 return this claim form, we will assume that you
4 wanted to get the faxes.

5 MR. VLAHAKIS: Correct.

6 THE COURT: You could -- I'm not saying that
7 that's -- that you have to do it that way, I'm
8 saying that you could. It's not impossible to
9 do that.

10 MR. VLAHAKIS: That's kind of what I was
11 trying to say but you said that much better,
12 thank you.

13 THE COURT: I'm a little -- I get a little
14 nervous shifting what arguably are liability
15 issues to the claim stage, but I recognize that
16 that may be the only practical way to get the
17 job done some of the time. I'm not going to try
18 to -- I think we've gone a little bit farther
19 than the actual scope of the motion this
20 afternoon, anyway.

21 MR. VLAHAKIS: Sure.

22 THE COURT: And I don't want to go too far
23 down the road.

24 MR. PIPER: Your Honor, if there were --

1 also, if there were a fax that said,
2 Dear Joe Shmoe, at your request, here is the
3 personalized estimate we've made for your
4 mortgage, that would be closer to what you're
5 talking about. I haven't seen any paper in this
6 case, though, that looks like that.

7 On the other hand, if somebody calls up
8 Sears back when they had catalogs and says
9 please send me your catalog, I think that would
10 still be an advertisement regardless of the fact
11 that the person called up and asked for it.

12 THE COURT: Isn't there an exemption for
13 Sears catalogs? I mean, this is a national
14 institution.

15 MR. PIPER: Well, they probably need the
16 exemption.

17 MR. VLAHAKIS: One thing I've seen done in
18 TCPA cell phone cases is that the person has to
19 swear on the format that, in fact, it is their
20 cell phone because there is no cell phone
21 database. And, so, we know we may have called
22 certain numbers and cases where it's a wrong
23 number where maybe we had consent to call the
24 debtor at a certain point in time, the debtor

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1 becomes so far in debt he or she loses their
2 cell phone, we call the wrong person. We've had
3 people then submit forms saying, yes, this is --
4 I was called within this date, I own this
5 number, it's mine, I'm the subscriber, language
6 like that, and then we submit the mind of that
7 individual.

8 The things that makes it somewhat
9 difficult unlike Teela or FTCPA which both have
10 a caps on liability and provide for attorney's
11 fees, here there's no attorney fee provision
12 under the TCPA so that's part of the Turza
13 decision discussed.

14 I don't know, and I know I'm getting a
15 little bit far afield here, but I think it might
16 be productive to discuss this, what do we do
17 to -- if the class members say, no, I never
18 consented to this or they checkoff for the
19 language we all agree might be appropriate,
20 that's money that goes to the class and that can
21 be a number that we're comfortable determining
22 might be rather low. The only other issue that
23 would remain is what do we do to deal with
24 the -- the fees that have been occurred. I

1 mean, a common fund is one way of looking at
2 this, but that common fund is tied to,
3 essentially, who was improperly sent the fax.

4 I think in Turza, he knows the case
5 better than I do, because of the nature of the
6 blasting, you were able to create a definitive
7 number of class members that, potentially,
8 allocate money in a common fund in that sense
9 because where there's a blast there's usually
10 liability. Here it'd be difficult to
11 necessarily come up with what the appropriate
12 amount of money is.

13 One thing I'm actually happy to report
14 is that the -- there was a denial of coverage
15 earlier in this case and one of the first things
16 I said to do aside from trying to find the facts
17 list trying to come up with the argument I've
18 presented to you, which, again, I appreciate you
19 giving me the time to make the argument, is to
20 have --

21 THE COURT: Well, I'm -- my time actually is
22 yours. I -- I -- I work here all day long, this
23 is my job. So, it's not like you're taking my
24 time, you own it.

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1 MR. VLAHAKIS: Well, I thank you, anyway.

2 The insurance company just yesterday
3 indicated that it was -- it has rethought its
4 prior denial of coverage and its defending the
5 case under reservation of rights now. So, that
6 factor coming in, there might be an ability for
7 the parties to put their heads together and
8 figure out what in light of all the work we may
9 have to do to determine consent, it's going to
10 cost them the time and money if we do
11 depositions or responding to discovery or
12 subpoenas or whatnot, it may not be worth their
13 time to go that far, we're now at a point with
14 the insurance company coming onboard saying
15 we'll defend on a reservation, I don't know what
16 they're willing to put up in terms of the
17 settlement, but that helps things out
18 significantly.

19 And, then, also, the Standard Mutual
20 case, that decision is helpful, too, so we're
21 not having a denial based on that reason.

22 So, I think this has been productive at
23 least from my standpoint to see where maybe
24 through some form of proof, whether it's the

1 claim process or discovery, we can narrow down
2 the size of this class and make it something
3 that's, you know, reasonable as opposed to
4 crippling.

5 THE COURT: Well, there are -- the methods of
6 dealing with the situation are in one sense
7 limited only by counsel's imagination. Whatever
8 you all agree on I am unlikely to get in the way
9 of. I'm really unlikely to get in the way of.
10 If we have to litigate this out, then,
11 obviously, due process and typical litigation
12 concerns are going to play a role in it. Not
13 that many of these cases are litigated out for
14 obvious reasons.

15 I think what I should probably do is
16 set this for status a month or so down the road,
17 give you a chance to talk to each other in light
18 of what you've just heard from the insurer and
19 see where we are unless somebody's got a better
20 idea.

21 MR. PIPER: No, I think that would make
22 sense.

23 MR. VLAHAKIS: I agree.

24 THE COURT: Okay.

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1 MR. PIPER: And do you want us to just say in
2 the order for the reasons stated in open court?

3 THE COURT: For the reasons stated on the
4 record, I think that's appropriate.

5 The -- it occurs to me to wonder
6 whether the denial of a motion to decertify is
7 appealable, let's see.

8 MR. VLAHAKIS: I believe it is.

9 THE COURT: Don't know. 306(a)8, you can
10 petition for leave to appeal from an order of
11 the Circuit Court denying or granting
12 certification of a class action.

13 Today's order does neither of those
14 things.

15 MR. VLAHAKIS: Correct.

16 MR. PIPER: The --

17 THE COURT: So --

18 MR. PIPER: -- my firm would be what you just
19 said, but I can't cite you what case, but denied
20 a petition on that basis, but there may be some.

21 THE COURT: I don't know.

22 MR. VLAHAKIS: I'm more -- I mean, I don't
23 normally practice in Federal Court, I know the
24 rule, think it's 23(f) with similar language you

1 quoted in the sense that there's -- either side
2 who loses the initial certification can
3 immediately take that up on an interrogatory
4 appeal whereas the 7th Circuit sometimes grants,
5 sometimes doesn't, but I'm not aware directly to
6 answer your questions whether what -- what this
7 leaves me today in terms of your denial. I
8 don't know if the --

9 THE COURT: There is a limited amount of
10 Illinois authority, mostly having to do with a
11 couple of cases in which a Court granted class
12 certification, the Defendants dropped the ball
13 and didn't timely petition for leave to appeal.
14 The Defendants got the Trial Court to enter a
15 new order and then tried to appeal that and the
16 Appellate Court said no, that won't work.

17 So, there's not direct authority for
18 the point that we're talking about, but it might
19 be a straw in the wind suggesting the Appellate
20 Court wants to see either an actual change in
21 the status of the class or the initial ruling.
22 I don't know. It's -- I -- I haven't seen a
23 case that addresses the precise point that we're
24 talking about.

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1 MR. VLAHAKIS: Yeah, I think that if this
2 Court were inclined and it sounded like you're
3 suggesting, well, we're denying your motion but
4 there's a possibility of redefining the class or
5 narrowing the class down based on what the
6 evidence shows if there is a modification of the
7 scope of the certification that is either to the
8 detriment to the Plaintiff or the detriment of
9 the Defendant --

10 THE COURT: Now, that I think probably would
11 fall within the rule.

12 MR. VLAHAKIS: Yes.

13 THE COURT: Although, you might have the
14 Appellate Court then saying, well, all we can
15 consider is the modification, we can't consider
16 the underlying order.

17 MR. VLAHAKIS: Correct.

18 THE COURT: I don't know. Maybe we won't
19 have to get there.

20 MR. VLAHAKIS: Correct.

21 MR. PIPER: If they'd appealed in 2011,
22 they'd of had the advantage that Nack and
23 Holtzman hadn't been decided.

24 THE COURT: Although, neither would Lay have

1 been decided.

2 MR. PIPER: True.

3 THE COURT: Let me get the book and see what
4 date I can give you.

5 (Whereupon, a discussion was had
6 off the record.)

7 MR. VLAHAKIS: I mean, would it be
8 appropriate to say, though, that denying for
9 reasons stated on the record, but that without
10 prejudice to the extent that we may need to
11 modify the -- the scope of the class to the
12 extent we get further along in either discovery,
13 because, oddly, we haven't done much discovery
14 in this case other than taking two rounds of
15 depositions of Mr. Allen, the owner of Crown,
16 his assistant, Bobby, we took the depositions of
17 I think the two Plaintiffs, but that's really
18 been it, we haven't done much of anything else.

19 THE COURT: I don't think it's appropriate to
20 put without prejudice in the order because even
21 if it doesn't say that, it's doubly without
22 prejudice.

23 MR. VLAHAKIS: Correct.

24 THE COURT: First, it's without prejudice

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1 because of the last sentence in Rule 304(a) that
2 says that everything before the final judgement
3 can be redone; and, second, it's, also, without
4 prejudice because 2-802 says that a class
5 determination can be modified prior -- at any
6 time prior to the --

7 MR. VLAHAKIS: Okay.

8 THE COURT: -- trial --

9 MR. VLAHAKIS: Right.

10 THE COURT: -- so we really don't need it.

11 MR. VLAHAKIS: Okay.

12 THE COURT: How about November -- November 4
13 at 9:30, does that work for you all?

14 MR. PIPER: Generally, somebody from my
15 office will be able to cover it, but I know I'm
16 not available and it might make sense for me to
17 come back. And for me probably the 18th or
18 after would be better.

19 THE COURT: After, okay. Well, do you want
20 to do the 18th, November 18th?

21 MR. PIPER: Sure.

22 THE COURT: Okay. At 9:30.

23 MR. PIPER: At 1:30?

24 THE COURT: 9:30.

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MR. PIPER: 9:30.

MR. VLAHAKIS: Thank you, your Honor.

THE COURT: Thank you.

MR. PIPER: Thank you, Judge.

(Which were all the proceedings
had in the above cause this
date and time.)

1 STATE OF ILLINOIS)
2) SS:
3 COUNTY OF C O O K)
4

5 Sandra Di Vito, as an Officer of the
6 Court, says that she is a shorthand reporter
7 doing business in the State of Illinois; that
8 she reported in shorthand the proceedings of
9 said hearing, and that the foregoing is a true
10 and correct transcript of her shorthand notes so
11 taken as aforesaid, and contains the proceedings
12 given at said hearing.

13 IN TESTIMONY WHEREOF: I have hereunto
14 set my verified digital signature this 15th day
15 of October, 2013.

16

17

Sandra Di Vito



18

Illinois Certified Shorthand Reporter

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 21, 2014, a copy of Crown Mortgage Company's Petition for Declaratory Rulings and/or for Waiver was served upon counsel of record at the following address via First Class Mail and email service.

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The undersigned certifies that on February 21, 2014, he filed, by mail and internet service, Crown Mortgage Company's Petition for Declaratory Rulings and/or Waiver with the Federal Communications Commission, Office of the Secretary, 445 12th Street, SW, Washington, D.C. 20554

/s/ James C. Vlahakis
James C. Vlahakis