

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

In the Matter of	)	
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 02-278
	)	
Rules and Regulations Implementing the	)	CG Docket No. 05-338
Telephone Consumer Protection Act of 1991	)	

**REPLY COMMENTS OF FOREST PHARMACEUTICALS,  
GILEAD SCIENCES, AND PURDUE PHARMA  
("JOINT PETITIONERS")**

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## EXECUTIVE SUMMARY

Joint Petitioners — like other petitioners covered by the Public Notice — are being sued under the TCPA for sending fax advertisements to recipients who expressly agreed to receive those faxes. These recipients assert that under a federal law designed to protect consumers from *unsolicited* advertisements sent by fax, they are entitled to cash-in each fax they agreed to receive for statutory damages of between \$500 and \$1,500 per fax if the fax deviated in any way from opt out notice requirements intended by Congress to govern only *unsolicited* faxes. Congress created no such cause of action, and the Commission should make that clear by issuing the declaratory ruling requested by Joint Petitioners and others.

The TCPA draws a bright line between solicited and unsolicited faxes, and imposes civil liability only on the latter. Some commenters assert that Congress expanded the TCPA to regulate solicited faxes, but these arguments are unavailing. The provisions these commenters cite in fact are limited to implementing a narrow exception allowing *unsolicited* advertisements to be faxed pursuant to an “Established Business Relationship,” as that term is defined by the statute and applicable Commission rules. Congress never extended the TCPA’s fax prohibitions on “unsolicited advertisements” to *solicited* faxes.

In the absence of a declaratory ruling, Petitioners and commenters have shown that the irregularities associated with the application of the Opt Out Notice Rule to solicited faxes, and the disproportionate penalties that can attach even to immaterial failures to comply, constitute good cause for the Commission to issue a blanket waiver for solicited faxes transmitted without an opt out notice (or with a deficient opt out notice). If the Commission does not grant the declaratory relief requested, it should grant a blanket retroactive waiver of the Opt Out Notice Rule for all solicited faxes dating back to the Rule’s enactment, and that waiver

should remain in place on a going-forward basis until addressed by the Commission in a further rulemaking. A failure to grant such relief would be manifestly unjust and inconsistent with the public interest.

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**REPLY COMMENTS OF FOREST PHARMACEUTICALS,  
GILEAD SCIENCES, AND PURDUE PHARMA  
("JOINT PETITIONERS")**

The undersigned Joint Petitioners<sup>1</sup> offer these reply comments in response to the initial comments submitted regarding the Commission’s January 31, 2014, Public Notice in these dockets.<sup>2</sup>

Joint Petitioners — like other petitioners covered by the Public Notice — are being sued under the Telephone Consumer Protection Act of 1991 (“TCPA”) for sending fax advertisements to recipients who expressly agreed to receive those faxes. These recipients assert that under a federal law designed to protect consumers from *unwanted* faxes, they are entitled to cash-in each fax they agreed to receive for statutory damages of between \$500 and \$1,500 per fax if the faxes deviated in any way from opt out notice requirements intended by Congress to govern only unsolicited faxes sent pursuant to the Established Business Relationship (“EBR”)

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<sup>1</sup> The Joint Petitioners consist of Forest Pharmaceuticals, Inc. (“Forest”); Gilead Sciences, Inc., and Gilead Palo Alto, Inc. (collectively, “Gilead”); and Purdue Pharma L.P., Purdue Pharma Inc., and Purdue Products L.P. (collectively, “Purdue”). Forest, Gilead, and Purdue each filed a petition in the above-referenced dockets seeking a declaratory ruling and/or other relief in connection with the misapplication of the TCPA’s Opt Out Notice Rule, 47 C.F.R. § 64.1200(a)(4)(iv), to faxes sent with the recipient’s prior express permission.

<sup>2</sup> 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) (“Public Notice”).

exception. Congress created no such cause of action, and the Commission should make that clear by issuing the declaratory ruling requested by Joint Petitioners and others. In the alternative, and at a minimum, the Commission should grant a blanket retroactive waiver to fax senders who understandably — and correctly — read the TCPA to mean what it says: that a person who expressly invites or agrees to receive a fax has no basis on which to seek damages from a sender who responds to that invitation or consent.

## I. INTRODUCTION AND BACKGROUND

The TCPA, as amended by the Junk Fax Prevention Act of 2005 (“JFPA”), prohibits the sending of most unsolicited advertisements via facsimile — *i.e.*, fax advertisements sent without the recipient’s prior express consent.<sup>3</sup> The TCPA provides a narrow exception to this prohibition for unsolicited advertisements faxed pursuant to an EBR between the sender and the recipient, so long as the fax includes an opt out notice that meets the statutory standards and complies with other requirements.<sup>4</sup> Section 64.1200(a)(4)(iv) of the Commission’s rules (the “Opt Out Notice Rule”) purports to impose the *same* opt out notice requirement on faxes sent *with* the recipient’s prior express consent — *i.e.*, solicited, as opposed to unsolicited, faxes. The Opt Out Notice Rule has spawned a wave of abusive litigation under the TCPA in which crippling levels of statutory damages are being sought, typically based on technical deviations from the Commission’s rule that are immaterial and have caused no consumer harm.

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<sup>3</sup> 47 U.S.C. § 227(b)(1)(C). The Joint Petitioners note that, in addition to being limited to *unsolicited* faxes, the TCPA’s fax restrictions apply only to *advertisements*, *i.e.*, “material advertising the commercial availability or quality of any property, goods, or services.” § 227(a)(5). Joint Petitioners do not concede that the faxes at issue qualify as “advertisements,” but in any case that question is not relevant to the issues raised in their petitions or in the Public Notice.

<sup>4</sup> 47 U.S.C. § 227(b)(1)(C).

As demonstrated by the numerous recent petitions filed on this issue,<sup>5</sup> and by the initial comments submitted by Anda and others, this is a widespread and growing problem that the U.S. Court of Appeals for the Eighth Circuit and other reviewing courts have held — and the Commission itself has insisted — must be addressed by the Commission in the first instance under the Hobbs Act, and on the merits.<sup>6</sup> Joint Petitioners agree with commenters who stated that the Commission can and must grant broad relief to fax senders who, though they acted in good faith and with the express consent of fax recipients, have been ensnared by a confusing — and legally dubious — rule.

The Commission is well-positioned to grant such relief. As stated in the petitions filed in this proceeding, a declaratory ruling clarifying that Section 227(b) was not the source of authority for any rule requiring a specific opt out notice on solicited faxes<sup>7</sup> would be appropriate, given the serious questions raised regarding the rule’s legality if it were premised on that statutory provision. In the alternative, the same legal and equitable considerations justify the kind of broad waiver relief raised by the Public Notice.<sup>8</sup> Joint Petitioners believe such a waiver, if properly structured, would provide effective relief while protecting the consumer interests the TCPA was intended to serve.

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<sup>5</sup> See Public Notice at 1 n.1 (listing petitions).

<sup>6</sup> See Comments of Anda, Inc., CG Docket Nos. 02-278 & 05-338, at 8-9 (filed Feb. 14, 2014) (“Anda Comments”); Comments of Staples, Inc. and Quill Corporation, CG Docket Nos. 02-278 & 05-338, at 5 (filed Feb. 14, 2014) (“Staples/Quill Comments”). Whether the Hobbs Act in fact restricts defendants’ ability to challenge the Opt Out Notice Rule for solicited faxes in a private TCPA suit alleging a violation of the rule is the subject of a pending petition for certiorari to the U.S. Supreme Court. *Nack v. Walburg*, 715 F.3d 680, 682 (8th Cir. 2013), *petition for cert. filed*, No. 13-486 (Oct. 15, 2013).

<sup>7</sup> In these reply comments, the term “solicited faxes” refers to advertisements — not other types of faxes — faxed with recipients’ prior express invitation or permission.

<sup>8</sup> See Public Notice at 2.

**II. THE FCC SHOULD ISSUE A DECLARATORY RULING CLARIFYING THAT, TO THE EXTENT THE FCC HAS AUTHORITY TO REQUIRE AN OPT OUT NOTICE ON SOLICITED FAXES, THAT AUTHORITY DOES NOT DERIVE FROM SECTION 227(b).**

A. The TCPA Confers No Authority to Regulate Solicited Faxes.

For the reasons stated in the petitions and by other commenters supporting relief, and contrary to the assertions of other commenters,<sup>9</sup> the TCPA does not authorize any rule requiring solicited faxes to include opt out notices. The TCPA draws a bright line between solicited and unsolicited faxes. The relevant TCPA provisions, codified at Section 227(b) of the Communications Act, address only “unsolicited advertisements,” which are defined by the plain language of the statute to exclude faxes that are transmitted with a person’s “prior express invitation or permission, in writing or otherwise.”<sup>10</sup>

Section 227(b)(1)(C) provides that it generally is unlawful to fax an unsolicited advertisement. The statute provides a narrow exception for unsolicited advertisements faxed pursuant to an EBR between the sender and recipient.<sup>11</sup> However, to qualify for this exception, the statute provides that, among other things, “the *unsolicited advertisement* [must] contain[] a notice meeting the requirements under” Section 227(b)(2)(D).<sup>12</sup> In contrast, nowhere does Section 227(b) regulate the transmission of *solicited* faxes or confer that authority on the Commission.

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<sup>9</sup> See, e.g., Comments of the National Association of Consumer Advocates, CG Docket Nos. 02-278 & 05-338, at 2 (filed Feb. 14, 2014).

<sup>10</sup> 47 U.S.C. § 227(a)(5).

<sup>11</sup> § 227(b)(1)(C).

<sup>12</sup> § 227(b)(1)(C)(iii) (emphasis added).

B. Provisions Implementing the EBR Exception Do Not Expand the TCPA's Scope.

Arguments by some commenters asserting that Section 227(b)(2) in general or Section 227(b)(2)(E) in particular expand the TCPA to cover solicited faxes are unavailing.<sup>13</sup> Section 227(b)(2)(E), enacted as part of the JFPA, is definitional. Section 227(b)(1)(C) generally makes unsolicited faxes unlawful, unless the fax is sent pursuant to an EBR, the sender obtained the fax number from a permissible source, and the fax “contains a notice meeting the requirements under paragraph (2)(D).” This notice, in turn, must “set[] forth the requirements for a request under subparagraph (E).” In other words, paragraphs (b)(2)(D) and (b)(2)(E) are purely definitional provisions explaining what is required to satisfy the EBR exception created by paragraph (b)(1)(C). Section 227(b)(2)(E) defines the information recipients must provide to opt out of future EBR-based *unsolicited* faxes, but provides no authority over *solicited* faxes. Indeed, Congress explicitly continued to use the term “unsolicited advertisement” — without changing its definition — throughout the fax-related provisions added by the JFPA.

Faxes sent pursuant to prior express permission — that is, solicited faxes — fall outside of this closely defined framework. Some commenters erroneously argue that solicited faxes must include the statutory opt out notice because fax recipients supposedly can opt out of such faxes only through the statutory procedure.<sup>14</sup> That is incorrect. The statutory structure makes clear that recipients of solicited faxes need not follow the precise terms of

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<sup>13</sup> See Comments of Bellin & Associates LLC, CG Docket Nos. 02-278 & 05-338, at 6-7 (filed Feb. 14, 2014) (“Bellin Comments”); TCPA Plaintiffs’ Comments on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements, CG Docket Nos. 02-278 & 05-338, at 4 (filed Feb. 14, 2014) (“TCPA Plaintiffs’ Comments”).

<sup>14</sup> See, e.g., Bellin Comments at 22; Comments of Michael Nack on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements, CG Docket Nos. 02-278 & 05-338, at 2 (filed Feb. 14, 2014) (“Nack Comments”); Comments of National Association of Consumer Advocates, CG Docket Nos. 02-278 & 05-338, at 3 (filed Feb. 14, 2014).

Section 227(b)(2)(E) to revoke prior express consent. Rather, those requirements apply only to opt outs from EBR-based *unsolicited* fax ads. By definition, recipients who have provided express consent *prior* to receiving a fax have at least one other channel of communication with the sender, if not several such channels, and recipients are free to use those channels to revoke their consent to receive faxes. For example, the plaintiff in Forest’s case could have revoked consent to receive faxes in the course of numerous live, one-on-one contacts with Forest sales representatives that occurred before, during, and after the time period during which the relevant faxes were sent.<sup>15</sup> In Forest’s and other cases, the subject faxes themselves provided cost-free opt out mechanisms and effective instructions for using those mechanisms.<sup>16</sup> And in still other cases, the entities that sent the faxes were identified clearly in the faxes. The point is that there are myriad ways to opt out of solicited faxes.

C. The Commission May Not Define “Prior Express Invitation or Permission” in a Manner Contrary to Congressional Intent.

Because nothing in the TCPA establishes requirements or grants authority with respect to solicited faxes, Section 227(b)(2)’s general grant of authority to prescribe regulations to implement the TCPA’s requirements likewise confers no authority over solicited faxes. Some commenters assert that the Commission could impose additional substantive requirements on solicited faxes as a way of “filling the gap” created by the TCPA’s lack of an explicit definition for “prior express invitation or permission.” However, although an agency may “fill gaps”

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<sup>15</sup> Forest Petition at 7-8.

<sup>16</sup> Forest Petition at 8-9; Purdue Petition at 15; Gilead Petition at 8-9; Staples/Quill Comments at 5-6 & n.19.

within a statute, it may not venture outside the lines of the authority Congress has granted.<sup>17</sup> Whatever authority the Commission might have to further define “prior express invitation or permission” — such as, for example, stating that a “negative option” procedure does not qualify<sup>18</sup> — it may not impose a definition “manifestly contrary to the statute” where the intent of Congress is clear.<sup>19</sup> In the TCPA context, Congress made clear through plain statutory language that where the recipient expressly consents to receive a fax prior to the fax being sent, the TCPA’s restrictions do not apply. The petitions in this proceeding seek relief only for such faxes. The Commission has no authority to fly in the face of Congressional intent by making this otherwise lawful activity unlawful.

This analysis is especially compelling given the decision of Congress to create a private right of action for violations of Section 227(b) or the regulations “prescribed under” that subsection. Congress repeatedly and consistently limited the coverage of Section 227(b)’s fax provisions to “unsolicited advertisements.” Had Congress intended the private right of action in Section 227(b)(3) to extend to solicited faxes, and thus potentially expose companies to crippling statutory damages on that basis, it would have said so explicitly.<sup>20</sup> There is no evidence of any

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<sup>17</sup> *See Am. Library Ass’n. v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005) (“It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.”).

<sup>18</sup> *See 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, at ¶ 45 (2006) (“*Junk Fax Order*”) (stating that mechanism where recipient’s consent is presumed unless sender is advised otherwise does not constitute prior express invitation or permission).

<sup>19</sup> *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 844 (1984).

<sup>20</sup> *See* Comments of Howmedica Osteonics Corp., CG Docket Nos. 02-278 & 05-338, at 3 (filed Feb. 14, 2014) (noting that, under well-established canons of statutory construction, Congress is presumed to legislate against existing law, including the principle that consensual conduct does not give rise to liability). *Cf. Ioffe v. Skokie Motor Sales, Inc.*, 414 F.3d 708, 713 (7th Cir. 2005) (where Congress created private right to sue a vehicle transferor for failure to disclose “the (continued...)”).

such intent. Nor is there any statutory, public policy, or other basis to apply the Opt Out Notice Rule to solicited faxes. One of the Eighth Circuit judges illustrated the absurdity of applying this requirement to solicited faxes during oral argument in *Nack*:

“[If] I call up Imo’s [pizzeria] and I want to order a pizza and I say [to Imo’s] fax me your menu, Imo’s is supposed to know that you got to have an opt-out on that or they are going to be liable for, according to opposing counsel, millions of dollars of damages?”<sup>21</sup>

If the Commission believes it had authority to promulgate and apply the Opt Out Notice Rule to solicited faxes under some source of authority other than Section 227(b) of the Act, it should identify that authority. Some commenters argue that the *Junk Fax Order*’s citation of 11 separate statutory authorities, including Section 227 in general, was sufficient. That is incorrect. In some cases, it may be sufficient for an agency to establish that it has some source of authority for a rule, without being more specific. But the TCPA also attaches *private* liability to violations of rules promulgated under one specific statutory subsection. Where, as here, it is questionable whether that provision authorizes a particular rule, the Commission has an obligation to, at a minimum, articulate specifically whether the rule was promulgated under the relevant provision, and if so how the provision provides the necessary authority for the rule. The Commission did not do this.

In *Nack*, the Eighth Circuit found it “questionable” that the regulation at issue “properly could have been promulgated under the statutory section that authorizes a private

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cumulative mileage registered on the odometer,” “with intent to defraud,” court rejected reading of interplay between agency regulation and statute that would “dramatically increas[e] the number and types of private claims available under the Act and expand[] the private right of action far beyond its scope under the statute.”)

<sup>21</sup> *Nack v. Walburg*, Oral Arg. at 28:23, available at <http://8cc-www.ca8.uscourts.gov/OAudio/2011/12/111460.mp3>.

cause of action.”<sup>22</sup> *Nack* held that District Courts lack jurisdiction to determine the validity of applying the Opt Out Notice Rule to solicited faxes and held that such challenges must first be brought to the Commission.<sup>23</sup> Likewise, the Commission’s Office of General Counsel took the position as *amicus curiae* in *Nack* that only the Commission, and not District Courts, can address these challenges. Having taken that position, it is incumbent on the Commission to now act.<sup>24</sup> A declaratory ruling would resolve this issue once and for all and eliminate the need for further prospective action by the Commission.

D. The Requested Declaratory Ruling Would Allow the Commission to Avoid Serious Constitutional Concerns.

A rule requiring specified opt out language to appear on faxes sent with the recipient’s prior express permission also raises serious First Amendment concerns, as the Eighth Circuit and other courts have recognized. Contrary to arguments raised by some opponents, intermediate scrutiny is the appropriate standard for analyzing the Opt Out Notice Rule to solicited faxes. The cases cited by some commenters applying the lower “reasonable relation” standard involve pure disclosure requirements of existing legal or factual information.<sup>25</sup> In contrast, the Opt Out Notice Rule goes beyond that — it requires not only a disclosure, but also a specific opt out mechanism to live up to that disclosure. Applying the rule as opponents read it therefore would make it unlawful to send a solicited fax at all unless the sender also sets up the

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<sup>22</sup> *Nack*, 715 F.3d at 682.

<sup>23</sup> *Id.* at 685.

<sup>24</sup> Moreover, although one commenter urged the Commission to dismiss the pending petitions on procedural grounds, *see* TCPA Plaintiffs’ Comments at 13-17, the Eighth Circuit indicated that a court might be empowered to consider challenges to the Opt Out Notice Rule, notwithstanding the Hobbs Act, if the Commission refused “to consider a substantive challenge to the regulation.” *Nack*, 715 F.3d at 686 n.2.

<sup>25</sup> *See* TCPA Plaintiffs’ Comments at 26-27; Bellin Comments at 25-26.

specific opt out mechanism defined in the rule. Because the Opt Out Notice Rule's burden on truthful, non-misleading commercial speech goes beyond mere disclosure, it must be evaluated under intermediate scrutiny.

In any case, for the reasons raised in the petitions and by courts that have considered the issue, there is a serious question as to whether the Commission could show that imposing specific opt out language on solicited faxes bears a reasonable relation to the problem of unwanted (*i.e.*, unsolicited) faxes, let alone that there is a *substantial* interest in requiring word-specific opt out terminology to appear on solicited faxes when senders already are responsible for obtaining consent. The TCPA's detailed opt out notice requirements are premised on the idea that when faxes are transmitted on the basis of an EBR alone, the recipient may have no knowledge of who manages the fax transmissions for the sender. That premise simply does not apply in the context of faxes to which the recipient has provided prior express consent. In the context of *solicited* faxes, the recipient *already* has demonstrated the ability to communicate his or her preferences regarding faxes. In addition, solicited faxes at a minimum contain the header information required of all faxes,<sup>26</sup> and in many cases (such as with respect to faxes sent by the Joint Petitioners) include specific opt out instructions. There is no government interest in demanding that senders of solicited faxes also provide the information spelled out in the opt out procedures Congress designed for *unsolicited* EBR-based faxes.

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<sup>26</sup> See 47 U.S.C. § 227(d)(2).

**III. IN THE ALTERNATIVE, THE FCC SHOULD ISSUE A RETROACTIVE BLANKET WAIVER FOR ALL SOLICITED FAXES TRANSMITTED WITHOUT AN OPT OUT NOTICE (OR WITH A DEFICIENT OPT OUT NOTICE) SINCE THE *JUNK FAX ORDER* BECAME EFFECTIVE.**

As demonstrated by Joint Petitioners and others, one of the ways the Commission can provide relief is by issuing a retroactive blanket waiver for solicited faxes transmitted without an opt out notice (or with an opt out notice alleged to be deficient). A retroactive blanket waiver would be an expedient, practical way to stop the abusive litigation tactics that are crippling a wide range of businesses, large and small — tactics that provide no commensurate consumer benefit. The Commission has the authority to issue such a retroactive blanket waiver and has done so in the past.<sup>27</sup> In fact, a retroactive blanket waiver is ideally suited for circumstances where, as here, the law and equities demand it. Petitioners and commenters have shown that the irregularities associated with the application of the Opt Out Notice Rule to solicited faxes, and the disproportionate penalties purportedly attaching to even alleged immaterial failures to comply constitute good cause for a waiver. Most notably:

- The Opt Out Notice Rule was applied to solicited faxes without proper notice in the NPRM.<sup>28</sup>

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<sup>27</sup> See, e.g., *Implementation of Sections 716 & 717 of the Commc'ns Act of 1934, As Enacted by the Twenty-First Century Commc'ns & Video Accessibility Act of 2010*, Order, DA 13-2039 (CGB Oct. 22, 2013) (granting temporary waiver of accessibility requirements for specified class of e-readers, retroactive to Oct. 8, 2013); *United Tel. Co. of Kansas United Tel. Co. of E. Kansas & Twin Valley Tel., Inc.*, 25 FCC Rcd 1648, 1650 (2010) (recognizing ability to grant study area waivers retroactively, where order does so explicitly); *Provision of Improved Telecommunications Relay Servs. & Speech-to-Speech Servs. for Individuals with Hearing & Speech Disabilities*, 20 F.C.C. Rcd. 5433, 5440, 5444 (2005) (giving waiver retroactive effect to allow IP Relay provider to be compensated for service provided during time period in which service may not have been complying with certain later-waived requirements, based in part on “initial ambiguity” of applicable rules); *Rath Microtech Complaint Regarding Electronic Micro Systems, Inc.*, Memorandum Opinion and Order, 16 FCC Red 16710 (Network Servs. Div. 2001).

<sup>28</sup> See Anda Comments at 7.

- The Opt Out Notice Rule was applied to solicited faxes in an Order with internally contradictory language about whether opt out notices are required for such faxes, and confusingly codified within a rule otherwise applying only to *unsolicited* faxes. As noted by the Eighth Circuit in *Nack*, “[t]he FCC acknowledged, but did not attempt to explain, the inconsistent passage from the 2006 Order.”<sup>29</sup>
- The application of the Opt Out Notice Rule to solicited faxes is contrary to express statutory language excluding solicited faxes from the scope of the TCPA and its rules.
- The lack of an opt out notice on solicited faxes (or one that does not meet every element in the Commission’s rule word-for-word) causes no demonstrable harm of any kind to consumers who consented to receiving faxes in the first place. The fax recipients described in the petitions were businesses that expressly requested faxes or consented to receive them, and the petitions do not seek relief with respect to any other class of faxes. Commenters opposing relief premise their claims of harm on the asserted harms caused by *unsolicited* faxes, which are not at issue in this proceeding, and generic, unsupported allegations that many claims of prior express consent are erroneous or fraudulent.<sup>30</sup> No commenter attempts to argue that a recipient who genuinely consented to receiving a fax is harmed by that fax’s lack of an opt-out notice, much less that any such harm is sufficient to justify the level of crippling statutory damages being sought in the putative class actions currently pending across the country. Concerns over fallacious consent may be — and long have been — challenged in court, but they are not relevant here.

The application of the Opt Out Notice Rule to EBR-based unsolicited faxes was mandated by statute. In contrast, even assuming *arguendo* that the Commission could apply the Opt Out Notice Rule to solicited faxes under the TCPA (which Joint Petitioners do not concede) or some other source of authority, this extension of the Rule was entirely discretionary on the

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<sup>29</sup> *Nack*, 715 F.3d at 684.

<sup>30</sup> For instance, one commenter — who represents a party currently suing Purdue in a putative class action premised on the Opt Out Notice Rule — challenges whether Purdue obtained consent for the faxes it sent to Physicians Healthsource, Inc. Comments of John P. Lowry, CG Docket Nos. 02-278 & 05-338, at 3-4 (filed Feb. 14, 2014) (“Lowry Comments”). However, in the Connecticut litigation the Lowry Comments cite, PHI no longer even alleges that the faxes at issue were unsolicited. PHI’s initial complaint contained such an allegation, but PHI dropped that claim as the factual record developed.

Commission's part, not mandated by any statutory provision. As a consequence, it would be entirely within the Commission's authority to waive the Rule with respect to solicited faxes. For the same reason, the Commission also has authority to determine that substantial compliance with the Opt Out Notice Rule in the solicited fax context (*e.g.*, effective notices like those provided by the Joint Petitioners) satisfies the Rule.

Any retroactive blanket waiver should apply to all solicited faxes transmitted since the *Junk Fax Order* became effective and should continue until the Commission addresses through rulemaking the numerous legal and practical issues raised in this proceeding.<sup>31</sup> Given the scope of the problem, granting waivers on a company-by-company or case-by-case basis would only result in an endless stream of petitions and squander Commission resources. This can — and should — be avoided. The waiver also should specify that no solicited fax will be considered to have violated the Opt Out Notice Rule (*i.e.*, Section 64.1200(a)(4)(iv)), and thus Section 227(b), regardless of whether and to what extent it contained (or did not contain) an opt out notice, and regardless of whether the question arises before the Commission directly or in another forum. Finally, the waiver should apply retroactively to all solicited faxes and on a going-forward basis until addressed in a further rulemaking. To ensure business certainty, the Commission should make clear that prospective action by the Commission, if any, would not affect the retroactive blanket waiver, should the Commission address the issue in a future rulemaking proceeding.

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<sup>31</sup> See Public Notice at 2; *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 Nos. 02-278, 05-338, at 7-10 (filed July 19, 2013).

#### **IV. ARGUMENTS DESIGNED TO PERPETUATE ABUSIVE LITIGATION PRACTICES SHOULD BE RECOGNIZED FOR WHAT THEY ARE AND ACCORDINGLY REJECTED.**

Certain commenters' claims of "practical necessity" — that opt-out notices are needed for all faxes — are dubious and should be rejected. It is noteworthy that the substantive comments opposing relief were filed primarily by parties (and representatives of parties) pursuing putative class actions based on solicited faxes that allegedly violated the Opt Out Notice Rule.<sup>32</sup> These parties stand to gain financial windfalls from their positions.

To the extent opponents' arguments are based on unsupported assertions that fax senders can fraudulently claim they secured prior express consent, nothing in the petitions at issue condones such behavior or would relieve senders of the consequences of such actions. Indeed, unsolicited faxes are outside the scope of the petitions and the Public Notice. In addition, the petitions do not challenge the separate statutory requirement that all fax machines "clearly mark[], in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual."<sup>33</sup> As previously noted, this should be enough information to contact legitimate senders to whom the recipient has provided prior express consent.

In essence, opponents do not actually argue that a fax to which the recipient has consented causes the recipient any harm, with or without an opt out notice. Rather, opponents argue that although the existence of consent is the key factor determining a fax sender's liability

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<sup>32</sup> See, e.g., Lowry Comments at 3 (represents plaintiff in suit against Purdue); Bellin Comments at 1 (represents "a number of plaintiffs" in TCPA litigation); TCPA Plaintiffs' Comments at 1 (attorneys representing plaintiffs in TCPA actions against seven petitioners in this proceeding); Nack Comments (plaintiff in *Nack v. Walburg* TCPA litigation).

<sup>33</sup> 47 U.S.C. § 227(d)(2).

under the TCPA, plaintiffs' attorneys find it too burdensome to litigate whether individual recipients consented to receive the faxes at issue. In Forest's case, for instance, the plaintiff originally alleged that Forest sent the plaintiff faxes without the plaintiff's consent, only to abandon that claim — after lengthy and expensive motion practice by Forest — in the face of clear evidence to the contrary.<sup>34</sup> The plaintiff's only remaining claim is that although the plaintiff consented to receive the faxes, the plaintiff — and all those similarly situated who consented to receive Forest's faxes — should receive statutory damages based on the faxes' allegedly deficient opt out notice. No matter how convenient its existence would be for plaintiffs' attorneys, Congress clearly never intended to create any such claim under the TCPA, which repeatedly and expressly limits its coverage to faxes sent without prior express consent.

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<sup>34</sup> See Forest Petition at 4.

## CONCLUSION

The TCPA draws a clear distinction between fax advertisements sent with prior express consent (which are lawful) and unsolicited fax ads (which are lawful only when sent pursuant to the EBR procedures). Congress intended to create private liability only for entities that send noncompliant, *unsolicited* fax ads. The Commission can and must stop attempts by private parties to pervert the TCPA into a litigation trap for senders of consensual faxes. Accordingly, the Commission should affirm that senders of consensual faxes have not violated any Commission rule prescribed under Section 227(b) of the Communications Act, either by granting a broad retroactive waiver or by issuing the declaratory ruling requested by Joint Petitioners and other petitioners in this proceeding.

Respectfully submitted,

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GILEAD SCIENCES, INC., AND GILEAD  
PALO ALTO, INC.  
PURDUE PHARMA L.P., PURDUE PHARMA  
INC., AND PURDUE PRODUCTS L.P.



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