

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

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

**TCPA PLAINTIFFS' REPLY COMMENTS ON PETITIONS CONCERNING  
THE COMMISSION'S RULE ON OPT-OUT NOTICES ON FAX  
ADVERTISEMENTS**

Brian J. Wanca  
Glenn L. Hara  
Anderson + Wanca  
3701 Algonquin Road, Suite 760  
Rolling Meadows, IL 60008  
Telephone: (847) 368-1500  
Facsimile: (847) 368-1501

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**TCPA Plaintiffs’ Reply Comments Concerning  
the Commission’s Rule on Opt-Out Notices on Fax Advertisements**

Four fax advertisers, Anda, Howmedica, Merck, and Staples, submitted comments on the current petitions.<sup>1</sup> Undersigned counsel represent the Plaintiffs in private TCPA actions against three of these four commenters (as well as seven of the nine petitioners). Plaintiffs filed their comments on the underlying petitions February 14, 2014. Plaintiffs appreciate the opportunity to submit this reply to the comments of the four defendant commenters.

**I. The commenters do not address the Commission’s stated rationale for the opt-out rule.**

The Commission has consistently maintained that it issued the rule requiring opt-out notice on faxes sent with permission to fill gaps in the undefined statutory term “prior

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<sup>1</sup> *In the Matter of Junk Fax Prevention Act of 2005, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Comments of Anda, Inc., CG Docket Nos. 05-338, 02-278 (Feb. 14, 2014) (Anda Comments); *In the Matter of Comment on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements*, Comment of Howmedica Osteonics Corp., CG Docket Nos. 02-278, 05-338 (Feb. 14, 2014) (Howmedica Comments); *In the Matter of Petition for Declaratory Ruling and/or Waiver Regarding the Statutory Basis for the Commission’s Opt-Out Notice Rule with Respect to Solicited Faxes, and/or Regarding Substantial Compliance with Section 64.1200(a)(4)(iii) of the Commission’s Rules*, Comments of Merck & Co., Inc., CG Docket Nos. 02-278, 05-338 (Feb. 14, 2014) (Merck Comments); *In the Matter of Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements*, Comments of Staples, Inc. and Quill Corp., CG Docket Nos. 02-278, 05-338 (Feb. 14, 2014) (Staples Comments).

express invitation or permission”<sup>2</sup> under its authority to “prescribe regulations to implement” the TCPA.<sup>3</sup> The 2006 Junk Fax Order explains that such permission is valid only “until the consumer revokes . . . by sending an opt-out request,”<sup>4</sup> and so the rule reasonably requires the fax advertiser to give the consumer “the necessary tools” to do so.<sup>5</sup>

Like the underlying petitions, none of the commenters address the Commission’s real explanation for the statutory basis of the rule. Instead, they attempt to re-frame the issue as whether the Commission has authority to regulate “solicited advertisements”—a term not used in the TCPA, the regulations, or the Commission’s prior statements.<sup>6</sup> This sleight of hand underlies every argument against the opt-out rule raised in this proceeding. The Commission did not regulate “solicited advertisements” in the opt-out rule; it regulated “prior express invitation or permission” by prescribing how it can be obtained, maintained, and revoked. No petitioner addressed that rationale, and the four TCPA-defendant commenters ignore it as well.

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<sup>2</sup> 47 U.S.C. § 227(a)(5).

<sup>3</sup> 47 U.S.C. § 227(b)(2).

<sup>4</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3812 ¶ 46 (rel. Apr. 6, 2006) (“2006 Junk Fax Order”).

<sup>5</sup> *Id.* ¶ 42; see also *Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission’s Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient’s Prior Express Consent*, Order, CG Docket No. 05-338 (May 2, 2012) (“Anda Order”) ¶ 7 (rule defines “how such prior express permission can be obtained from, and revoked by, a consumer in that context”); Comm’n Amicus Br., *Nack v. Walburg*, No. 11-1460 (8th Cir), 2012 WL 725733, at 6, 20 (rule was adopted to “allow consumers to stop unwanted faxes in the future” pursuant to § 227(b)).

<sup>6</sup> Anda Comments at 4; Howmedica Comments at 2; Merck Comments at 4; Staples Comments at 1 (referring to “Solicited Fax Rule”).

## **II. The commenters fail to address the Anda Order.**

Less than two years ago, the Bureau denied Anda’s petition seeking a declaratory ruling on the same statutory-authority issue raised in the petitions, holding (1) there was no “controversy” or “uncertainty” that the Commission adopted the rule under § 227, (2) that the challenge was an untimely “collateral attack” on the statutory basis for the rule, and (3) that the challenge was “unpersuasive” on the merits because the opt-out rule merely fills a gap in the statutory term “prior express invitation or permission.”<sup>7</sup>

Three of the fax-advertiser commenters ignore the Anda Order entirely.<sup>8</sup> Anda—the party whose petition was denied in the Anda Order—mentions it only in passing in a footnote.<sup>9</sup> With no meaningful challenge to the Anda Order, the requests for declaratory rulings regarding the Commission’s statutory authority do not even make it out of the starting gate. They are time-barred.

## **III. The commenters fail to cite an example of the Commission granting a waiver for the express purpose of extinguishing a judicial proceeding, and doing so would violate the separation of powers.**

Three of the four commenters ask the Commission to issue a universal waiver of the opt-out rule to “expunge[] liability in both administrative and judicial proceedings” for every fax advertiser across the United States for the past seven-plus years.<sup>10</sup> Like the underlying

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<sup>7</sup> *Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission’s Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient’s Prior Express Consent*, Order, CG Docket No. 05-338 (May 2, 2012) (“Anda Order”) ¶¶ 5–7.

<sup>8</sup> Howmedica Comments at 1–6; Merck Comments at 1–9; Staples Comments at 1–9.

<sup>9</sup> Anda Comments at 1–2, n.3.

<sup>10</sup> *Id.* at 5; *see also* Merck Comments at 7–8; Staples Comments at 7 (“The Commission should explicitly clarify that the retroactive waiver eliminates any cause of action under the TCPA for asserted violations of the Solicited Fax Rule.”).

petitions, the commenters pose this request as if it were nothing out of the ordinary (or even an exercise of their prerogative). Yet they cite no example of the Commission ever granting a waiver for the express purpose of allowing a party to make an end-run around the courts. The only examples cited are where the Commission grants a waiver in *Commission* proceedings,<sup>11</sup> for example in waiving filing deadlines.<sup>12</sup> That is a far cry from the Commission deliberately acting to short-circuit pending lawsuits.

Neither Commission Rule 1.3 nor the Administrative Procedures Act contemplate a judicially binding agency waiver, and it would most likely violate the separation of powers. Although the courts will generally defer to an agency's *interpretation* of the statutes and regulations it enforces,<sup>13</sup> it remains the judicial branch's duty to "say what the law is."<sup>14</sup> The waiver requests here are not asking the Commission to "interpret" the opt-out rule. Nor are they asking the Commission to repeal it; that is a separate issue. Instead, the waiver requests assume the Commission will leave the regulation in place but decree that the courts cannot enforce it. Plaintiff's counsel were unable to find a case where a party even *asked* an agency to interfere with the judicial process in this manner. The requested waiver may also

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<sup>11</sup> See, e.g., Anda Comments at 13–14.

<sup>12</sup> See Anda Comments at 13–14, n.37 (citing *GTE Serv. Corp. and Its Affiliated Domestic Tel. Operating Companies, Petition for Waiver of Sections 1.785, 43.21, and 43.22 of the Commission's Rules*, Mem. Op. and Order, 7 FCC Rcd 6317 ¶ 6 (1992)).

<sup>13</sup> *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

<sup>14</sup> *AKM LLC dba Volks Constructors v. Sec'y of Labor*, 675 F.3d 752, 769 (D.C. Cir. 2012) (Brown, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); see also 16A Am. Jur. 2d Constitutional Law § 266, Distinction between Judiciary & Administrative Agencies & Tribunals (stating, "courts will grant some deference to legal determinations that fall within the agency's expertise; however, it is a function of the courts to interpret the law"); 16A Am. Jur. 2d Constitutional Law § 310, Judicial Power—Nondelegable Judicial Powers (judicial power to "hear cases, decide disputed issues of fact and law, enter a judgment in accordance with the facts and the law, and enforce its judgment" may not be delegated "to another agency or tribunal").

constitute a violation of due process or a taking of private property without just compensation.<sup>15</sup> Plaintiffs reserve all arguments against such an action.

The Commission need not delve into these thorny issues, however, since none of the TCPA defendants meet the standards for a waiver in the Commission-enforcement context. They do not acknowledge their mistakes, offer a credible explanation for their violations, or state any intention to comply with the law in the future. For example:

- Were these fax advertisers justifiably ignorant of the opt-out rule? Some defendants have hinted at this excuse, but it is not plausible. The defendants are multi-million- or multi-billion-dollar, corporations. They have ample resources to devote to compliance, as most advertisers did following the 2006 rules. Staples in particular submitted comments in the rulemaking process. It must have read the resulting regulations and the 2006 Junk Fax Order.
- Were they aware of the rule but misunderstood it? This is not possible. The rule states, “[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)(4)(iii) of this section.” There is no way to misunderstand it.
- Did they rely on the faulty advice of others? No defendant has made this assertion, but even if it were the case, the remedy is to seek damages against those who provided the bad advice, not to wipe out the consumer’s private right of action.
- Have the defendants taken any steps to ensure compliance in the future? No one has uttered a word on the subject.

The party seeking a waiver has a heavy burden to “plead with particularity the facts and circumstances” supporting such relief.<sup>16</sup> Since no TCPA defendant here has even attempted to do so, they would not be entitled to a waiver in a Commission enforcement proceeding, let alone the unprecedented judicial-waiver requests they seek here.

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<sup>15</sup> See, e.g., Jeremy A. Blumenthal, *Legal Claims As Private Property: Implications for Eminent Domain*, 36 Hastings Const. L.Q. 373, 376 (2009) (discussing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (considering it “settled” that “a cause of action is a species of property”)).

<sup>16</sup> *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).

#### **IV. The few novel arguments raised in the fax advertisers' comments fail.**

The four TCPA-defendant commenters raise a few novel arguments not made in the petitions. None of them withstand scrutiny.

##### **A. Anda's examples of Commission waivers do not support a Commission order expressly designed to short-circuit the judicial process.**

Anda cites several new Commission orders in support of its claim that an agency waiver designed to wipe out dozens of pending lawsuits is “consistent with precedent.”<sup>17</sup> But each of the orders involved a waiver from Commission enforcement, where the petitioner gave a good reason for non-compliance.<sup>18</sup> One order denied in part on the basis that similar waivers had been granted in the past “before the Bureau became aware of the magnitude of the potential cumulative effect” of such waivers.<sup>19</sup> Another waives a filing deadline.<sup>20</sup> Anda cites one order granting “forbearance” of a rate-setting rule where a statute *required* the Commission to do so if certain factors were met.<sup>21</sup>

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<sup>17</sup> Anda Comments at 13, n.35.

<sup>18</sup> *ALLTEL Service Corporation on behalf of Texas ALLTEL, Inc. and ALLTEL Texas, Inc., Petition for Waiver of the Definition of “Study Area” contained in Part 36, Appendix-Glossary, of the Commission’s Rules*, Mem. Op. and Order, 9 FCC Rcd 4450 ¶¶ 8–9 (CCB 1994) (waiver appropriate to create consolidated “study area” where merger between two carriers was approved by state regulators); *Petition for Waiver Filed by Vermont Telephone Company, Inc. Concerning the Definition of “Study Area” in the Part 36 Appendix-Glossary of the Commission’s Rules*, Order on Reconsideration, 14 FCC Rcd 826 ¶ 6 (CCB 1998) (waiver appropriate to avoid redundant cost study); *Petitions for Waiver and Reconsideration Concerning Sections 36.611, 36.612, 61.41(c)(2), 69.605(c), 69.3(e)(11) and the Definition of Study Area Contained in Part 36 Appendix-Glossary of the Commission’s Rules, Filed by Copper Valley Telephone Inc., et al.*, Mem. Op. and Order, DA 99-1845, 1999 WL 700555, ¶ 25 (CCB 1999) (same).

<sup>19</sup> *Copper Valley*, 1999 WL 700555 ¶ 23.

<sup>20</sup> *GTE Serv. Corp. and Its Affiliated Domestic Tel. Operating Companies, Petition for Waiver of Sections 1.785, 43.21, and 43.22 of the Commission’s Rules*, Mem. Op. and Order, 7 FCC Rcd 6317 ¶ 6 (1992)).

<sup>21</sup> *Petition for Forbearance of Iowa Telecomms. Servs., Inc.*, Order, 17 FCC Rcd 24319 ¶ 6 (2002).

None of these orders involved the Commission taking an action for the express purpose of allowing a party to make an end run around the courts. None of them even involved a regulation with a concomitant private cause of action. Anda simply presumes it would be appropriate for the Commission to dictate to the judiciary what private rights of action a consumer can and cannot enforce in court, without acknowledging the separation-of-powers and other constitutional ramifications. That presumption is unwarranted, especially given Anda’s burden to establish the propriety of the unprecedented waiver it seeks.

**B. Howmedica’s reliance on canons of statutory construction fails.**

Howmedica argues the canon of statutory construction, “*inclusio unius, exclusio alterius*”<sup>22</sup> (in English, the “expression-exclusion rule”), compels the conclusion that the Commission exceeded its statutory authority by requiring fax advertisers to include opt-out notice on advertisements sent with prior permission.<sup>23</sup> Since the statute expressly requires opt-out notice on faxes sent with an EBR, Howmedica reasons, Congress must have intended for notice *not* to be required on faxes sent with prior permission.<sup>24</sup>

The Supreme Court rejected an identical argument in *Chevron USA Inc. v. Echazabal*.<sup>25</sup> In that case, the Americans with Disabilities Act contained a general clause authorizing an agency to adopt employment “qualification standards” that were “job-related and consistent

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<sup>22</sup> Howmedica also relies on “*volenti non fit injuria*” (in English, “to one consenting, no harm is done”), but here it is merely assuming its conclusion. The question is what it means to obtain and maintain consent (“permission”). That is the Commission’s province, not Howmedica’s.

<sup>23</sup> Howmedica Comments at 2.

<sup>24</sup> *Id.*

<sup>25</sup> 536 U.S. 73, 80–81 (2002).

with business necessity,” along with a specific clause stating those standards “may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”<sup>26</sup> The agency adopted a regulation allowing an employer to turn away an applicant who poses a threat “*to the individual* or others.”<sup>27</sup> The Ninth Circuit relied on the expression-exclusion rule to invalidate the regulation, holding the inclusion of “to other[s]” in the statute signaled Congress’s intention to exclude the applicants’ risk *to themselves* as an employment consideration.<sup>28</sup>

The Supreme Court reversed, holding the expression-exclusion rule did not apply because (1) the “harm-to-others” clause was merely an example of the broader “qualification standards” authorization, (2) there was no “series of two or more terms or things” from which harm-to-self was excluded, and (3) the narrow reading would have “no apparent stopping point,” for example, requiring the employer to hire Typhoid Mary because she might pose a risk to those *outside* the workplace as well as inside.<sup>29</sup> Instead, the Court held, the general clause in the statute created “a gap for the EEOC to fill,” with the “to others” clause being merely one instance where Congress gave the agency specific direction.<sup>30</sup>

The holding of *Echazabal* applies with full force here. The general clause in § 227(b) gives the Commission broad authority to “prescribe regulations to implement the requirements of this subsection” and, in addition, the JFPA specifically directs the

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<sup>26</sup> *Id.* at 80.

<sup>27</sup> *Id.* (emphasis added).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 82–83.

<sup>30</sup> *Id.* at 79.

Commission to adopt opt-out regulations for EBR faxes.<sup>31</sup> It is not an either-or proposition. The Commission has broad authority to implement the TCPA (including delineating the contours of the statutory phrase “prior express invitation or permission”) *and* the specific duty to promulgate opt-out regulations for EBR faxes. In that context, the expression-exclusion rule poses no bar to a rule requiring a fax advertiser to inform the consumer of how to effectively opt out of future faxes in order to maintain prior permission.

Anda illustrates this point in its comments, where it explains that the Commission often “adopts regulations that are *permitted* under but not *mandated* by the governing statute.”<sup>32</sup> Anda cites as an example the Commission’s 2010 rules enabling video distributors to pursue complaints involving terrestrially delivered programming, even though the governing statute addressed only satellite-delivered programming.<sup>33</sup> Here, the TCPA *permits* the regulation requiring a fax advertiser to include opt-out notice to maintain prior permission, even though it does not *mandate* such a regulation, as it does with EBR faxes.

Finally, Howmedica argues the opt-out rule is contrary to public policy because it has “exposed small businesses and corporations to potentially massive liability . . . .”<sup>34</sup>

Howmedica is not a small business. The gross profit of its parent company, Stryker Corp., was over \$6 billion in 2013.<sup>35</sup> The other commenters, Anda, Merck, and Staples, are also not

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<sup>31</sup> See 47 U.S.C. § 227(b)(1)(C)(iii); *id.* § 227(b)(2)(D).

<sup>32</sup> Anda Comments at 12, n.31.

<sup>33</sup> *Id.* (citing *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010), *affirmed in part, vacated in part, Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011)).

<sup>34</sup> Howmedica Comments at 4.

<sup>35</sup> Stryker Corp. Form 8-K, at <http://www.sec.gov/Archives/edgar/data/310764/000031076414000008/sykexhibit012214.htm>.

“small businesses” by any definition, and there is no basis for imposing an “ordinary person” standard for them, as Howmedica suggests.<sup>36</sup> These commenters have ample resources to comply with the TCPA, as have the vast majority of companies that choose to advertise by fax in the United States. Their failure to explain why they failed to comply with this simple disclosure rule leads to the conclusion that they chose not to.

**C. Merck’s caselaw does not undercut the Commission’s statutory authority.**

Merck cites two previously undiscussed Supreme Court decisions in support of its argument that the Commission lacked statutory authority to require fax advertisers to include opt-out instructions to maintain prior express permission.<sup>37</sup> Neither case supports Merck’s position.

In *FDA v. Brown & Williamson Tobacco Corp.*,<sup>38</sup> the Court held the FDA lacked authority to issue regulations governing the advertising, labeling, and sale of tobacco products under a general statutory grant of authority allowing it to regulate a device if it “determines that there cannot otherwise be reasonable assurance of its safety and effectiveness.”<sup>39</sup> But the FDA had already determined unequivocally that tobacco products are *unsafe*.<sup>40</sup> So, if anything, the only thing the FDA could reasonably do in its rulemaking is *ban* tobacco products from the market entirely, not regulate the details of how they are

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<sup>36</sup> Howmedica Comments at 4–5.

<sup>37</sup> Merck Comments at 4–5.

<sup>38</sup> 529 U.S. 120 (2000).

<sup>39</sup> *Id.* at 129.

<sup>40</sup> *Id.* at 130.

sold.<sup>41</sup> An outright ban, however, was foreclosed by at least six other statutes passed over the previous 35 years, the Court held, regulating tobacco advertising, research, sales, and age restrictions.<sup>42</sup> Over that period, the FDA consistently maintained that “it lacked authority” to regulate tobacco and “Congress considered and rejected bills that would have granted the FDA such jurisdiction.”<sup>43</sup>

*Brown & Williamson* has no application here. The TCPA places no limits on the Commission’s ability to regulate “prior express invitation or permission.” It directs the Commission to “implement” that clause.<sup>44</sup> There are no competing statutory schemes in which Congress expressly regulates faxes sent with permission. There is no history of the Commission declining to regulate how prior permission is obtained, maintained, and revoked, nor is there evidence Congress considered and then rejected legislation directing the Commission to do so.

In *MCI Telecomms. Corp. v. AT&T Co.*,<sup>45</sup> the Court held a statute authorizing an agency to “modify” did not include the power to “change fundamentally.” Merck argues the analogy here is that “unsolicited” does not mean “solicited,” but that is off base because the relevant authorizing language in the statute is the word “implement” in § 227(b). So the real question under *MCI Telecomms.* is whether the power to “implement” the prohibition on faxes sent without “prior express invitation or permission” includes the power to delineate

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<sup>41</sup> *Id.* at 136–37.

<sup>42</sup> *Id.* at 143–44.

<sup>43</sup> *Id.* at 144.

<sup>44</sup> 47 U.S.C. § 227(b)(2).

<sup>45</sup> 512 U.S. 218, 227 (1994).

the circumstances under which such permission may be obtained, maintained, and revoked. The answer is yes.

**D. Staples’s assertion that its faxes contained the “necessary information” to opt out is incorrect, and it cannot credibly claim surprise.**

The only novel assertion in Staples’s comments is that its fax advertisements “contained the necessary information about how to opt out of future facsimile advertisements, had those plaintiffs desired to do so.”<sup>46</sup> The language on the two faxes Staples points to is (1) “We apologize if you received this fax in error. If you wish to be removed from our fax list, please write ‘remove’ on this document and fax it back toll free to 1-877-490-2660” and (2) “If you prefer not to receive future fax communications from Quill, call 800-789-1331.”<sup>47</sup>

These perfunctory instructions do not contain the “necessary” information to opt out because they do not inform the consumer that an opt-out request is effective only if it “identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates.”<sup>48</sup> In a future lawsuit alleging Staples failed to honor an opt-out request made using its cursory instructions, Staples would argue the request was not effective, even if the request complied with the instructions on the fax. That is why none of the fax advertisers seeking repeal of the opt-out-notice rule ask the Commission to repeal the consumer’s obligations. They want a regime in which a consumer’s opt-out request can

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<sup>46</sup> Staples Comments at 5–6.

<sup>47</sup> *Id.* at 6, n.19.

<sup>48</sup> 47 C.F.R. § 64.1200(a)(4)(v).

be ignored for failure to meet the technical requirements without a corresponding obligation on the advertiser to tell the consumer *what those requirements are*.

Staples complains it is being treated unfairly because the opt-out rule “was not clear at the time it was adopted,” that it was “genuinely surprised to learn” of the rule when it was sued, and that it sent its faxes “pursuant to a reasonable, good-faith belief that [its] conduct was lawful.”<sup>49</sup> These claims are not credible. Staples was involved in the 2006 rulemaking process, submitting comments asking the Commission to allow fax advertisers to obtain oral permission in order to facilitate its “comprehensive marketing program to communicate with both existing and potential customers” via fax advertisements.<sup>50</sup> Staples got what it asked for. The 2006 rules allow a fax advertiser to obtain oral permission. But as explained in the 2006 Junk Fax Order, the rules balance things out by stating oral permission is valid only “until the consumer revokes such permission by sending an opt-out request to the sender”<sup>51</sup> and by requiring an advertiser to include compliant opt-out instructions so the consumer has “the necessary tools” to “revoke” prior permission.<sup>52</sup>

The resulting regulation is as clear as can be. It states, “[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

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<sup>49</sup> Staples Comments at 7–8.

<sup>50</sup> *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, Comments of Staples, Inc., CG Docket No. 02-278, 05-338 (Jan. 18, 2006) (“Staples JFPA Comments”) at 6–7.

<sup>51</sup> 2006 Junk Fax Order ¶ 46.

<sup>52</sup> *Id.* ¶ 42.

(a)(4)(iii) of this section.”<sup>53</sup> Staples does not explain how it could have been “surprised to learn” of the regulation years after it was adopted, given its involvement in the rulemaking process. Did Staples not read the regulation? Did it read only the parts where it got what it wanted? Did it rely on mistaken advice of others? Staples, like other commenters and petitioners, does not explain. Since Staples is the party seeking a waiver, it has the burden to plead the factual basis with particularity.<sup>54</sup> It didn’t bother to try.

## V. Conclusion

The TCPA defendants fail to recognize that the interests of consumers and the public are at the heart of the TCPA. Some of the real people on the other end of their faxes submitted compelling comments in these proceedings, including these excerpts:

William Schneider - 7521071988.txt

big businesses should be required to follow the laws, just like everyone else. Their request for an exemption should not be granted.

Lauren Serrano - 7521073090.txt

There are lots of companies out there who obey the law. Make everybody follow the same rules.

Jaqueline Friare - 7521073086.txt

I’m sick and tired of getting junk faxes. Its frustrating because we call them to be taken off their lists and they still keep faxing us. Don’t let them get rid of opt outs just because they think they should be able to make up their own rules. Small business owners have rights too.

Howard I Benesch, Ph. D. - 7521073103.txt

I am strongly opposed to granting any exemptions to any business, especially large ones, from current laws. If anything, these laws should be made more stringent with substantial fines imposed on those who ignore first requests to delete fax numbers from their database.

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<sup>53</sup> 47 C.F.R. § 64.1200(a)(4)(iv).

<sup>54</sup> *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).

Thomas M Wilson – (no document number)

I am opposed to allowing companies to cancel opt out notices--even on permission based faxes. I am also opposed to allowing waivers for companies that have violated the FCC rules requiring opt out notices on all advertising faxes. If the 1991 TCPA is going to remain, then it needs to remain in its present form and not watered down.

No consumer or member of the public submitted comments on behalf of the petitioners, as far as Plaintiff's counsel could determine.

The fax advertisers who have filed petitions and comments in this proceeding have one overriding concern: their own self-interest in avoiding civil liability for their violations. They do not attempt to explain why they failed to comply, nor do they pledge to comply going forward. Instead, they ask the Commission to give them a free pass, to risk violating the separation of powers, and to rule that non-compliance equals compliance, anything to escape the consequences of their actions. The Commission should deny all the petitions in their entirety.

Respectfully submitted,

By: s/Brian J. Wanca

Brian J. Wanca  
Glenn L. Hara  
Anderson + Wanca  
3701 Algonquin Road, Suite 760  
Rolling Meadows, IL 60008  
Telephone: (847) 368-1500  
Facsimile: (847) 368-1501