Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	
Petitions Concerning the Commission's Rule on Opt-out Notices on Fax Advertisements	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	CG Docket No. 02-278
Junk Fax Prevention Act of 2005	CG Docket No. 05-338

REPLY COMMENTS OF ROBERT BIGGERSTAFF

No one "consented" to the lack of an opt-out notice.

Petitioners and industry commenters appear to miss some important aspects of the concept of express consent. While repeatedly stating, almost *ad nauseam*, that they are being sued for sending "solicited" faxes or faxes that the recipients "consented" to receive, they never say exactly what the recipients actually consented to. At best, those recipients consented to being sent an advertising fax. Nowhere does any Petitioner or commenter claim that a recipient ever "consented" to the absence of the mandatory opt-out notice required by the Commission's rules. Indeed, a consumer can no more consent to a fax advertisement without a proper opt-out notice than a consumer can "consent" to the absence of anything else affirmatively required by a Commission rule. So senders of fax advertisements without proper opt-out notices are indeed doing something that was *not* consented to or "solicited" by the recipients of their advertising faxes.

Merck's comments[1] recite many things that it says complaining parties in TCPA lawsuits have not alleged. But one critical element that Merck and other filers themselves have not alleged is that anyone expressly consented to a fax ad being sent that violated the Commission's clear rule requiring a proper notice on permission-based facsimile advertisements.

I find it curious that these publicly traded companies repeatedly claim they are subject to "massive" damages in TCPA lawsuits. Indeed, they virtually shout it in their filings. Yet these same companies seem to make very little, if any, noise about these "massive" liabilities in their 10-K forms or other financial filings. They can't have it both ways.

Substantial compliance irony

It is ironic that numerous petitions and comments from businesses ask that "substantial compliance" be deemed equal to actual compliance without stating any objective measurement of what "substantial compliance" means. The irony is that the business community also argues vociferously for clarity—evidenced by numerous petitions for declarations and clarifications on the TCPA dockets. Indeed, the industry filers claim ambiguity in the TCPA and Commission's rules is at the root of the very lawsuits they seek to avoid. I too commend every step the Commission takes that reduces uncertainty and ambiguity. What logic is there in seeking an *increase* in ambiguity and uncertainty? There is no logic in it, other that the logic of throw everything on the wall and see what sticks. This again demonstrates that the Petitions private pecuniary interests are the motivation here, and not a reasoned and logical approach to policy.

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[1] *Comments of Merck & Co., Inc.*, p. 8.

Reply to the Comments of Anda, Inc.

I agree with a number of statements of Anda, Inc. Anda did file the first petition on this issue. However, all of the issues raised by Anda are subsumed in the nine instant Petitions. Despite the procedural defects in Anda's filings, I encourage the Commission to dispose of any relevant issues raised by Anda or other petitioners in denying the nine instant Petitions.

To its credit, Anda is quite direct in admitting that it seeks any form of relief "as long as such relief would eliminate the threat of private lawsuits brought pursuant to the rule."[2] Indeed, Anda expressly states that preventing these private suits from proceeding is a "core justification for the waiver."[3] I commend Anda for candidly identifying the real purpose of the instant Petitions.[4]

Anda is also correct that the rule regarding opt-out notices on permission-based fax advertisements is not *mandated*, but is merely *permitted* by the statute[5] and the Commission's *discretion* to grant a waiver is at its highest. This does not mean, however, that the elements necessary to be pled and proven to justify a waiver are different or are applied with any less vigor. The only difference is that once the elements are met, the Commission's discretion may be more freely exercised, than if the rule were mandated by a statute. In this case, however, those elements are not met.

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[2] *Comments of Anda, Inc.*, p. 3.

[3] *Id.*, p. 11.

[4] *See also Comments of Howmedica Osteonics Corp.*, p. 6 stating that the relief sought "is necessary to bring closure to pending litigation centered on this issue."; *Comments of Staples, Inc. and Quill Corp.*, p. 7 stating that retroactive waivers are sought "to obviate the asserted basis for liability in the pending class actions."

[5] *Anda Comments.*, p. 12.

Anda cites to its own Petition which also makes an important distinction lost on other filers when it cites "a substantial interest in preventing the cost shifting and interference such *unwanted* advertising places on the recipient."[6] As Anda pointed out in italics "unwanted" is the important operative term not "unsolicited." Consent is revokable. A fax that was previously consented to can be "unwanted" for many reasons, including the recipient simply changing their minds. It is the permission-based fax that becomes "unwanted" which proves the case for an opt-out notice on permission-based fax ads.

I also commend Anda for attempting to enumerate actual grounds for granting a waiver—grounds which were curiously absent from the Petitions.[7] A summary of these comments is:

1) the rule was adopted without any prior notice,

2) the rule arose from an internally contradictory order,

3) the rule conflicts with the text of the governing statute,

4) the rule poses serious First Amendment concerns, and

5) the rule exposes legitimate business to enterprise-threatening liability in class action lawsuits

Each one is addressed in turn.

1) the rule was adopted without any prior notice,

This is a perpetual falsehood. The Commission's JFPA NPRM expressly alerted the public that the forthcoming rules might include requirements that:

> [S]enders would need to take steps to ensure that their facsimile advertisements contained the notice and that such notice meets any specific

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[6] Emphasis in original. *Id.*, at 4, citing to Anda Petition p. 9 & n.32 (*quoting* S. Rep. No. 109-76, at 7 (2005)).

[7] *Anda Comments*, p. 5.

> criteria as outlined above. In addition, senders of facsimile advertisements must implement a cost-free mechanism, if they do not already have one in place, to allow recipients of such messages to request not to receive future advertisements.[8]

Indeed, when read as a whole, the Commission's NPRM generally used the term "facsimile advertisement" in the context of a permission-based fax ad as opposed to the term "unsolicited fax advertisement" in the context of an EBR-based fax ad.[9] Under the Commission's interpretation prior to the JFPA, an EBR was deemed to provide the required consent to make such a fax ad a "facsimile advertisement" and not an "unsolicited advertisement."[10] This was the express nomenclature the Commission used in its rules adopted by the *2003 TCPA Order*.[11] The JFPA NPRM clearly notes that permission-based fax ads (i.e. a "facsimile advertisement") would be potentially subject to opt-out notice requirements.

2) the rule arose from an internally contradictory order,

As was mentioned in opening comments, this false notion has been perpetuated by industry filers. There is nothing contradictory in the Commission's JFPA Order. [12]

3) the rule conflicts with the text of the governing statute,

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[8] JFPA NPRM ¶59.

[9] *See e.g., id.*, ¶¶4, 9.

[10] *Id.*, ¶9. *See also 2003 TCPA Order*, 18 FCC Rcd 14014 (2003) ¶¶188, 191.

[11] 18 FCC Rcd 14014 (2003) (Stating "a facsimile advertisement is not 'unsolicited' if the recipient has granted the sender prior express invitation or permission to deliver the advertisement." Formerly codified at 47 C.F.R. § 64.1200(a)(3)(i).)

[12] *See Comments of Robert Biggerstaff*, p. 16.

This could only be true if the statute *forbade* the Commission from enacting a rule requiring an opt-out notice on permission-based faxes. Obviously, the statute imposes no such restriction. As Anda itself pointed out:

> Indeed, the Commission often adopts regulations that are permitted under but not mandated by the governing statute. One such example is the Commission's 2010 order adopting rules enabling video distributors to pursue program access complaints involving terrestrially delivered, cable-affiliated programming, even though the governing statute addressed only satellite-delivered programming.[13]

4) the rule poses serious First Amendment concerns, and

Anda claims to invoke the "constitutional avoidance doctrine"[14] but it has misunderstood and misapplied that doctrine. There has been no finding that any actions actually are unconstitutional or rely on an unconstitutional interpretation of the statute. Anda suggests that the Commission's rule might be unconstitutional so an interpretation of the TCPA permitting the rule should be avoided.

> But this suggestion confuses two similar (and often confused) doctrines of statutory construction. Judicial restraint instructs us that a court should avoid any constitutional questions if a non-constitutional question is dispositive of the case. A different doctrine establishes a presumption that an act of Congress is constitutional, and any ambiguity must be interpreted so as to not impart a constitutional infirmity to a statute. The former canon avoids a constitutional question. The latter avoids an unconstitutional result after answering a constitutional question. These canons cannot be hybridized to compel a court to construe any statutory ambiguity in a remedial statute, such as the TCPA, so as to avoid the mere consideration of a constitutional question. At the very least, some minimal inquiry must be made into the question to determine that the proposed construction "would raise serious constitutional problems." To reinterpret an ambiguity to avoid an unconstitutional result first requires inquiry and significant indications

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[13] *Anda Comments*, p. 12 n.31, 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).

[14] *Anda Comments*, p. 9, citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575 (1988).

that the result to be avoided actually is unconstitutional-not merely that it might be.[15]

5) the rule exposes legitimate business to enterprise-threatening liability in class action lawsuits

As pointed out previously, this supposed ground is in fact not a proper ground for granting a waiver. This is purely the pecuniary self-interest of a handful of negligent entities that failed to comply with a very simple Commission rule.

The absence of enforcement actions for lack of opt-out notices

Anda suggests that "the Commission itself has never taken enforcement action against any business for failing to include a compliant opt-out notice on a fax sent with the recipient's express consent" and attributes this to the "fact" that "businesses that chose to opt in to receiving such faxes—have had no reason to complain about receiving faxes with incomplete or missing opt-out notices."[16] Quite the contrary, Anda has failed to consider the more direct explanation—that the millions of permission-based fax advertisements sent by businesses every day fully comply with the Commission's rules. This small handful of Petitions are all that have been raised in the 8 years since the rule went into effect. This is not a systemic failure of a large portion of American businesses to comply with an indecipherable and obtuse rule. It is negligence of a small group who didn't follow a very simple and publicized rule.

Reply to the Comments of Howmedica Osteonics, Corp.

Howmedica's invocation of the doctrine of *volenti non fit injuria* fails on two counts. First, the concept of *volenti non fit injuria* depends on actual consent to each element of the

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[15] Robert Biggerstaff, *State Courts and the Telephone Consumer Protection Act of 1991: Must States Opt-in? Can States Opt-out?*, 33 CONN. L. REV. 407, 446-47 (2001) (internal citations omitted).

[16] *Anda Comments*, p. 10.

subsequent act. Consent to send an advertising fax, with nothing more, is not express consent to send an advertising fax that lacks information required by statute or the Commission's rule. Consent to send an advertisement for an artificial hip, does not constitute consent to send a fax advertising an artificial elbow or a fax promoting a training seminar for knee replacement techniques.

Second, no one can "consent" to an act that is prohibited by law. This is particularly appropriate in consumer protection paradigms such as the TCPA where big business has the propensity to try to force Draconian—and illegal—waiver terms onto consumers.[17]

Howmedica, like a number of Petitioners, curiously refrains from stating the actual contents of their faxes, leaving to reader with the impression that their faxes were only "technically" noncompliant implying some minor technical detail. Despite the fact that this argument is irrelevant, it seems there was good reason for this omission by these Petitioners. The record in the matter[18] involving Howmedica for example, reveals that *none* of the 128 separate fax templates at issue in that case had *any* opt out instructions at all, much less a compliant notice.

Reply Comments of All Granite & Marble Corp

All Granite holds a fundamental misunderstanding of the term "unwanted:"

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[17] A recent news article stated that Capital One in its latest terms of service is extracting adhesive consent to deliver falsified "spoofed" callerID when calling customers, with the clause "We may modify or suppress caller ID and similar services and identify ourselves on these services in any manner we choose." David Lazarus, *Capital One says it can show up at cardholders' homes, workplaces*, LOS ANGELES TIMES <http://www.latimes.com/business/la-fi-lazarus-20140218, 0,5011779,full.column> (last visited Feb. 21, 2014).

[18] *Physicians Healthsource, Inc. v. Stryker Sales Corp, Stryker Biotech L.L.C., Stryker Corp. & Howmedica Osteonics Corp.*, No. 12-cv-00729 (W.D. Mich. Jonker, J.)

> "[Some commenters] lament that they receive numerous *unwanted* faxes and try to opt-out to no avail. Such comments disregard that those types of faxes are not the subject of the Petitions or Public Notice."[19]

The fact that a fax ad can be sent based on express consent and be "unwanted" at the same time, is lost on Granite and other Petitioners. Consenting recipients may have been coerced as a condition of doing business to consent to the unwanted faxes. Consenting recipients can change their mind. Faxes get sent to wrong numbers. Fax numbers can change hands.[20] All of these demonstrate the necessity of opt-out notices on permission-based fax ads in order to effectuate the right to revoke permission.

Granite is the only filer to expressly quantify the number of violations of the Commission's rule requiring opt-out notices on permission-based faxes. It claims 857 recipients consented to the faxes at issue. That is $428,500 in damages—not millions of dollars.[21]

Bootstrapping

Recognizing that no "special circumstances" were identified in any of the Petitions, Granite attempts to bootstrap that element with the conclusory claim that "[t]he special circumstances are abundantly clear—the Rule is invalid. No documentary or evidentiary

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[19] *Reply Comments of All Granite & Marble Corp.*, p. 4.

[20] I note that another petition on this docket seeks an exemption from the TCPA for telemarketing calls made to phone numbers that have been reassigned. *See United Healthcare Services, Inc., Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Jan. 16, 2014). I fully expect fax advertisers to raise a similar argument. If successful, that would mean that when they send faxes to wrong numbers, they aren't liable and they don't have to tell the recipient how to stop the faxes.

[21] The other recipients that did not consent, were either sent EBR-based advertisements or faxes with neither EBR nor permission, all of which are violative regardless of the issue raised by the instant Petitions on the opt-out notice rule for permission-based faxes. Furthermore, it seems highly unlikely that a court would find the violations to be willful or knowing, unless Granite has misrepresented the facts.

support is needed to substantiate that 'special circumstance.'"[22] This is logic that Granite seems not to have fully thought through.

If the Commission determines the rule is *not* invalid, then by Granite's logic there is in fact no grounds for a waiver. If the Commission finds the rule is indeed invalid, Granite needs no waiver since the rule would be void *ab initio*. However, the Commission has been provided no grounds to declare its own rule legally invalid. Nor should the Commission do so.

Ignorance of the law?

By complaining that the rule is found in the CFR and not the statute[23] both Howmedica and Granite seem unconcerned about the truism that ignorance of the law is no excuse. As stated many times both on this docket, and in a plethora of marketing industry publications, sending fax advertisements is a highly regulated activity, like all forms of cost-shifted advertising. Not only is ignorance of the law not an excuse, no Petitioner has claimed that it's failure to comply with the rule was actually due to ignorance of the rule. Since no Petitioner has stated that its failure was due to ignorance of the rule, the Commission should not even consider this purely hypothetical argument.

CONCLUSION

Each of the nine Petitions should be denied in their entirety.

Respectfully submitted, this the 21st day of February, 2014.

/s/ Robert Biggerstaff

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[22] *Granite Reply Comments*, p. 7. Granite doubles-down on this logic stating "All Granite did not violate the law (the Rule) because the Rule is invalid" which concedes that if the rule is valid, All Granite violated the law. *Id.*, p. 8.

[23] *Granite Reply Comments*, n. 15 citing *Howmedica Comments*, pp. 4-5.