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March 14, 2014

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notification of Ex Parte Presentation, CG Docket Nos. 02-278, 05-338

Dear Ms. Dortch:

On March 12, 2014, the following parties met with Mark Stone, Nancy Stevenson, and Aaron Garza from the Commission's Consumer and Governmental Affairs Bureau, and Jacob Lewis, Suzanne Tetreault, Diane Griffin Holland, and Rick Mallen from the Office of General Counsel: Anda, Inc., represented by the undersigned and Matthew Murchison of Latham & Watkins LLP; Forest Pharmaceuticals, Inc., Gilead Sciences, Inc., Purdue Pharma L.P., Purdue Pharma Inc., and Purdue Products L.P., represented by Yaron Dori and Michael Beder of Covington & Burling LLP; and Staples, Inc. and Quill Corp., represented by Thomas McCarthy of Wiley Rein LLP.

At the meeting, we argued in support of several pending petitions seeking declaratory rulings, waivers, and other relief in connection with Section 64.1200(a)(4)(iv) of the Commission's rules, as described in a Public Notice released on January 31, 2014.¹ We urged the Commission to take prompt action in response to these petitions and reiterated that each party faces class action lawsuits under Section 64.1200(a)(4)(iv) seeking massive statutory damages based solely on the sending of faxes to recipients with their prior express consent. We explained that, if these class actions were certified and resolved in favor of the plaintiffs, they could result in catastrophic damage awards despite the absence of any harm.

¹ 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).

We also reiterated that granting the relief sought in the petitions would advance the public interest in several respects. As an initial matter, granting relief would help eliminate the abusive litigation, associated costs, and significant liability exposure that together pose a serious danger to the petitioning companies and threaten consumers with higher prices and diminished choice. As Anda has explained in past submissions, these lawsuits not only jeopardize Anda's continued viability, but also endanger "the tens of thousands of pharmacies—many of which cannot afford to keep significant amounts of generic pharmaceuticals in stock—that rely on Anda to fill orders of any size on short notice."² Other petitioners likewise have shown that the massive costs imposed by these lawsuits present a significant threat to their businesses,³ and a deadweight loss to society, as they inevitably drive up the downstream costs of products and services for consumers with little to no corresponding social benefit.⁴ For pharmaceutical companies such as Forest, Gilead, Purdue, and Anda's parent Actavis, which use their profits to fund the development of innovative drugs that promote health and consumer welfare, abusive litigation costs and disproportionate judgments divert resources that would be better spent on the complex task of bringing new products to market. These considerations directly implicate the public interest and strongly support granting the relief sought in the petitions.⁵

² Letter of Matthew A. Brill, Counsel for Anda, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 05-338, at 2 (filed Jun. 4, 2013); *see also* Letter of Matthew A. Brill, Counsel for Anda, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 05-338, at 2 (filed May 17, 2013).

³ *See, e.g.*, Petition of Douglas Paul Walburg and Richie Enterprises, LLC, for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278, 05-338, at 5 (filed Aug. 19, 2013) (noting that the damages awards sought in one case would put the petitioner "out of business").

⁴ *See, e.g.*, Reply Comments of Staples Inc. and Quill Corp., CG Docket Nos. 02-278, 05-338, at 4 (filed Feb. 21, 2014) ("Staples/Quill Reply") (explaining that the petitioners' customers "feel the costs of defending against class actions in the form of . . . increased prices").

⁵ *See, e.g.*, *James Cable, LLC, Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules*, Memorandum Opinion and Order, 25 FCC Rcd 9129 ¶¶ 5, 9-10 (MB 2010) (granting waiver of the integration ban where the "costs associated with the integration ban's imposition . . . impose[d] an undue hardship" on the petitioner and where non-enforcement would allow the petitioner to "pass savings on to consumers"); *Samsung Electronics America, Inc., Petition for Waiver of Section 15.118(b) of the Commission's Rules*, Memorandum Opinion and Order, 28 FCC Rcd 12941 ¶ 4 (MB 2013) (finding that the "public interest" supported waiver of the Commission's analog cable tuner requirements where strict enforcement would have led to significantly higher operating and production costs and therefore higher costs for consumers); *Requests of Am. Tower Corp. & Global Signal, Inc. to Waive Section 17.47(b) of the Commission's Rules*, Memorandum Opinion and Order, 22 FCC Rcd 9743 ¶ 11 (2007) (waiving quarterly tower inspection requirement where advanced monitoring system served public interest in aircraft safety and waiver would save company "millions of dollars and

Such relief also would advance the public interest by eliminating a significant impediment to businesses' ability to honor the preferences of consumers and others who receive commercial communications. As petitioners have pointed out, not only have the recipients of the faxes at issue in these lawsuits expressly consented to such faxes, but many also have indicated that they *prefer* faxes over other forms of communication.⁶ Nevertheless, the current threat of class action litigation over opt-out notices on solicited faxes represents a significant deterrent to communicating with customers by fax. Indeed, concerns over potential liability or the risk of having to incur the cost of defending against such actions have led some petitioners to discontinue fax communications altogether.⁷ Grant of a clarification, waiver, or similar relief would restore the ability of businesses to communicate with their customers and other businesses in the manner those recipients prefer.

Moreover, even apart from the consumer harms caused by the rule, the plainly disproportionate nature of the penalty—under which legitimate businesses are exposed to billions of dollars in liability merely for engaging in consensual communications with their own customers, many of them with longstanding and positive relationships with these companies— independently demonstrates that granting the requested relief would advance the public interest.⁸

Please contact the undersigned if you have any questions regarding these issues.

thousands of person-hours that are unnecessarily spent on quarterly inspections annually”).

⁶ See, e.g., Reply Comments of Anda, Inc., CG Docket Nos. 02-278, 05-338, at 6 (filed Feb. 21, 2014) (noting evidence in court proceedings demonstrating that many of the fax recipients expressed a strong preference for fax communications); Petition of Forest Pharmaceuticals, Inc., for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278, 05-338, at 9 (filed Jun. 27, 2013).

⁷ See, e.g., Staples/Quill Reply at 3-4 (“Staples and Quill have stopped using fax advertising in many cases out of concern that they will face financial penalties, even though many of their longstanding customers *prefer* to receive advertising via fax and have done so for years.”).

⁸ See *Ascent Media Group, Inc.*, Order on Reconsideration, 28 FCC Rcd 6150 ¶¶ 9-11 (WCB 2013) (finding that waiver of a rule was in the “public interest” where “strict enforcement . . . and the imposition of the associated interest and penalties in this case would disproportionately penalize” the petitioner); *Aventure Communications Technology, LLC*, Order, 23 FCC Rcd 10096 ¶¶ 4-6 & n.10 (WCB 2008) (finding that the “public interest” warranted waiver of a rule that, if strictly applied, would have “disproportionately penalize[d]” and “caus[ed] undue hardship” to the party by requiring substantial and unwarranted payments).

LATHAM & WATKINS^{LLP}

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill
Counsel for Anda, Inc.

cc: Mark Stone
Nancy Stevenson
Aaron Garza
Jacob Lewis
Suzanne Tetreault
Diane Griffin Holland
Rick Mallen