

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

In the Matter of)	
)	CG Docket No. 02-278
)	
Petition for Declaratory Ruling and/or Waiver of Masimo Corporation)	CD Docket No. 05-338
)	
)	

**PETITION FOR DECLARATORY RULING AND/OR WAIVER
OF MASIMO CORPORATION**

Derrick L. Brent
Masimo Corporation
Associate General Counsel
Forty Parker
Irvine, CA 92618
949-297-7028
DBrent@masimo.com

Yaron Dori
Michael Beder
Covington & Burling LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
202-662-6000
ydori@cov.com
mbeder@cov.com

Its Attorneys

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Executive Summary

Masimo Corporation respectfully requests that the Commission issue a declaratory ruling clarifying that a fax that (1) is transmitted pursuant to the prior express invitation or permission of a fax recipient, and (2) includes an opt out notice on the first page of the fax that complies substantially with Section 64.1200(a)(4)(iii) of the Commission's rules, does not violate any Commission regulation promulgated pursuant to the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005, or any other provision of the Communications Act. In the absence of such a ruling, Masimo respectfully requests that the Commission grant Masimo a waiver of Sections 64.1200(a)(4)(iii) and (iv) with respect to faxes that have been transmitted by or on behalf of Masimo under such circumstances. In the alternative, Masimo respectfully requests that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of the Commission's rules — which purports to require *solicited* fax advertisements to include the same opt out notice as *unsolicited* fax advertisements — was not promulgated pursuant to Section 227(b) of the Communications Act.

The plain language and scope of Section 227(b) is expressly limited to *unsolicited* faxes, which the statute expressly defines to *exclude* solicited faxes. Yet in recent years, plaintiffs' attorneys have filed countless putative class action lawsuits against companies — including Masimo, a developer of innovative non-invasive medical devices and sensors — who sent *solicited* faxes. These plaintiffs argue that under the Commission's rules implementing the TCPA, a fax recipient is entitled to collect statutory damages of \$500 or more for each fax that deviates in any detail from the opt out notice mandated by the TCPA for *unsolicited* faxes, regardless of how minor the deviation is and regardless of whether the recipient in fact invited or authorized the sender to transmit the fax.

This argument ignores the plain text and clear structure of the TCPA. Accepting these plaintiffs' theory would impose unintended and unjustifiable burdens both on regulated companies and on the courts required to adjudicate these frivolous claims — particularly in cases like Masimo's where the solicited faxes at issue in fact satisfied or were in substantial compliance with the Commission's rules governing opt out notices for unsolicited faxes. Under these circumstances, and considering the legal uncertainty regarding the Commission's authority to impose an opt out notice requirement on solicited faxes, the public interest favors granting the relief requested herein.

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**PETITION FOR DECLARATORY RULING AND/OR WAIVER
OF MASIMO CORPORATION**

Pursuant to Section 1.2 of the Commission’s rules, Masimo Corporation (“Masimo”) respectfully requests that the Commission issue a declaratory ruling clarifying that a fax that (1) is transmitted pursuant to the prior express invitation or permission of a fax recipient, and (2) includes an opt out notice on the first page of the fax that complies substantially with Section 64.1200(a)(4)(iii) of the Commission’s rules, does not violate any Commission regulation promulgated pursuant to Section 227(b)(2)(D) or another provision of the Communications Act. In the absence of such a ruling, Masimo respectfully requests that, pursuant to Section 1.3 of the Commission’s rules, the Commission grant Masimo a waiver of Sections 64.1200(a)(4)(iii) and (iv) with respect to faxes that have been transmitted by or on behalf of Masimo under the above-described circumstances.

In the alternative, Masimo respectfully requests that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of the Commission’s rules — which purports to require *solicited* fax advertisements to include the same opt out notice as *unsolicited* fax advertisements — was not promulgated pursuant to Section 227(b) of the Communications Act, because the plain language and scope of Section 227(b) is expressly limited to *unsolicited* faxes, which the statute expressly defines to *exclude* solicited faxes.

Introduction & Background

The Growth of Abusive TCPA Litigation

The need for Commission action on the issues raised in this petition has become urgent, as is evident from the growing number of petitions filed in this proceeding by similarly situated parties.¹ In recent years, plaintiffs' attorneys have filed countless putative class action lawsuits against companies for alleged violations of the fax provisions of the Telephone Consumer Protection Act of 1991,² as amended by the Junk Fax Prevention Act of 2005³ (together, the "TCPA"), and related Commission regulations. Such suits can be highly lucrative because the TCPA allows for the award of statutory damages based on any violation of Section 227(b) of the Communications Act "or the regulations prescribed under" that subsection.⁴ It is not uncommon for class action lawsuits to seek millions of dollars or more in statutory damages

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, at 1 n.1 (rel. Jan. 31, 2014); Petition of Forest Pharmaceuticals, CG Docket No. 05-338 (filed June 27, 2013); Petition of Staples, Inc. and Quill Corp., CG Docket Nos. 02-278, 05-338 (filed July 19, 2013); Petition of Gilead Sciences, Inc., CG Docket Nos. 02-278, 05-338 (filed Aug. 9, 2013); Petition of Douglas Paul Walburg et al, CG Docket Nos. 02-278, 05-338 (filed Aug. 19, 2013); Petition of Futuredontics, Inc., CG Docket Nos. 02-278-05-338 (filed Oct. 18, 2013); Petition of All Granite and Marble Corp., CG Docket Nos. 02-278, 05-338 (filed Oct. 28, 2013); Petition of Crown Mortgage Company, CG Docket Nos. 02-278, 05-338 (filed Feb. 21, 2014).

² Pub. L. No. 102-243, 105 Stat. 2394, § 3(a) (1991), *codified at* 47 U.S.C. § 227.

³ Pub. L. No. 109-21, 119 Stat. 359 (2005), *codified at* 47 U.S.C. § 227.

⁴ 47 U.S.C. § 227(b)(3) ("A person or entity may . . . bring in an appropriate court of that State— (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to . . . receive \$500 in damages for each such violation . . . , or (C) both such actions"). Section 227(b)(3) goes on to state that "[i]f the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award" available under Section 227(b)(3)(B) by three times, so up to \$1,500 for each violation.

for alleged violations that, as a practical matter, have a negligible to non-existent effect on consumers and businesses.

In recent years, plaintiffs have begun targeting *solicited* faxes — that is, faxes sent with the prior express permission or invitation of the recipient — even though the TCPA never was intended to regulate solicited faxes.⁵ In May 2013, the Eighth Circuit issued an opinion in one such case, *Nack v. Walburg*.⁶ In *Nack*, the defendant transmitted a single solicited fax to the plaintiff that did not contain the opt out language that the plaintiff claimed was prescribed by the Commission’s regulations.⁷ The defendant argued that the opt out requirement set forth in the Commission’s rules applied only to *unsolicited* faxes based on the plain language of the authorizing statute, the TCPA.⁸ The trial court agreed with the defendant’s interpretation, found the regulation did not cover solicited faxes, and granted the defendant summary judgment.⁹ The Eighth Circuit was skeptical that the Commission possessed the authority to prescribe an opt out requirement for solicited faxes. However, the Eighth Circuit ultimately reversed the trial court because it determined that the Administrative Orders Review Act

⁵ Masimo notes 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). Whether the faxes at issue qualify as “advertisements” is not relevant to the issues raised in this Petition, which seeks only a declaratory ruling or waiver with respect to solicited fax advertisements. Accordingly, this Petition uses the term “faxes” to refer to fax advertisements.

⁶ *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013).

⁷ *Nack*, 715 F.3d at 682.

⁸ *Id.*

⁹ *Nack v. Walburg*, 2011 WL 310249, at *5 (E.D. Mo. Jan. 28, 2011), *rev’d and remanded*, 715 F.3d 680 (8th Cir. 2013).

(“Hobbs Act”)¹⁰ limited the court’s ability to rule on the defendant’s challenge to the validity of the regulation.¹¹ The Eighth Circuit recognized that this outcome placed the defendant in an untenable position and therefore suggested that the appropriate course for securing a merits ruling on this question would be to stay the action while, first seeking an administrative ruling from the Commission and then, if necessary, seek judicial review of that ruling on the merits.¹²

Here, Masimo currently is the defendant in a TCPA lawsuit and finds itself in a procedural posture similar to the *Nack* defendant’s. Specifically, Masimo is a defendant in a putative class action lawsuit filed earlier this year by Physicians Healthsource, Inc. (“PHI”) — a serial TCPA plaintiff represented by a serial TCPA plaintiffs’ counsel.¹³ As evidence for its putative class action claim against Masimo, a developer of innovative non-invasive medical devices and sensors, PHI cites two faxes sent to PHI about two years before PHI filed suit.¹⁴ PHI alleges that these faxes were sent without PHI’s prior express invitation or permission, and

¹⁰ 28 U.S.C. § 2342, *et seq.*

¹¹ *Nack*, 715 F.3d at 682.

¹² *Id.* at 687.

¹³ *See, e.g., Physicians Healthsource, Inc. v. Transcept Pharma, Inc., et al.*, No.: 3:13-cv-05490 (N.D. Cal. filed Nov. 26, 2013) (hereinafter plaintiff is referred to as “PHI” in case cites); *PHI v. Multiplan Services, Corp.*, No.: 1:12-cv-11693-GAO (D. Mass., dismissed Sept. 18, 2013); *PHI v. Purdue Pharma L.P., et al.*, No.: 3:12-cv-01208 (D. Conn., filed Aug. 17, 2012); *PHI v. Formedic Comms. Ltd.*, No. 3:12cv5087 (D.N.J., filed Aug. 13, 2012); *PHI v. Stryker Sales Corp.*, No. 1:12cv729 (W.D. Mich., filed July 16, 2012); *PHI v. Cephalon, Inc.*, No. 2:12cv3753 (E.D. Penn., filed July 3, 2012); *PHI v. A-S Med. Solutions, LLC*, No. 1:12cv5105 (N.D. Ill., removed to federal court June 26, 2012); *PHI v. Alma Lasers, Inc.*, No. 1:12cv4978 (N.D. Ill., removed to federal court June 22, 2012); *PHI v. Doctor Diabetic Supply, LLC*, No. 1:12cv22330 (S.D. Fla., filed June 22, 2012); *PHI v. Reliant Tech., Inc.*, No. 1:12cv2180 (N.D. Cal., filed May 1, 2012); *PHI v. Allscripts-Misy’s Healthcare Solutions, Inc.*, No. 1:12cv3233 (N.D. Ill., filed May 1, 2012); *PHI v. Anda, Inc.*, No. 0:12cv60798 (S.D. Fla. May 1, 2012); *PHI v. Janssen Pharma., Inc.*, No. 3:12cv2132 (D.N.J., filed Apr. 5, 2012).

¹⁴ *See* Class Action Complaint at ¶¶ 12, Doc. No. 1, *Physicians Healthsource, Inc. v. Masimo Corporation et al.*, No.: 8:14-cv-00001-JVS-AN (C.D. Cal. filed Jan. 2, 2014) (“PHI Masimo Complaint”).

that the faxes bear an allegedly insufficient opt out notice. Masimo's solicited fax *did* contain an opt out notice, but PHI alleges that the opt out notice was defective if it did not track word-for-word the requirements of Section 64.1200(a)(4)(iii). Moreover, PHI asserts — in clear contravention of common sense and the TCPA's text — that if the faxes' opt out notices were deficient, Masimo is precluded even from “claiming that a recipient gave ‘prior express permission or invitation’ to receive the sender's fax” in the first place.¹⁵ In other words, PHI's theory is that a fax recipient is entitled to collect statutory damages of \$500 or more for each fax that deviates in any detail from the opt out notice described in Section 64.1200(a)(4)(iii) of the Commission's rules, regardless of how minor the deviation is and regardless of whether the recipient in fact invited or authorized the sender to transmit the fax.

Although Masimo believes the recipients of its faxes opted into receiving them, this Petition does not ask or require the Commission to determine whether these recipients in fact provided their prior express invitation or permission. That factual inquiry is for the District Court. It is imperative, however, for the Commission to clarify that, contrary to PHI's distortion of the TCPA's language and intent, the TCPA does not impose liability on the senders of solicited faxes. The outcome PHI is pursuing is absurd, contrary to public policy, and manifestly unjust. Such an outcome would impose unintended and unjustifiable burdens both on regulated companies and on the courts required to adjudicate these frivolous claims. Masimo therefore is seeking administrative relief from the Commission to ensure that the District Court — and, if necessary, the Ninth Circuit or another appropriate appeals court — can address the merits of Masimo's defense.

¹⁵ PHI Masimo Complaint at ¶ 30.

The Scope of the TCPA's Fax Provisions

Section 227(b) addresses only “unsolicited advertisements,” which are defined by the statute’s plain language to *exclude* faxes that are transmitted with a person’s “prior express invitation or permission, in writing or otherwise.” 47 U.S.C. § 227(a)(5). Nowhere does Section 227(b) regulate the transmission of *solicited* faxes or confer that authority on the Commission. Although Sections 227(b)(1)(C) and (2)(D) of the Communications Act together prescribe what information must be included in an opt out notice on the first page of an *unsolicited* fax, they impose no similar requirement for *solicited* faxes.

Thus, to the extent the Commission has any authority at all to impose opt out notice obligations on *solicited* faxes it necessarily also must possess the authority to conclude that an opt out notice on the first page of a *solicited* fax that is in substantial compliance with the requirements of Section 64.1200(a)(4)(iii) does not violate a Commission regulation promulgated pursuant to Section 227(b)(2)(D) or any other provision of the Communications Act. This Petition asks the Commission to make such a finding, either in the form of a declaratory ruling or waiver. If the Commission is unwilling to make such a finding, then Masimo respectfully requests that the Commission issue a declaratory ruling to clarify, based on the TCPA’s plain language, that the Commission’s regulations regarding *solicited* faxes cannot and do not rely on the TCPA for their statutory authority, and that these regulations therefore cannot be the basis for private causes of action. Companies such as Masimo that comply or comply substantially with the plain language of the TCPA and related Commission regulations in the context of solicited faxes should not have to continue to defend themselves against specious legal claims such as those repeatedly being leveled by PHI. If the Commission is unwilling to provide the other relief requested herein, the principles of prudence, sound public policy, and

reasoned decision-making suggest that these companies, at minimum, are entitled to a Commission decision addressing this issue squarely so that the companies may mount a full defense in court.

Argument

I. The Commission Should Confirm that Masimo Satisfied the Commission’s Opt out Disclosure Rules and Thus Did Not Violate Sections 64.1200(a)(4)(iii) and (iv) of the Commission’s Rules.

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.¹⁶ The TCPA provides a narrow exception to this prohibition for unsolicited advertisements faxed pursuant to an Established Business Relationship 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.¹⁷ Section 64.1200(a)(4)(iv) of the Commission’s rules 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. However, the TCPA does not authorize any rule requiring solicited faxes to include opt out notices. Rather, 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

¹⁶ 47 U.S.C. § 227(b)(1)(C).

¹⁷ 47 U.S.C. § 227(b)(1)(C).

to exclude faxes that are transmitted with a person’s “prior express invitation or permission, in writing or otherwise.”¹⁸

To the extent PHI and other recipients provided their prior express invitation or permission for Masimo to send the faxes at issue, the faxes were not *unsolicited*, and therefore fall outside the scope of Section 227(b) of the Act. The *content* of the faxes Masimo sent in response to the recipients’ invitation or permission — including the details of the opt out notice provided on each fax — is irrelevant to the factual question of whether the recipients provided their prior express consent.

In any case, Masimo’s solicited faxes in fact satisfied or were in substantial compliance with the Commission’s rules governing unsolicited faxes. Each fax contained a clearly legible notice on the first page providing recipients with all the necessary information to effect a cost-free opt out.¹⁹ Specifically, the opt out notice informed recipients they could call a specified phone number and follow the voice prompts “if [recipients] no longer wish to receive fax messages from this sender.”²⁰ The opt out number was cost-free and available 24 hours a day, 7 days a week. PHI has not alleged that it ever attempted to opt out of Masimo’s faxes or that it did not know how to do so. Nonetheless, PHI insists that the faxes were unlawful because the opt out notice on the first page did not include elements such as a specific statement that opt out requests must be honored within 30 days or a list of the specific information recipients would

¹⁸ 47 U.S.C. § 227(a)(5).

¹⁹ See § 64.1200(a)(4)(iii).

²⁰ See PHI Masimo Complaint at Ex. A.

need to provide when submitting opt out requests.²¹ However, any such deviations were immaterial and did nothing to impede PHI's ability to opt out of receiving future faxes and to have that opt out honored in a timely manner.

The Commission should issue a declaratory ruling to clarify that a fax sent pursuant to the recipient's prior express invitation or permission and that includes a demonstrably effective opt out notice on the first page of the fax complies substantially with 47 C.F.R. § 64.1200, even if the opt out notice does not conform verbatim with the letter of the rule defining the opt out notice required for *unsolicited* faxes. This would not require a novel undertaking. The Commission itself recognized in the *Junk Fax Order* that it was unnecessary to specify minutiae such as "the font type, size and wording of the notice," and that doing so "might interfere with fax senders' ability to design notices that serve their customers."²² In other

²¹ See § 64.1200(a)(4)(iii)(B), (C) (requiring opt out notices to specify that valid opt out requests must be honored within 30 days and to explain that valid requests must identify the fax numbers to which the opt out request relates, use the designated opt out channel, and not be superseded by the recipient's subsequent prior express invitation or permission for the sender to send additional fax advertisements).

²² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket No. 02-278 *et al.*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3801 (2006) ("*Junk Fax Order*"). Cf. *Facilitating the Deployment of Text-to-911 & Other Next Generation 911 Applications*, PS Docket No. 11-153 *et al.*, Report and Order, 28 FCC Rcd 7556, 7581 (2013) (declining to require specific wording in text providers' bounce-back messages informing consumers when text-to-911 is not available, in order to "afford[] covered text providers with the necessary guidance and flexibility to create bounce-back messages that are understood by their particular consumer base"); *Implementation of Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information et al.*, CG Docket No. 96-115 *et al.*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 F.C.C.R. 14860, 14907 (2002) (declining "to mandate specific language" carriers must use when describing consequences of customer's denying carrier access to CPNI, based on conclusion that rules "provide carriers with sufficient guidance to formulate scripts that inform customers in a neutral manner of significant consequences, without unduly restricting carrier flexibility in delivering the message").

contexts, the Commission also has recognized that “absolute compliance with each component of the rules may not always be necessary to fulfill the purposes of the statute.”²³ Here, the opt out notice provided in the faxes fulfilled the purposes of the TCPA: protecting consumers and businesses from unsolicited faxes and ensuring that fax advertisers provide effective opt out mechanisms. Requiring “absolute compliance with each component of the rules” in this case does nothing to protect recipients who in fact consented to receive the faxes at issue. Instead, such a rigid interpretation exposes legitimate enterprises that act in good faith — and that design notices that demonstrably served their customers — to potentially staggering levels of aggregated statutory damages based on minor technical faults to which no one objects, years after transmission.

In the alternative, Masimo asks the Commission to waive strict compliance with Sections 64.1200(a)(4)(iii) and (iv), pursuant to the Commission’s authority under Section 1.3 of its rules,²⁴ with respect to all faxes sent with the recipient’s prior express invitation or permission. The Commission may waive any provision of its rules “for good cause shown”²⁵ when it concludes that a waiver would serve the public interest, considering all relevant factors.²⁶ In Masimo’s case, the faxes in question included a clear and effective opt out notice on the first

²³ *Provision of Improved Telecommunications Relay Services and Speech-To-Speech Services for Individuals with Hearing and Speech Disabilities*, 20 FCC Rcd 5433, 5445 (2005) (internal quotations omitted) (noting a TRS provider may be eligible for TRS Fund reimbursement “if it has substantially complied with Section 64.604”).

²⁴ 47 C.F.R. § 1.3.

²⁵ *Id.*

²⁶ See *Rath Microtech Complaint Regarding Electronic Micro Systems, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 16710, 16714 (Network Servs. Div. 2005) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and *FPC v. Texaco Inc.*, 377 U.S. 33, 39 (1964))

page describing a cost-free opt out mechanism. It does not serve the public interest, the TCPA's statutory purposes, nor the interests of justice to impose potentially staggering aggregated statutory damages on the basis of alleged violations of minor technical requirements, which Congress never intended to apply to solicited faxes in the first place.

As has been detailed by similarly situated petitioners in this proceeding,²⁷ a limited waiver with respect to solicited faxes like those in Masimo's case would serve the public interest by avoiding an abuse of the private right of action created by the TCPA, thus preventing the imposition of penalties plainly disproportionate to any possible harms purportedly caused by Masimo's consensual communications²⁸ and preserving Masimo's ability to continue to invest in the development of innovative medical devices. Over the past 25 years, Masimo has grown from a "garage start-up" founded by an individual inventor to a global medical technology company that has successfully researched, developed, and manufactured breakthrough techniques and devices for noninvasive patient monitoring. Masimo's advances — made possible by the company's heavy investment in research and development — have improved patient outcomes and helped reduce the cost of care. The public interest would be ill-served by requiring parties like Masimo to divert resources from productive medical research to litigation over the minutiae of faxes sent to willing recipients.

²⁷ See Letter of Matthew A. Brill, Counsel for Anda, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 02-278, 05-338 (filed March 14, 2014).

²⁸ 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).

In other contexts, the Commission has retroactively waived similarly minor violations of its rules. For instance, the Commission granted a conditional retroactive waiver to a manufacturer of improperly labeled emergency telephones for elevators, in part based on its conclusion that, under the circumstances, no harm to the Public Switched Telephone Network had occurred or was likely to occur, and affected purchasers “have actual knowledge of the manufacturer’s identity, and thus have not been harmed by the improper labeling.”²⁹ The Commission has issued other retroactive waivers in appropriate circumstances.³⁰ Similar logic supports the waiver requested here: the use of an effective opt out notice on a fax that was expressly invited or permitted by the recipient caused no harm to the recipient or to the public interest. Given the draconian consequences that could attach to minor failures under PHI’s theory of the scope of the TCPA private right of action, there is good cause for the Commission to waive these defects to the extent the Commission does not find Masimo was in substantial compliance with Sections 64.1200(a)(4)(iii) and (iv) of the rules.

²⁹ *Rath Microtech Complaint*, 16 FCC Rcd at 16713 & n.18, 16715.

³⁰ *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).

II. The Commission Should Clarify that the Requirements It Imposed on Solicited Faxes Were Not, and Could Not Have Been, Promulgated Under Section 227(b) of the Communications Act.

If the Commission does not find that Masimo was in substantial compliance with Section 64.1200 of the Commission’s rules — or that any technical failures should be waived — the Commission should clarify that its rule requiring solicited faxes to include the same opt out notice as unsolicited faxes was not promulgated under Section 227(b) of the Communications Act. A declaratory ruling clarifying the scope and basis of this rule is appropriate and necessary, given the Commission’s contradictory statements and its questionable authority to require opt out notices on solicited faxes.

Section 227(b)(1) of the Communications Act makes it unlawful for any person “to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an *unsolicited advertisement*” unless certain requirements are met, including that the sender has an established business relationship with the recipient and the fax displays an opt out notice meeting the statutory criteria.³¹ The Act explicitly defines an “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person *without that person’s prior express invitation or permission*, in writing or otherwise.”³² By its terms, then, the statutory restrictions — including the opt out notice requirement — do not apply to any fax advertisements sent *with* the recipient’s prior express invitation or permission. Yet Section 64.1200(a)(4)(iv) of the Commission’s rules purports to impose an opt out-notice requirement on

³¹ 47 U.S.C. § 227(b)(1)(C) (emphasis added).

³² § 227(a)(5) (emphasis added).

any fax advertisement “that is sent to a recipient that has provided prior express invitation or permission.”³³

The order adopting this rule offered inconsistent explanations of the rule’s scope, stating first that “the opt out notice requirement only applies to communications that constitute *unsolicited advertisements*,”³⁴ while later making the contradictory assertion that “entities that send facsimile advertisements to consumers *from whom they obtained permission*[] must include on the advertisements their opt out notice and contact information.”³⁵ Though the former explanation is more consistent with the TCPA’s text and legislative history, the Commission since has taken the position that the rule does indeed require opt out notices on solicited faxes.³⁶ However, it is at best questionable whether Congress or the Commission could validly impose such a requirement on solicited faxes consistent with the First Amendment. It is well-established that in order to burden truthful commercial speech, the government must show its proposed restrictions serve “a substantial interest,” that the restrictions “directly advance the state interest involved,” and that the asserted interest could not “be served as well by a more limited restriction on commercial speech.”³⁷ It is difficult to imagine that the detailed opt out notice required on *unsolicited* faxes would pass muster under this standard as the most limited means available to address any substantial state interest in regulating *solicited* faxes. Indeed, the Eighth Circuit expressed skepticism over precisely this point in *Nack*. The court noted that, although it

³³ 47 C.F.R. § 64.1200(a)(4)(iv).

³⁴ *Junk Fax Order*, 21 FCC Rcd at 3810 n.154 (emphasis added).

³⁵ *Id.* at 3812 (emphasis added).

³⁶ *See Nack*, 715 F.3d at 682.

³⁷ *Central Hudson Gas & Elec. Corp. v. Public Servo Comm’n*, 447 U.S. 557, 564 (1980)

previously found “the TCPA provisions regarding unsolicited fax advertisements were not an unconstitutional restriction upon commercial speech” under the *Central Hudson* test, that analysis and conclusion “would not necessarily be the same if applied to the agency’s extension of authority over solicited advertisements.”³⁸

Faxes sent pursuant to the recipient’s express permission or invitation certainly implicate no state interest in “protecting the public from the cost shifting and interference caused by *unwanted* fax advertisements.”³⁹ The Commission has never identified any other state interest sufficient to justify regulations dictating the contents of consensual communications between commercial entities, particularly under circumstances where the recipient clearly knows how to submit an effective opt out request. Indeed, attempting to control consensual communications to such a degree under such circumstances would not only raise First Amendment concerns, but also would be sufficiently arbitrary and capricious so as to raise serious due process concerns under the Fifth Amendment. These due process concerns are amplified if the rules governing solicited faxes under such circumstances purportedly were promulgated under a statutory authority that could expose fax senders to excessive aggregated statutory damages that are radically disproportionate to the *de minimis* actual damages, if any, sustained by recipients.

Even if an opt out notice requirement on solicited faxes could be constitutional in the abstract, the scope of Commission rules adopted pursuant to a statutory provision cannot be

³⁸ *Nack*, 715 F.3d at 687 (declining to consider constitutional challenge raised for the first time on appeal).

³⁹ *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 660 (2003) (emphasis added).

broader than the authority conferred by the statute itself.⁴⁰ PHI’s argument that under the Commission’s rules a defective opt out notice can nullify a fax recipient’s prior express consent is untenable given the TCPA’s language and structure. Section 227(b)(1)(C) generally makes unsolicited faxes unlawful, unless the fax is sent pursuant to an Established Business Relationship (“EBR”), the sender obtained the fax number from a permissible source, and the fax “contains a notice meeting the requirements under paragraph (2)(D).” In other words, the opt out notice defined by paragraph (b)(2)(D) is required only to make the transmission of an *unsolicited* fax lawful under the EBR exception. Faxes sent pursuant to prior express permission — that is, solicited faxes — fall outside of this framework. 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 qualify⁴¹ — it may not impose a definition “manifestly contrary to the statute” where the intent of Congress is clear.⁴² 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 — including the need for an

⁴⁰ See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (“The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.”); *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.”).

⁴¹ 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).

⁴² *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 844 (1984).

opt out notice — do not apply. The Commission has no authority to fly in the face of Congressional intent by making this otherwise lawful activity unlawful.

Given the TCPA’s clear language and structure, any authority the Commission might arguably have had to regulate the opt out notices provided on solicited faxes must derive from some statutory provision *other than* Section 227(b) of the Act. If that is the case, then alleged violations of the Commission’s rules governing solicited faxes cannot be the basis for a private suit brought under the TCPA.⁴³ Therefore, the Commission should if nothing else issue a declaratory ruling clarifying that the statutory provision the Commission relied on in promulgating Section 64.1200(a)(4)(iv) of its rules was *not* Section 227(b) of the Communications Act and that Section 227(b) cannot be the basis for bringing a private suit based on alleged violations of the regulations governing solicited faxes.

Previously, the Consumer & Governmental Affairs Bureau concluded that there was “no issue of controversy or uncertainty” regarding the *Junk Fax Order*’s statutory basis for promulgating Section 64.1200(a)(4)(iv) because “[t]he *Junk Fax Order* cited the statutory provisions, including section 227 of the Act, that provide the Commission authority for the rules adopted in that Order.”⁴⁴ But the *Junk Fax Order* never stated that *every* specific rule adopted in the *Order* was adopted under the authority of *all* 11 separate statutory provisions provision cited at the end of the *Order*, or even that *every* rule was adopted under the authority of Section 227.

⁴³ See 47 U.S.C. § 227(b)(3).

⁴⁴ *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, DA 12-697, at ¶ 5 (CG May 2, 2005) (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3788 at ¶ 64 (2006)).

If the Commission believes either of those propositions to be the case, it should say so clearly and be willing to defend that view before a reviewing court.⁴⁵

Notwithstanding the Commission’s ultimate determination on the merits, an administrative determination of these issues is needed urgently. The Commission’s improper attempt to extend hyper-technical opt out requirements to solicited faxes has encouraged a torrent of frivolous litigation, such as PHI’s cases. These cases not only burden defendants but also waste judicial resources on claims Congress never intended to create. In its recent opinion addressing precisely this question in *Nack*, the Eighth Circuit concluded that it is “questionable whether the regulation at issue [as interpreted by the FCC] properly could have been promulgated under the statutory section that authorizes a private cause of action.”⁴⁶ At most, the court concluded, the Commission’s rationale for these regulations only “arguably brings the regulation within range of what § 227(b) authorized the FCC to regulate.”⁴⁷ The Eighth Circuit concluded that under the circumstances it would not be “possible or prudent for our court to resolve this issue without the benefit of full participation by the agency,” while specifically noting that the District Court on remand “may entertain any requests to stay proceedings for pursuit of administrative determination of the issues raised herein.”⁴⁸ PHI brings this Petition seeking precisely such an administrative determination. The Commission has an obligation to

⁴⁵ The Eighth Circuit’s panel decision in *Nack* held that the Hobbs Act generally precludes a civil defendant from mounting “a defense that a private enforcement action is based upon an invalid agency order” except by presenting its argument for an administrative determination by the agency and, if necessary, judicial review of that determination pursuant to the Hobbs Act. *Nack*, 715 F.3d at 685-86. If that holding is correct, it only underscores the Commission’s obligation to address Masimo’s petition — and similar petitions filed by other parties — on the merits.

⁴⁶ *Nack*, 715 F.3d at 682.

⁴⁷ *Id.* at 687.

⁴⁸ *Id.*

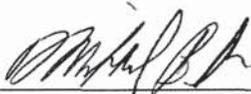
regulated entities, TCPA litigants, and the court system to respond directly and promptly to the issues raised in this Petition and in similar petitions.

Conclusion

For the reasons stated above, the Commission should issue a declaratory ruling clarifying that a fax that (1) is transmitted pursuant to the prior express invitation or permission of a fax recipient, and (2) includes an opt out notice on the first page that complies substantially with Section 64.1200(a)(4)(iii) of the Commission's rules, does not violate any Commission regulation promulgated pursuant to Section 227(b)(2)(D) or another provision of the Communications Act. In the absence of such a ruling, the Commission should grant Masimo a waiver of Sections 64.1200(a)(4)(iii) and (iv) of the Commission's rules under the circumstances described herein. In the alternative, the Commission should issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of the Commission's rules, which purports to impose specific opt out notice requirements on *solicited* faxes, was not promulgated pursuant to Section 227(b) of the Communications Act, because the plain language and scope of Section 227(b) is expressly limited to *unsolicited* faxes, which the statute expressly defines to *exclude* solicited faxes.

Respectfully submitted,

MASIMO CORPORATION

By:  _____

Yaron Dori
Michael Beder
Covington & Burling LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
202-662-6000
ydori@cov.com
mbeder@cov.com

Its Attorneys

Derrick L. Brent
Masimo Corporation
Associate General Counsel
Forty Parker
Irvine, CA 92618
949-297-7028
DBrent@masimo.com

Dated: April 1, 2014

Declaration of Derrick L. Brent

I have read the foregoing Petition, and I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief, formed after reasonable inquiry.

Executed on April 1, 2014

A handwritten signature in black ink, appearing to read "Derrick L. Brent", is written over a horizontal line.

Derrick L. Brent
Masimo Corporation
Associate General Counsel