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April 11, 2014

VIA ECFS

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

Re: Public Notice DA 14-416, dated March 28, 2014, entitled “Consumer and Governmental Affairs Bureau Seeks Comment on Crown Mortgage Company Petition Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements,” and CG Docket Nos. 02-278 & 05-338

On behalf of Bais Yaakov of Spring Valley, Roger H. Kaye, Roger H. Kaye, MD PC, Menachem Raitport and Crown Kosher Meat Market Inc. (hereinafter “the Parties”), Bellin & Associates LLC is submitting these comments in response to the Commission’s Public Notice dated March 28, 2014, DA 14-416, CG Docket Nos. 02-278 & 05-338, entitled “Consumer and Governmental Affairs Bureau Seeks Comment Crown Mortgage Company Petition Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements.” The Parties have already submitted comments on previous Petitions about this issue via ECFS, *see* Comments dated February 13, 2014 and posted on February 14, 2014 (hereinafter “Comments”), that opposed the pending Petitions. Rather than repeat all of the arguments contained therein, those arguments, which are equally applicable to Crown Mortgage Company’s (“Crown”), Petition are incorporated herein by reference and should be deemed to be made again herein by the Parties.

Additionally, the Parties wish to point out that the request by Crown and other Petitioners for a waiver under the Commission's rules appear to be based on a misconception that the Commission has the power to absolve them of their liability under the TCPA rights of action that have been brought by private parties or will be brought by private parties against them. Nothing could be further from the truth.

The private right of action based on violation of the Commission's regulations is authorized by a federal statute, the TCPA, passed by Congress. *See* 47 U.S.C. § 227(b)(3). Any claim by the Commission that it has the power to administratively do away with a private right of action passed by Congress would be not only inconsistent with separation of powers principles but would be invalid as inconsistent with the TCPA statute itself. Nothing in the TCPA suggests, let alone authorizes the Commission to take away a private plaintiff's right to sue a defendant and receive damages for violations of the Commission's regulations. Accordingly, the Commission cannot extinguish private plaintiffs' right to sue through administrative action or even through a regulation, since to do so would be inconsistent with the TCPA statute that authorizes that private right of action. *See, e.g., Brown v. Gardner*, 513 U.S. 115, 116-121 (1994)(regulation that required persons injured at a Veteran's Administration ["VA"] facility as a result of medical treatment to prove fault on the VA's part in order to recover struck down as inconsistent with the statute which said nothing at all about requiring fault as a condition of recovery). Indeed, the Supreme Court has made abundantly clear that an administrative agency, like the Commission, does not even have the power to pass a retroactive regulation if Congress has not clearly and specifically authorized the administrative agency to do so. *See Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988)("[A] statutory grant of legislative rulemaking authority will not, as a general matter be understood to encompass the power to

promulgate retroactive rules unless that power is conveyed by Congress in express terms.”).

Thus, any attempt by the Commission to retroactively absolve persons of liability in a private right of action in a federal court would be invalid as a violation of this principal as well.

Of course, the Commission has no power to dismiss lawsuits that are already pending in the courts, as that too would violate separation of powers principles. As the Supreme Court has held for over 200 years “it is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 1 Cranch 137, 177 (1803). An administrative agency, like the Commission, has no power to control the operations of the courts in particular cases.

A waiver of the opt-out rules by the Commission would only be operative vis-à-vis any enforcement actions the Commission might consider taking on its own. Indeed, the Petitioners have cited no examples, and the Parties know of none, in which a waiver was even attempted to be exercised by an administrative agency to absolve a person of liability under a private right of action. Rather, the requests for a waiver are typically to have the agency refrain from its own enforcement actions. Thus, the Petitioners, by asking for a waiver in order to be absolved of liability from private rights of action in courts, are not only asking the Commission to do something it is not empowered to do, but is also asking the Commission to do something that is completely unprecedented.

Another argument which the parties would like to add to its previous arguments made in their February 13, 2014 comments is that while the Petitioners claim that they may be put out of business by pending TCPA suits, they have brought forward no concrete evidence to support this contention, such as their financial conditions and the TCPA judgments they are subject to, as is required under the waiver cases. It is also instructive to note that none of the Petitioners has brought forth a single example of a company that was put out of business as a result of a

judgment under the TCPA or a TCPA settlement. That is not surprising because putting a company out of business for its TCPA violations would most likely prevent any recompense for consumers and their advocates. That is because, if a company was in bankruptcy, class members, as unsecured creditors, would likely receive little or nothing. For that reason, consumer advocates who sue on behalf of consumers take into consideration the financial condition of defendants and are careful to enter into settlements that permit the defendants to continue to exist as going concerns.

Of course, as noted in the parties February 13, 2014 comments, Petitioner's concerns about their financial conditions are purely self-interest and are not a public interest of any type. Accordingly, these concerns, even if they were supported by evidence, would not justify any type of waiver in this case.

Accordingly, for all of the reasons stated above, and for all of the reasons stated in the Parties' February 13, 2014 comments, all of the Petitions concerning the Opt-Out Regulation, including the Petition brought by Crown, should be denied.

Dated: White Plains, New York
April 11, 2014

Respectfully submitted,

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