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May 5, 2014

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW - Room TW-A325
Washington, DC 20554

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

Dear Ms. Dortch:

On May 1, 2014, the undersigned, Brian J. Wanca, and Glenn L. Hara, both of the law firm of Anderson + Wanca, met with Kris Anne Monteith, Aaron Garza, Kurt Schroeder, Richard Smith, Nancy Stevenson, and Mark Stone from the Commission's Consumer and Governmental Affairs Bureau on behalf of the plaintiffs in pending private TCPA actions against 10 of the 13 petitioners seeking to challenge the opt-out-notice regulation in 47 C.F.R. § 64.1200(a)(4)(iv),¹ as described in the Public Notice released January 31, 2014.² Undersigned counsel also represent the plaintiff in a private TCPA action against Anda, Inc., whose application for review of the Bureau order dismissing its petition is currently before the full Commission.³

¹ Counsel represents the plaintiffs against petitioners Best Buy Builders, Inc.; Crown Mortgage Company; Forest Pharmaceuticals, Inc.; Gilead Sciences, Inc.; Masimo Corporation; Prime Health Services, Inc.; Purdue Pharma, Inc.; Staples, Inc. and Quill Corporation; TechHealth, Inc.; and Douglas Walburg and Richie Enterprises. Counsel also represents the plaintiff against Howmedica Osteonics Corp., which submitted comments in response to the Public Notice. *See 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).

² *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).

³ *See Application for Review, Junk Fax Prevention Act of 2005; 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*, CG Docket No. 05-338 (filed May 14, 2012).

At the meeting, we discussed my firm's experience in enforcing the TCPA in more than 100 class actions over the past decade and the various manufactured claims of "prior express invitation or permission" we have encountered, such as the claim that the class members are "customers." These claims almost never withstand the scrutiny of discovery, we argued, and are often more properly characterized as claims of an established business relationship ("EBR"). Since the line between permission and EBR is often murky, we argued that requiring the same opt-out notice whether the sender claims permission or EBR is the best policy to implement the TCPA's goal of protecting consumers from unwanted fax advertising. Without the opt-out-notice requirement for faxes sent under a claim of permission, we submitted, the exception will swallow the rule, with senders trying to shoehorn EBR cases into "consent" cases. We argued this phenomenon is already occurring and that it is exacerbated by the ease with which a sender can claim it obtained permission orally, which was the Commission's main reason for requiring opt-out notice on faxes sent under a claim of permission in the 2006 Junk Fax Order.⁴

Regarding the relief sought in the petitions, we maintained none of it is available. We argued the requests for a judicially binding waiver of the opt-out regulation would violate the separation of powers vis-à-vis the judiciary (which has the non-delegable duty to hear and decide cases based on the laws on the books) and Congress (which created an unconditional private right of action for violations of TCPA regulations, with no provision for Commission waivers). The Commission has authority to grant waivers from *agency* enforcement, we agreed, but we pointed out that (to our knowledge) there is no such agency proceeding pending. Moreover, we argued the petitioners failed the high standards for an agency-enforcement waiver (e.g., pleading with particularity why they failed to comply, how many violations they committed, and what steps they have taken to comply in the future). Also, instead of establishing each petitioner's entitlement to a waiver, we explained, the petitioners seek a universal, blanket waiver of the opt-out regulation for all fax advertisers in the United States for the past 7.5 years. Considering the unprecedented nature of this request, even in the agency-enforcement context, we argued it was incumbent on the petitioners to plead the underlying facts with particularity, which they have refused to do.

Regarding the petitioners' requests to "interpret" the regulation to allow "substantial compliance," we argued doing so is incompatible with the plain language of the regulation, which unambiguously states an opt-out notice complies "only if" it contains certain information. We maintained that these obligations are easy to satisfy, taking no more than a

⁴ *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) (explaining Commission was "concerned that permission not provided in writing may result in some senders erroneously claiming they had the recipient's permission to send facsimile advertisements" and that, therefore, Commission was empowering consumers with a legally enforceable right to "revoke[] such permission by sending an opt-out request to the sender").

couple of lines of text, and that none of the petitioners have explained why they could not have complied. We noted that similar statutory “safe harbors” in the law are not uncommon (e.g., the federal Fair Debt Collection Practices Act), and that strict compliance is the norm.

We discussed that some (but not all) of the petitioners placed telephone numbers on their faxes with a pledge to “unsubscribe” consumers if they called. We argued this is not “substantial” compliance in any event, even if such a standard were allowed, because the faxes do not explain (1) that the consumer has a legal right to opt out and (2) that a sender’s failure to honor a request is unlawful. Without that crucial information, we argued a consumer is unlikely to even attempt to opt out, and might justifiably suspect that calling will result in receiving *more* fax advertisements, since the sender now knows there is someone paying attention on the other end of the line.

We also argued that, if “substantial compliance” was permitted, each court would need to decide whether the advertiser disclosed enough information and which information was more important than others. Such a case-by-case analysis would severely undercut a consumer’s ability to enforce the TCPA and opt-out regulation. In addition, the cost and expense required to include the required opt-out language is minimal and likely does not require more than two lines. Many advertisers have complied with the regulation. It is easy and not burdensome. Most of the petitioners are large publicly traded companies which have in-house legal staff and regularly engage outside counsel, spending large amounts of money for legal counsel. Compliance with the opt-out rule is easy and costs little.

Regarding the requests for declaratory rulings, we argued they should be dismissed for the same procedural reasons as the Anda Petition: (1) they seek “clarification” where there is no uncertainty or controversy as required by Commission Rule 1.2 and (2) they are “improper collateral challenge[s]” that are time barred by 47 U.S.C. § 405(a) and Rule 1.429(d).⁵ Regarding whether the petitioners can raise their arguments in a federal court, we argued that is not the Commission’s decision to make. We pointed out that Staples raised this issue in its petition, and the Public Notice directed commenters not to respond to it, since it “does not request any specific Commission action”⁶ We also noted that the Commission argued before the Eighth Circuit in *Nack v. Walburg* that petitioners had several routes available to challenge the opt-out regulation, but they failed to avail themselves of

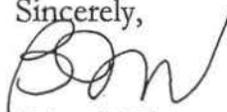
⁵ *Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission’s Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient’s Prior Express Consent*, Order, CG Docket No. 05-338 (May 2, 2012) ¶¶ 5, 6.

⁶ *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements*, Public Notice (rel. Jan. 31, 2014) at 2, n.8.

those remedies.⁷ Most notably, any petitioner could have come to the Commission and asked to amend or repeal the regulation prospectively *before* violating it.⁸

Finally, we commented that despite the petitioners' accusations that plaintiffs' counsel are "opportunistic" and similar remarks, there is no practical way for consumers to enforce the TCPA outside of class actions. Following the United States Supreme Court's decision in *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 748 (2012), holding federal courts have federal-question jurisdiction in TCPA suits, even if an individual consumer files a case in a state court, the defendant can remove it. We argued consumers simply do not have the resources and expertise necessary to stand toe-to-toe with these defendants in federal court.

Sincerely,



Brian J. Wanca

cc: Kris Anne Monteith
Aaron Garza
Kurt Schroeder
Richard Smith
Nancy Stevenson
Mark Stone

⁷ Comm'n Amicus Br., *Nack v. Walburg*, No. 11-1460 (8th Cir), 2012 WL 725733, at 22.

⁸ *Id.*; see also *Nack v. Walburg*, No. 11-1460 (8th Cir.), Comm'n Supp. Amicus Br. (Aug. 21, 2012) at 13 (stating petitioners were subject to liability because they "chose to violate a binding FCC rule in effect at the time without first challenging its lawfulness").