Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of:	)
	)
Petition of S&S Firestone, Inc., d/b/a S&S Tire	)
For Declaratory Ruling To Clarify Scope and/or Statutory Basis for	)
Rule 64.1200(a)(3)(iv) and/or for Waiver	)

REPLY COMMENTS OF S&S FIRESTONE, INC., d/b/a S&S TIRE

/s/ Mac B. Greaves
Mac B. Greaves
(ASB-6830-A60M)
Emily Sides Bonds
(ASB-9610-N77E)
Sarah Canzoniero Blutter
(ASB-3276-V40E)
Attorneys for Defendant S&S Firestone, Inc., d/b/a S&S Tire

OF COUNSEL:
Jones Walker LLP
1819 5th Avenue North, Suite 1100
Birmingham, AL 35203
(205) 244-5200 Telephone
(205) 244-5400 Facsimile
mgreaves@joneswalker.com
ebonds@joneswalker.com
sblutter@joneswalker.com

June 20, 2014

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of:	)	
	)	CG Docket No. 02-278
Petition of S&S Firestone, Inc., d/b/a S&S Tire	)	CG Docket No. 05-338
For Declaratory Ruling To Clarify Scope	)	
and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver	)	

REPLY COMMENTS OF S&S FIRESTONE, INC., d/b/a S&S TIRE

Petitioner S&S Firestone, Inc., d/b/a S&S Tire (hereinafter "S&S") respectfully submits these Reply Comments in response to the Federal Communications Commission's (hereinafter "FCC") Public Notice[1] seeking comment on S&S Tire's Petition for Relief (hereinafter "Petition").

S&S's Petition, like the 15 or so others currently pending before the FCC, seeks a declaratory ruling that Section 64.1200(a)(4)(iv) (hereinafter the "Regulation") does not apply to S&S's advertisements of special tire deals which were faxed to some of its customers with their express consent. Alternatively, S&S requests clarification for the statutory basis for the Regulation. If the FCC is

[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 No. 02-278, CG Docket No. 05-338, DA 14-734 (May 30, 2014).

not inclined to grant this relief, then S&S has requested a retroactive waiver of the application of the Regulation to faxes transmitted by S&S to its customers with their express permission.

The only comments in response to S&S's Petition were filed by the attorney representing M.P.G. Tent Rentals, Inc., d/b/a Special Occasions ("Special Occasions"), the customer of S&S that filed a nationwide class action against S&S alleging liability for faxed advertisements sent without an opt-out notice. Special Occasions is a business in Birmingham, Alabama. It was a customer of S&S having bought tires for its commercial vehicles. Special Occasions does not dispute that it voluntarily provided its fax number to S&S when it submitted a business credit application. Special Occasions does not dispute that it gave approval to S&S to send special tire deals to it by fax. Despite Special Occasions' specific approval for the faxes, it is pursuing a multi-million dollar class action which threatens the ongoing viability of S&S.

A. A Declaratory Ruling is not Prohibited by the *Anda* Order or by *Nack v. Walburg*.

Special Occasions suggests in its response that all petitions currently before the FCC, including S&S's Petition, should be dismissed based upon an application of the *Anda* Order issued by the FCC on May 2, 2012.[2] Special Occasions'

[2] *See Junk Fax Prevention Act; 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, 27 FCC Rcd 4912 (CGB 2012).

argument, though, fails to note that Anda filed an Application for Review[3] of that Order pursuant to Section 1.115 of the FCC's rules. Anda's Application for Review remains pending, as are the other petitions for similar relief.

Since Anda filed its Application for Review, the Eighth Circuit Court of Appeals decided *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013), a decision the FCC is well aware of. The decision in *Nack* makes it clear that there is a controversy for the FCC to decide. In *Nack*, the Eighth Circuit stated: "it is questionable whether the regulation at issue (thus interpreted) properly could have been promulgated under the statutory section that authorizes a private cause of action." *Id.* at 682. Obviously, if the statutory basis for the Regulation is questionable in the eyes of the Eighth Circuit, then S&S and the other petitioners have met their burden to identify a legitimate uncertainty or controversy such that the FCC should clarify the Regulation.

Indeed, given the Eighth Circuit's decision in *Nack*, it is hard to believe that Special Occasions would cite it as support for its position that S&S's Petition should be denied. S&S is filing this Petition because of *Nack* and its holding that the challenge to the Regulation should first be presented to the FCC. *See Nack*, 715 F.3d at 685-686. Similar arguments were made by other plaintiffs' attorneys and counsel for Anda has already pointed out to the FCC that these tactics "fl[y]ies in

[3] *See Anda Application for Review*, CG Docket No. 05-338, filed on May 14, 2012.

the face of their [plaintiffs' attorneys] sustained efforts to prevent the federal and state courts adjudicating their TCPA clams from deciding those issues." *See* Letter from Matthew A. Brill, counsel for Anda, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 02-278 and 05-338 (May 23, 2014).

B. S&S Has Submitted Good Cause for a Waiver.

S&S respectfully disagrees with Special Occasions' statement that it has not presented good cause for a waiver of the application of the Regulation to the special tires deals S&S faxed to some of its customers. First, good cause exists because the FCC had no authority to adopt a Regulation requiring an opt-out notice on solicited faxes. Second, S&S submitted evidence in support of its request for a waiver – evidence which is not controverted by Special Occasions. That evidence is the affidavit of Jim Bailey, a Customer Service Representative of S&S. Mr. Bailey was assigned the Special Occasions account. He specifically asked Special Occasions and the other S&S customers assigned to him whether they consented to receiving advertisements by fax. Those who indicated their consent were faxed advertisements. Those who did not indicate their consent were removed from the fax list. Jim Bailey's reasonable efforts to determine the customers who wished to receive advertisements by fax support granting a waiver to S&S.

Third, a waiver for solicited and consented to faxes sent by S&S to its customers serves the public interest. It will discourage abusive litigation

practices and serial plaintiffs, like Special Occasions, who seem to be making a living from suing under the TCPA. *See M.P.G. Tent Rental, Inc. v. Taymark, Inc.*, in the United States District Court for the Northern District of Alabama, 2:11-cv-03498-RDP; *M.P.G. Tent Rentals, Inc. v. Wasatch Tees of Atlanta, Inc.*, in the United States District Court for the Northern District of Alabama, 2:08-cv-02218-LSC. It will ensure that S&S, a legitimate business who merely communicated with its customer in a manner of which they approved, will continue to operate as a viable entity. If the FCC considers the motivations of the parties (which S&S submits is not relevant since there is good cause for the waiver), then Special Occasions' obviously "selfish" motives must also be considered. Special Occasions consented to the faxes it received; thus, it was not harmed in any way when it received advertisements from S&S by fax. Special Occasions has filed other TCPA litigation. Id. Special Occasions has sued S&S seeking certification of a nationwide class action and millions of dollars in compensation for it and its attorney when it's expressly converted to receipt of the faxes at issue.

Several petitions and comments have responded to all of the concerns expressed by Special Occasions, including those incorporated by reference here: *Reply Comments of Anda*, CG Docket Nos. 02-278 and 05-338 (February 21, 2014); *Letter of Matthew A. Brill*, counsel for Anda, CG Docket Nos. 02-278 and 05-338 (March 14, 2014); *Reply Comments of Staples, Inc. and Quill*

Corporation, CG Docket Nos. 02-278; 05-338 (February 21, 2014). Thus, S&S respectfully requests the FCC to grant its petition for Declaratory Ruling and/or Waiver.

DATED this 20th day of June, 2014.

/s/ Mac B. Greaves
Mac B. Greaves
(ASB-6830-A60M)
Emily Sides Bonds
(ASB-9610-N77E)
Sarah Canzoniero Blutter
(ASB-3276-V40E)
Attorneys for Defendant S&S Firestone, Inc., d/b/a S&S Tire

OF COUNSEL:
Jones Walker LLP
1819 5th Avenue North, Suite 1100
Birmingham, AL 35203
(205) 244-5200 Telephone
(205) 244-5400 Facsimile
mgreaves@joneswalker.com
ebonds@joneswalker.com
sblutter@joneswalker.com