

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

In the Matter of)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

TCPA Plaintiffs’ Comments on American CareSource’s Petition Concerning the Commission’s Rule Requiring Opt-Out Notices on Fax Advertisements

Undersigned counsel represent the plaintiff in a private TCPA action against petitioner American CareSource, Inc.,¹ as well as 11 other petitioners² challenging the Commission’s regulation requiring opt-out notice on fax advertisements where the sender claims “prior express invitation or permission.”³ The Consumer and Governmental Affairs Bureau sought comments on American CareSource’s petition on July 25, 2014.⁴

American CareSource seeks (1) a declaratory ruling “clarifying” that the regulation requiring opt-out notice on faxes sent with permission “does not apply” to faxes sent with permission, (2) a declaratory ruling “clarifying” that the regulation does not allow a consumer to enforce the right to enforceable opt-out notice, and/or (3) a “retroactive

¹ See *Petition of American CareSource Holdings, Inc. for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (June 30, 2014).

² See Petitions of Staples, Inc./Quill Corp. (July 19, 2013); Forest Pharms., Inc. (July 24, 2013); Gilead Sciences, Inc. (Aug. 9, 2013); Douglas Paul Walburg & Richie Enters., LLC (Aug. 19, 2013); Purdue Pharma L.P. (Dec. 12, 2013); Prime Health Servs., Inc. (Dec. 17, 2013); TechHealth, Inc. (Jan. 6, 2014); Crown Mtg. Co. (Mar. 11, 2014); Masimo Corp. (Apr. 1, 2014); Best Buy Inc. (Apr. 7, 2014); and Stericycle, Inc. (June 6, 2014).

³ 47 C.F.R. § 64.1200(a)(4)(iv).

⁴ See *Consumer & 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 (July 25, 2014).

waiver” instructing the federal court presiding over its TCPA case (the United States District Court for the Northern District of Ohio) not to enforce the regulation.⁵ American CareSource does not ask the Commission to change the regulation prospectively,⁶ nor does it ask the Commission to create a retroactive “substantial compliance” defense.⁷

American CareSource’s requests for declaratory rulings should be denied for the reasons in the Bureau’s order dismissing the Anda petition⁸ and the FCC’s amicus briefs in *Nack v. Walburg*.⁹ The entire petition, including the request for a judicially binding waiver, should also be denied for the reasons in TCPA Plaintiffs’ comments filed February 14, 2014, February 21, 2014, and July 11, 2014. To summarize: (1) the Commission cannot “interpret” the regulation such that it does not apply to faxes sent with “prior express invitation or permission” because that is the opposite of what it says; (2) the regulation reasonably provides a private cause of action so consumers can enforce their right to compliant opt-out notice; and (3) the Commission does not have authority under the TCPA or the Constitution to grant a “waiver” telling the courts not to enforce the regulation, especially given the

⁵ American CareSource Pet. at 1–2.

⁶ It appears that Staples/Quill is the only petitioner requesting prospective rulemaking. See *Petition of Staples, Inc. and Quill Corp. for a Rulemaking to Repeal Rule 64.1200(a)(3)(iv) and for a Declaratory Ruling to Interpret Rule 64.1200(a)(3)(iv)*, CG Docket Nos. 02-278, 05-338 (July 19, 2013) at 8.

⁷ American CareSource’s faxes contain no opt-out language at all. (See Ex. A).

⁸ *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) ¶¶ 5–7.

⁹ The Commission’s opening amicus brief is available at 2012 WL 725733 (Feb. 24, 2012). Its supplemental amicus brief is available at 2012 WL 3781344 (Aug. 21, 2012).

petitions do not satisfy the demanding standards for a waiver from Commission enforcement proceedings.¹⁰

TCPA Plaintiffs also note that American CareSource (as is typical with the petitioners in these proceedings) claims it obtained “prior express invitation or permission” to send the faxes at issue in its underlying TCPA case, giving it a stake in these proceedings. For example, it claims that “many” of its faxes “were sent to customers who consented to receive communications from American CareSource,”¹¹ that it is subject to lawsuits by “plaintiffs who agreed to receive communications,”¹² that “many class members agreed to receive communications from American CareSource,”¹³ and that “American CareSource sent faxes in order to facilitate commercial transactions to recipients that had requested or agreed to accept them.”¹⁴ Yet American CareSource cites no evidence to support these claims.¹⁵

The Commission’s rules state that “the burden of proof rests on the sender to demonstrate that permission was given,” that senders are “expected to take reasonable steps to ensure that such permission can be verified,” and that senders should “take steps to

¹⁰ *Cf. In re Rath Microtech*, 16 FCC Rcd 16710 ¶¶ 7, 10, 13, 14 (Network Servs. Div. 2005) (party justified waiver by demonstrating it (1) sold “10,326 non-compliant telephones,” (2) “promptly” corrected violations, (3) immediately sent equipment for testing and retesting at separate laboratories, (4) “redesign[ed] and modif[ied]” the equipment, (5) understood “the importance of complying with FCC rules,” and (6) implemented procedures to ensure future compliance).

¹¹ American CareSource Pet. at 1.

¹² *Id.* at 2.

¹³ *Id.* at 3.

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 1–8. American CareSource also cited no evidence of permission in its motion to stay the TCPA action pending “final disposition” of its petition. (See Ex. B, *Sandusky Wellness Ctr. v. American CareSource Holdings, Inc.*, No. 14-cv-874, American CareSource’s Mem. Supp. Mot. to Dismiss or Stay (Doc. 18-1) at 1–11).

promptly document that they received such permission.”¹⁶ If American CareSource had any evidence of permission, it would have cited it in its petition.

In reality, Plaintiff did not give permission to American CareSource to send the fax. Nor did it provide American CareSource with its fax number. Rather, American CareSource most likely obtained Plaintiff’s fax number—like the defendants in hundreds of other junk-fax cases—by purchasing a list of fax numbers from a third party, creating a form advertisement, and then paying a fax broadcaster to transmit the advertisement to the numbers on the list.

This is exactly the scenario the Commission was “concerned” about when it promulgated the rule in 2006, wherein the more relaxed rules allowing senders to obtain permission orally leads to senders “erroneously claiming” prior express invitation or permission.¹⁷ The Commission offset that risk by requiring senders to “include on the advertisements their opt-out notice and contact information to allow consumers to stop unwanted faxes in the future.”¹⁸ That was a reasonable balance.

TCPA Plaintiffs also reiterate that the opt-out-notice requirement, although it imposes some minimal burden on the sender, is part of a set of rules that ultimately benefits the sender as well as the consumer. In 2006, the Commission considered allowing consumers to revoke prior express invitation or permission “through other avenues not identified in the notice” but decided against it, reasoning that allowing consumers to opt out

¹⁶ *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).

¹⁷ *Id.*

¹⁸ *Id.* ¶ 48.

however they chose would “impair an entity’s ability to account for all requests and process them in a timely manner.”¹⁹ In turn, it required senders to tell consumers how to opt out, a requirement given teeth by the TCPA’s private right of action. This was another reasonable balance, and the overwhelming majority of advertisers have complied. The relative handful of violators seeking to escape liability in these proceedings have failed to demonstrate any infirmity with the regulation or the Commission’s prior positions.

Conclusion

The Commission should deny American CareSource’s petition, along with all the other petitions.

Respectfully submitted,

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¹⁹ *Id.* ¶ 34 & n.127.

EXHIBIT A

— FAX TRANSMISSION —

From: Patti Davidson
Subject: New Provider Agreement - status needed
Date: 4/29/2013 9:04:41 AM
Message: To: Office Manager
Gregg D. Winnestaffer, DC
Sandusky Wellness Center

Good Morning!

We recently sent a new provider agreement for your review but have not received any paperwork back. Did you receive it? Do you need another copy? Please let me know ASAP as we have several payor/clients that have requested we contract with your facility so that they may use your services as in-network.

My cutoff for credentialing is fast approaching and we would really like to include your facility.

Email me at: pdavidson@anci-care.com with any questions.

Thank you for your time and help with this agreement.
Patti FAX---- 214-224-0182

Ancillary Care Services
Attn: Patti
5429 LBJ Frwy., Suite 850
Dallas, TX 75240


**Ancillary
Care Services**

American CareSource Holdings Inc.
5429 Lyndon B. Johnson Freeway, Suite 700 Dallas, TX 75240
Tel: 800-370-5994 Fax: 972-980-2560
Website: www.anci-care.com

This fax was sent by Ancillary Care Services

This fax was sent by American CareSource Holdings Inc.



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This fax was sent by American CareSource Holdings Inc.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

SANDUSKY WELLNESS CENTER,)	CASE NO. 14-CV-00874
LLC, individually and as the representative)	
of a class of similarly situated persons,)	DISTRICT JUDGE HELMICK
)	
Plaintiff,)	
)	
v.)	
)	
AMERICAN CARESOURCE)	
HOLDINGS, INC., et al.,)	
)	
Defendants.)	
)	

MEMORANDUM IN SUPPORT OF
DEFENDANT AMERICAN CARESOURCE HOLDINGS, INC.'S
MOTION TO DISMISS OR STAY PLAINTIFF'S CLASS ACTION COMPLAINT

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In re 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 (Apr. 6, 2006)4

Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, DA 14-923 (released June 27, 2014)5

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967 (May 3, 2006)4

Defendant American CareSource Holdings, Inc. (“American CareSource”) respectfully submits this memorandum of law in support of its motion, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, to dismiss or stay the Class Action Complaint (ECF # 1) (“Complaint”) filed by Plaintiff Sandusky Wellness Center, LLC (“Plaintiff”).

INTRODUCTION

This case is one in a nationwide flood of class actions — many of which were filed by Plaintiff¹ — claiming violations of the Telephone Consumer Protection Act (“TCPA”) and regulations promulgated thereunder by the Federal Communications Commission (“FCC”), which impose restrictions on facsimile advertisements. A central dispute in this case concerns the lawfulness of alleged facsimile transmissions sent by American CareSource with putative class members’ agreement to receive communications from American CareSource, but that did not contain language instructing consenting recipients of their right to “opt-out” of receiving future faxes. Some courts — and the FCC itself — have questioned the scope and validity of an FCC regulation, 47 C.F.R. § 64.1200(a)(4)(iv) (the “Regulation”), which requires that such solicited faxes contain “opt out” language. The agency presently is considering numerous petitions challenging the Regulation, and has solicited comments on the same through a series of public notices. American CareSource has filed its own petition with the FCC seeking

¹ See *Sandusky Wellness Ctr., LLC v. Medco Health Solutions, Inc.*, No. 3:14-cv-00583-JGC (N.D. Ohio filed Mar. 18, 2014); *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, No. 3:13-cv-02085-JZ (N.D. Ohio filed Sept. 19, 2013); *Sandusky Wellness Ctr., LLC v. NovaSom, Inc.*, No. 3:12-cv-02291-JJH (N.D. Ohio filed Sept. 11, 2012); *Sandusky Wellness Ctr., LLC v. DrFirst.com, Inc.*, No. 1:12-cv-10437 (N.D. Ill. filed Sept. 6, 2012); *Sandusky Wellness Ctr., LLC v. Wagner Wellness Inc.*, No. 3:12-cv-02257-DAK (N.D. Ohio filed Sept. 5, 2012); *Sandusky Wellness Ctr., LLC v. Medtox Scientific, Inc.*, No. 0:12-cv-02066-DSD-JJG (D. Minn. filed Aug. 23, 2012); *Sandusky Wellness Ctr., LLC v. Vaxmax, Inc.*, No. 1:12-cv-05568 (N.D. Ill. filed July 16, 2012); *Sandusky Wellness Ctr., LLC v. Coll. Pharmacy, Inc.*, No. 3:12-cv-01471-JJH (N.D. Ohio filed June 11, 2012); *Sandusky Wellness Ctr., LLC v. Heel, Inc.*, No. 3:12-cv-01470-JZ (N.D. Ohio filed June 11, 2012)

declaratory rulings to clarify the scope and statutory basis of the Regulation. In light of the FCC's current review of the Regulation, many courts have stayed class action lawsuits commenced under the TCPA pending a final determination in the administrative proceedings.

As set forth below, this Court should exercise its discretion under its inherent power to control its docket in the interest of judicial economy, as well as under the doctrine of primary jurisdiction, to dismiss or stay this action pending the FCC's resolution of this core issue because doing so will advance regulatory uniformity, answer a question within the FCC's discretion, and enable the Court to benefit from technical and policy considerations within the agency's expertise.

RELEVANT FACTUAL ALLEGATIONS²

This case concerns a facsimile message sent by American CareSource to Plaintiff on April 9, 2013, for the purpose of inquiring about the status of a contract. Compl. Exh. A. The fax did not contain any language concerning a right to "opt-out" of receiving future facsimile transmissions. *Id.*

The Complaint alleges that American CareSource violated the TCPA because Plaintiff did not consent to receive the alleged fax advertisement. Plaintiff alleges "on information and belief" that American CareSource sent similar faxes to other persons without their express permission or invitation. Compl. ¶ 16. Further, Plaintiff asserts that in defending this action, "Defendants are precluded from asserting any prior express permission or invitation because of the failure to comply with the Opt-Out Notice Requirements." *Id.* at ¶ 31. Presumably, Plaintiff grounds this assertion in the Regulation, which purports to extend the

² Solely for the purposes of this motion, American CareSource assumes the truth of all properly pled facts in the Complaint.

TCPA's requirement that *unsolicited* faxes contain certain "opt-out" language to *solicited* fax advertisements as well. 47 C.F.R. § 64.1200(a)(4)(iv).

Plaintiff purports to represent a class of "all persons" who were sent facsimile advertisements in the past four years "which did not display a proper opt-out notice," whether or not such persons agreed to receive such faxes. Compl. ¶ 19. Based on these allegations, Plaintiff seeks monetary and injunctive relief.

RELEVANT STATUTORY AND REGULATORY BACKGROUND

The TCPA mandates that an *unsolicited* fax advertisement include an opt-out notice, prescribes requirements with which the notice must comply, and directs the FCC to promulgate regulations implementing these requirements. 47 U.S.C. § 227(b)(1)(C)(iii); §227(b)(2)(D)(i)-(vi); *see id.* § 227(a)(5) (an "unsolicited advertisement" is "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"). Although the statute is specifically limited to unsolicited fax advertisements, the FCC promulgated a Regulation that extends the opt-out notice requirements to solicited fax advertisements:

A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.

47 C.F.R. § 64.1200(a)(4)(iv).

The Regulation does not make sense when read in context; it is a subsection of an FCC regulation dealing only with unsolicited fax advertisements and does not grammatically cohere with its preceding language. *See* 47 C.F.R. § 64.1200(a)(4)(i)-(iv) ("No person or entity may . . . [u]se a telephone facsimile machine, computer, or other device to send an *unsolicited*

advertisement to a telephone facsimile machine, unless . . . [a] facsimile advertisement that is sent to a recipient *that has provided prior express invitation or permission* to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.”) (emphasis added). The FCC’s 2006 final order amending the Commission’s rules on unsolicited fax advertisements adds to this confusion, stating on the one hand that the “opt-out notice requirement only applies to communications that constitute unsolicited advertisements,” but on the other hand that “entities that send facsimile advertisements to consumers from whom they obtained permission, must include on the advertisements their opt-out notice. . . .” *See In re 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, 3810 n.154, 3812 (Apr. 6, 2006); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25,967, 25,971-72 (May 3, 2006).

As a consequence of this tension between the plain language of the TCPA and the Regulation, seventeen petitions concerning this subject matter are pending before the FCC. Twelve of these petitions seek a declaratory ruling clarifying that the Regulation does not apply to solicited fax advertisements, such that they need not include any form of opt-out notice.³

³ Petition of Stericycle, Inc. for Declaratory Ruling and/or Waiver Regarding 47 C.F.R. § 64.1200(a)(4)(iv), CG Docket Nos. 02-278 & 05-338 (filed June 6, 2014); Petition of Cannon & Assocs. LLC D/B/A/ Polaris Grp. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed May 15, 2014); Petition of S&S Firestone, Inc., d/b/a S&S Tire for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed May 7, 2014); Petition of Crown Mortg. Co. for Declaratory Rulings and/or Waiver of the “Opt Out” Requirement, CG Docket Nos. 02-278 & 05-338 (filed Feb. 21, 2014); Petition of TechHealth, Inc. for Declaratory Ruling and/or Waiver, CG Docket No. 02-278 (filed Jan. 6, 2014); Petition of Prime Health Servs., Inc. for Declaratory Ruling and/or Waiver, CG Docket No. 05-338 (filed Dec. 17, 2013); Petition of Best Buy Builders, Inc. for Declaratory Ruling and/or Waiver, CG Docket No. 05-338 (filed Dec.

Sixteen of the petitions — including the petition filed by American CareSource — additionally or instead seek a declaratory ruling clarifying that Section 227(b) of the TCPA, which establishes a private right of action to enjoin or recover damages for violations of the Act, is not the statutory basis for the Regulation, such that a solicited fax advertisement lacking an opt-out notice cannot engender a private lawsuit.⁴ The FCC has solicited comments on most of these petitions through a series of public notices. *See* Public Notice, *Consumer and Governmental*

13, 2013); Petition of All Granite & Marble Corp. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed Oct. 28, 2013); Petition of Futuredontics, Inc. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed Oct. 18, 2013); Petition of Douglas Paul Walburg & Richie Enters., LLC for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed Aug. 19, 2013); Petition of Staples, Inc. & Quill Corp. for Rulemaking and Declaratory Ruling, CG Docket Nos. 02-278 & 05-338 (filed July 19, 2013) (also seeking FCC rulemaking to repeal Section 64.1200(a)(4)(iv)). The FCC renumbered its opt-out notice rule during the period in which these petitions were filed. As such, references in the petitions to the former Section 64.1200(a)(3)(iv) are treated as references to the current Section 64.1200(a)(4)(iv).

⁴ *See* Petition of Stericycle, Inc. for Declaratory Ruling and/or Waiver Regarding 47 C.F.R. § 64.1200(a)(4)(iv), CG Docket Nos. 02-278 & 05-338 (filed June 6, 2014); Petition of Cannon & Assocs. LLC D/B/A/ Polaris Grp. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed May 15, 2014); Petition of S&S Firestone, Inc., d/b/a S&S Tire for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed May 7, 2014); Petition for Declaratory Ruling and/or Waiver of Masimo Corp., CG Docket Nos. 02-278 & 05-338 (filed Apr. 1, 2014); Petition of Magna Chek, Inc. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed Mar. 28, 2014); Petition of Crown Mortg. Co. for Declaratory Rulings and/or Waiver of the “Opt Out” Requirement, CG Docket Nos. 02-278 & 05-338 (filed Feb. 21, 2014); Petition of TechHealth, Inc. for Declaratory Ruling and/or Waiver, CG Docket No. 02-278 (filed Jan. 6, 2014); Petition of Prime Health Servs., Inc. for Declaratory Ruling and/or Waiver, CG Docket No. 05-338 (filed Dec. 17, 2013); Petition of Best Buy Builders, Inc. for Declaratory Ruling and/or Waiver, CG Docket No. 05-338 (filed Dec. 13, 2013); Petition for Declaratory Ruling and/or Waiver [by Purdue Pharma L.P.], CG Docket Nos. 02-278 & 05-338 (filed Dec. 12, 2013); Petition of All Granite & Marble Corp. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed Oct. 28, 2013); Petition of Futuredontics, Inc. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed Oct. 18, 2013); Petition of Douglas Paul Walburg & Richie Enters., LLC for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed Aug. 19, 2013); Petition for Declaratory Ruling and/or Waiver [by Gilead Scis., Inc. & Gilead Palo Alto, Inc.], CG Docket Nos. 02-278 & 05-338 (filed Aug. 8, 2013); Petition for Declaratory Ruling and/or Waiver [by Forest Pharm., Inc.], CG Docket No. 05-338 (filed June 27, 2013).

Affairs Bureau Seeks Comment on Petition Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements, CG Docket Nos. 02-278, 05-338, DA 14-923 (released June 27, 2014).⁵ The agency has signaled its willingness to reconsider the Regulation in a recent internet blog post of Commissioner Michael O'Rielly, who remarked that the FCC "needs to take a hard look at its own precedent" and cited the extension of opt-out notice requirements to solicited facsimile advertisements as an example. *See* Michael O'Rielly, *TCPA: It is Time to Provide Clarity*, Official FCC Blog (Mar. 25, 2014), <http://www.fcc.gov/blog/tcpa-it-time-provide-clarity> (stating that the "FCC should also follow through on the pending TCPA petitions to make sure that good actors and innovators are not needlessly subjected to enforcement actions or lawsuits").

ARGUMENT

PLAINTIFF'S CLAIMS SHOULD BE DISMISSED OR STAYED

Plaintiff purports to represent a class of persons that includes those who agreed to receive communications from American CareSource. Compl. ¶ 19. Plaintiff asserts that in defending the alleged TCPA violations, American CareSource is precluded from asserting that such class members consented to receipt of facsimile transmissions "because of the failure to comply with the Opt-Out Notice Requirements" of the Regulation. *Id.* ¶ 31. Thus a core issue in this case is whether an alleged solicited fax advertisement must include a notice informing the

⁵ *See also* 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 14-734 (released May 30, 2014); 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 14-556 (released Apr. 25, 2014); Public Notice, *Consumer and Governmental Affairs Bureau Seeks Comment on Crown Mortgage Company Petition Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, DA 14-416 (released Mar. 28, 2014); 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 (released Jan. 31, 2014).

recipient of her prerogative to opt out of future fax advertisements and the means by which she can do so. Because the FCC presently is considering numerous petitions — including one filed by American CareSource — concerning this precise issue, a forthcoming agency ruling as to whether solicited fax advertisements must include an opt-out notice is a virtual certainty.

In light of this fact and as set forth more fully below, this case should be stayed or dismissed on two independent grounds. First, under the Court’s broad inherent authority to control its docket, and second under the doctrine of primary jurisdiction.

A. The Court Should Exercise its Discretion to Stay the Action in the Interest of Judicial Economy and Consistency

It is well-settled that a district court has broad discretion to stay civil proceedings. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997). The power to stay an action “is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis*, 299 U.S. at 254. A stay is appropriate where, as here, it is “likely to conserve judicial and party time, resources, and energy.” *Bank of Am., N.A. v. WRT Realty, L.P.*, 769 F. Supp. 2d 36, 39 (D. Mass. 2011); *see also PDS Elecs., Inc. v. Hi-Z Antennas*, No. 5:10-cv-02806, 2011 WL 1097745, at *2 (N.D. Ohio Mar. 22, 2011); *Michael v. Ghee*, 325 F. Supp. 2d 829, 832-33 (N.D. Ohio 2004).⁶

Given the myriad petitions pending before the FCC on a central issue in this litigation — namely, the agency’s authority to regulate solicited facsimile advertisements — it

⁶ Further militating in favor of a stay, one appellate court has held that a party cannot challenge the Regulation as *ultra vires* unless it first petitions the FCC and, if unsuccessful, appeals that determination. *See Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir. 2013). The *Nack* Court observed that in implementing the Regulation, the FCC may have unlawfully exceeded its authority under the TCPA. *See id.* at 682 (“[I]t is questionable whether th[is] regulation . . . properly could have been promulgated under the statutory section that authorizes a private cause of action.”).

would be a waste of judicial resources for this case to proceed prior to a final agency determination. Numerous District Courts have stayed similar class action lawsuits on similar grounds.⁷ One of these courts has reasoned, “[i]t stands to reason that the more petitions the FCC receives, the greater the likelihood that the Commission will address the relevant issues on the merits, and the more cases that are stayed pending the resolution of those proceedings, the greater the potential for consistent results in TCPA litigation.” *Physicians Healthsource, Inc. v. Purdue Pharma L.P.*, No. 3:12-CV-1208 SRU, 2014 WL 518992, at *3 (D. Conn. Feb. 3, 2014). This logic is rendered even more persuasive by the filing of another seven petitions — including one by American CareSource — challenging the Regulation since *Purdue Pharma* was decided.

B. This Action Should be Dismissed or Stayed on the Basis of the Doctrine of Primary Jurisdiction

“The doctrine of primary jurisdiction allows courts to refer a matter to [a] relevant agency whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.” *Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 466 (6th Cir. 2010) (citation and internal quotation marks omitted). Courts will apply the primary jurisdiction doctrine “(1) to advance regulatory uniformity; (2) to answer a question . . . within the agency’s discretion; and (3) to benefit from technical or policy considerations within the agency’s . . . expertise.” *Id.* (citations

⁷ See *Physicians Healthsource, Inc. v. Masimo Corp.*, No. 8:14-cv-00001-JVS-AN (C.D. Cal. May 22, 2014); *Whiteamire Clinic, P.A., Inc. v. Quill Corp.*, No. 1:12-cv-05490 (N.D. Ill. Apr. 9, 2014); *Physicians Healthsource, Inc. v. Purdue Pharma L.P.*, No. 3:12-CV-1208 SRU, 2014 WL 518992 (D. Conn. Feb. 3, 2014); *Critchfield Physical Therapy, P.C. v. TechHealth, Inc.*, No. 4:12CV00268 AGF (E.D. Mo. Oct. 15, 2013); *St. Louis Heart Ctr., Inc. v. Gilead Palo Alto, Inc.*, No. 4:13-CV-958-JAR, 2013 WL 5436651 (E.D. Mo. Sept. 27, 2013); *Nack v. Walburg*, No. 4:10 CV 00478 AGF, 2013 WL 4860104 (E.D. Mo. Sept. 12, 2013); *Burik v. Staples Contract & Commercial, Inc.*, No. 1:12-cv-10806-NMG (D. Mass. Aug. 9, 2013); *St. Louis Heart Ctr., Inc. v. Forest Pharm., Inc.*, No. 4:12CV2224 JCH, 2013 WL 3988671 (E.D. Mo. July 17, 2013).

and internal quotation marks omitted). “The outstanding feature of the doctrine is . . . its flexibility permitting . . . courts to make a workable allocation of business between themselves and the agencies.” *Id.* (citation and internal quotation marks omitted). Each of these considerations favors a referral to the FCC in this case.

First, there is a danger of inconsistent rulings because the petitions that are the subject of the pending FCC proceedings seek resolution of a key question of law underlying this litigation. Resolution of this issue will materially aid the Court in ruling on any eventual motion for class certification, and will help to guide the scope of any discovery. Moreover, there has been a torrent of class action lawsuits raising similar claims and “[t]he volume of these lawsuits heightens the risk that individuals and companies will be subject to decisions pointing in opposite directions.” *Charvat*, 630 F.3d at 466; *see Kocolene Oil Corp. v. Ashland Oil, Inc.*, 509 F. Supp. 741, 743 (S.D. Ohio 1981) (“Reference to the agency in this case will promote even-handed treatment and uniformity in this highly regulated industry as well as protect the integrity of the ongoing regulatory scheme”); *see also Raitport v. Harbour Capital Corp.*, No. 09-cv-156-SM, 2013 WL 4883765 (D.N.H. Sept. 12, 2013) (staying action *sua sponte* until FCC issues guidance as to whether opt-out notices must appear on solicited fax advertisements).

Second, “Congress vested the FCC with considerable authority” to enforce, and interpret the TCPA and its accompanying regulations, including the power to construe the provisions at stake in this case. *Charvat*, 630 F.3d at 466-67; *see* 47 U.S.C. § 227(b)(2).

Third, the FCC “has comparative expertise on the matter. The agency, no surprise, is familiar with the regulations it prescribed . . . and possesses expertise over the statute it implements.” *Charvat*, 630 F.3d at 467. The interpretive dispute here turns on the TCPA and its implementing regulations, “all of which come within the bailiwick of the FCC.” *Id.* “Only the

FCC can disambiguate [its regulations]; all [a court] could do would be to make an educated guess. And although the FCC's position would be subject to review by the judiciary for reasonableness, the agency's views are the logical place for the judiciary to start." *Id.* (citation and internal quotation marks omitted).

In addition to all three considerations weighing in favor of dismissal or stay, the doctrine of primary jurisdiction "is particularly applicable to a case such as this where an administrative agency has exercised its primary jurisdiction and is conducting proceedings involving the same question as the Court." *Kocolene Oil Corp.*, 509 F. Supp. at 743; *see Avila v. Redwood Hill Farm & Creamery, Inc.*, No. 5:13-CV-00335-EJD, 2014 WL 2090045, at *3 (N.D. Cal. May 19, 2014) ("[C]ourts find it appropriate to defer to an agency when, as here, the agency is in the process of making a determination on a key issue in the litigation."); *Bluegrass Tel. Co. v. Qwest Commc'ns Co.*, No. 4:09-CV-70-M, 2010 WL 1257727, at *3 (W.D. Ky. Mar. 26, 2010) (because "the claims and issues in this case are closely related to the claims and issues" in other actions that were "awaiting rulings from the FCC on those questions, the Court concludes that the instant matter should be stayed until the FCC has had an opportunity to resolve the pending cases"); *see also Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 844 F. Supp. 2d 873, 879 (S.D. Ohio 2012) (primary jurisdiction applicable where "similar, if not identical, issues to those raised by AT&T here were until very recently before the [FCC] for determination.").

The FCC is highly likely to consider a key issue in this case; namely, whether an alleged solicited facsimile advertisement must include a notice informing the recipient of her prerogative to opt out of future fax advertisements. Indeed, the FCC Commissioner has indicated that the agency will act on the pending petitions. Accordingly, application of the primary jurisdiction doctrine to dismiss or stay this action is particularly appropriate here.

CONCLUSION

For the foregoing reasons, American CareSource respectfully requests that this Court dismiss or stay the Complaint.

Dated: June 30, 2014

Respectfully submitted,

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CERTIFICATION

Pursuant to L.R. Civ. 7.1(f), I hereby certify that the instant Memorandum in support of the Motion to Dismiss or Stay Plaintiff's Class Action Complaint, which numbers 11 substantive pages in length, complies with the 20-page limitation established for dispositive motions in cases that have not yet been assigned to a "track" under the Court's differentiated case management system (*see* L.R. Civ. 16.1, 16.2 & 16.3).

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