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

In the Matter of)
)
CITATION ADDRESSED TO) File No. EB-01-TC-027
FAX.COM AND U.S. TRAVEL)
SERVICES, INC. ET AL.)

TO: Kurt A. Schroeder, Deputy Chief
Telecommunications Consumers Division
Enforcement Bureau

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RESPONSE TO CITATIONS

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Summary

The ban on unsolicited commercial facimiles set out in the Telephone Consumer Protection Act is an unconstitutional infringement on rights protected by the First Amendment.

Notwithstanding that unconstitutionality, Fax.com provides herein responses to the Citation issued to it by the Commission.

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RESPONSE TO CITATIONS

1. Fax.com, Inc. ("Fax.com") and U.S. Travel Services, Inc. ("U.S. Travel" ^{1/}) (collectively, "Respondents") hereby respond to the above-referenced Citations, dated May 11, 2001 and addressed by the Commission to Fax.com and U.S. Travel concerning the relationship between Fax.com and U.S. Travel and certain aspects of those companies' operations. The Citations are directed to "possible violations" of the Telephone Consumer Protection Act of 1991 ("TCPA"), Pub. L. No. 102-243, 105 Stat. 2394-2402 (1991) (codified at 47 U.S.C. §227), and the Commission's Rules implementing the TCPA, i.e., 47 C.F.R. §64.1200.

I. PRELIMINARY OBSERVATIONS AND OBJECTIONS CONCERNING DOCUMENTS SUPPOSEDLY SUPPORTING THE CITATIONS.

2. Included with the Citations are various documents ("the

^{1/} The Citation addressed to U.S. Travel also lists a number of other business names (i.e., Omega Marketing of Orlando, Inc., Discovery Marketing, Inc., Consumer Magic Travel), all of which are referred to here as "U.S. Travel".

FCC Attachments") which apparently form the basis for the Commission's determination that Fax.com and U.S. Travel have "transmitted to telephone facsimile machines unsolicited advertisements", see Citations at (unnumbered) Page 1, ¶2. It is not clear, however, whether all of the FCC Attachments are in fact probative of anything. ^{2/}

3. For example, the complaint from Muriel Wolland refers to faxes relating to dental work. However, none of the materials included with the Citations -- whether or not those materials are associated with Ms. Wolland's complaint -- appear to relate to dental work of any kind. It is not clear whether all materials relating to that complaint have been provided, whether the materials which have been provided are in fact the materials about which Ms. Wolland was complaining, or whether all those materials relate to U.S. Travel and/or Fax.com.

4. Similarly, the complaint of Janice F. Cowan of Geothermal Development Associates indicates that "five unsolicited faxes" were enclosed with that complaint. However, only one one-page fax appears to be associated with Ms. Cowan's complaint in the materials included with the Citation. Moreover, her complaint refers to a "final paragraph" on two faxes which refers to "a Permission Page" which she claims not to have received. However, none of the materials included with the Citations appears to include any verbiage concerning a "Permission Page", and such verbiage was not included in any

^{2/} Factual statements herein are supported by Declarations included as Attachments A and B hereto.

faxes transmitted on behalf of U.S. Travel. Again, it is thus not clear whether all the materials relating to Ms. Cowan's complaint have been provided, whether the materials which have been provided are in fact the materials about which Ms. Cowan was complaining, or whether all those materials relate to U.S. Travel.

5. Similarly, the complaint of M. Tomlinson refers to "copies of fax violations", although it appears that only one one-page fax is included with that complaint. It is therefore not clear whether all the materials relating to M. Tomlinson's complaint have been provided, or whether the materials which have been provided are in fact the materials to which the complaint is addressed.

6. Finally, U.S. Travel hereby advises the Commission that U.S. Travel has ceased operations. As a result, U.S. Travel does not contemplate transmitting any fax solicitations in the future.

II. THE TCPA AND THE FCC'S REGULATIONS ADOPTED PURSUANT TO THE TCPA ARE UNCONSTITUTIONAL INFRINGEMENTS ON FAX.COM'S FREEDOM OF SPEECH PROTECTED BY THE FIRST AMENDMENT.

7. Before responding to the particular questions presented in the Citations, Respondents wish to state clearly and unequivocally that they believe that the TCPA and related rules are unconstitutional. Since the Citations are based exclusively on the TCPA and rules adopted pursuant thereto, the Citations are, in Respondents' view, of no force and effect. Respondents' constitutional analysis is as follows.

A. Background - The TCPA and the Commission's Rules

8. The TCPA, enacted in 1991, absolutely prohibits the use of

any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine.

47 U.S.C. §227(b)(1)(C). The TCPA defines "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.

47 U.S.C. §227(a)(4) (emphasis added).

9. The Findings adopted by Congress in connection with the passage of the TCPA contain no indication whatsoever of the legislative purpose of the TCPA's absolute ban on unsolicited commercial facsimiles ("faxes"). See Public Law 102-243, 102d Congress, 105 Stat. 2394 (December 20, 1991). At most those Findings reflect unspecified "evidence" that "automated or prerecorded telephone calls" are regarded by some as a "nuisance" and an "invasion of privacy". Id. Congress made no findings at all concerning any effect which unsolicited commercial faxes might have on any legitimate governmental interest.^{3/} Further, Congress made no findings at all concerning the effect which unsolicited noncommercial faxes might have on any legitimate governmental interest. Having failed to identify any legitimate governmental interest threatened by unsolicited commercial faxes,

^{3/} The TCPA distinguishes for regulatory purposes between prerecorded "telephone calls" and faxes. Compare 47 U.S.C. §§227(b)(i)(B) and 227(b)(i)(C).

Congress failed also to consider in its Findings whether mechanisms other than an absolute ban on unsolicited commercial faxes might be available to protect any such governmental interest. Id.

10. In the Senate Report, Senate Report No. 102-178, accompanying the TCPA, the Senate stated that the "purpose of the bill" insofar as fax advertising was concerned was, inter alia, "to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers", Senate Report at 1. The Senate also observed that some consumers had complained the "unsolicited calls placed to fax machines . . . require the called party to pay for the paper used". Senate Report at 2. But again, the Senate Report contained no findings at all concerning the effect which unsolicited noncommercial faxes might have on any legitimate governmental interest. And the Senate Report also contained no consideration at all of any mechanisms other than an absolute ban on unsolicited commercial faxes which might be available to address the perceived governmental interest. Id.

11. In adopting rules pursuant to the TCPA, the Commission declined to consider any alternatives to the absolute ban mandated by the TCPA because, according to the Commission, the TCPA left the Commission "without discretion" in that regard. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd 8752, 8779, n. 87 (1992), recon. denied, 10 FCC Rcd 12391 (1995).

12. Thus, in order to address, at most, a vaguely stated

concern expressed by some consumers (a concern alluded to in passing in the Senate Report, and not even mentioned, much less expressly identified, by Congress itself in its Findings), Congress and the Commission have imposed an absolute ban on unsolicited fax advertisements.

B. The TCPA is a content-based restriction on protected speech and is, therefore, subject to strict scrutiny analysis.

13. On its face and as applied to the transmission of unsolicited fax advertisements, the TCPA ^{4/} is a content-based restriction on free speech. The TCPA imposes an absolute prohibition on unsolicited fax advertisements, while the TCPA places no limits at all on the transmission of unsolicited faxes with any other content. See 47 U.S.C. §§227(a)(4) and 227(b)(3). The content of the fax transmission -- i.e., whether the substance of that transmission is commercial or noncommercial -- is the sole factor which determines whether or not the transmission will be banned.

14. When the content of the message determines whether the speech is subject to governmental restriction, that restriction is content-based. See, e.g., Whitton v. City of Gladstone, 54 F.3d 1400, 1403-04 (8th Cir. 1995) (citations omitted). In this case, ONLY the content of the speech -- i.e., whether the

^{4/} Since, as discussed above, the Commission's Rules concerning unsolicited fax advertising track the absolute ban on that practice set out in the TCPA, for purposes of this Response references hereinafter to "TCPA" should, unless otherwise indicated, be deemed to encompass both the TCPA itself and the rules adopted by the Commission pursuant thereto.

taxes are "commercial" or "noncommercial" -- determines whether the speech is permissible or prohibited. As in City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), "the very basis for the regulation is the difference" between commercial and noncommercial taxes. 507 U.S. at 429. As the Court indicated in Discovery Network, "[b]y any commonsense understanding of the term, the ban in this case is 'content-based.'" Id.

15. When Congress attempts to restrict speech based on its content, "the usual presumption of constitutionality afforded congressional enactments is reversed. 'Content-based' regulations are presumptively invalid, and the Government bears the burden to rebut that presumption." U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803, 120 S.Ct. 1878, 1886 (2000). It is well-settled that content-based restrictions on speech must satisfy the strict scrutiny standard of review. E.g., id. Strict scrutiny analysis requires that the governmental restriction be the least restrictive means of promoting a compelling governmental interest. E.g., Playboy Entertainment, supra; Whitton, 45 F.3d at 1408.

- (1) The governmental interests underlying the TCPA's prohibition against unsolicited commercial faxes, if such interests exist at all, are not compelling.

16. As indicated above, the TCPA itself does not identify the legislative purpose of the TCPA's absolute ban on unsolicited commercial faxes. The Senate Report at most alludes, in passing, to the complaints of some consumers that "unsolicited calls placed to fax machines . . . require the called party to pay for the paper used". Senate Report at 2. The bill's sponsors also asserted that the TCPA's ban on unsolicited commercial faxes would protect consumers from having to pay for the paper and toner to receive such faxes while allegedly tying up their machine and preventing them from receiving faxes they wished to receive. See 137 Cong. Rec. S. 9874 (daily ed. July 11, 1991) (introductory remarks of Senator Hollings).

17. So the sole justification for this content-based prohibition against a particular class of speech (i.e., unsolicited commercial faxes) was the desire to placate some unspecified number of unidentified consumers who were supposedly annoyed at some unspecified costs for paper and toner as a result of receiving an unspecified number of unsolicited faxes. Moreover, the "justification" failed to address why a ban on unsolicited commercial faxes was more justified than a ban on all unsolicited faxes, commercial and noncommercial.

18. Preventing consumer annoyance or offense and preventing minimal cost-shifting are neither cognizable justifications nor sufficient as a matter of law to justify a sweeping ban on

speech. See, e.g., Bolger v. Young's Drug Products, Inc., 463 U.S. 60, 71 (1983). As the Supreme Court has held, "the short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned." 463 U.S. at 72 (ellipses in original), quoting Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y. 1967). Weighing the indeterminate de minimis burdens supposedly placed on fax recipients against the free speech rights of citizens seeking to inform consumers of commercial opportunities leads to the unmistakable conclusion that the interests asserted by the government in support of the TCPA are insubstantial and far from "compelling."

19. This is especially so today, a decade after the enactment of the TCPA. Whatever specialized fax paper may have cost in 1991 -- and there does not appear to be any factual record developed before either Congress or the Commission to support even speculation concerning such costs -- the fact is that, in the intervening decade, technology has made "plain paper" fax machines readily available. As a result, any concern about the cost of specialized "fax paper" is valid no longer (if such a concern ever were, arguendo, valid).^{5/} Indeed, with the near ubiquity of fax modems installed in home and office computers, the cost of any paper is largely irrelevant, since

^{5/} While it does not appear to have been suggested that the cost of fax machines themselves is or should be a consideration here, in that respect it may also be noted that the cost of fax machines over the course of the last decade has also plummeted dramatically.

faxes received in such computers can be reviewed before they are printed out. Thus, to the extent that a consumer receives an unwanted fax (whether that fax was solicited or not, commercial or noncommercial) on a home or office computer, the consumer is easily able to delete the fax with a simple click of the mouse, without incurring ANY costs for paper, toner, or the like.

20. This underscores the minimal, virtually non-existent nature of the governmental "interest" underlying the TCPA. Clearly, such a negligible interest cannot override important rights protected by the First Amendment.

- (2) Even if the TCPA were directed to some compelling governmental interests, it is not narrowly tailored or the least restrictive means to protect those interests.

21. The TCPA is directed not only to unsolicited commercial faxes, but also to telephone telemarketing practices. The TCPA's treatment of the latter firmly establishes that its outright ban on the former is not by any means a narrowly tailored "least restrictive means" of protecting the supposed governmental interests in question.

22. In addressing the matter of telephone telemarketing calls, the TCPA stopped well short of an absolute ban. Instead, it permitted such calls subject to certain statutory restrictions and Commission oversight. See 47 U.S.C. §227(c)(5); 47 C.F.R. §64.1200(e)(2). For example, Commission regulations require that telemarketers maintain and implement a "do-not-call" list. 47 C.F.R. §64.1200(c). A consumer may ask to be taken off the calling list at any time and the telemarketer may not thereafter

than one page and must be received between the hours of 9 p.m. and 6 a.m.).

Clearly, there are many viable alternatives for regulation of unsolicited faxes (whether commercial or noncommercial) short of the blanket content-based ban imposed by the TCPA.

26. In Playboy Entertainment, supra, the Court held that if a less restrictive means is available for the government to achieve its goals, the government MUST use that less restrictive means rather than a content-based ban. Playboy Entertainment, 120 S.Ct. at 1886-1887. Moreover, to justify its actions the government bears the burden of showing that the plausible, less restrictive means available to it will in fact be ineffective to achieve its goals. Id. at 1888.

27. In Playboy Entertainment, Justice Kennedy noted that other provisions of the Communications Decency Act ("CDA") demonstrated the availability of plausible alternatives to the certain content-based restrictions imposed by the CDA on cable operators. Id. The Court affirmed the lower court's decision requiring the government to show that the less restrictive alternative could not be effective; the Court's decision was based in part on the fact that other sections of the CDA demonstrated the availability of less-restrictive alternatives. Id. The TCPA presents a virtually identical situation, particularly since the TCPA's own treatment of unsolicited telephone calls itself firmly establishes the availability of less restrictive alternatives to an absolute ban. Before that ban can be implemented consistently with the Constitution, the

Commission must show that the obvious alternatives to a complete ban on unsolicited commercial faxes -- for example, the regulatory treatment of telemarketing phone calls, or the regulations imposed by the states on unsolicited faxes -- would not be effective to achieve the supposed goals of the TCPA. It is respectfully suggested that this is a showing that the Commission cannot make.

- C. Even if the TCPA were deemed not to be subject to "strict scrutiny" analysis, it would still fail to satisfy the "intermediate scrutiny" analysis applicable to governmental restrictions on commercial speech.

28. As discussed above, the TCPA's ban on unsolicited commercial faxes is content-based and therefore subject to "strict scrutiny" analysis. See Discovery Network, supra. But even if that were not the case, the ban constitutes at minimum a regulation of commercial speech which is subject to the analysis described by the Supreme Court in, e.g., Greater New Orleans Broadcasting Association, Inc. v. U.S., 527 U.S. 173 (1999) and 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996). The TCPA fails to satisfy that analysis.

29. As set out in, e.g., Greater New Orleans and 44 Liquormart, governmental restrictions on commercial speech must pass a four-part test:

- the commercial speech must be subject to First Amendment protection, i.e., it must concern "lawful activity and not be misleading", Greater New Orleans, 527 U.S. at 183, quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980);
- the governmental interest supposedly served by the speech restriction must be "substantial", 527 U.S.

at 183;

- the governmental restriction on speech must "directly and materially advance[] the asserted governmental interest", a burden which cannot be satisfied by "mere speculation or conjecture", but as to which the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree", 527 U.S. at 188; and
- the governmental restriction must be narrowly tailored to the asserted governmental interest, reflecting that, in formulating the restriction, the government "'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition", 527 U.S. at 188, quoting Discovery Network, 507 U.S. at 417.

This four-part test has been developed over the last two decades, and reflects that Supreme Court's recognition that commercial speech is an important element in the proper functioning of our free society:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

44 Liquormart, 517 U.S. at 497. Indeed, the four-part analysis, first announced in 1980 in Central Hudson, has become by the Court's own acknowledgement "more strict[]", Greater New Orleans, 527 U.S. at 182, following, e.g., 44 Liquormart. In the words of the Fifth Circuit, the analysis has "become a tougher standard for the [government] to satisfy", Greater New Orleans, 527 U.S. at 182, quoting 149 F.3d 334, 338 (5th Cir. 1998).

30. The TCPA clearly fails to satisfy that four-part test.

- (1) The speech regulated by the TCPA is lawful and not misleading.

31. As a threshold matter, it is beyond argument that the speech in question here is lawful and not misleading. Neither the TCPA, nor the sparse legislative history underlying it, nor either of the Citations issued pursuant to it, suggests any inherent illegality or fraud in the content of commercial faxes. Thus, such faxes are entitled to First Amendment protection.

- (2) No substantial governmental interest supports the TCPA.

32. As discussed above, no substantial governmental interest has been shown to support the TCPA. The TCPA on its face gives no indication of any such governmental interest, and the legislative history underlying it, when carefully combed, yields only passing indications that Congress was attempting to relieve some perceived "annoyance" or "invasion of privacy" arising from telemarketing generally, e.g., 137 Cong. Rec. S. 18781, 18782 (daily ed. Nov. 27, 1991) (comments of Senator Hollings), and Congress was also attempting to prevent some unspecified cost-shifting and inconvenience with respect to fax advertising in particular, 137 H.R. Rep. 102-317, 102nd Cong. (1991).

33. The question of supposed cost-shifting is discussed above at 10-12. As demonstrated there, nothing in the TCPA, its underlying legislative history, or the record before the Commission, establishes at all, much less with any specificity:

(a) how much cost-shifting actually occurs through unsolicited faxes; (b) how much of that cost-shifting is attributable to commercial, as opposed to noncommercial, unsolicited faxes; or (c) whether technological advances in the intervening decade -- advances of which the Commission may, from its own real-world experience, take official notice -- have eliminated most if not all of any cost-shifting which may ever have occurred. In light of the lack of any record concerning supposed cost-shifting, this cannot seriously be deemed a "substantial" government interest.

34. Similarly, consumer "annoyance" cannot be a "substantial" governmental interest sufficient to support a ban on protected speech. Mere annoyance or offense to the consumer is an irrelevant consideration and one not permitted by well-settled commercial speech jurisprudence. E.g., Bolger, supra. In Bolger, the Court clearly stated that restrictions on speech cannot be justified because the repressed expression might offend or annoy the recipient, 463 U.S. at 71. As Justice Marshall observed,

Recipients of [unsolicited] objectionable mailings . . . may 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.' Consequently, the 'short, though, regular, journey from the mail box to the trash can is an acceptable burden, at least so far as the Constitution is concerned.

463 U.S. at 72, quoting Cohen v. California, 403 U.S. 15, 21 (1971) and Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y. 1967).

35. The burden supposedly placed on recipients of unsolicited commercial faxes can be addressed simply and easily

with that same walk to the trash can. Indeed, for recipients using a fax modem and computer, that minimal "burden" is reduced even further, as the walk to the trash can becomes a mere click of the mouse or the pressing of the "delete" key.

36. Finally, to the limited extent that the ban on unsolicited commercial faxes may be said to be directed to the elimination of "invasions of privacy" in some way -- and it is not at all clear that the passing reference to "invasions of privacy" in the Congressional findings accompanying the TCPA in fact related to faxes, as opposed to telemarketing phone calls -- the First Amendment does not permit such a justification unless the audience is captive and cannot avoid the supposedly objectionable speech. See, e.g., Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 542 (1980). Obviously, fax recipients do not fit that very narrow description.

37. To escape any "intrusion" from an unsolicited fax, a recipient need only turn off his or her fax machine, throw away the unsolicited fax, or dial the toll-free number provided and request that his/her number be removed from the calling list. A fax recipient is no more a captive than the recipient of mail at home or the subject of unsolicited visits by petition gatherers, pollsters, salespeople, or Jehovah's Witnesses. All are protected forms of speech regardless of any "annoyance" which they may generate.

38. Moreover, fax technology does not communicate any information -- let alone confidential or private information --

about the recipient other than the fact that the person has equipment capable of receiving a fax. The ringing of the fax line is the only possible "disturbance" experienced by a fax recipient, and that is truly a minimal "disturbance", particularly since virtually all fax machines automatically answer and, therefore, the recipient need not respond at all to the ringing.

39. Thus, it cannot be said that any "substantial" governmental interest support the ban on unsolicited commercial faxes. As a result, the TCPA fails the second prong of the Greater New Orleans test.

(3) The TCPA does not directly advance the alleged governmental interests.

40. Even if there existed a "substantial" governmental interest sufficient to justify the TCPA's blanket ban on unsolicited commercial faxes, that ban does not directly and materially advance that asserted interest. The government has the burden of producing actual evidence -- not "mere speculation or conjecture" -- concerning the nature of the harm in question and the extent to which the restriction on speech will in fact alleviate that harm to a material degree. See Greater New Orleans; Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995); Edenfield v. Fane, 507 U.S. 761, 767 (1993).

41. No such evidence has been produced, either by Congress or by the Commission, in support of the TCPA.

42. Further, any effort at this very late date to produce such evidence would encounter a further problem arising from the

irrationality of the TCPA ban. That is, the TCPA bans only unsolicited commercial faxes, while leaving unsolicited noncommercial faxes undisturbed. But unsolicited noncommercial faxes are presumably just as annoying, intrusive, potentially offensive, and responsible for cost-shifting as are commercial faxes. In this regard this situation is directly analogous to that in Discovery Network, supra. There, the City of Cincinnati banned from the city streets newsracks used to distribute newspapers classified as "commercial handbills". According to the City, its goal was to prevent blight caused by litter and to preserve the safety and aesthetics of the city streets.

43. The Court firmly rejected the City's arguments, holding instead that there was no "reasonable fit" between the City's interests and the blanket restriction because the supposed problems of blight, safety, etc., would still be present despite the ban because "noncommercial" newspapers and their respective newsracks were not in any way restricted. 507 U.S. at 424. As the Court held,

Not only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial and non-commercial speech, but in this case, the distinction bears no relationship whatsoever to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests.

Id. Precisely the same analysis applies here. The TCPA's ban in question here is based exclusively on a distinction between commercial and noncommercial faxes, even though -- as was the case in Discovery Network -- that distinction bears absolutely no

relationship whatsoever to the particular interests being asserted by the government in support of the TCPA. Thus, even if the TCPA were directed to some "substantial" governmental interest, the means used by the TCPA are not permissible.

- (4) The TCPA is more extensive than necessary to serve the asserted governmental interests.

44. Finally, the TCPA fails the fourth prong of the Greater New Orleans test because it is not at all narrowly tailored to the asserted governmental interest. As the Court held in Greater New Orleans, in cases such as this the speech restriction must reflect that the government "carefully calculated" the costs and benefits associated with the restriction. 527 U.S. at 188.

45. As discussed above, there is nothing in the history of the TCPA (or the Commission's related rules) which indicates that ANY effort was made to calculate ANY costs associated with the supposed governmental interests to be served or with the speech restriction. In the absence of any such basic information, it was therefore impossible for the government to undertake the "careful calculations" required to assure that the ban was in fact narrowly tailored.

46. In assessing the extent to which a speech restriction is "narrowly tailored", the Court considers whether alternatives exist which would achieve the same beneficial results vis-à-vis the asserted government interest but with less burden on speech. See Discovery Network, 507 U.S. at 418; 44 Liquormart, 517 U.S. at 529 (O'Connor, J., concurring). As discussed above at 13-15, there are numerous, obvious, readily available, less burdensome

alternatives available to the government. Indeed, some of those alternatives appear on the face of the TCPA itself with respect to telemarketing phone calls.

47. Thus, the TCPA fails the fourth prong of the Greater New Orleans test as well.

D. The TCPA Requirement That All Facsimiles Be Marked With The Sender's Identification Violates The First Amendment.

48. The Citation addressed to U.S. Travel states that

it appears that [U.S. Travel] has also violated the provisions of the TCPA and the Commission's Rules that require any person or entity who sends a message via a telephone facsimile machine to clearly mark "in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual."
47 U.S.C. §227(d)(1)(B); 47 C.F.R. §68.318(d).

49. The requirement referred to by the Commission violates the First Amendment of the Constitution and is therefore unconstitutional.

50. It has long been held by the Supreme Court that the liberty to distribute written material is a fundamental right protected by the First Amendment. In Lovell v. City of Griffin, 303 U.S. 444 (1938), the Court ruled unconstitutional a municipal ordinance which prohibited the unlicensed distribution of "circulars, handbooks, advertising, or literature of any kind." This liberty includes the right to make door-to-door presentations. E.g., Schneider v. New Jersey, 308 U.S. 147 (1939); Martin v. Struthers, 319 U.S. 141 (1943).

51. Two decades later, in Talley v. California, 362 U.S. 60 (1960), the Court invalidated, on First Amendment grounds, another ordinance which prohibited the distribution of "any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address" of the person who "printed, wrote, compiled or manufactured" the hand-bill or the person who caused the hand-bill to be distributed. As the Court held in Talley,

There can be no doubt that [the] identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." [citation omitted]

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. . . . Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

Talley, 362 U.S. at 64-65 (footnotes omitted).

52. More recently, in McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), the Court held that an Ohio statute which prohibited the distribution of anonymous campaign literature violated the First Amendment. In so doing, the Court held that.

[A]n author generally is free to decide whether or not to disclose her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. . . . [A]n author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment.

514 U.S. at 341-342. The Court concluded by observing that

Anonymity is a shield from the tyranny of the majority. [citation omitted]. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation - and their ideas from suppression - at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But . . . in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. [citation omitted]

514 U.S. at 357. See also Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182 (1999) (Court rules unconstitutional a Colorado law requiring that persons who circulate an initiative-petition wear an identification badge bearing the circulator's name).

53. Thus, it is very well-established that the First Amendment affords a right to anonymity.

54. The TCPA unquestionably abridges that right.

55. By requiring, without exception, that ALL facsimile communications, regardless of their nature or purpose, be marked with the originator's identification, the TCPA completely ignores the right to anonymity, and forces those who would communicate by facsimile to forego the protection otherwise afforded them by the First Amendment. The breathtaking sweep of this requirement encompasses not only mundane correspondence and advertising, but also any and all political writing, religious tracts, educational

materials, news reports, raw information, elaborate analyses, everything -- the TCPA imposes an identification requirement on ALL facsimile transmissions of ANY kind. ^{5/}

56. Infringements of the First Amendment can survive, if at all, only if they pass the "strict scrutiny" standard of review. That standard requires that the infringing provision be narrowly tailored to serve an overriding governmental interest. E.g., McIntyre, 514 U.S. at 347. But there is no indication in ANY of the legislative or regulatory history relating to this aspect of the TCPA which even remotely suggests that the facsimile identification requirement was designed to effectuate ANY particular governmental purpose. As a result, the TCPA requirement cannot pass ANY level of judicial scrutiny, much less the exacting standard of strict scrutiny to which First Amendment infringements are subject.

E. Conclusion

57. The TCPA plainly violates the First Amendment. Whether subjected to strict scrutiny as a content-based restriction on speech or to the arguably more relaxed analysis applicable to commercial speech, the TCPA falls short.

58. Respondents acknowledge that, to their knowledge, only one federal appellate court has directly considered the constitutionality of the TCPA's fax advertising ban. In

^{5/} By way of obvious illustration and in reference to the Supreme Court decisions quoted above, the Founding Fathers' pseudonymous publication of the Federalist Papers would have run afoul of the TCPA facsimile identification requirement had the Founding Fathers sought to fax their work.

Destination Ventures, Ltd. v. FCC, 46 F.3d 54 (9th Cir. 1995), Ninth Circuit, upheld that ban in a cursory and dismissive fashion. In so doing, the Ninth Circuit did not have the benefit of the guidance provided by the Supreme Court in 44 Liquormart or Greater New Orleans, both of which were decided after Destination Ventures. Whether or not the Ninth Circuit correctly assessed the applicable First Amendment law as it stood in February, 1995 -- and Respondents are doubtful of the correctness of Destination Ventures even then -- the fact is that the Supreme Court has, by its own admission, made the relevant analysis more strict, "tougher" (in the words of the Fifth Circuit). The terse opinion in Destination Ventures is thus unpersuasive here.

59. This is particularly true in view of the reliance placed by the Ninth Circuit on U.S. v. Edge Broadcasting Co., 509 U.S. 418 (1993). In Edge the Supreme Court upheld a state statute regulating advertising of otherwise illegal gambling. But in 44 Liquormart, Justice Stevens expressly rejected the application of Edge to a ban targeting "information about entirely lawful behavior" such as the ban presented by the TCPA. See 44 Liquormart, 517 U.S. at 508-509. As noted above, there is no allegation anywhere in the TCPA, its underlying legislative history, or in the Citations in question here which suggests that Respondents have engaged in anything but "entirely lawful behavior". Thus, Edge is irrelevant here, and the fact that Destination Ventures is based at all on Edge undermines the precedential weight of Destination Ventures.

60. In sum, then, the TCPA violates the First Amendment and

thereby infringes the constitutional rights of Respondents.

61. Respondents recognize that the Commission adopted its regulations banning unsolicited commercial faxes in response to the clear Congressional direction set out in the TCPA. But whatever duty the Commission may owe to Congress, it owes a greater duty to the Constitution. Indeed, the oath of office required to be taken by Commissioners specifically includes a solemn commitment to "support and defend the Constitution". See 5 U.S.C. §3331. If the ban on unsolicited commercial faxes is unconstitutional -- as Respondents have demonstrated above -- then the Commission has an overriding obligation and a sworn commitment to rescind that ban immediately.

III. RESPONSE TO QUESTIONS POSED IN THE CITATIONS

62. Without waiving any of the foregoing arguments concerning the unconstitutionality of the TCPA and related rules, Fax.com provides the following responses to the five questions presented in the Citation addressed to Fax.Com concerning its relationship to the U.S. Travel. ^{2/}

Question 1

"Has [Fax.com] had any control over or involvement in determining the content of advertisements transmitted by facsimile on behalf of US Travel Services, Inc. [et al.] or any other entities on whose behalf you transmit advertisements by facsimile? Please describe such control or involvement in detail."

63. Fax.com has not exercised any editorial control over the content of advertisements of U.S. Travel. Fax.com has made available to U.S. Travel advice and assistance relative to graphics presentations, in order to permit U.S. Travel to enhance the quality of those presentations if it so chooses. Whether or not U.S. Travel elects to avail itself of such advice and/or assistance is left completely to the discretion of U.S. Travel, and is not in any way required by Fax.com. U.S. Travel has retained control over the final editorial content of its advertisements. Irrespective of that final editorial content, Fax.com has insisted that all facsimile advertisements transmitted in connection with its operation (including the advertisements of U.S. Travel) include a clearly legible

^{2/} Factual representations are supported by a declaration prepared under penalty of perjury included as Attachment A hereto.

statement advising recipients of the toll-free telephone number ("the Opt-Out Number") to contact in the event that they do not wish to receive similar advertisements in the future.

Additionally, while Fax.com has no control over the editorial content of the advertisements which it transmits, Fax.com does reserve the right to refuse to transmit any advertisements or other materials which in its view are offensive or misleading.

Question 2

"Who provided, compiled, or generated the distribution list(s) of telephone facsimile numbers that [Fax.com] has used to transmit advertisements on behalf of [other entities, including U.S. Travel]?"

64. The telephone facsimile numbers used by Fax.com to transmit the advertisements described in the Citations were obtained and compiled by Fax.com.

Question 3

"If [Fax.com] has been involved in any way in providing, compiling, generating, or editing the distribution list(s) of telephone numbers that [Fax.com] has used to transmit advertisements o[n] behalf of [other entities, including U.S. Travel], describe in detail the process by which [Fax.com] produces or participates in the generation of such list(s). Does [Fax.com] employ or compensate any individuals or entities outside the company, including any tax-exempt nonprofit organizations, for any service, activity, assistance, or facilities used in connection with [Fax.com]'s providing, compiling, generating, or editing of such list(s)? Please describe such arrangements in detail."

65. As a preliminary matter, Fax.com notes that the question posed in the second sentence of this particular inquiry -- i.e., seeking information concerning whether Fax.com "employs or compensates" persons "outside the company, including

any tax-exempt nonprofit organizations" -- appears to be irrelevant and immaterial insofar as the Commission's regulatory concerns here can be said to be involved. While the Commission's rules do contain a regulatory exemption for certain telephone solicitations made by "a tax-exempt nonprofit organization", 47 C.F.R. §64.1200(c)(4), that exemption relates only to "telephone calls" as that term is used in 47 C.F.R. §64.1200(a)(2), which is separate and distinct from the transmission of facsimile communications addressed in 47 C.F.R. §64.1200(a)(3). Nothing in any of the above-referenced Citations suggests that Fax.com or U.S. Travel has engaged in the making of "telephone calls" prohibited by 47 C.F.R. §64.1200(a)(2). Thus, questions concerning whether Fax.com employs or compensates any particular person or entity, including particularly any tax-exempt nonprofit organizations, appear to be completely irrelevant and immaterial to the violations alleged in the Citations. Nevertheless, Fax.com specifically advises the Commission that Fax.com does not, to its knowledge, employ or compensate any tax-exempt nonprofit organization(s) in connection with Fax.com's business, including the providing, compiling, generating, or editing of distribution list(s) of telephone numbers.

66. Fax.com compiles its list of facsimile telephone numbers from three sources. First, Fax.com has purchased from independent vendors database lists of such telephone numbers. Second, Fax.com has, through its own research methods, identified

such telephone numbers. And third, Fax.com maintains a list of numbers provided by persons who have affirmatively contacted Fax.com and consented (through an automated process which involves inputting, by pressing numbers on the caller's telephone keypad, the number to be added) to the inclusion of their number(s) in Fax.com's database of facsimile telephone numbers.

Question 4

". . . [W]hat steps has [Fax.com] taken to ensure that the telephone facsimile numbers belong to individuals or entities who have agreed, by explicit consent or by virtue of an established business relationship with the advertiser, to receive the advertisement? Please describe in detail the manner in which you record consumers' consent or the existence of an established business relationship and provide copies of any written record-keeping policies with respect to maintaining evidence of such consent or business relationship."

67. As indicated in response to Question 3, above, Fax.com maintains a list of numbers provided by persons who have affirmatively consented to the inclusion, in Fax.com's database, of their facsimile telephone numbers. Fax.com has no formal, written "record-keeping policy" with respect that list -- it is simply a list of numbers which is routinely maintained and updated with respect to calls, made to a Fax.com number, during which the caller, through the selection of certain menu entries, notifies Fax.com of the caller's willingness to have his/her facsimile telephone number included in Fax.com's database.

68. With respect to facsimile telephone numbers obtained from independent vendors or identified through Fax.com's own research methods, Fax.com has historically taken no steps to

verify consent or established business relationships. However, any person or entity which receives a facsimile distributed by Fax.com is provided with a toll-free Opt-Out Number. When a person calls the toll-free Opt-Out Number, the caller is given the opportunity, through a recorded menu, of entering (through his/her telephone keypad) the facsimile number to be removed from Fax.com's database. Fax.com routinely reviews the list of numbers so generated and removes those numbers from its database. In addition, Fax.com routinely sends to each fax number added to its database a noncommercial notice advising that Fax.com wishes to transmit fax alerts concerning missing children ^{8/}, and that in addition Fax.com will also transmit some commercial paid advertising. A copy of the notice has previously been provided to the Commission. That notice contains clear reference to the toll-free Opt-Out Number.

Question 5


"Does [Fax.com] advertise its fax transmittal services, and, if so, by what means? Please provide copies of all print, audio, and video materials that have been used within the past year to advertise [Fax.com]'s fax transmittal services. For each advertisement, list the media in which the advertisement appeared and the date(s) of such appearance(s)."

69. Fax.com does not advertise its fax transmittal services. Fax.com does maintain a web site (www.fax.com) from

^{8/} In addition to its commercial fax operations, Fax.com also regularly transmits fax alerts concerning missing children. Fax.com understands that its efforts in that regard were directly instrumental in the location of as many as 10 missing children during a period of several months.

which interested persons seeking information about services available from Fax.com may inform themselves.

Respectfully submitted,


/s/ Harry F. Cole
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Counsel for Fax.com, Inc. and
U.S. Travel Services, Inc. et al.

June 1, 2001

ATTACHMENT A

DECLARATION

Kevin Katz, under penalty of perjury, hereby declares the following to be true and correct:

1. I am President of Fax.com, Inc. ("Fax.com"). I am preparing this Declaration for submission to the Federal Communications Commission ("FCC") in connection with a Response to be filed on behalf of Fax.com and U.S. Travel Services, Inc. et al. ("U.S. Travel"). The Response is in response to certain Citations, dated May 11, 2001, sent to Fax.com and U.S. Travel by the FCC.
2. The Citations include a copy of a complaint of Janice F. Cowan of Geothermal Development Associates which describes a "final paragraph" on two faxes which refers to "a Permission Page" which she claims not to have received. However, none of the materials included with the Citations appears to include any verbiage concerning a "Permission Page", and such verbiage was not included in any faxes transmitted on behalf of U.S. Travel.
3. Fax.com has not exercised any editorial control over the content of advertisements of U.S. Travel. Fax.com has made available to U.S. Travel advice and assistance relative to graphics presentations, in order to permit U.S. Travel to enhance the quality of those presentations if U.S. Travel so chooses. Whether or not U.S. Travel elects to avail itself of such advice and/or assistance is left completely to the discretion of U.S. Travel, and is not in any way required by Fax.com. U.S. Travel has retained control over the final editorial content of its

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advertisements. Irrespective of that final editorial content, Fax.com has insisted that all facsimile advertisements transmitted in connection with its operation (including the advertisements of U.S. Travel) include a clearly legible statement advising recipients of the toll-free telephone number ("the Opt-Out Number") to contact in order to have their numbers removed from Fax.com's list of fax telephone numbers in the event that those recipients do not wish to receive similar advertisements in the future. Additionally, while Fax.com has no control over the editorial content of the advertisements which it transmits, Fax.com does reserve the right to refuse to transmit any advertisements or other materials which in its view are offensive or misleading.

4. The telephone facsimile numbers used by Fax.com to transmit the advertisements described in the Citations were obtained and compiled by Fax.com.

5. Fax.com does not, to its knowledge, employ or compensate any tax-exempt nonprofit organization(s) in connection with Fax.com's business, including the providing, compiling, generating, or editing of distribution list(s) of telephone numbers.

6. Fax.com compiles its list of facsimile telephone numbers from three sources. First, Fax.com has purchased from independent vendors database lists of such telephone numbers. Second, Fax.com has, through its own research methods, identified such telephone numbers. And third, Fax.com maintains a list of

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numbers provided by persons who have affirmatively contacted Fax.com and consented (through an automated process which involves inputting, by pressing numbers on the caller's telephone keypad, the number to be added) to the inclusion of their number(s) in Fax.com's database of facsimile telephone numbers.

7. As indicated previously, Fax.com maintains a list of numbers provided by persons who have affirmatively consented to the inclusion, in Fax.com's database, of their facsimile telephone numbers. Fax.com has no formal, written "record-keeping policy" with respect that list -- it is simply a list of numbers which is routinely maintained and updated with respect to calls, made to a Fax.com number, during which the caller, through the selection of certain menu entries, notifies Fax.com of the caller's willingness to have his/her facsimile telephone number included in Fax.com's database.

8. With respect to facsimile telephone numbers obtained from independent vendors or identified through Fax.com's own research methods, Fax.com has historically taken no steps to verify consent or established business relationships. However, any person or entity which receives a facsimile distributed by Fax.com is provided with a toll-free Opt-Out Number. When a person calls the toll-free Opt-Out Number, the caller is given the opportunity, through a recorded menu, of entering (through his/her telephone keypad) the facsimile number to be removed from Fax.com's database. Fax.com routinely reviews the list of numbers so generated and removes those numbers from its database.


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In addition, Fax.com routinely sends to each fax number added to its database a noncommercial notice advising that Fax.com wishes to transmit fax alerts concerning missing children, and that in addition Fax.com will also transmit some commercial paid advertising. That notice also contains clear reference to the toll-free Opt-Out Number.

9. In addition to its commercial fax operations, Fax.com also regularly transmits fax alerts concerning missing children.

Fax.com understands that its efforts in that regard were directly instrumental in the location of as many as 10 missing children during a period of several months.

10. Fax.com does not advertise its fax transmittal services. Fax.com does maintain a web site (www.fax.com) from which interested persons seeking information about services available from Fax.com may inform themselves.



Kevin Katz

Date: _____

June 1 2001

ATTACHMENT B

DECLARATION

Douglas Kaplan, under penalty of perjury, hereby declares the following to be true and correct:

I was the President of U.S. Travel Services, Inc., a company which was also known as Omega Marketing of Orlando, Inc., Discovery Marketing, Inc. and Consumer Magic Travel (collectively, "U.S. Travel"). The Federal Communications Commission has addressed a Citation to U.S. Travel concerning certain fax solicitations transmitted on behalf of U.S. Travel. The purpose of this Declaration is to notify the FCC that U.S. Travel ceased operation in 2000. As a result, no further fax solicitations on behalf of U.S. Travel are contemplated.

Douglas Kaplan
Douglas Kaplan President

Date: 5-31-01