

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<hr/> PHYSICIANS HEALTHSOURCE, INC., :	Civil Action No. 14-2289
individually and as the representative of :	
a class of similarly situated entities, :	
	:
v. :	
	:
ENDO PHARMACEUTICALS, et al. :	
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ORDER

Plaintiff has filed a putative class action lawsuit, asserting a single claim for violations of the opt-out notice provision of the Junk Fax Protection Act (the “Act”), 47 U.S.C. § 227, *et seq.* Plaintiff alleges that it received two facsimile advertisements from Defendants which did not contain opt-out notices. Plaintiff purports to represent a class of others similarly situated, who allegedly received fax advertisements without opt-out notices. Plaintiff asserts its claims without regard to whether the facsimile advertisements received were solicited or unsolicited.

The Act was passed to address the dissemination of *unsolicited* advertisements by fax. Under the Act, unsolicited facsimile advertisements must contain opt-out notices, and the Act creates a private right of action for violations of this requirement. The Federal Communications Commission (“FCC”) has implemented regulations requiring opt-out language on both unsolicited *and solicited* facsimile advertisements; that is, the regulations appear to expand the statutory opt-out notice requirement. Defendants dispute the validity of the regulation, arguing that the FCC has exceeded its statutory authority in promulgating a regulation requiring opt-out notices in solicited faxes. Defendants cite to a number of administrative petitions filed with the FCC, which ask the FCC to rule on issues related to the subject of this litigation. Defendants have asked the Court to stay this case until the FCC rules as to whether: 1) 47 C.F.R. §

64.1200(a)(4)(iv) applies to solicited faxes; 2) 47 C.F.R. § 64.1200(a)(4)(iv) was promulgated under 47 U.S.C. § 227(b); and 3) 47 C.F.R. § 64.1200(a)(4)(iii) is satisfied by substantial compliance.

The decision to stay a proceeding rests within the district court's discretion. Many district courts have stayed similar cases under the Act, to allow the FCC to rule on pending administrative petitions for declaratory rulings.¹ A few district courts have refused to stay similar cases.² The Court notes that there is no schedule for the FCC to reach a final decision, and any stay may be open-ended. However, the Court believes that the issues before the FCC are potentially dispositive of identical claims before this court. For example, the FCC may determine that the statute does not create a private right of action when a solicited fax advertisement lacks an opt-out notice. Judicial efficiency will be better served by imposing a stay of litigation while the FCC considers these related issues, which have already been presented to it, which are within the FCC's domain of specialized knowledge,³ and which may significantly limit the scope of this action. In reaching its decision, the Court has also considered the risk of inconsistent rulings if the FCC is not permitted to issue its ruling before the courts act.⁴ Balancing the equities, the Court finds potential prejudice to the Defendants if they must defend this action without guidance from the FCC on issues such as statutory authority and standing to pursue a private right of action. Because Defendants have acknowledged their duty to preserve evidence, and will

¹ See, e.g., *Physicians Healthsource, Inc. v. Anda, Inc.*, No 12-60798 (S.D. Fla., May 23, 2014), ECF No. 105; *Physicians Healthsource, Inc. v. Masimo Corp., et al.*, No. 14-00001 (C.D. Cal., May 22, 2014), ECF No. 47; *Physicians Healthsource, Inc. v. Purdue Pharma, L.P.*, No. 12-001208 (D. Conn., Feb. 3, 2014), ECF No. 101; *Raitport v. Harbour Capital Corp.*, 09-156 (D.N.H., Sept. 12, 2013), ECF No. 85.

² See, e.g., *Physicians Healthsource Inc. v. Stryker Sales, et al.*, 12-729 (W.D. Mich. Sept. 8, 2014), Doc. No. 160 (this case had "already advanced through years of litigation"; a class had been certified and cross-motions for summary judgment briefed when the Motion to Stay was filed).

³ *AT&T Corp. v. PAB, Inc.*, 935 F.Supp. 584, 589-90 (E.D. Pa. 1996).

⁴ *Id.*

alert pertinent third parties that they must preserve evidence while the case is stayed, the Court finds that Plaintiff will not be prejudiced by a stay.

Accordingly, it is hereby **ORDERED** that Defendant's Motion to Stay [Doc. No. 19] is **GRANTED**. The case is placed in administrative suspense pending adjudication of related actions by the FCC. The case shall be reactivated upon the filing of an answer or motion to dismiss. Defendants shall file their answer or motion to dismiss within 28 days after the FCC has ruled on the relevant petitions challenging 47 C.F.R. § 64.1200(a)(4)(iv). The parties shall provide the Court with a joint status report every 90 days while the case is in suspense.

The Clerk of Court shall place this case in administrative suspense.

It is so **ORDERED**, this 5th day of January 2015.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.