

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

In the Matter of)	
)	
Petition of Chester Limited, Inc.,)	CG Docket No.
for a Waiver of Section 64.1200(a)(4)(iv))	
of the Commission's Rules)	

PETITION OF CHESTER LIMITED, INC.FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the rules of the Federal Communications Commission,¹ Chester Limited, Inc., (“Chester Limited”) by and through its undersigned counsel, respectfully requests a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) (the “Opt-out Requirement”) with respect to facsimiles that were transmitted by Chester Limited, or on Chester Limited’s behalf, before April 30, 2015, where such facsimiles were sent with the prior express invitation or permission of the recipients or their agents but did not include opt-out notices pursuant Section 64.1200(a)(4)(iv)’s requirements. Similar waivers have been granted to other petitioners. Granting such a waiver in this matter would serve the public interest because Chester Limited faces the possibility of substantial damages after being targeted by a plaintiff’s firm known for its prolific filing of Telephone Consumer Protection Act (“TCPA”)² class actions.

I. INTRODUCTION AND BACKGROUND

Chester Limited is a Michigan entity operating in coordination with Johnstone Supply for the sale and distribution of heating, ventilation, air conditioning, refrigeration and plumbing supplies. As part of their marketing strategy, Chester Limited sent marketing materials to its existing customers by facsimile.

¹ 47 C.F.R § 1.3.

² Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); 47 U.S.C. §227 *et seq.*

The Junk Fax Prevention Act of 2005 (“JFPA”),³ prohibits sending an “unsolicited advertisement” to a telephone fax machine.⁴ 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.”⁵ In 2006, the Commission adopted a rule requiring that a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice.”⁶ In a footnote, however, the Commission stated, “We note that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”⁷

On October 30, 2014, the Commission issued an Order, commonly referred to as the “*Anda Order*,” acknowledging that the 2006 footnote, when read in context, caused confusion as to whether the opt-out requirement applied to *solicited* fax advertisements:

While we affirm that the Commission’s rules require that an opt-out notice must be contained on all fax ads, the record indicates that a footnote contained in the *Junk Fax Order* caused confusion regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission or created a false sense of confidence that the requirement did not apply. As a result, we find good cause exists to grant individual retroactive waivers of section 64.1200(a)(4)(iv) of the Commission’s rules⁸

Thus, the Commission decided that granting retroactive waivers to parties affected by the confusion would serve the public interest. The Commission clarified, though, that

. . . the waiver granted herein applies only to the petitioners insofar as they may have failed to comply with section 64.1200(a)(4)(iv) prior to six months from the release date of this Order. *As a result, the waiver granted herein shall not apply*

³ Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

⁴ 47 U.S.C. § 227(b)(1)(C).

⁵ *Id.*, § (a)(5).

⁶ 47 C.F.R. § 64.1200(a)(4)(iv); *see also* 21 FCC Rcd at 3812, ¶ 48.

⁷ 21 FCC Rcd at 3818, ¶ 42, n.154.

⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd 13998 (2014) (rel October 30, 2014) (“*Anda Order*”).

to such conduct that occurs more than six months after the release date of this Order nor shall it apply to any situation other than where the fax sender had obtained the prior express invitation or permission of the recipient to receive the fax advertisement. We direct the Bureau to conduct outreach to inform potential senders of our reconfirmed requirement to include an opt-out on faxes.

*Other, similarly situated parties, may also seek waivers such as those granted in this Order.*⁹

Therefore, provided they obtain a waiver, any such individuals are not liable under section 64.1200(a)(4)(iv) of the Commission's regulations for not including the opt-out language during that period.

Following the *Anda Order*, on August 28, 2015,¹⁰ December 9, 2015,¹¹ and November 2, 2016,¹² the Commission granted more than 100 retroactive waivers, reaffirming that waivers are supported by good cause and are in the public interest¹³ and determining that waivers are appropriate and should be granted even after April 30, 2015.¹⁴

III. ARGUMENT

Chester Limited is similarly situated to many of the other recipients of retroactive waivers pursuant to the *Anda Order* for solicited faxes sent before April 30, 2015 and is a Defendant in a purported class-action lawsuit in the U.S. District Court for the Eastern District of Michigan.¹⁵ The claims against Chester Limited are brought by a plaintiff who is alleged to have received a fax advertisement that did not meet the Opt-out Requirement. The plaintiff, however, is represented by the law firm of Anderson & Wanca, a frequent filer of JFPA claims throughout

⁹ *Anda Order* at ¶¶ 29-30 (emphasis added).

¹⁰ *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 8598 (Aug. 28, 2015) (“*Aug. Waiver Order*”).

¹¹ *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 14057 (Dec. 9, 2015) (“*Dec. Waiver Order*”).

¹² *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*. DA 16-1242 (rel. Nov. 2, 2016) (“*Nov. Waiver Order*”).

¹³ *Aug. Waiver Order* at ¶ 13; *Dec. Waiver Order* at ¶ 12; *Nov. Waiver Order* at ¶ 12.

¹⁴ *Aug. Waiver Order* at ¶ 20; *Dec. Waiver Order* at ¶ 18; *Nov. Waiver Order* at ¶ 18.

¹⁵ *Compressor Engineering Corporation v. Comfort Control Supply Co, Inc.*, No. 16-11726 (E.D. Mich. 2016).

the United States. More notably, though, Anderson & Wanca has represented the same plaintiff in other claims for JFPA violations.¹⁶ Rather than seeking individual relief, though, plaintiff claims to represent the following class of persons:

All persons who (1) on or after [May 16, 2012], (2) were sent telephone facsimile messages of material advertising the commercial availability or quality of any property, goods, or services by or on behalf of Defendants, and (3) which Defendants did not have prior express invitation or permission, or (4) which did not display a proper opt-out notice.¹⁷

Thus, plaintiff's proposed class includes persons that received fax messages with advertising materials from May 16, 2012, through April 30, 2015, whom had given Chester Limited prior express permission to send advertising materials, but where the fax did not include an opt-out notice. This is precisely the type of confusion the *Anda Order* addressed; that is, given the language of the 2006 footnote, Chester Limited could not have known that sending fax advertisements to its own customers with their permission would violate the JFPA unless the fax contained an opt-out notice.

The Commission has granted waivers to other petitioners where “no record evidence demonstrates that [the petitioners] understood that they did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so” and “where the petitions referenced the confusion between the footnote and the rule.”¹⁸ Like prior petitioners, Chester Limited has shown good cause for its request.

Additionally, granting a waiver would serve the public interest. In the *Anda Order*, the Commission made clear that the public interest favors not subjecting businesses that understandably were confused by the opt-out requirements to “potentially substantial damages.”

¹⁶ See *Compressor Engineering Corp. v. Manufacturers Financial Corp.*, No. 09-14444 (E.D. Mich. 2009); *Compressor Engineering Corp. v. Chicken Shack, Inc.*, No. 10-01951 (E.D. Mich. 1010).

¹⁷ *Id.*, docket no. 1 at 6.

¹⁸ *Dec. Waiver Order* ¶14 (citing the *Anda Order* ¶¶24-26).

As noted, Chester Limited is a Defendant in a putative class action seeking statutory damages for four years of fax advertisements that it sent to its own customers with their express permission simply because the advertisements did not contain an opt-out notice. This request for retroactive waiver bears directly on the pending litigation and is in the public interest because Chester Limited is subject to potentially significant monetary damages as well as related defense expenses. Such a judgement would adversely affect Chester Limited's business, but more importantly, such a judgment would only benefit Plaintiff's counsel. This is certainly not the intent of the JFPA or the TCPA.

III. CONCLUSION

For the reasons stated above, Chester Limited respectfully requests that the Commission grant a limited retroactive waiver of Section 61.1200(a)(4)(iv) with respect to facsimiles that have been transmitted by Chester Limited, or on its behalf, before April 30, 2015, where such facsimiles were sent with the prior express invitation or permission of the recipients or their agents but did not include opt-out notices pursuant to Section 64.1200(a)(4)(iv)'s requirements.

Respectfully submitted,

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Dated: January 10, 2017

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