

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

In the Matter of Fetch, Inc. d/b/a Petplan
Petition for Retroactive Waiver of 47 C.F.R.
§ 64.1200(a)(4)(iv)

CG Docket No. 02-278

CG Docket No. 05-338

Petition for Reconsideration

Fetch, Inc. d/b/a Petplan

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SUMMARY

In its Petition for a retroactive waiver of the terms of Section 64.1200(a)(4)(iv), specifically the opt-out notice requirement for solicited facsimile advertisements, Petitioner Fetch, Inc. d/b/a Petplan demonstrated that it was similarly situated to other petitioners previously granted waivers by the Commission. As a result, Petplan was also entitled to a waiver. Specifically, Petplan is similarly situated to the petitioners granted waivers by the full Commission on October 30, 2014 because Petplan's Petition referenced the confusion between the footnote and the rule in the Commission's 2006 Junk Fax Order and because no record evidence demonstrated that Petplan understood that it had to comply with the opt-out notice requirement for facsimile advertisements sent with prior express permission but nonetheless failed to include the opt-out notice.

In its November 2, 2016 Order, however, the Bureau under delegated authority mistakenly interpreted Petplan's Petition as supposedly admitting ignorance of the TCPA and the Commission's opt-out notice requirement for solicited fax advertisements. The Bureau denied Petplan's Petition solely on that basis. This is directly inconsistent with the Commission's grant of waiver requests to petitioners who expressly asserted that they were unaware of the opt-out notice requirement for solicited faxes. The Bureau applied that same standard in its August 28, 2015 Order. Under this standard, there is no basis for Petplan's Petition to have been rejected.

Furthermore, Petplan's Petition was not intended to be read, and should not have been read, as seeking a waiver based on ignorance of the law. Rather, Petplan used the same language employed by the Commission and the Bureau in previous orders to describe what a petitioner must assert to qualify for and be granted a waiver.

Finally, the Bureau acted arbitrarily in denying Petplan's petition because the Bureau has granted waivers to numerous petitioners who used the same language as Petplan, even going so

far as to grant waivers to petitioners who, unlike Petplan, *did* admit lack of awareness of the TCPA regulations. Thus, Petplan seeks reconsideration of the denial of its retroactive waiver request.

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Petition for Reconsideration

Petitioner Fetch, Inc. d/b/a Petplan (“Petplan” or “Petitioner”), by and through its undersigned counsel, and pursuant to Section 1.429 of the Rules,¹ hereby petitions the Consumer and Governmental Affairs Bureau (the “Bureau”) of the Federal Communications Commission (the “Commission”) for reconsideration of the Bureau’s Order released on November 2, 2016.² In relevant part, that order denied Petplan’s Petition for retroactive waiver of Section 64.1200(a)(4)(iv) (the “Regulation”) of its Rules³ as to the opt-out notice requirement for solicited facsimiles sent prior to April 30, 2015 to recipients by or purportedly on behalf, or marketing the products or services, of Petplan. Specifically, Petplan seeks reconsideration of the *November 2 Order* insofar as the Bureau determined that Petplan did not qualify for a waiver because it was not “similarly situated” to the petitioners previously granted relief by the full Commission in the *2014 Anda Commission Order*.⁴

¹ 47 C.F.R. § 1.429.

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 16-1242 (rel. Nov. 2, 2016) (the “*November 2 Order*”).

³ 47 C.F.R. § 64.1200(a)(4)(iv).

⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, 29 FCC Rcd. 13998 (2014) (the “*2014 Anda Commission Order*”).

BACKGROUND

As the Bureau recognized in its *November 2 Order*, on October 30, 2014, the full Commission granted a raft of petitioners' requests for waiver of the solicited fax rule where (i) no record evidence demonstrated that they 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 (ii) where the petitioners referenced the confusion between the footnote and the rule in the 2006 Junk Fax Order.⁵ The Commission encouraged "similarly situated" parties to submit their own waiver requests.⁶ Petplan submitted its waiver request by filing its Petition on November 25, 2015.

In its *November 2 Order*, the Bureau stated that petitioners are "similarly situated" and "thus qualify for waivers" where: (1) "the faxes at issue were sent prior to the [Commission's clarification] in the *2014 Anda Commission Order*," (2) the petitioners "assert their general lack of understanding that the rule[s] in question applied to solicited faxes and/or refer to the confusion caused by the inconsistency between the text of the Junk Fax Order and the erroneous footnote," and (3) "no record evidence rebuts the presumption of confusion or misplaced confidence."⁷

Petplan satisfied each of these stated requirements, but its Petition was denied by the Bureau. This was because the Bureau unaccountably misinterpreted a statement in Petplan's Petition as simply "admit[ting] a lack of awareness of the TCPA and/or Commission rules requiring them to include opt-out notices on faxes sent to recipients who provided prior express

⁵ See generally *November 2 Order* ¶ 14 (citing *2014 Anda Commission Order* ¶¶ 24-26).

⁶ *2014 Anda Commission Order* ¶¶ 2, 30.

⁷ *November 2, Order* ¶ 14.

permission or consent.”⁸ As a direct result, the Bureau therefore determined that Petplan was not “similarly situated to the initial waiver recipients” because “[t]he *2014 Anda Commission Order* made clear that ignorance of the law would not constitute grounds for a waiver.”⁹

ARGUMENT

A. The Commission Has Granted Waiver Requests To Petitioners Who Expressly Asserted They Were Unaware Of The Opt-Out Notice Requirement For Solicited Faxes, And Under That Standard, Petplan’s Petition Should Have Been Granted.

In its *2014 Anda Commission Order*, the full Commission granted waivers to petitioners based on its finding that there was “good cause” for a retroactive waiver of the Regulation and that the waiver would serve the public interest.¹⁰ The Commission explained that there were “two grounds” for its finding of “good cause”: (i) “the inconsistent footnote” in the Junk Fax Order and (ii) the “lack of explicit notice” that the opt-out requirement would apply to fax ads sent with the prior express permission of the recipient.¹¹ It further explained that *because* good cause existed, the granting of waivers was based on “special circumstances” rather than ignorance of the law: “We emphasize, however, that simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver. Rather, it is the inconsistent footnote, combined with the [lack of explicit notice] . . . along with particular facts and concerns relevant to the public interest at this time . . . [that] warrants deviation from the rule.”¹² In other words, the Commission presumed that the petitioners *were* unaware that the opt-out notice applied to solicited faxes because there was a “lack of explicit notice in the *Junk Fax NPRM*” to make the petitioners aware of the requirement, and “nothing in the record [] demonstrat[ed] that

⁸ *Id.* ¶ 21.

⁹ *Id.* (citing *2014 Anda Commission Order* ¶ 26).

¹⁰ *2014 Anda Commission Order* ¶¶ 24-26.

¹¹ *Id.*

¹² *Id.* ¶¶ 24, 26.

the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement.”¹³

That this is the correct reading of the *2014 Anda Commission Order* is made plain by the Commission’s granting of the petition of Crown Mortgage Company—one of the “initial petitioners” to whom Petplan had to be “similarly situated” to be granted a waiver.¹⁴ In its Petition, Crown Mortgage Company asserted that it was entitled to a waiver because “*When the faxes were sent, nobody at Crown was aware of . . . the TCPA’s so-called ‘opt out language.’*”¹⁵ Likewise, initial petitioners Staples, Inc. and Quill Corporation noted in their petition that they “*could not have known*” of the opt-out notice requirement for solicited faxes when the faxes at issue were sent because the Commission’s Notice of Proposed Rulemaking failed to mention the intent to apply the requirement to solicited faxes.¹⁶ Thus, any subsequent petitioner who asserted that it was unaware of the opt-out language requirement for solicited faxes, absent record evidence to the contrary, would be “similarly situated” and therefore entitled to a waiver.

That this is the correct reading of the *2014 Anda Commission Order* is further confirmed by exchanges during the recent oral argument in *Bais Yaakov of Spring Valley v. FCC*, No. 14-1234 (D.C. Cir.)—the appeal of the *2014 Anda Commission Order*. As Judge Pillard explained during argument regarding the authority of the Commission to grant a retroactive waiver of Section 64.1200(a)(4)(iv): “I believe [the Commission] even gave the waiver to entities that said oh, we just didn’t know. Just total ignorance of the standard. Not confusion, not even aware that

¹³ See *id.* ¶¶ 26, 28.

¹⁴ *Id.* ¶¶ 24-26.

¹⁵ Petition of Crown Mortgage Company at 4 n.2 (filed Feb. 24, 2014) (emphasis added). Indeed, Crown asserted not only that it was unaware of the opt-out notice requirement for solicited faxes, but also that it was “unaware of the TCPA,” and it was still granted a waiver by the Commission. See *id.*

¹⁶ Petition of Staples, Inc. and Quill Corporation at 24 (filed July 19, 2013) (emphasis added).

there's an obligation, but they get the waiver also.”¹⁷ Counsel for the Class Action Plaintiff Appellants confirmed Judge Pillard's understanding: “[T]here is nothing in the [2014 *Anda Commission Order*] that says ignorance of the TCPA you don't get a waiver. That's something that the Bureau seems to have created later on, in fact, in one of my own cases[,] the Amicus mediation case, if you look at the comments . . . [the petitioners] said they didn't know about the TCPA, and they got a waiver anyway.”¹⁸

Applying the standard created by the Commission in the *2014 Anda Commission Order*, the Bureau in its *August 28 Order*,¹⁹ on delegated authority, granted waiver requests to numerous petitioners who expressly and unequivocally asserted in their petitions that they were “unaware” that the opt-out notice applied to solicited faxes because there was nothing in the record demonstrating that those petitioners *were* aware of the opt-out notice requirement for solicited faxes and failed to comply notwithstanding. For example:

- Sinopec USA, Inc. asserted in its petition (which the Bureau granted) that it “was *not aware* that the requirement for opt-out language in the form required by Section 64.1200(a)(4)(iii) and (iv) applied to such faxes.”²⁰
- Salix Pharmaceuticals, Inc. and Salix Pharmaceuticals, Ltd. asserted in their petition (which the Bureau granted) that they and their vendors “*did not know* they had to abide by th[e opt-out notice] requirements for solicited faxes.”²¹
- United Stationers Inc., United Stationers Supply Co., and Lagasse LLC asserted in their petition (which the Bureau granted) that “Petitioners sent facsimiles to

¹⁷ Tr. of Nov. 8, 2016 Oral Argument at 72:21-25, *Bais Yaakov of Spring Valley v. FCC*, No. 14-1234 (D.C. Cir.) (excerpt attached hereto as Exhibit No. 1).

¹⁸ *Id.* at 77:25-78:3 (excerpt attached hereto as Exhibit No. 1).

¹⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-976 (rel. Aug. 28, 2015) (the “*August 28 Order*”).

²⁰ Petition of Sinopec USA, Inc. at 3 (filed Apr. 30, 2015) (emphasis added).

²¹ Petition of Salix Pharmaceuticals, Inc. and Salix Pharmaceuticals, Ltd. at 3 (filed Apr. 27, 2015) (emphasis added).

recipients who had provided their prior express invitation or permission and were *not aware* that opt-out notices were required on such faxes.”²²

- Meadowbrook Insurance Group, Inc. asserted in its petition (which the Bureau granted) that “Meadowbrook was *unaware* of the October 30, 2014 Order until after it was sued and had a chance to analyze the issues in the lawsuit.”²³
- GE Healthcare, Inc. asserted in its petition (which the Bureau granted) that it and its vendors “*did not know* they had to abide by th[e opt-out notice] requirements for solicited faxes.”²⁴
- Northwood, Inc. asserted in its petition (which the Bureau granted) that it “was *not aware* of the Commission’s October 30, 2014 Order until recently when it retained counsel to assist it in responding to a demand letter from a putative plaintiff sent to an affiliated entity.”²⁵
- Alma Lasers, Inc. asserted in its petition (which the Bureau granted) that “it sent certain faxes that were solicited or sent with express permission, and was *not aware* that the requirement for opt-out language in the form required by Section 64.1200(a)(4)(iii) and (iv) applied to those faxes.”²⁶
- Versa Cardio, LLC asserted in its petition (which the Bureau granted) that it and its vendors “*did not know* they had to abide by th[e opt-out notice] requirements for solicited faxes.”²⁷

In fact, when assessing the significance of limited opt-out notices on solicited faxes, the Bureau expressly stated that the presence of such limited opt-out notices suggested that such opt-out notices may have been included “as a matter of good business practice *rather than knowledge of the rule*.”²⁸

²² Petition of United Stationers Inc., United Stationers Supply Co. and Lagasse LLC at 9 (filed May 18, 2015) (emphasis added).

²³ Petition of Meadowbrook Insurance Group, Inc. and Meadowbrook, Inc. at 5 (filed May 29, 2015) (emphasis added).

²⁴ Petition of GE Healthcare, Inc. at 3 (filed Apr. 15, 2015) (emphasis added).

²⁵ Petition of Northwood, Inc. at 5 (filed June 2, 2015) (emphasis added).

²⁶ Petition of Alma Lasers, Inc. at 4 (filed Nov. 14, 2014) (emphasis added).

²⁷ Petition of Versa Cardio, LLC at 3 (filed Apr. 29, 2015) (emphasis added).

²⁸ *August 28 Order* ¶ 18 (emphasis added).

Moreover, in the *August 28 Order*, the Bureau also granted waivers to petitioners who expressly stated on the record in the underlying litigation that they were unaware of the TCPA:

- ACT, Inc. was granted a waiver by the Bureau despite the ACT employee who authorized the sending of the faxes at issue testifying in a deposition that prior to the lawsuit filed against ACT, he was not “aware of the Telephone Consumer Protection Act” and not “aware of any statute or regulations concerning the sending of faxes.”²⁹
- Amicus Mediation & Arbitration Group, Inc. and Hillary Earle were granted waivers by the Bureau despite Ms. Earle (the co-owner and CEO of Amicus) testifying in a deposition that “no,” she was “not really” “familiar with the [T]elephone [C]onsumer [P]rotection [A]ct” and that she had “never heard of it” until she and Amicus were sued.³⁰

Thus, to the extent that the Bureau reads Petplan’s Petition as asserting that Petplan was “unaware” of the TCPA’s opt-out requirements for solicited faxes, Petplan is entitled to a waiver of the rule since it is plainly “similarly situated” to the original petitioners, because there was and is “nothing in the record here demonstrating that [Petplan] understood that they did, in fact, have to comply with the opt-out notice requirements for fax ads sent with prior express permission but nonetheless failed to do so.”³¹ Petplan therefore seeks reconsideration of the Bureau’s determination that Petplan is not “similarly situated” to the original petitioners (the basis upon which the Bureau denied Petplan’s Petition), and grant its Petition.

B. Petplan’s Petition Was Not Intended To Be Read, And Should Not Be Read, As Seeking A Waiver Based On “Simple Ignorance” Of The Law.

In its Petition, Petplan stated that “[p]rior to learning of the instant lawsuit regarding facsimiles sent well over three years ago and retaining counsel, Petitioner did not have any

²⁹ Corrected Comment of Bais Yaakov of Spring Valley, Ex. A (Tr. of June 6, 2013 Dep. of Lawrence Rich at 85:21-86:3, *Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 4:12cv40088 (D. Mass.)) (filed Dec. 15, 2014).

³⁰ Corrected Comment of Bais Yaakov of Spring Valley, Ex. B (Tr. of Nov. 20, 2013 Dep. of Hillary Earle at 67:13-18, *Kaye v. Amicus Mediations & Arbitration Group, Inc.*, No. 13cv00347 (D. Conn.)) (filed Dec. 15, 2014).

³¹ *2014 Anda Commission Order* ¶ 26.

understanding that opt-out notices were required on solicited faxes.”³² The Bureau read this language as “admit[ting] a lack of awareness of the TCPA and/or Commission rules requiring them to include opt-out notices on faxes sent to recipients who provided prior express permission or consent.”³³ According to the Bureau, this meant that Petplan was not “similarly situated to the initial waiver recipients.”³⁴ For the reasons set forth in Section A, Petplan does not believe that the Bureau consistently applied the standard announced by the Commission in its *2014 Anda Commission Order* and applied by the Bureau itself to petitions it granted in its *August 28 Order*.

However, to the extent that the Bureau created and applied a new standard for granting petitions, Petplan met that standard because it did not assert a lack of “awareness” of the TCPA or of the Commission’s Orders. Rather, Petplan purposefully used the very term repeatedly used by the Commission and the Bureau: “understanding.” A comparison of the language used by the Bureau and that used by Petplan is provided below:

November 2 Order ¶ 14

Stating petitioners must “assert their general lack of ***understanding*** that the rule in question applied to solicited faxes” to be similarly situated. (emphasis added).

Petplan Petition at 6

Stating “Petitioners did not have any ***understanding*** that opt-out notices were required on solicited faxes.” (emphasis added).

Given that the Commission and the Bureau used the term “understanding” to characterize the standard under which they would find that a petitioner was ***not*** “asserting simple ignorance of the TCPA or the Commission’s attendant regulations” as grounds for waiver, Petplan could not reasonably have expected the Bureau to read Petplan’s use of that same term in precisely the opposite fashion.

³² Petplan Petition at 6.

³³ *November 2 Order* ¶ 21.

³⁴ *Id.*

Petplan did not intend for the use of the term “understanding” to be read as “asserting simple ignorance of the TCPA or the Commission’s attendant regulations” as the grounds for waiver and it was not seeking a waiver on that basis. Petplan therefore asks the Bureau to reconsider its *November 2 Order* insofar as it denied Petplan’s request for a waiver for that reason. Rather, Petplan sought and was entitled to a waiver on the basis that it referenced the confusion between the footnote and the rule in the 2006 Junk Fax Order and no record evidence demonstrated that Petplan understood that it did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to include the required opt-out notice.

C. The Denial of Petplan’s Petition by the Bureau Is Arbitrary.

On August 28, 2015, the Bureau granted 117 petitions seeking a waiver of the Regulation with regard to the opt-out notice requirement for solicited facsimiles sent prior to April 30, 2015.³⁵ Many of those petitions used the exact same language as the Petplan Petition. For example:

- Consumer Energy Solutions, Inc. sought and was granted a waiver based on the fact that “Petitioner did not *understand* the opt-out requirement to apply to such expressly-solicited faxes.”³⁶
- J.L. Barnes Insurance Agency, Inc. d/b/a/ JLBG Health sought and was granted a waiver based on the fact that “JLBG did not *understand* that it had to comply with the opt-out notice requirement for facsimile advertisements sent with prior express permission.”³⁷

³⁵ See *August 28 Order* ¶ 11.

³⁶ Petition of Consumer Energy Solutions, Inc. at 3 (filed Mar. 26, 2015) (emphasis added).

³⁷ Petition of J.L. Barnes Insurance Agency, Inc. d/b/a/ JLBG Health at 3 (filed Dec. 5, 2014) (emphasis added).

- Logistic Innovations, LLC sought and was granted a waiver based on the fact that it “certainly did not *understand* that it did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission.”³⁸
- Medversant Technologies, LLC sought and was granted a waiver based on the fact that it “certainly did not *understand* that it 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.”³⁹
- Royal Canin U.S.A., Inc. sought and was granted a waiver based on the fact that it “did not *understand* that the opt-out requirements applied to solicited facsimiles.”⁴⁰
- Sunwing Airlines Inc., Vacation Express USA Corp, and Sunwing Vacations Inc. sought and were granted waivers based on the fact that they “did not *understand* the opt-out requirement to apply to solicited faxes.”⁴¹
- United Stationers Inc., United Stationers Supply Co., and Lagasse LLC sought and were granted waivers based on the fact that they “did not *understand* the opt-out requirements to apply to solicited faxes.”⁴²
- Zoetis, Inc., Zoetis LLC, and Zoetis Products, LLC sought and were granted a waiver based on the fact that they “did not *understand* that they needed to comply with the opt-out notice requirement for faxed webinar invitations sent to its customers who had provided prior express invitation or permission (i.e., faxes that were ‘solicited’”).⁴³
- Endo Pharmaceuticals Inc., Endo Pharmaceutical Solutions Inc., Endo Pharmaceuticals Valera Inc., Endo Health Solutions Inc., Endo Pharma LLC and Endo Pharma Delaware Inc. sought and were granted a waiver based on the fact that they “did not *understand* the opt-out requirement to apply to solicited faxes.”⁴⁴

³⁸ Petition of Logistic Innovations, LLC at 4 (filed Apr. 24, 2015) (alternations and internal quotations omitted) (emphasis added).

³⁹ Petition of Medversant Technologies, LLC at 4 (filed Jan. 7, 2015) (alternations and internal quotations omitted) (emphasis added).

⁴⁰ Petition of Royal Canin U.S.A., Inc. at 6 (filed Apr. 27, 2015) (emphasis added).

⁴¹ Petition of Sunwing Airlines Inc., Vacation Express USA Corp, and Sunwing Vacations Inc. at 5 (filed Nov. 26, 2014) (emphasis added).

⁴² Petition of United Stationers Inc., United Stationers Supply Co., and Lagasse LLC at 7 (filed May 18, 2015) (emphasis added).

⁴³ Petition of Zoetis, Inc., Zoetis LLC, and Zoetis Products, LLC at 5 (filed Jan. 16, 2015) (emphasis added).

⁴⁴ Petition of Endo Pharmaceuticals Inc., Endo Pharmaceutical Solutions Inc., Endo Pharmaceuticals Valera Inc., Endo Health Solutions Inc., Endo Pharma LLC and Endo Pharma Delaware Inc. at 5 (filed Apr. 27, 2015) (emphasis added).

- Dongili Investment Group, Inc. and Label Tape Systems, Inc. sought and were granted a waiver based on the fact that they “contend[ed] that faxes were sent with the prior express permission of the recipients and . . . did not *understand* the opt-out requirement to apply to solicited faxes.”⁴⁵

Other petitions used similar language. For example, another one of the initial petitioners granted a waiver by the *2014 Anda Commission Order*—Douglas Paul Walburg—stated that the faxes he sent “did not contain an opt-out notice because Mr. Walburg did not *believe* that such a notice was necessary if he had obtained the prior express consent of the recipient.”⁴⁶

Consequently, in the *August 28 Order*, the Bureau granted dozens of petitions using the same language.⁴⁷

⁴⁵ Petition of Dongili Investment Group, Inc. and Label Tape Systems, Inc. at 3 (filed Jan. 23, 2015) (emphasis added).

⁴⁶ Petition of Douglas Paul Walburg and Richie Enterprises, LLC, at 5 n.13 (filed Aug. 19, 2013) (emphasis added).

⁴⁷ *See, e.g.*, Petition of McKesson Corporation at 2 (filed Nov. 25, 2014) (“McKesson and its wholly owned subsidiaries did not *believe* that these solicited facsimiles required opt-out notices.” (emphasis added)); Petition of American Power & Gas LLC, AP&G Holdings LLC, and Tom Cummins at 3 (filed Apr. 17, 2015) (“AP&G did not *believe* that any of its solicited facsimiles required opt-out notices.” (emphasis added)); Petition of Amicus Mediation & Arbitration Group, Inc. and Hillary Earle at 2 (filed Nov. 13, 2014) (“Amicus did not *believe* that it was legally required to include an opt-out notice in faxes sent to recipients who gave prior express permission.” (emphasis added)); Petition of Electronic Funds Source LLC Petition at 2 (filed Apr. 28, 2015) (“EFS did not *believe* that any of its solicited facsimiles required opt-out notices.” (emphasis added)); Petition of Greenway Health, LLC at 3 (filed Apr. 29, 2015) (“Greenway, and its predecessor, Sage, did not *believe* that these solicited fax transmissions required opt-out notices.” (emphasis added)); Petition of Henry Schein, Inc. at 3 (filed Dec. 17, 2014) (“Henry Schein did not *believe* that the opt-out notice requirements of 47 CFR 64.1200(a)(4)(iii) were applicable to those faxes sent with the prior express invitation or permission of the recipients.” (emphasis added)); Petition of Heska Corporation at 2 (filed Apr. 14, 2015) (“Heska did not *believe* that any of its solicited facsimiles required opt-out notices.” (emphasis added)); Petition of Jay Geier’s Scheduling Institute at 4 (filed Apr. 20, 2015) (“Scheduling Institute did not *believe* that the TCPA required an opt-out notice to be included on fax advertisements sent with prior express permission.” (emphasis added)).

This is why Petplan used similar language, asserting “Petplan had no cause to file such a petition for retroactive waiver with the Commission pursuant to the order until it was very recently sued Prior to that time, Petplan, a small start-up venture, had no basis upon which to *believe* there was any question regarding the legality of any solicited fax messages sent by or on behalf of Petplan.” Petplan Petition at 4-5 (emphasis added). Indeed, this language closely tracks the language used by Petitioner Joseph T. Ryerson & Son, Inc. (whose petition was granted in the *August 28 Order*), asserting that “Ryerson was not aware of any claims against it for violations of the TCPA until May 14, 2015 — two weeks after the expiration of the six-month period set forth in the October 30 Order. Ryerson therefore had no reason to file a petition within the original six-month period because it did not *believe* that there was any question about the legality of the faxes that it may have sent to its customers” Petition of Joseph T. Ryerson & Son, Inc. at 3 (filed June 4, 2015) (emphasis added).

In the *December 9 Order*,⁴⁸ the Bureau granted five petitions on the basis that the petitioners were “similarly situated to the waiver recipients previously granted relief by the Commission,” meaning that the Bureau did *not* read their petitions as seeking a waiver by “admit[ting] a lack of awareness of the TCPA and/or Commission rules requiring them to include opt-out notices on faxes sent to recipients who provided prior express permission or consent.”⁴⁹ The Petplan Petition, however, did not make assertions different from those made in the petitions that were granted in the *December 9 Order*: Scrip Inc. sought and was granted a waiver based on the fact that “at the time it sent the faxes at issue, in 2012 and 2013, Petitioner did not *understand* the opt-out notice requirement to apply to solicited faxes;”⁵⁰ and Dental Fix Rx LLC sought and was granted a waiver based on the fact that “Dental Fix did not *understand* that it needed to comply with the opt-out notice requirement for solicited faxed advertisements.”⁵¹

Likewise, in the *November 2 Order*, the Bureau again granted numerous petitions that employed language substantially similar to the language used in the Petplan Petition.⁵² For example:

- HomeoPet, LLC asserted in its petition (which the Bureau granted) that it “*did not understand* the TCPA” to “require additional opt-out language in the faxes at issue.”⁵³
- North American Bancard, LLC asserted in its petition (which the Bureau granted) that “NAB *did not understand* and was *reasonably uncertain* whether the opt-out requirement applied to solicited facsimiles.”⁵⁴

⁴⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-1402 (rel. Dec. 9, 2015) (the “*December 9 Order*”).

⁴⁹ *December 9 Order* ¶ 20.

⁵⁰ Petition of Scrip Inc. at 5 (filed Sept. 17, 2015) (emphasis added).

⁵¹ Petition of Dental Fix Rx LLC at 4 (filed Sept. 11, 2015) (emphasis added).

⁵² See *November 2 Order* ¶ 11.

⁵³ Petition of HomeoPet, LLC at p. 6 (filed June 13, 2016) (emphasis added).

- Posture Pro, Inc. asserted in its petition (which the Bureau granted) that it “*did not understand* the opt-out notice requirement to apply to solicited faxes.”⁵⁵
- Buccaneers Limited Partnership asserted in its Reply Comments in support of its petition (which the Bureau granted) that it “*did not, in fact, understand* that it had to comply with the Opt-out Requirement for solicited faxes.”⁵⁶
- Amatheon, Inc. asserted in its petition (which the Bureau granted) that it “*did not believe* any of their solicited facsimiles required opt-out notices.”⁵⁷
- Virbac Corporation asserted in its petition (which the Bureau granted) that it “*did not believe* that any of its solicited facsimiles required opt-out notices.”⁵⁸
- Synchrony Bank and Synchrony Financial asserted in their petition (which the Bureau granted) that they “*did not know* they had to abide by” the opt-out notice requirements for solicited faxes.⁵⁹
- Warner Chilcott Corporation asserted in its petition (which the Bureau granted) that it was operating pursuant to “a *misplaced belief* that the opt-out notice requirement does not apply to solicited fax advertisements.”⁶⁰

The Bureau did not read these petitions as seeking a waiver by “admit[ting] a lack of awareness of the TCPA and/or Commission rules requiring them to include opt-out notices on faxes sent to recipients who provided prior express permission or consent.”⁶¹ Accordingly, the

⁵⁴ Petition of North American Bancard, LLC at pp. 7-8 (filed Aug. 16, 2016) (emphasis added).

⁵⁵ Petition of Posture Pro, Inc. at p. 6 (filed Feb. 23, 2016) (emphasis added).

⁵⁶ Reply Comments of Buccaneers Limited Partnership at 13-14 (filed May 20, 2016) (emphasis added).

⁵⁷ Petition of Amatheon, Inc. at 2 (filed June 3, 2016) (emphasis added).

⁵⁸ Petition of Virbac Corporation at p. 2 (filed Nov. 9, 2015) (emphasis added).

⁵⁹ Petition of Synchrony Bank and Synchrony Financial at p. 4 (filed June 13, 2016) (emphasis added).

⁶⁰ Petition of Warner Chilcott Corporation at 6, 7 (no filing date identified) (emphasis added).

⁶¹ See *November 2 Order* ¶ 21. Furthermore, the Comments submitted in opposition to the petitions filed by North American Bancard, LLC and Posture Pro, Inc. explicitly argued that the petitions should be denied because the petitioners allegedly admitted “ignorance of the law.” Comments of West Loop Chiropractic & Sports Injury Center, Ltd. and West Loop Health & Sports Performance Center, LLC at p. 4 (filed Sept. 9, 2016); Comments of Carradine Chiropractic Center, Inc. at pp. 4-6 (filed April 8, 2016). The arguments presented in these Comments were also raised in the Comments submitted in opposition to the Petplan Petition. Compare Comments of West Loop Chiropractic at p. 4, and Comments of Carradine Chiropractic at pp. 4-6, with Comments of Shaun Fauley at pp. 1, 8-9 (filed Dec. 8, 2015). Accordingly, the Bureau’s decision to deny Petplan’s Petition and grant the other petitions at issue in the *November 2 Order* that contained virtually identical language cannot be rationalized by attempting to draw distinctions between the arguments submitted in opposition to the petitions.

Bureau should reconsider its reading of Petplan’s Petition because the Petplan Petition included virtually identical language.

Moreover, in both the *December 9 Order* and the *November 2 Order*, the Bureau granted waivers to petitioners who, *unlike* Petplan, affirmatively and unmistakably stated that they were “unaware” of “the TCPA and/or Commission rules.” For example:

- Costco Wholesale Corporation asserted in its petition (which the Bureau granted in the *December 9 Order*) that it “*was not aware* of the need to seek a waiver from compliance with the Regulation.”⁶²
- Cochran Wholesale Pharmaceuticals, Inc. asserted in its petition (which the Bureau granted in the *November 2 Order*) that it was sued in April and May of 2016 for purported violations of Section 64.1200(a)(4)(iv) , and that “[u]ntil these lawsuits were filed . . . , it *was not aware* of the need to seek a retroactive wavier.”⁶³
- Educational Testing Service asserted in its reply in support of its petition (which the Bureau granted in the *November 2 Order*) that it was not served with a copy of a complaint alleging violations of Section 64.1200(a)(4)(iv) until August 2015, and that “[I]ike other petitioners, [it] needed time to hire outside counsel and conduct its initial investigation into the facts alleged in the Complaint and *was not aware* of the need to seek a retroactive waiver until it had done so.”⁶⁴

CONCLUSION

Petplan respectfully requests that the Bureau reconsider the determinations made in its *November 2 Order* as applied to Petplan’s Petition and grant this Petition for Reconsideration as well as the underlying request for a retroactive waiver from liability under 47 C.F.R. § 64.1200(a)(4)(iv).

⁶² Petition of Costco Wholesale Corporation at 3 (filed July 10, 2015) (emphasis added).

⁶³ Petition of Cochran Wholesale Pharmaceuticals, Inc. at 4 (filed June 14, 2016) (emphasis added).

⁶⁴ Reply of Educational Testing Service at 3 (filed Apr. 15, 2016) (emphasis added).

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Respectfully submitted,

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