

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

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

**DR. ROBERT L. MEINDERS, D.C., LTD. COMMENTS ON THE
EMERY WILSON CORPORATION d/b/a STERLING
MANAGEMENT SYSTEMS' PETITION FOR WAIVER**

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TABLE OF CONTENTS

	Page
EXECUTIVE SUMMARY	iii
FACTUAL BACKGROUND	2
ARGUMENT	4
I. No good cause exists to grant the Emery waiver because Emery is not “similarly situated” to other petitioners who were granted waivers.....	4
II. The Commission should clarify whether the standard for a waiver from §64.1200(a)(4)(iv) is <i>actual</i> confusion or <i>presumed</i> confusion, but the Emery petition fails either standard.	6
A. If the standard is <i>actual</i> confusion, the Emery petition should be denied because Emery does not claim confusion.	8
B. If the standard is <i>presumed</i> confusion, then the presumption has been rebutted by Emery’s own statements.	8
CONCLUSION.....	10

EXECUTIVE SUMMARY

On October 30, 2014, the Commission granted “retroactive waivers” of 47 C.F.R. § 64.1200(a)(4)(iv)—the regulation requiring opt-out notices on fax advertisements sent with “prior express invitation or permission”—to defendants in private TCPA actions and allowed “similarly situated” persons to seek waivers. The Commission stressed that “all future waiver requests will be adjudicated on a case-by-case basis” and that the Commission did not “prejudge the outcome of future waiver requests in the order.” The Emery Wilson Corporation d/b/a Sterling Management Systems (“Emery”) petition, requesting a similar retroactive waiver, is the first of the follow-on waiver petitions contemplated by the October 30 Order. The Commission should deny the Emery petition.

No good cause exists here to grant Emery’s request for a retroactive waiver. First, the Commission should deny Emery’s request for a waiver because Emery does not claim that it sent faxes with the “prior express permission or invitation” (“consent”), and therefore Emery is not “similarly situated” to other petitioners who were granted waivers. Emery makes claims regarding its established business relationships with fax recipients, and erroneously contends that because it has fax recipients’ fax numbers, consent must have been given. These facts are not sufficient to establish that Emery obtained “prior express permission” to send advertisements by fax to recipients (sometimes referred to herein as “solicited faxes”). Emery does not meet the requirement for a waiver because the waiver only applies to petitioners who were confused about whether or not opt-out notices were

required on faxes sent with the “prior express permission” of recipients, not established business relationships.

Second, if the Commission entertains the petition, it should clarify the standard for a retroactive “waiver” from 47 C.F.R. § 64.1200(a)(4)(iv). The October 30 order is unclear whether a petitioner must show it was *actually* confused about the law or whether the Commission will *presume* the petitioner was confused in the absence of evidence that the petitioner was merely ignorant of the law or had actual knowledge of the opt-out rules. Regardless of the standard, the Commission should deny the Emery petition.

If the standard is actual confusion, the Commission should refuse to issue a waiver because Emery does not claim it was “confused” about the law. If the standard is a rebuttable presumption of confusion, then the Commission should consider Emery’s own statements in its petition that indicate Emery was merely ignorant of the law, not confused, as rebuttal to any presumption of confusion. Finally, if the Commission does not determine that Emery’s own statements rebut a presumption of confusion, then the Commission should allow Plaintiff to confirm through investigation, either before the Commission or in court, that Emery was not aware of the opt-out rules when it sent its faxes.

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Commenter Dr. Robert L. Meinders, D.C., Ltd. is the plaintiff in a private TCPA action pending in the United States District Court for the Southern District of Illinois against petitioner Emery Wilson Corporation d/b/a Sterling Management Systems (“Emery”).¹ Emery filed a petition on November 10, 2014, seeking a “retroactive wavier [sic]” of the regulation requiring an opt-out notice on fax advertisements sent with “the prior express consent or permission of the recipients or their agents”.²

The Commission issued an order on 24 similar petitions on October 30, 2014 (the “Opt-Out Order”).³ That order rejected the challenges to the validity of the Commission’s ability to promulgate and enact the opt-out regulation, but granted

¹ See Meinders v. Emery Wilson Corporation, et al., 14-cv-00596 (S.D. Ill.).

² Petition of the Emery Wilson Corporation d/b/a Sterling Management Systems for Waiver, CG Docket Nos. 02-278, 05-338 (filed Nov. 10, 2014) (the “Emery petition”).

³ *In re Rules & 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, FCC 14-164 (rel. Oct. 30, 2014) (“Opt-Out Order”).

retroactive “waivers” purporting to relieve the 24 petitioners of liability in private TCPA litigation.⁴ The Opt-Out Order allowed other “similarly situated” parties to request waivers, and invited comments on those requests.⁵ Plaintiff requests the Commission deny Emery’s petition for a waiver request.

FACTUAL BACKGROUND

Few of the relevant facts are known to Plaintiff, since discovery has only just commenced and Emery has not yet responded to some of Plaintiff’s discovery requests. On April 3, 2014, Plaintiff filed a Class Action Complaint in the Circuit Court of St. Clair County, Illinois, challenging Emery’s practice of faxing unsolicited advertisements in violation of the TCPA.⁶ On May 23, 2014, Emery removed the action to the United States District Court for the Southern District of Illinois.⁷ The complaint alleges Emery sent an unsolicited fax ad to Plaintiff on March 2, 2013, and another unsolicited fax ad sometime shortly thereafter (advertising upcoming June 2014 seminars).⁸ Plaintiff asserts that it did not invite or give permission to Emery, or anyone, to send the faxes to him.⁹ Plaintiff alleges, on information and belief, that Emery sent fax advertisements to more than 39 other recipients without

⁴ *Id.* ¶¶ 19–20, 32 and n.70.

⁵ *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Nov. 28, 2014) (“Public Notice”) (“With this Public Notice, we seek comment on the Petitions as described below. Specifically, the Petitioners seek retroactive waivers of the opt-out notice requirement for fax ads they sent where prior express invitation or permission had been obtained from the recipient”).

⁶ Class Action Complaint.

⁷ Notice of Removal, dated May 23, 2014, Doc. 5.

⁸ Class Action Complaint, ¶¶ 11, 13.

⁹ *Id.* at ¶¶ 12, 14.

first receiving the recipients' "express permission or invitation."¹⁰ Plaintiff further alleges that the faxes do not contain the proper opt-out notice pursuant to the TCPA, as the faxes completely omit any information by which a recipient can request to opt-out.¹¹

Emery answered the Class Action Complaint on June 13, 2014.¹² Emery admitted that it sent the two faxes to Plaintiff, but denies that it did not have Plaintiff's consent to send him faxes.¹³ Emery also denies sending fax advertisements to others without their prior express permission or invitation.¹⁴ Emery further denies that its failure to include an opt-out notice violated the TCPA.¹⁵

The parties issued written discovery in September 2014. Documents produced by Emery confirm that Plaintiff attended training seminars in 1987 hosted by Emery. Emery has not responded to additional outstanding discovery issued by Plaintiff.

On November 14, 2014, Emery filed its petition with the Commission. The petition claims that Plaintiff was a "past customer," having attended seminars offered by Emery in 1987, but does not provide any facts indicating that Plaintiff, or

¹⁰ *Id.* at ¶ 16.

¹¹ *Id.* at ¶¶ 15, 22(g), 22(h), 32.

¹² Answer to Class Action Complaint, dated June 13, 2014 ("Answer"), Doc. 9.

¹³ *Id.* at ¶¶ 11-14.

¹⁴ *Id.* at ¶ 16.

¹⁵ *Id.* at ¶ 32.

any other class member, gave “prior express permission” to Emery to send the fax advertisements at issue.¹⁶ Emery contends that it does not solicit new customers with fax advertising and that it does not purchase lists of fax numbers from third-parties.¹⁷ Emery thus argues that “[t]he only logical conclusion is that the plaintiff in the *Meinders* case voluntarily provided his fax number.”¹⁸ Critically, however, Emery does not contend that it ever requested and secured Plaintiff’s or any other class members’ express permission to send fax advertisements. Instead, Emery contends that its prior business relationship with Plaintiff indicates consent.¹⁹

ARGUMENT

I. No good cause exists to grant the Emery waiver because Emery is not “similarly situated” to other petitioners who were granted waivers.

In its Opt-Out Order, the Commission found that “good cause” existed to grant the 24 waivers because an “inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission.”²⁰ No good cause exists to grant the Emery petition because Emery does not claim that it obtained “prior express permission” to send advertisements by fax, as other petitioners did.

¹⁶ *Id.*

¹⁷ Emery petition at 5.

¹⁸ *Id.*

¹⁹ *See id.*

²⁰ Opt-Out Order ¶24.

Emery does not assert that it sent the faxes with the “prior express permission” of recipients. Instead, Emery asserts facts regarding its established business relationships with fax recipients, including Plaintiff, and erroneously contends that because it had fax recipients’ fax numbers, consent must have been given.²¹ It is well established that “[e]xpress permission to receive a faxed ad requires that the consumer understand that by providing a fax number, he or she is agreeing to receive faxed advertisements.”²² Merely obtaining or confirming a fax number does not suffice.²³ Emery’s assumption that its business relationship with Plaintiff in 1987 established that it had Plaintiff’s consent to send Plaintiff advertisements by fax 16 years later does not indicate that Emery sent its faxes with the “prior express permission” of Plaintiff. Moreover, Plaintiff denies giving Emery consent to send it faxes.

Emery’s waiver request is thus based on the erroneous assertion that it was not required to include opt-out notices on faxes sent to persons with whom it had established business relationships. This is not grounds for a waiver. The Commission underscored that the “waiver does not extend to a similar requirement to include opt-out notices on fax ads sent pursuant to an established business relationship, as there is no confusion regarding the applicability of this requirement

²¹ Emery petition at 5 (“The only logical conclusion is that the plaintiff in the *Meinders* case voluntarily provided his fax number.”).

²² *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order adopted June 26, 2003, and released July 3, 2003, at ¶¶ 193, 18 FCC Rcd. at 29 (2003).

²³ *Id.*

to such faxes.”²⁴ Moreover, the Commission emphasized “that simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.”²⁵ Thus Emery’s confusion here does not constitute “good cause” to grant it a waiver of the requirement that faxes sent with “prior express permission” contain opt-out notices.

Without asserting that it sent faxes with the “prior express permission” of recipients, Emery’s arguments that good cause exists to grant its waiver request are inapplicable and should be denied.

II. The Commission should clarify whether the standard for a waiver from §64.1200(a)(4)(iv) is *actual* confusion or *presumed* confusion, but the Emery petition fails either standard.

The public notice seeks comments “consistent with the guidelines set forth in the *Fax Order*.” But it is unclear what the guidelines are. The Opt-Out Order states that the lack of notice in the 2005 rulemaking and an inconsistent footnote in the 2006 *Junk Fax Order* “led to confusion or misplaced confidence on the part of petitioners,” justifying a waiver.²⁶ It also states these factors “caused businesses mistakenly to believe that the opt-out notice requirement did not apply.”²⁷ These statements suggest the Commission found that the 24 petitioners covered by the order were entitled to waivers because, prior to sending their faxes, they did in fact

²⁴ Opt-Out Order ¶2, n. 2. See also *FCC Confirms Opt-Out Notice Requirements Applicable to All Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Oct. 30, 2014) (“Public Notice Confirmation”), n. 6.

²⁵ Opt-Out Order ¶26.

²⁶ Opt-Out Order, ¶26.

²⁷ *Id.* ¶27.

(1) receive inadequate notice, (2) read the regulation and the footnote, and (3) suffer actual “confusion or misplaced confidence” as a result.²⁸

At the same time, however, the order states these factors “*may have* contributed to confusion or misplaced confidence,” that the combination of factors “*presumptively* establishes good cause for retroactive waiver,” and that “nothing in the record here demonstrat[es] that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement . . . but nonetheless failed to do so.”²⁹ The Commission also emphasized that “simple ignorance” of the law “is not grounds for a waiver.”³⁰ These statements suggest the Commission found the regulation objectively “confusing,” giving rise to a *presumption* that the 24 petitioners were “confused,” and that Plaintiffs failed to rebut that presumption with evidence the petitioners knew opt-out notices were required or were simply ignorant of the regulation.

Plaintiff’s counsel expect a significant number of TCPA defendants to petition the Commission for waivers from § 64.1200(a)(4)(iv) in the next six months. The Commission should clarify the standard under which it issued its waivers from § 64.1200(a)(4)(iv) for both the ensuing fax-waiver petitions, as well as the many non-fax-waiver petitions the Commission will be presented with over the coming months.

Regardless of the standard, however, the Emery petition must be denied.

²⁸ Plaintiff does not concede that any of the 24 petitioners met these standards.

²⁹ Opt-Out Order ¶¶25-26 (emphasis added).

³⁰ *Id.* ¶26.

A. If the standard is *actual* confusion, the Emery petition should be denied because Emery does not claim confusion.

Emery does not claim it was “confused” or had “misplaced confidence” about whether opt-out notice was required when it sent two fax advertisements to Dr. Meinders in the spring of 2013. Emery claims that the Commission was concerned about “industry-wide confusion” regarding whether opt-out notices were required on solicited faxes and recites the Commission’s determination that the regulation may have caused confusion, but it does not claim, at any point in time, that *it* was confused about whether opt-out notices were required on solicited faxes.³¹ If the standard is actual confusion, the Emery petition should be denied on this ground alone.

B. If the standard is *presumed* confusion, then the presumption has been rebutted by Emery’s own statements.

As argued above, the Emery petition itself indicates that Emery is confused about what constitutes “prior express permission” to send fax ads, but was not confused about whether solicited faxes required opt-out notices. If the standard for a waiver in this case is that a petitioner is considered “presumptively” confused unless the plaintiff can show the petitioner was simply ignorant of the law or whether it understood that it did, in fact, have to comply with the opt-out notice requirement, then Plaintiff argues that Emery’s own admissions in its petition rebut any presumption that Emery was confused about whether solicited faxes require opt-out notices.

³¹ Emery petition at 3.

If the Commission is not persuaded that Emery's own admissions in its petition rebut the presumption of confusion about whether opt-out notices were required on solicited faxes, Plaintiff requests that the Commission either engage in fact-finding proceedings to determine what Emery knew about the opt-out notice rules or stay a ruling on the Emery petition until Plaintiff conducts discovery regarding Emery's knowledge, or lack thereof, prior to sending its faxes.

While the waiver petition itself casts serious doubt on the premise that Emery was confused about the opt-out rules, but instead indicates that Emery was simply ignorant of the law, Plaintiff does not have *evidence* to rebut a presumption that Emery was confused when it sent the faxes at issue. The underlying lawsuit was filed earlier this year, and while discovery has commenced, Emery has not responded to certain outstanding discovery issued by Plaintiff that will assist determining whether Emery was aware of the opt-out notice requirements before it sent the faxes at issue and on what basis Emery claims it had consent to send advertisements by fax.

The Emery petition does not state whether it was aware of the opt-out notice rules before it sent its faxes. Plaintiff has a due process right to investigate whether Emery was aware of the opt-out notice rule if that factor is dispositive of its private right of action under the TCPA.³² The Commission may initiate proceedings "for the

³² See, e.g., *Applications of Comcast Corp. and Time Warner Cable Inc. For Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57; *Applications of AT&T, Inc. and DIRECTV For Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Dissenting Statement of Commissioner Pai (arguing Commission violated petitioners' "due process rights" by denying "serious arguments that merit the Commission's thoughtful consideration" in "cursory two-page order").

purpose of obtaining information necessary or helpful in the determination of its policies”.³³ Here, because the Emery petition seeks a determination of the Commission’s policies regarding retroactive waivers regarding opt-out notices, Plaintiff respectfully requests that before the Commission attempts to absolve Emery of liability in Plaintiff’s lawsuit prior to any fact-finding, the Commission either hold such proceedings as described, or stay a ruling on the Emery petition until Plaintiff has conducted discovery regarding Emery’s knowledge of the opt-out rules.

CONCLUSION

The Commission should deny the Emery petition for waiver because Emery does not claim or establish that it obtained prior express permission to send persons advertisements by fax. If the Commission entertains the petition, it should clarify whether the standard for a waiver is *actual* confusion or *presumed* confusion. If actual confusion is required, the Commission should deny the petition because Emery does not claim it was confused. If the standard is presumed confusion that may be rebutted with evidence of ignorance of the law or an intentional violation, the Commission should deny the petition because Emery’s own statements rebut that presumption. In the event the Commission does not find a presumption rebutted, Plaintiffs requests the Commission allow Plaintiff to investigate whether Emery was aware of the opt-out rules, either before the Commission or in court, before the Commission purports to absolve Emery of civil liability on that basis.

³³ 47 C.F.R. § 1.1.

Respectfully submitted,

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