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

| | | |
|---|---|---|
| In the matter of: | ) | CG Docket No. 02-278 |
| | ) | |
| Petition of Amicus Mediation & Arbitration Group, Inc., and Hillary Earle for Waiver of the "Opt Out" Requirement Pursuant to FCC Order 14-164 | ) | CG Docket No. 05-338 |

# REPLY COMMENTS OF AMICUS MEDIATION & ARBITRATION GROUP AND HILLARY EARLE IN SUPPORT OF PETITION FOR WAIVER


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Dated: December 19, 2014

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## EXECUTIVE SUMMARY

Amicus Mediation & Arbitration Group, Inc. and Hillary Earle (collectively "Amicus" or "Amicus Petitioners") submitted a Petition for Waiver Regarding 47 C.F.R. § 64.1200(a)(4)(iv) with respect to faxes sent with prior express permission of the recipient, pursuant to 47 C.F.R. § 1.3, as a "similarly situated party" to those Petitioners granted waiver by the Federal Communications Commission's ("Commission" or "FCC") recent Order. *See* Order, CG Docket Nos. 02-278, 05-338, FCC 14-164 (Oct. 30, 2014) ("FCC 14-164" or "FCC Opt-Out Order"), ¶ 1.

Roger H. Kaye and Roger H. Kaye, MD PC (the "Kaye Commenters") have submitted Comments regarding Amicus's Petition for Waiver.[1] In these Comments, the Kaye Commenters contend that the FCC does not have the authority to grant the requested waiver, and that Amicus has not shown that it deserves the requested waiver in any event. *See* Kaye's Comments, *generally*.

Kaye's Comments are without merit. First, the FCC's authority to grant waiver "at any time," as well as its authority to interpret its regulations, is well-established, and exercise of that authority is not only permissible, but granted deference. Second, Amicus has demonstrated that, because of the specific circumstances and public policy concerns involved in this matter, Amicus' Petition for Waiver should be granted.

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[1] *See* Bais Yaakov of Spring Valley's Comments on ACT, Inc. Petition Seeking "Retroactive Waiver" of the Commission's Rule Requiring Opt-Out Notices on Fax Advertisements Sent with Permission, CG Docket Nos. 02-278, 05-338 (Dec. 12, 2014) ("Kaye's Comments"). It should be noted that a "corrected" version of these Comments was re-filed on December 15, 2014, after the due date for Comments. All cites to Kaye's Comments are to the original filed Comments.

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**PETITION FOR WAIVER REGARDING 47 C.F.R. § 64.1200(a)(4)(iv)**

Petitioners, Amicus Mediation & Arbitration Group, Inc., and Hillary Earle (collectively "Amicus" or "Amicus Petitioners"), respectfully submit these Reply Comments in response to the comments to the Federal Communications Commission's ("Commission" or "FCC") Public Notice[2] seeking comment on Petitions concerning Petitioners' (including Amicus') requests for retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv), as described in the Commission's recent Order at FCC 14-164, ¶¶ 2, 30.

## I. INTRODUCTION

The Kaye Commenters contend that the FCC does not have the authority to grant the requested waiver and that Amicus has not shown that it deserves the requested waiver in any event. Kaye's Comments are without merit. First, the FCC has the well-established authority to grant waivers "at any time" and to interpret its regulations, and exercise of this authority is not an abrogation or infringement upon the private right of action clause of the TCPA. Second, Amicus has demonstrated the specific circumstances and public policy concerns involved in this matter,

[2] *See* Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Petitions For Waiver of the Commission's Rule on Opt-Out Notices on Fax Advertisements, CG Docket Nos. 02-278, 05-338, DA 14-1717 (Nov. 28, 2014).

and that these circumstances show that Amicus' Petition for Waiver should be granted. As such, Amicus requests that its Petition for Waiver, excusing Amicus from compliance with 47 C.F.R. § 64.1200(a)(4)(iv) for any faxes sent by Petitioner with the recipient's prior express consent,[3] be granted.

## II. ARGUMENT

### A. The FCC Has Authority to Grant the Requested Waiver

The Kaye Commenters first argue that the FCC lacks the authority to "absolve [Amicus] of liability under TCPA causes of action" or to "do away with a private right of action passed by Congress," citing cases inapposite to the present circumstances. *See* Kaye's Comments, pp. 2, 6-7. By so arguing, the Kaye Commenters attempt to confuse the issue by obscuring what it is the FCC accomplishes when it grants a waiver.

The Commission's rules allow it "at any time" to waive the requirements of its regulations for good cause. *See* 47 C.F.R. § 1.3 (1996). "[A]n agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." *Keller Communs. v. FCC*, 130 F.3d 1073, 1076 (D.C. Cir. 1997), *quoting WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). The Commission may waive its rules if "particular facts would make strict compliance inconsistent with the public interest." *Keller Communs.*, 130 F.3d at 1076, *quoting Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). The FCC's "weighing of the 'public interest' in considering a waiver request is thus similar to the type of 'public interest' or 'reasonableness' determinations that the Supreme Court has emphasized require administrative—rather than judicial—review under the primary jurisdiction doctrine." *Ellis v.*

[3] Defined by the Kaye Commenters as "permission-based fax advertisement."

*Tribune TV Co.*, 443 F.3d 71, 84 (2d Cir. 2006) (Second Circuit Court of Appeals ruled that District Court erred in not granting a stay and allowing the FCC to decide the defendant's pending waiver petition, because the district court's decision involved a substantial danger of establishing inconsistent rulings on an issue within the FCC's expertise and discretion).

Thus, not only is the FCC's consideration of waiver requests permitted, but it is *proper* for the FCC to determine if such waiver serves the public interest. *See id.* That was precisely what the FCC has determined with respect to faxes sent with the recipient's prior express consent.

The grant of a waiver, pursuant to 47 C.F.R. § 1.3, does not abrogate the TCPA clause providing for a private right of action, nor is it a determination of a party's liability under the regulations promulgated by the FCC; rather, such a determination is the lawful consideration of public policy and the interpretation of the FCC's own regulations, which is permitted and granted significant deference. Indeed, nothing in Section 227(b)(3) of the TCPA, which creates a private right of action for violations of Section 227(b) or the accompanying regulations, limits the FCC's well-established authority to interpret or waive its regulations. *See* 47 U.S.C. § 227(b)(3).

The Kaye Commenters attempt to support their contention that the FCC may not grant a waiver in this case with a line of case law disallowing federal agencies from issuing regulations that directly conflict with the provisions of the applicable statute,[4] and from determining the scope

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[4] The Kaye Commenters cite *Brown v. Gardner*, 513 U.S. 115 (1994) to support their contention that the FCC cannot take away a plaintiff's private right of action through administrative action. *See* Kaye's Comments, p. 6. First, as explained below, the FCC's grant of a waiver does not "take away" or "abrogate" the private right of action provision in the TCPA. Second, the *Brown* case stood merely for the well-recognized principle that an agency cannot impose requirements by regulation that *directly conflict* with the statute as enacted by Congress. *Brown*, 513 U.S. at 116-121. Thus, in *Brown*, the court held that a regulation requiring proof of fault in order to recover was improper where the statute required *only* that the claimant's injury did not result from willful misconduct. *Id.*

of judicial power vested by statutes establishing private rights of action. *See* Kaye's Comments, pp. 6-7. Not only is this case law inapplicable to the issue at hand, but the FCC has already addressed and rejected this argument.[5]

The Kaye Commenters rely heavily upon *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990) to support their contention that the FCC cannot grant a waiver that would in any way affect pending cases in federal district courts. *See* Kaye's Comments, p. 7. However, the holding in *Adams Fruit* does not support the Kaye Commenters' contentions, and actually stands for a much narrower proposition, as noted by the U.S. Supreme Court in a later case (which case, inexplicably, the Commenters also purport to rely upon):

> *Adam's Fruit* stands for the modest proposition that the Judiciary, not any executive agency, determines "the scope"—including the available remedies—"of judicial power vested by" statutes establishing private rights of action. *Adams Fruit* **explicitly affirmed** the Department [of Labor]'s authority to promulgate the **substantive standards enforced** through that private right of action.

*City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 n.3 (2013) (emphases added) (internal citations omitted), *quoting Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990).

Thus, while an agency may not determine whether a court has jurisdiction over a matter, or whether a certain remedy is appropriate or available to a private litigant, the agency does have authority to provide substantive interpretation of statutes and accompanying regulations, and such

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[5] "Finally, we reject any implication that by addressing the petitions filed in this matter while related litigation is pending, we have 'violate[d] the separation of powers vis-à-vis the judiciary,' as one commenter has suggested. By addressing requests for declaratory ruling and/or waiver, the Commission is interpreting a statute, the TCPA, over which Congress provided us authority as the expert agency. Likewise, the mere fact that the TCPA allows for private rights of action based on violations of our rules implementing that statute in certain circumstances does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply." *See* FCC Opt-Out Order, ¶21.

interpretation is offered great deference. *City of Arlington*, 133 S. Ct. at 1871-72.[6] Simply put, by granting a waiver, the FCC is, in interpreting its regulations accompanying the TCPA and, considering public policy, acknowledging that certain regulations were subject to confusion and misplaced confidence, which constitutes special circumstances meriting waiver.

Lastly, the Kaye Commenters cite to *Bowen v. Georgetown University Hospital* and *Landgraf v. USI Film Products* to support their contention that an agency "does not have the power to alter the legal consequences of past actions." *See* Kaye's Comments, pp. 7-8. This contention is also groundless. *Bowen* stands for the proposition that, without express authorization, an agency cannot make retroactive *regulations*, but specifically states that case-by-case retroactive *adjudications* are permissible. *Bowen*, 488 U.S. 204, 209 (1988). Further, as discussed in *Landgraf*, this line of case law applies to the general proposition that statutes and regulations should ordinarily not be given retroactive effect because of the "unfairness of imposing *new* burdens on persons after the fact. Indeed, at common law a contrary rule applied to statutes that merely *removed* a burden . . . ." *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994) (first emphasis added). Thus, neither case substantiates the Kaye Commenters' position, which is simply unsupportable.

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[6] The Kaye Commenters also rely upon *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). *See* Kaye's Comments, p. 7. However, *Natural Resources* merely states that the EPA could not establish an affirmative defense by regulation which would limit a court to assessing penalties against a party *only if* violators fail to meet the burden specified by the affirmative defense, where the applicable statute allowed a court to apply "any appropriate" civil remedies. *Nat'l Resources Defense Council*, 749 F.3d at 1062-63. *Natural Resources*, therefore, merely states that it is within the court's purview to determine which civil remedies are appropriate, when the applicable statute expressly gives that right to the court. *Id.* Most importantly, the two statutory schemes compared here are extremely different, and the EPA did not rely upon an authority similar to the broad, well-established waiver authority available to the FCC.

**B. Amicus Has Satisfied Their Burden Demonstrating Entitlement to Waiver**

The Kaye Commenters next contend that the Amicus Petitioners have not satisfied their burden to show their entitlement to their requested waiver. First, the Kaye Commenters have conflated the requirements of a Petitioner's request for waiver and the responsibility of the FCC in granting a waiver. Second, Amicus has submitted sufficient evidence, similar (if not substantially identical) to the evidence submitted by the Petitioners who have already been granted waiver by the FCC, to entitle Amicus to waiver of the opt-out requirements.

The Kaye Commenters cite several cases to define the "burden" which a petitioner must satisfy to be entitled to a waiver. *See* Kaye's Comments, pp. 8-9. However, they confuse and place on the petitioner both the petitioner's burden, as well as the FCC's burden for articulating its reasons for waiver upon judicial review. *See id.* In reality, the standard is that the FCC is required to give petitions for waiver a "hard look," but is not required to "process in depth" petitions which are only "generalized pleas," or "hollow claims." *WAIT Radio*, 418 F.2d at 1157 n.9. The petitioner asking for waiver is required to "articulate a specific pleading, and adduce concrete support, preferably documentary." *Id.* ("[A]llegations . . . made by petitioners, stated with clarity and accompanied by supporting data, are not subject to perfunctory treatment, but must be given a 'hard look.'")

The Kaye Commenters' additional case law references point to the FCC's responsibility, upon grant or denial of the waiver petition, to articulate clearly the special circumstances involved, as well as why the waiver would better serve the public interest. *See Kaye's Comments*, pp. 8-9, *citing NetworkIP, LLC v. F.C.C.*, 548, F.3d 116 (D.C. Cir. 2008); *Northeast Cellular Telephone Co., L.P. v. F.C.C.*, 897 F.2d 1164 (D.C. Cir. 1990); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946 (D.C.

Cir. 1986). In essence the Kaye Commenters seek to recast as a new burden on Petitioner the very issues that the FCC carefully explained in its initial decision to grant waivers.

As detailed in the FCC's Opt-Out Order granting waiver, the "specific combination of factors"—that is "the inconsistency between a footnote contained in the *Junk Fax Order* and the rule[,]" as well as the fact that "the notice provided did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient"—"*presumptively* establishes good cause for retroactive waiver of the rule." FCC 14-164, ¶¶ 24-26 (emphasis added). That is, the combination of these two factors may have "contributed to confusion or misplaced confidence" regarding "the applicability of this requirement to faxes sent to those recipients who provided prior express permission." *Id.* at ¶¶ 24-25.

The Kaye Commenters insist that Petitioners have not demonstrated their entitlement to a waiver because Petitioners have not proven "actual confusion[.]" *See* Kaye's Comments, pp. 5, 9-10. This argument merely invokes the well-established inability to prove a negative, a point recognized by the FCC in its initial ruling: the FCC's Opt-Out Order specifies that special circumstances above may have led to "confusion ***or misplaced confidence*** regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission." FCC 14-164, ¶ 24. This "confusion or misplaced confidence" inevitably permeated the legal landscape in which the Petitioners operated, regardless of what they may actually have believed. Had sufficient clarity existed, the Petitioners' "actual" understanding may have been entirely different, and its actions legally compliant.

Amicus notes further that there is no evidence that the Petitioners already granted waiver by the FCC Opt-Out Order were "actually confused" by the subject regulations. Quite clearly,

the FCC presumed confusion or misplaced confidence by the "special circumstances" outlined in its Order, circumstances that are independent of what the Petitioners may actually have believed at the time. Thus, the "special circumstances" entitling Amicus to a waiver were already presumptively established and articulated in the FCC Opt-Out Order. *See id.*

Moreover, while the Kaye Commenters make much of Hillary Earle's lack of familiarity with the acronym for the Telephone Consumer Protection Act, the fact remains that inconsistent language, as well as a lack of notice of the provision's applicability to solicited faxes, led to confusion and misplaced confidence in the fax regulatory system as a whole. Given the confusion surrounding the regulations that purportedly apply to solicited faxes, Hillary Earle had misplaced confidence that her fax activities—which consisted mostly of general business activities, such as communicating with and sending relevant business documents (contracts and invoices) to clients who expressly requested receipt of such faxes—were lawful.[7]

Similarly, the Kaye Commenters contend that Amicus has failed to provide concrete evidence, such as their "financial condition" and "insurance coverage" to show how Amicus will be affected by these lawsuits. *See* Kaye's Comments, p. 10. Such proof is simply not required. None of the Petitioners granted waiver by the FCC Opt-Out Order appear to have submitted financial records or similar evidence to the FCC for consideration. Rather, each Petitioner pled,

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[7] It should also be noted that the Kaye Commenters' contention that Hillary Earle's personal knowledge or lack thereof of the opt-out requirements of the TCPA at her deposition is determinative of whether there was confusion regarding the requirement of opt-out notices for solicited faxes, is misleading. It was a temporary law student who was an independent contractor that suggested the inclusion of, and language to be contained in, the opt-out notices that came to be included with Amicus' faxes. *See* Exhibit A, Excerpts of Deposition Transcript of Hillary Earle, at 80:17 to 81:13. Thus, Ms. Earle's personal knowledge is not conclusive or determinative in this matter and the Kaye Commenters cannot be allowed to hang their hat on a snippet of testimony wherein Ms. Earle struggles with an acronym. For all of the reasons explained above, had the FCC provided the greater clarity it now acknowledges was lacking, then the advice Ms. Earle received may have been entirely different.

as Amicus does, that they are the defendant in a TCPA private action suit, and liable for potentially millions of dollars in damages, which some Petitioners (Amicus included) supported with documentary evidence—specifically, the applicable Complaint in the TCPA action. According to the allegations in that complaint, Amicus is being subject to millions of dollars of potential damages for an alleged violation of a confusing regulation. The FCC *has already determined* that because of this consideration, the public interest would be better served by granting retroactive waiver of its requirement.

In sum, the Kaye Commenters' contentions lack support. Although repackaged, these issues have already been decided by the FCC, as described in its Opt-Out Order. Amicus has established the specific circumstances and public interest to be served in granting its Petition for Waiver.

## III. CONCLUSION

For the foregoing reasons, Kaye's Comments opposing Amicus' requested relief are without merit. Thus, Amicus requests a retroactive waiver excusing Amicus from compliance with 47 C.F.R. § 64.1200(a)(4)(iv) for any faxes sent by Petitioner with the recipient's prior express consent.

Respectfully submitted,

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*Counsel for Amicus Mediation & Arbitration Group, Inc., and Hillary Earle*

Dated: December 19, 2014

**Declaration of Hillary Earle**

I have read the foregoing Reply Comments in Support of Petition for Waiver, and I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief, formed after reasonable inquiry.

Executed on December 19, 2014

Hillary Earle

Hillary Earle
President
Amicus Mediation & Arbitration Group Inc.

# Exhibit A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

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ROGER H. KAYE AND ROGER H. KAYE, M.D. PC., ON BEHALF OF THEMSELVES AND ALL OTHERS SITUATED,

Plaintiff, Docket No. 13-CV-00347

-against-

AMICUS MEDIATIONS & ARBITRATION GROUP, INC. AND HILLARY EARLE,

Defendants.

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EXAMINATION BEFORE TRIAL of the Defendant, HILLARY EARLE, taken by the Plaintiff, pursuant to Order, held at the offices of Eckert Seamans Cherin & Merllot, LLC, 10 Bank Street, White Plains, New York 10601, on November 20, 2013, at 10:47 a.m., before, Stephanie Morano, a court reporter and a Notary Public of the State of New York.

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MAGNA LEGAL SERVICES

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www.MagnaLS.com

EARLE

Q. The times that faxes were sent out with a cover page, was there any opt out notice placed on the cover page by your company?

A. There wasn't and we weren't able to change anything to do that so no.

Q. When you say you weren't able to change anything to do that, what do you mean?

A. Well, since the lawsuit -- because the lawsuit specified page one being the fax cover page didn't have an opt out, we tried to be compliant and we contacted Rapid Fax to see if something can be put in the footer and it's not doable, but the short answer is no, there isn't anything on a fax cover page.

Q. You testified at some point one of the members of your staff or workers suggested that you put some sort of opt out language on the fax advertisement itself; is that correct?

A. Correct.

Q. Before you were given that advice, was there any type of opt language on any of your faxes that you sent out?

EARLE

A. I think there may have been, but then every time you create something like a new document, I might not have had it. In all instances I can't be sure.

Q. Do you know what the content of that opt out notice was?

A. No.

Q. Do you know whether it contained an 800 number to call up and request or a toll free to call and request being taken off a fax list?

A. I do not know.

Q. You don't know either way, it's possible it included that?

A. It's possible.

Q. Did you ever have an 800 number that someone could call to be taken off?

MR. BILDER: You have one right here.

MR. BELLIN: I'm asking the witness.

A. I was going to say that. We've always had our 800 number on here because it automatically comes up in our letterhead.

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2 C E R T I F I C A T E

3 I, STEPHANIE MORANO, hereby certify that the
4 Examination Before Trial of HILLARY EARLE was held before
5 me on the 20th day of November, 2013; that said witness
6 was duly sworn before the commencement of his testimony;
7 that the testimony was taken stenographically by myself
8 and then transcribed by myself; that the party was
9 represented by counsel as appears herein;
10 That the within transcript is a true record of
11 the Examination Before Trial of said witness;
12 That I am not connected by blood or marriage with
13 any of the parties; that I am not interested directly or
14 indirectly in the outcome of this matter; that I am not
15 in the employ of any of the counsel.
16 IN WITNESS WHEREOF, I have hereunto set my hand
17 this day of , 2013.
18
19 - - - - - - - - - - - -
20 STEPHANIE MORANO
21
22
23
24
25

## CERTIFICATE OF SERVICE

The undersigned certifies that on December 19, 2014, a copy of REPLY COMMENTS OF AMICUS MEDIATION & ARBITRATION GROUP AND HILLARY EARLE IN SUPPORT OF PETITION FOR WAIVER was served upon counsel of record at the following address via First Class Mail, postage prepaid:

Aytan Y. Bellin, Esq.
Bellin & Associates, LLC
85 Miles Avenue
White Plains, New York 10606

The undersigned also hereby certifies that on December 19, 2014, the undersigned caused to be filed, by mail and by electronic service, the foregoing REPLY COMMENTS OF AMICUS MEDIATION & ARBITRATION GROUP AND HILLARY EARLE IN SUPPORT OF PETITION FOR WAIVER with the Federal Communications Commission, Office of the Secretary, 445 12th Street, SW, Washington, D.C., 20554.

Geraldine A. Cheverko