

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

In the Matter of)	
)	
Petition for Waiver of)	CG Docket No. 02-278
Philadelphia Consolidated Holding Corp.,)	
Philadelphia Indemnity Insurance Company,)	
Tokio Marine Specialty Insurance Company ,)	
Maguire Insurance Agency, Inc.,)	CG Docket No. 05-338
Gillingham and Associates, Inc.,)	
PCHC Investment Corp.,)	
Liberty American Insurance Group, Inc.,)	
Liberty American Insurance Services, Inc.)	
Liberty American Select Insurance Company, and)	
Liberty American Insurance Company)	
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DEC 19 2014

Federal Communications Commission
Office of the Secretary

PETITION FOR WAIVER

Philadelphia Consolidated Holding Corp., on its behalf and on behalf of each of its subsidiaries, Philadelphia Indemnity Insurance Company, Tokio Marine Specialty Insurance Company, Maguire Insurance Agency, Inc., Gillingham and Associates, Inc., PCHC Investment Corp., Liberty American Insurance Group, Inc., Liberty American Insurance Services, Inc., Liberty American Select Insurance Company, and Liberty American Insurance Company (collectively, "PCH"), through their undersigned counsel, and pursuant to section 1.3 of the Federal Communications Commission's ("Commission") rules, 47 C.F.R. § 1.3, and the Commission's October 30, 2014, Waiver Order in the above-referenced dockets,¹ respectfully

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; CG Docket No. 02-278; 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*

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requests that the Commission grant PCH a retroactive waiver of the opt-out requirement set forth in sections 64.1200(a)(4)(iii)-(iv)² from the effective date of the regulation for any solicited facsimile sent by PCH on its own behalf or on behalf of a third party.³

In the *Waiver Order*, the Commission found good cause existed to grant individual retroactive waivers of the facsimile opt-out requirement set forth in section 64.1200(a)(4), and invited similarly situated entities to seek retroactive waivers of that rule. Like the petitioners in the *Waiver Order*, PCH only transmitted facsimiles with the express consent of the recipient, but PCH has been subject to a purported class action, and, thus, the potential for significant monetary damages, because such facsimiles did not contain the specific opt-out language as set forth in the Commission's rules. PCH now includes that opt-out language on all facsimile advertisements sent with express consent. Accordingly, and as demonstrated below, good cause exists to grant PCH a retroactive waiver of sections 64.1200(a)(4)(iii)-(iv) for each of the requested facsimiles that it transmitted.

I. BACKGROUND

PCH designs and markets various commercial property and casualty insurance products to businesses through insurance brokers. Plaintiff's attorneys have filed a purported class action

Express Permission, CG Docket No. 05-338, FCC 14-164 (rel. Oct. 30, 2014) (the "*Waiver Order*").

² 47 C.F.R. § 64.1200(a)(4)(iv) ("A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.")

³ One PCH entity, Maguire Insurance Agency, Inc. ("MIA"), conducted limited marketing on behalf of Fitness & Wellness Risk Purchasing Group and the James A. Grundy Agency, Inc. Any facsimile sent by MIA, whether in its name or on behalf of a third party, only would have been sent in response to a specific request from a previously contacted person or entity.

lawsuit against certain PCH entities⁴ for alleged violations of the Telephone Consumer Protection Act (“TCPA”) and the Commission’s implementing regulations. Plaintiff claims that PCH transmitted facsimile advertisements either without providing opt-out notices or with opt-out notices that were inadequate under the TCPA. However, as PCH demonstrated in its pleadings in that putative class action, PCH’s business model does not include the sending of unsolicited facsimiles for marketing purposes. Nor does PCH use so-called ‘mass faxing’ services that have been the subject of other lawsuits alleging violations of the TCPA. PCH also does not incentivize its marketing representatives to send facsimiles to current or prospective customers. Rather, the primary responsibility of PCH’s marketing representatives is to communicate with potential clients via telephone and in-person meetings. Marketing representatives do not send facsimiles unless a customer or prospect with whom PCH already has spoken specifically requests information via facsimile and voluntarily communicates a facsimile number.

Indeed, this is precisely the factual background with the plaintiff in the current class action litigation against PCH: a PCH marketing representative first contacted the plaintiff by phone. During that call, the plaintiff voluntarily provided its facsimile number and requested receipt of information via facsimile. Only at that time did PCH send information to the plaintiff. Moreover, the facsimile at issue in the complaint contained complete contact information for the PCH marketing representative, thus providing the recipient with ample notice of how to opt out of the receipt of any future facsimile. In the facsimile at issue in the complaint, PCH provided contact information, including full contact name of the marketing representative, their work

⁴ *True Health Chiropractic, Inc. v. Philadelphia Consolidated Holding Corp., Philadelphia Insurance Companies*, United States District Court (E.D. PA) Civil Action No.: 2:13-CV-03541-EL.

phone number, cell phone number, toll-free fax number, and mailing address.⁵ There was no need to opt-out, however, because PCH did not send the plaintiff any additional faxes; PCH only sent the one initial fax that was explicitly requested by the plaintiff. The class action has been stayed pending the Commission's issuance of the *Waiver Order* and PCH has requested that the action remain stayed while the Commission considers this Petition.

II. GOOD CAUSE EXISTS TO GRANT A RETROACTIVE WAIVER OF THE OPT-OUT REQUIREMENT TO PCH

Good cause exists to grant PCH a retroactive waiver of the opt-out language requirement set forth in section 64.1200(a)(4)(iii)-(iv). The Commission has the authority to waive any rule for good cause shown.⁶ The Commission has found that good cause exists if: "(1) special circumstances warrant a deviation from the general rule; and (2) the waiver would better serve the public interest than would application of the rule."⁷

In the *Waiver Order*, the Commission granted retroactive waivers to numerous petitioners of the opt-out requirement set forth in sections 64.1200(a)(4)(iii)-(iv). Specifically, the Commission granted a retroactive waiver of the requirement that faxes sent with the express permission of the recipient contain the precise opt-out language as mandated by section 64.1200 of the Commission's rules. In doing so, the Commission concluded that special circumstances existed to warrant deviation from the rule: specifically, the Commission found that an

⁵ See Attachment A (providing a copy of the facsimile at issue in the putative class action).

⁶ 47 C.F.R. § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown."). *Waiver Order*, at para. 22 (citing 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990)).

⁷ *Waiver Order*, at para. 23.

inconsistency between a footnote in the *Junk Fax Order*,⁸ which explicitly stated that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements,”⁹ and the text of the opt-out rule caused confusion regarding whether the opt-out requirement applied to facsimiles sent *at the request of the recipient*.¹⁰ The Commission also concluded that granting a retroactive waiver would serve the public interest, finding that strict application of the rule could subject “parties to potentially substantial damages, as well as possible liability for forfeitures under the Communications Act.”¹¹ Therefore, on balance, the Commission concluded that confusion regarding the rule warrants relief from potentially substantial consequences. The Commission also invited other parties affected by the confusion in the rules to seek similar retroactive waivers.¹²

In the present situation, good cause also exists to grant PCH a retroactive waiver of the opt-out language requirement set forth in the Commission’s rules. The same special circumstances found in the *Waiver Order*—the inconsistency between the footnote in the *Junk Fax Order* and the text of the rule, as applied to *solicited facsimiles*—warrant a deviation from the general rule in this case, thus satisfying the first prong of the good cause standard. PCH did not—and does not—send unsolicited facsimile advertisements. PCH does not purchase facsimile numbers to facilitate its marketing efforts, nor does it utilize so called ‘mass faxing’ services that have been the subject of other lawsuits alleging violations of the TCPA. Rather, PCH marketing representatives contact businesses by telephone or in-person visits, and only transmit facsimiles

⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, at note 154 (2006) (“*Junk Fax Order*”).

⁹ *Id.*

¹⁰ *Id.* at para. 24.

¹¹ *Id.* at para. 27.

¹² *Id.* at para. 30.

if the business's representative: (i) voluntarily provides a facsimile number to PCH; and (ii) specifically requests that PCH send information via facsimile. PCH's position is further bolstered because PCH does not send follow-up or additional faxes after sending the initial solicited fax. As a result, there is no need for the recipient to opt-out. In addition, on the first page of the facsimile sent to the plaintiff, PCH set forth detailed contact information for the marketing representative: contact name, work telephone number, cell phone number, a toll-free fax number (available 24 hours/day), and business mailing address. Facsimile recipients could have reached out to any of the contact numbers provided at any time to opt-out of the receipt of a facsimile. Since PCH only sent facsimiles in response to a specific request, and due to the conflicting language between the footnote in the *Junk Fax Order* and the Commission rule, special circumstances also exist in this case for the Commission to grant a retroactive waiver of the opt-out requirement to PCH.

It is also in the public interest for the Commission to grant to PCH a retroactive waiver of sections 64.1200(a)(4)(iii)-(iv). PCH is facing a lawsuit where the plaintiff seeks to pursue substantial remedies. In addition, absent the waiver, as the Commission has recognized, PCH could face significant fines and penalties under the TCPA simply because it did not include the precise opt-out language required by the Commission even though those facsimiles were sent with the express permission of the recipient. In contrast, the plaintiffs to the litigation have not suffered any harm; PCH only sent facsimiles to requesting businesses and did not send follow-up faxes. Further, PCH provided clear and unambiguous contact information, such that facsimile recipients if they had any concerns that follow-on would be sent could have requested removal from the contact list at any time. Moreover, since being named in the class action, PCH has inserted opt-out language consistent with the Commission's rules. Applying the strict confines

of the rule to PCH in this case, when PCH sent facsimiles only in response to a specific request, sent no additional faxes, and included detailed contact information, would be unjust and inequitable, and contrary to the public interest. Therefore, it is in the public interest to grant PCH the requested retroactive waiver.

Accordingly, since special circumstances are present to justify a waiver of the rule, and the public interest would be served by waiving the rule, PCH has demonstrated that good cause exists to grant it a retroactive waiver of the opt-out requirement for facsimiles set forth in section 64.1200 of the Commission's rules.

III. CONCLUSION

For the foregoing reasons, PCH respectfully requests that the Commission grant a retroactive waiver of the facsimile opt-out requirement set forth in sections 64.1200(a)(4)(iii)-(iv).

Respectfully submitted,



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December 19, 2014

ATTACHMENT A

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Thank you for your time!

Ashley Birchmeyer, ARM
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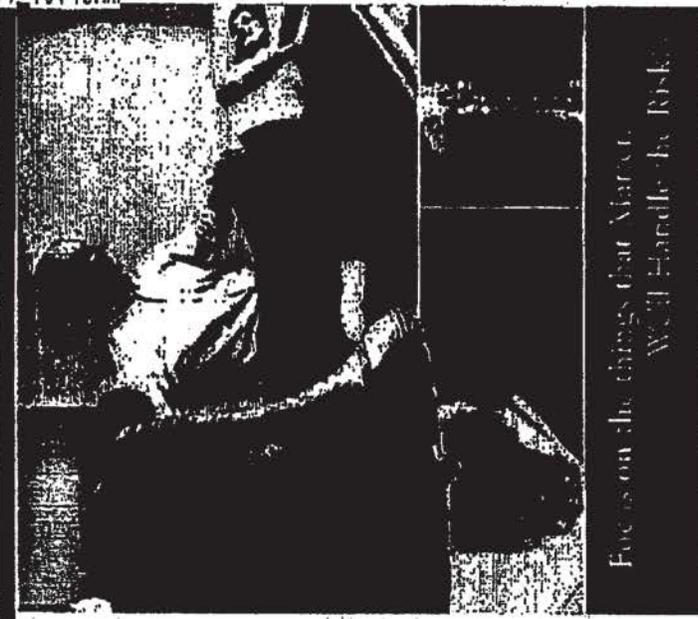
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DECLARATION OF BRIAN O'REILLY

I, Brian O'Reilly, make the following declaration in support of the above-captioned Petition for Waiver.

1. Since 1990, I have held various sales and marketing positions on behalf of Philadelphia Consolidated Holding Corporation and its subsidiaries, and I have knowledge of the company's current and prior sales and marketing procedures, including those of its subsidiaries. Currently, I am the Executive Vice President and Chief Marketing Officer for Philadelphia Consolidated Holding Corporation.
2. In this capacity, I oversee the marketing and sales for Philadelphia Consolidated Holding Corporation and of its subsidiaries, as named above (collectively "PCH").

3. I have read the foregoing 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.

By: 

Brian O'Reilly
Executive Vice President and Chief Marketing Officer
Philadelphia Consolidated Holding Corporation

Executed on December 15, 2014