

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

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

Bais Yaakov of Spring Valley’s Comments on Houghton Mifflin Harcourt Publishers, Inc.’s, Houghton Mifflin Harcourt Publishing Company’s, and Laurel Kaczor’s Petition Seeking “Retroactive Waiver” of the Commission’s Rule Requiring Opt-Out Notices on Fax Advertisements Sent with Permission

Commenter Bais Yaakov of Spring Valley (“Bais Yaakov”) is the Plaintiff in a private TCPA class action currently pending in the United States District Court for the Southern District of New York against Houghton Mifflin Harcourt Publishers, Inc., Houghton Mifflin Harcourt Publishing Company, and Laurel Kaczor (collectively “Houghton”).¹ Houghton filed a petition with the FCC (the “Commission”) on January 20, 2015 (the “Petition”) seeking a retroactive waiver of a regulation (“the opt-out regulation”) requiring opt-out notices on fax advertisements sent with “prior express invitation or permission.”² The Consumer and Governmental Affairs Bureau sought Comments on the Petition on January 30, 2015.³

¹ See *Bais Yaakov of Spring Valley v. Houghton Mifflin Harcourt Publishers, Inc. et al.*, Docket No. 7:13 CV 4577 (S.D.N.Y.).

² *Petition for Waiver of Houghton Mifflin Harcourt Publishers, Inc., Houghton Mifflin Harcourt Publishing Company, and Laurel Kaczor*, CG Docket Nos. 02-278, 05-338 (January 20, 2015). The regulation requiring opt-out notices on permission-based fax advertisements is codified at 47 C.F.R. § 64.1200(a)(4)(iv).

³ *Consumer & 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 (January 30, 2015) (“Public Notice”).

Because the Commission does not have the authority to retroactively absolve defendants of liability under a private right of action established by Congress, like the private right of action under TCPA under which Houghton has been sued, Houghton's request for waiver must be denied. Moreover, even if the Commission had the power to grant waivers of liability in private TCPA causes of action, the Commission could not do so here because Houghton has not satisfied its heavy burden to justify waiver here.

Background

A. Bais Yaakov of Spring Valley v. Houghton Mifflin Harcourt Publishers, Inc. et al.

Currently pending before the United States District Court for the Southern District of New York is a class action Bais Yaakov filed against Houghton for, among other things, sending thousands of unsolicited and permission-based fax advertisements without proper opt-out notices to Bais Yaakov and other persons throughout the United States.⁴

In an attempt to be relieved of potential liability for sending permission-based fax advertisements without proper opt-out notices, Houghton filed a cursory, seven-page petition with the Commission, on January 20, 2015, requesting a retroactive waiver of the application of the opt-out regulation. In that petition, Houghton argues that it should be granted such a waiver because Houghton allegedly (1) is similarly situated to the persons to whom the Commission granted retroactive waivers to in its October 30, 2014 Order⁵ ("the Order"); and (2) included

⁴ A "permission-based fax advertisement" is a fax advertisement that is transmitted to any person with that person's prior express invitation or permission. That term is used herein instead of the undefined term "solicited faxes" used by Houghton.

⁵ *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).

some opt-out information on its faxes.

Significantly, never once in in the instant petition or in the District Court litigation has Houghton argued that it was confused by a footnote in an earlier Commission Order (“the *Junk Fax Order*”)⁶ about the applicability of the opt-out regulation. Moreover, Houghton has never one contended in the instant petition or in the District Court that it was even aware of the opt-out regulation or the *Junk Fax Order* prior to Bais Yaakov’s filing of the Class Action against it. In addition, Houghton has not argued in its petition or in the District Court that it was somehow confused in 2005 or thereafter by the Commission’s alleged lack of explicit notice in the Commission’s 2005 Notice of Proposed Rulemaking⁷ of the Commission’s intent to adopt 47 C.F.R. § 64.1200(a)(4)(iv).

ARGUMENT

I. HOUGHTON’S REQUEST FOR RETROACTIVE WAIVER OF THE APPLICABILITY OF THE OPT-OUT REGULATION IN PRIVATE CAUSES OF ACTION AUTHORIZED BY THE TCPA MUST BE DENIED BECAUSE THE COMMISSION DOES NOT HAVE THE AUTHORITY TO RETORACTIVELY ABSOLVE DEFENDANTS OF LIABILITY IN SUCH PRIVATE CAUSES OF ACTION ESTABLISHED BY CONGRESS

The request by Houghton for a retroactive waiver of the Commission’s rules appear to be based on a misconception that the Commission has the power to retroactively absolve them of liability under TCPA causes actions brought against them by private parties in court or that will be brought by private parties against them in court. Nothing could be further from the truth.

The private right of action based on violation of the Commission’s regulations is authorized by a federal statute, the TCPA, passed by Congress. *See* 47 U.S.C. § 227(b)(3). Any

⁶ *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 (2006) (*Junk Fax Order*).

⁷ *Junk Fax Protection Act*, CG Docket Nos. 02-278 and 05-338, Notice of Proposed Rulemaking, 20 FCC Rcd 19758, 19767-70, ¶¶ 19-25 (2005) (*Junk Fax NPRM*).

claim by the Commission that it has the power to administratively do away with a private right of action passed by Congress would be invalid as inconsistent with the TCPA statute itself. *See, e.g., Brown v. Gardner*, 513 U.S. 115, 116-121 (1994)(regulation that required persons injured at a Veteran's Administration ["VA"] facility as a result of medical treatment to prove fault on the VA's part in order to recover struck down as inconsistent with the statute which said nothing at all about requiring fault as a condition of recovery). Indeed, if the Commission grants the waiver requested here, that action would not only violate TCPA statute but would violate the Separation of Powers between Congress and the Executive Branch.

Nothing in the TCPA suggests, let alone authorizes the Commission to retroactively do away with a private plaintiff's right to sue a defendant and receive damages for the defendant's violations of the statute through the defendant's violations of the Commission's regulations. Indeed, under 1 U.S.C. § 109, if Congress itself had wished to wished to retroactively do away with that such private causes of action, it would have been required to do so explicitly. *See, e.g., Washington Metropolitan Area Transit Auth. V. Beynum*, 145 F.3d 371, 372-373 (D.C. Cir. 1998)(pursuant to 1 U.S.C. 109 claim for workers compensations for injury incurred before repeal of 1928 workers compensation law should be decided under that old law because where there was not explicit retroactivity provision in the new statute). Accordingly, because the Commission's powers are limited to those powers that Congress has delegated to it, and because Congress did not explicitly state that the private right of action under the TCPA for the violations of the Commission's regulations was retroactively repealed, let alone explicitly state that the Commission had the power the power to retroactively do away with private rights of action under the TCPA, the Commission cannot, through administrative action (i.e, through an adjudicatory rule) or even through regulation, extinguish private plaintiffs' right to sue. Indeed,

such a retroactive waiver without explicit Congressional authorization would improperly impair Bais Yaakov's right to damages and other relief against Houghton and would impermissibly interfere with the right of recovery under the TCPA against them for their past conduct. *See generally Landgraf v. USI Film Products*, 511 U.S. 244 (1994)(discussing presumption against retroactivity of substantive laws when Congress has not explicitly authorized such retroactivity).

Moreover, the Commission's ruling on retroactive waiver in the Order is the equivalent of a regulation, notwithstanding the Commission's claims that each future individual request for waiver will be considered on its merits. That is because, among other things, as will be discussed below, the Commission has required no individual evidence from any waiver applicant as to why that waiver applicant is entitled to a waiver. Rather the Commission has concluded, as a general rule, that because there was allegedly confusion over the applicability of the opt-out regulation, persons who are being sued for the violation of the opt-out regulation are entitled to a waiver. Indeed, in the Order, the Commission granted retroactive waivers to 30 applicants and did not require any individual evidence from any of them as to their alleged confusion over the meaning of the opt-out regulation and did not make any individual evaluations of each of the waiver applicants' circumstances. Therefore because the Commission's Order released on October 30, 2014 is a regulation, it may not be applied retroactively. *See Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988)("[A] statutory grant of legislative rulemaking authority will not, as a general matter be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.").

Besides the reasons given above, even if the Commission's granting of a retroactive waiver could be considered an adjudicatory rule, rather than a regulation it would also be improper because it would not satisfy the requirements for retroactive applications of

adjudicatory rules. *See, e.g., Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972)(listing factors to consider for determining the appropriateness of retroactive application of adjudicatory rules); *Williams Natural Gas Co. v. F.E.R.C.*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)(where an adjudicatory rule “substitu[tes] new law for old law that was reasonable clear. . . .it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule.”). Here it would be improperly retroactive to grant Houghton’s request to be retroactively absolved from past violations of the TCPA for which Bais Yaakov and the classes of persons it intends to represent are suing Houghton. *See, e.g., Matthews v. Kidder Peabody & Co., Inc.*, 161 F.3d 156, 165, 170-71 (3d Cir. 1998) (in ruling that provision in Private Securities Litigation Reform Act (“PSLRA”) eliminating RICO causes of action based on predicate acts of securities fraud did not apply retroactively to causes of action that had accrued and had been asserted by plaintiff prior to effective date of PSLRA, court reasons: “Settled expectations and vested rights and obligations are highly prized in our legal system. Absent clear evidence ‘that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits,’ . . . we are extremely reluctant to create causes of action that did not previously exist, or—as in this case—to destroy causes of action and remedies that clearly did exist before Congress acted”) (citations omitted).

Moreover, the Supreme Court has long made clear that even when an agency that has been granted authority to administer a statute, it is “the judiciary, not any executive agency, determines ‘the scope’ — including the available remedies — ‘of judicial power vested by’ statutes establishing private rights of action.” *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871

n.3 (2013)(quoting *Adams Fruit Co. v. Barret*, 494 U.S. 638, 650 (1990)). *Accord*, e.g., *Natural Resources Defense Council v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014). This is true even if the agency has the authority to administer the statute in question by issuing regulations. *See*, e.g., *Adams Fruit*, 494 U.S. at 650. As the Supreme Court has squarely held “[t]his delegation, [] does not empower the [agency] to regulate the scope of the judicial power vested by the statute. Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction.” *Id.* (internal quotation marks omitted). Such an action would violate the separation of powers between executive and judiciary.⁸ This reasoning makes clear that the Commission does not have the power to grant the waivers of liability requested here with regard to private rights of action under the TCPA.

For the reasons stated above, the Commission does not have the authority to retroactively waive liability in private TCPA causes of action that are based on violations of the opt-out regulation, including but not limited to the causes of action brought by Bais Yaakov against Houghton.

B. EVEN IF THE COMMISSION HAD THE AUTHORITY TO GRANT THE WAIVERS OF LIABILITY FOR TCPA PRIVATE RIGHTS OF ACTION, THE COMMISSION COULD NOT GRANT THE WAIVERS REQUESTED HERE BECAUSE HOUGHTON HAS NOT SATSIFIED ITS HEAVY BURDEN FOR SUCH WAIVERS

The Commission’s rules generally provide that “[a]ny provision of the [Commission’s] rules may be waived by the Commission on its own motion or on petition if good cause therefor

⁸ While the Commission appears to have rejected this argument in the Order, see Order at 11, ¶ 21, Bais Yaakov respectfully submits that that rejection was error as is made clear by the case law cited above and below.

is shown.” 47 C.F.R. § 1.3. However, a petitioner requesting a waiver of a Commission rule may not simply make a “generalized plea” for a waiver, but must show “special circumstances,” “articulate a specific pleading, and adduce concrete support, preferably documentary” for a waiver. *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 n.9 (D.C. Cir. 1969); *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 127 (D.C. Cir. 2008). Moreover, “before the FCC can invoke its good cause exception, it *both* ‘must explain why deviation better serves the public interest, *and* articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation,’” *Id.*, quoting *Northeast Cellular Telephone Co., L.P. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). “The reason for this two-part test flows from the principle ‘that an agency must adhere to its own rules and regulations,’ and ‘[a]d hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.’” *Id.*, quoting *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, 950-51 (D.C. Cir. 1986).

Houghton has failed to provide concrete evidentiary support for waivers, much less to articulate a public interest that supports granting any waivers of application of the Opt-Out Regulation. First of all, Houghton has absolutely failed to submit any evidence that prior to sending out the fax advertisements at issue it suffered any actual confusion about the applicability of the opt-out regulation because of a footnote in the 2005 Notice of proposed Rulemaking or because the Notice of Proposed Rulemaking allegedly did not provide explicit notice in of the Commission’s intent to adopt the opt-out regulation. Moreover, Houghton has never even claimed to have been so actually confused. Accordingly, the reasons given by the

Commission for granting waivers in the Order simply do not apply here.⁹

Moreover, while Houghton complains about the possible financial liability that it may face in the private TCPA lawsuit against it, Houghton has not submitted a shred of concrete evidence to the Commission, such as its financial condition and insurance coverage, of how it will likely be affected by these lawsuits. Such specific evidence is explicitly required under the waiver cases discussed above. It is also instructive to note that Houghton has not brought forth a single example of a company that has been put out of business as a result of a judgment under the TCPA or a TCPA settlement. That is not surprising because putting a company out of business for its TCPA violations would most likely prevent any recompense for consumers and their advocates. That is because, if a company was in bankruptcy, class members, as unsecured creditors, would likely receive little or nothing. For that reason, consumer advocates who sue on behalf of consumers take into consideration the financial condition of defendants and are careful to enter into settlements that permit the defendants to continue to exist as going concerns. In any event, in the Order, the Commission held that the fact that parties who violate the TCPA may face substantial liability is not an “inherently adequate ground” for a waiver. Order at 14 ¶ 28.

Nor would such waivers based on the vast number of violations Houghton has committed be fair to fax advertisers in general. Granting waivers on that basis would effectively reward entities that have engaged in massive violations of the law, while leaving other entities that did not violate the law on that scale still open to liability, resulting in precisely the type of “discriminatory application” of waivers that the Courts have admonished the Commission to

⁹ By making the above arguments, Bais Yaakov is not conceding that the reasons given by the Commission for granting the waivers it did in the Order were a legally sufficient basis to do so. In fact, even if the Commission had the power to waive liability in private causes of action under the TCPA, Bais Yaakov still maintains that the reasons given by the Commission for granting the waivers were legally insufficient and that the waivers should not have been granted.

avoid. *NetworkIP, LLC v. F.C.C.*, *supra*, 548 F.3d at 127.

In any event, Houghton has not provided concrete evidentiary support for a waiver, much less articulated a public interest that supports granting any waiver of application of the opt-out regulation. That is not surprising, as no public interest could be served by allowing fax advertisers not to inform the persons to whom they send their fax advertisements of the only effective method of opting out of receiving future unsolicited faxes. *See* 42 C.F.R. § 64.1200(a)(4)(v) (requiring that a request to opt-out of receiving future fax advertisements must abide by all of the requirements of § 64.1200(a)(3)(v), or else the request can be ignored by sender of such fax advertisements). Indeed, the only interest that Houghton has identified in support of their request for a waiver is its own *self-interest* in not being held financially liable for their thousands of violations of the TCPA – a private interest that is wholly insufficient to support a waiver.

Essentially, Houghton’s cursory waiver petition reflects that Houghton believes that the retroactive waivers they seek in this case are simply for the asking. Because the Commission’s stated reasons for granting the waivers it did in the Order are simply not present regarding Houghton, the Commission’s reasoning simply does not apply to these petitions.

What Houghton has done here is simply make a “generalized plea” for a waiver, and has failed to show “special circumstances,” “articulate a specific pleading, and adduce concrete support, preferably documentary” for a waiver. *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 n.9 (D.C. Cir. 1969); *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 127 (D.C. Cir. 2008). Accordingly, because Houghton has failed to carry its heavy burden to justify the granting of retroactive waiver of the application of the opt-out regulation to it, their requests for such waivers must be denied.

CONCLUSION

For all the foregoing reasons, The Commission should deny Houghton's petition in its entirety.

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Respectfully submitted,

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