

**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)	

**Christopher Lowe Hicklin, DC, PLC's Comments on National Pen's
Petition for Retroactive Waiver**

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March 13, 2015

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Executive Summary

The Commission's October 30, 2014 Order stated all future requests for "retroactive waivers" of 47 C.F.R. § 64.1200(a)(4)(iv) would be "adjudicated on a case-by-case basis" and the Commission did not "prejudge the outcome of future waiver requests in the order." The Commission should deny the National Pen petition for three reasons.

First, the Commission has no authority to "waive" violations of the regulations "prescribed under" the TCPA in a private right of action. Doing so would violate the separation of powers because the courts have exclusive authority to determine whether "a violation" of the regulations has taken place, and because Congress has determined that "each such violation" gives rise to \$500 in statutory damages. The requested waiver would not merely affect a Commission rule divorced from the statute; a violation of the rule *is* a violation of the statute where a private right of action is concerned. In any case, the TCPA does not expressly authorize the Commission to issue retroactive rules.

National Pen is also not "similarly situated" to the petitioners covered by the Opt-Out Order, since (1) there is no genuine "dispute" that National Pen did not "promptly document" permission from any class members, (2) National Pen does not claim it was actually "confused" about the law, and (3) the most likely explanation is that National Pen was simply ignorant of the opt-out regulation.

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Commenter Christopher Lowe Hicklin, DC, PLC, is the plaintiff in a private TCPA action pending in the United States District Court for the Middle District of Florida against petitioners National Pen Co. LLC and National Pen Holdings LLC (collectively, “National Pen”).¹ On February 13, 2015, National Pen filed a petition seeking a “retroactive waiver” of 47 C.F.R. § 64.1200(a)(4)(iv), the regulation requiring opt-out notice on fax advertisements sent with “prior express invitation or permission.”²

The Commission issued an order on 24 similar petitions on October 30, 2014 (“Opt-Out Order”).³ That order rejected several challenges to the validity of the opt-out regulation,⁴ but granted retroactive “waivers” purporting to relieve the 24 petitioners of liability from both Commission forfeiture actions and liability in private TCPA litigation

¹ *Christopher Lowe Hicklin DC, PLC v. Nat’l Pen Co. LLC, et al.*, No. 8:14-cv-02657 (M.D. Fla.).

² *Petition for Retroactive Waiver*, CG Docket Nos. 02-278, 05-338 (Feb. 13, 2015).

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).

⁴ *Id.* ¶¶ 19–20, 32 & n.70 (ruling that Commission issued regulation under its statutory authority to “implement” the TCPA by empowering consumers to “halt unwanted faxes” and regulation is enforceable through the TCPA’s private right of action).

under the private right of action in 47 U.S.C. § 227(b)(3).⁵ The Consumer and Governmental Affairs Bureau sought comments on National Pen’s petition on February 27, 2015.⁶

Procedural History

On October 30, 2014, the Commission issued the Opt-Out Order, granting “retroactive waivers” intended to relieve the covered TCPA defendants of liability in private TCPA actions for violations of § 64.1200(a)(4)(iv) from its effective date, August 1, 2006, to October 30, 2014, as well as prospective waivers for any future violations through April 30, 2015.⁷ As one petitioner recently argued, the Commission retroactively “modifie[d] the operative date of an existing FCC regulation” with respect to the covered petitioners.⁸ The Commission invited “similarly situated” parties to petition for similar waivers.⁹

Plaintiff’s counsel filed comments on two post-order petitions on November 18, 2014,¹⁰ five petitions on December 12, 2104,¹¹ six petitions on January 13, 2015,¹² and one

⁵ *Id.* ¶¶ 22–31.

⁶ *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning Commission’s Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Feb. 27, 2015).

⁷ Opt-Out Order ¶ 29.

⁸ *Physicians Healthsource, Inc. v. Stryker Corp.*, No. 12-cv-729 (W.D. Mich.), Defs.’ Mem. Supp. Mot. Reconsideration & Renewed Mot. Stay (Doc. 199) at 6 (Feb. 6, 2015).

⁹ Opt-Out Order ¶ 30.

¹⁰ *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Beck Simmons LLC’s Comments on Francotyp-Postalia Petition (Nov. 18, 2014); *id.*, Physicians Healthsource, Inc.’s Comments on Allscripts Petition (Nov. 18, 2014).

¹¹ *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, TCPA Plaintiffs’ Comments on Petitions for Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by Alma Lasers, ASD Specialty Healthcare, Den-Mat Holdings, and Stryker Corp. (Dec. 12, 2014).

¹² *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, TCPA Plaintiffs’ Comments on Petitions for Waiver

petition on February 13, 2015.¹³ In each set of comments, Plaintiffs’ counsel requested the Commission clarify whether the standard for a waiver is that the petitioner was *actually* confused about whether opt-out notice was required when it sent its faxes¹⁴ or whether the Commission created a *presumption* that petitioners are confused in the absence of evidence they were “simpl[y] ignorant” or knowingly violated the law.¹⁵

Plaintiffs’ counsel expect dozens of TCPA fax defendants to petition for waivers before April 30, 2015, and the Commission should expect waiver requests from defendants in non-fax TCPA litigation, as well. For example, on December 5, 2014, Wells Fargo cited the Opt-Out Order as authority for a retroactive waiver absolving TCPA defendants of liability for cellular-phone calls where the “called party” is not the “intended recipient.”¹⁶ Plaintiffs reiterate their request that the Commission clarify the standards it applied in the Opt-Out Order.

of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by EatStreet Inc., McKesson Corp., Philadelphia Consolidated Holding Corp., St. Luke’s Center for Diagnostic Imaging, LLC, Sunwing Vacations, Inc., and ZocDoc, Inc. (Jan. 13, 2015).

¹³ *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Physicians Healthsource, Inc.’s Comments on A-S Medication Solutions LLC’s Petition for Wavier of Section 64.1200(a)(4)(iv) of the Commission’s Rules and/or Declaratory Relief.

¹⁴ Opt-Out Order ¶ 26 (stating waiver was justified because footnote 154 of the 2006 Junk Fax Order “led to confusion or misplaced confidence on the part of petitioners”); *id.* ¶ 32 (stating Commission granted waivers “to parties that have been confused by the footnote”).

¹⁵ *Id.* (stating combination of footnote 154 and lack of notice “presumptively establishes good cause for retroactive waiver,” finding no evidence “that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement,” and “emphasiz[ing]” that “simple ignorance” of the law “is not grounds for a waiver”).

¹⁶ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling of the Consumer Bankers Assoc.*, CG Docket No. 02-278, Reply Comments of Wells Fargo (Dec. 5, 2014) at 9 & n.35 (citing Opt-Out Order ¶ 26).

Factual Background

On October 21, 2014, Plaintiff, a chiropractic practice in Florida, filed a TCPA action in the Middle District of Florida alleging National Pen sent it unsolicited fax advertisements on August 6, September 9, September 25, October 1, October 8, October 15, and October 16, 2014.¹⁷ The faxes, attached hereto, advertised National Pen’s products, including various pens and keychains that may be personalized for the purchaser.¹⁸ The faxes state at the bottom: “*If you would like to be removed from receiving future faxes, please call 855-684-2505.*”¹⁹

The Complaint alleges National Pen sent “the same and other” fax advertisements to “Plaintiff and more than 25 other recipients” and that class certification was appropriate.²⁰ The Complaint alleged National Pen is precluded from raising an affirmative defense based on a claim of established business relationship (“EBR”) or “prior express invitation or permission” because the faxes do not comply with the opt-out-notice requirements.²¹

On January 4, 2013, National Pen answered the Complaint, admitting it “sent facsimile advertisements to Plaintiff and members of the putative class” on the dates alleged.²² National Pen asserted affirmative defenses of an EBR and prior express permission from Plaintiff and the putative class members.²³

¹⁷ *Christopher Lowe Hicklin DC, PLC v. Nat’l Pen Co. LLC, Nat’l Pen Holdings, LLC*, No. 8:14-cv-02657 (M.D. Fla.), Pl.’s Class Action Complaint (Doc. 1) ¶ 11.

¹⁸ Ex. A.

¹⁹ *Id.*

²⁰ *Hicklin*, Pl.’s Class Action Complaint ¶ 15.

²¹ *Id.* ¶¶ 17, 31.

²² *Id.*, Defs.’ Answer to Pl.’s Class Action Complaint (Doc. 23) ¶ 30.

²³ *Id.* at 19, Aff. Defenses 1–4.

On January 21, 2015, Plaintiff moved for class certification, stating discovery revealed National Pen sent 215,661 fax advertisements to 74,608 unique fax numbers through a fax broadcaster in eight separate broadcasts in September and October 2014.²⁴ Plaintiff argued National Pen had no evidence of “prior express invitation or permission” and that, even if it did, the faxes lack compliant opt-out language, which is a common question for classwide resolution.²⁵ Plaintiff acknowledged National Pen had filed a petition for “waiver” of the opt-out regulation with the Commission, but argued that “[i]t would be a fundamental violation of the separation of powers for the administrative agency to ‘waive’ retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court,” citing the only judicial ruling on that issue to date.²⁶

National Pen argued a class cannot be certified because it obtained prior express permission from some class members, so litigating the merits would require “case-by-case investigation” and “interviews with every member of the putative class.”²⁷ National Pen admitted it “did not maintain any records of when and how it received permission from

²⁴ *Id.*, Pl.’s Mot. Class Certification (Doc. 26) at 1.

²⁵ *Id.* at 13.

²⁶ *Id.* (citing *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, --- F. Supp. 3d ---, 2014 WL 7109630, at *14 (W.D. Mich. Dec. 12, 2014)). The district court denied defendant’s motion to reconsider this ruling. See *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 12-cv-0729 (W.D. Mich.), Order (Doc. 201) (Feb. 26, 2015); see also *Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC*, 2014 WL 7366255, at *5 (S.D. Fla. Dec. 24, 2014) (reserving decision on “whether the FCC can grant a retroactive waiver that would apply in civil litigation between private parties”).

²⁷ *Id.*, Nat’l Pen Opp. Mot. Class Cert. (Doc. 36) at 8.

customers,”²⁸ but argued it obtained after-the-fact declarations from 40 of its customers stating they gave National Pen permission to send them fax advertisements.²⁹

In response to Plaintiff’s argument that opt-out-notice violations preclude a permission defense, National Pen argued the Commission “effectively abrogated its rule requiring that *solicited* faxes contain opt-out language” in the Opt-Out Order.³⁰ National Pen argued that when combined, “[t]he Waiver Order and National Pen’s pending petition are fatal to class certification here, because they exempt National Pen from the opt-out notice requirement for any solicited faxes, and therefore make consent an individual issue in this case.”³¹ Merely filing a petition, it argued, “entitles National Pen to raise consent as a defense *even where the faxes did not contain the FCC’s opt-out language.*”³²

National Pen argued a waiver aimed at Plaintiff’s private right of action would not violate the separation of powers because (1) the Commission would not be “interfering with the ‘statute,’” as Plaintiff contends, but merely “abrogating rules of its own creation,” and (2) “regulations can be applied retroactively,”³³ where expressly allowed by the authorizing statute, citing *Bowen v. Georgetown Univ. Hosp.*³⁴

²⁸ *Id.*

²⁹ *Id.* at 10.

³⁰ *Id.* at 13.

³¹ *Id.*

³² *Id.* at 14; *see also id.* at 30 (referring to Commission’s “abrogated regulations” on opt-out notice).

³³ *Id.* at 15–17.

³⁴ 488 U.S. 204, 208 (1988) (holding “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”).

On February 13, 2015, National Pen filed its waiver petition. The petition does not claim National Pen obtained prior express invitation or permission from Plaintiff.³⁵ It does, however, state it “intends to demonstrate” in court that it obtained permission from other class members.³⁶

National Pen does not claim it was actually “confused” about whether opt-out notice was required on faxes sent with permission at any time.³⁷ National Pen does not claim it read footnote 154 in the 2006 order implementing the opt-out regulation or the 2005 public notice preceding the rule.³⁸

Argument

I. The Commission has no authority to “waive” violations of the regulations prescribed under the TCPA in a private right of action, and doing so would violate the separation of powers.

The TCPA creates a private right of action for any person to sue “in an appropriate court” for “a violation of this subsection or the regulations prescribed under this subsection,”³⁹ and directs the Commission to “prescribe regulations” to be enforced in those lawsuits.⁴⁰ The “appropriate court” then determines whether “a violation” has taken place.⁴¹ If the court finds “a violation,” the TCPA automatically awards a minimum \$500 in damages

³⁵ Nat’l Pen Pet. at 1–8.

³⁶ *Id.* at 6.

³⁷ *Id.* at 1–8.

³⁸ *Id.*

³⁹ 47 U.S.C. § 227(b)(3).

⁴⁰ *Id.* § 227(b)(2).

⁴¹ *Id.* § 227(b)(3)(A)–(B).

for “each such violation” and allows the court “in its discretion” to increase the damages up to \$1,500 per violation if it finds they were “willful[] or knowing[].”⁴²

The TCPA does not authorize the Commission to “waive” its regulations in a private right of action.⁴³ It does not authorize the Commission to intervene in a private right of action.⁴⁴ It does not require a private plaintiff to notify the Commission it has filed a private lawsuit.⁴⁵ Nor does it limit a private plaintiff’s right to sue to cases where the Commission declines to prosecute.⁴⁶ The Commission plays no role in determining whether “a violation” has taken place, whether a violation was “willful or knowing,” whether statutory damages should be increased, or how much the damages should be increased. These duties belong to the “appropriate court” presiding over the lawsuit.⁴⁷

The Communications Act does, however, grant the Commission authority to enforce the TCPA through administrative forfeiture actions.⁴⁸ Private citizens have no role in that process, such as determining whether a violator acted “willfully or repeatedly.”⁴⁹ Thus, the TCPA and the Communications Act create a dual-enforcement scheme in which the Commission promulgates regulations that both the Commission and private litigants may

⁴² *Id.* § 227(b)(3).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*; *C.f.*, Clean Air Act, 42 U.S.C. § 7604(b) (requiring 60 days prior notice to the EPA to maintain a citizen suit).

⁴⁶ *C.f.*, *e.g.*, 42 U.S.C.A. § 2000e-5(f)(1) (requiring employment-discrimination plaintiffs to obtain “right-to-sue” letter from Equal Employment Opportunity Commission).

⁴⁷ *Id.* § 227(b)(3).

⁴⁸ *Id.* § 503(b).

⁴⁹ *Id.*

enforce but where the Commission plays no role in the private litigation and private citizens play no role in agency enforcement.⁵⁰ This scheme is similar to several other statutes, including the Clean Air Act, which empowers the EPA to issue regulations imposing emissions standards⁵¹ that are enforceable both in private “citizen suits”⁵² and in administrative actions.⁵³

The D.C. Circuit Court of Appeals recently held the EPA could not issue a regulation creating an affirmative defense for “unavoidable” violations in private litigation under the Clean Air Act in *Nat. Res. Def. Council v. EPA*,⁵⁴ holding it is “the Judiciary” that “determines ‘the scope’—*including the available remedies*” of “statutes establishing private rights of action”⁵⁵ and that, consistent with that principle, the Clean Air Act “vests authority over private suits in the *courts*, not EPA.”⁵⁶ TCPA Plaintiffs discussed *NRDC* extensively in a letter to the Commission after it was issued April 18, 2014,⁵⁷ and in subsequent comments on waiver petitions.⁵⁸ The Opt-Out Order does not cite *NRDC*.

⁵⁰ *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 688 (7th Cir. 2013) (holding TCPA “authorizes private litigation” and agency enforcement, so consumers “need not depend on the FCC”).

⁵¹ 42 U.S.C. § 7412(d).

⁵² 42 U.S.C. § 7604(a).

⁵³ 42 U.S.C. § 7413(d).

⁵⁴ 749 F.3d 1055, 1062 (D.C. Cir. 2014).

⁵⁵ *Id.* (quoting *City of Arlington v. FCC*, --- U.S. ---, 133 S. Ct. 1863, 1871 n.3 (2013); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)).

⁵⁶ *Id.*

⁵⁷ Letter of Brian J. Wanca, CG Docket No. 05-338 (May 19, 2014).

⁵⁸ See *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Nos. 02-278, 05-338, TCPA Pls.’ Comments on Stericycle Pet. at 7 (July 11, 2014); *id.*, TCPA Pls.’ Comments on Unique Vacations, Inc. Pet. at 6–8 (Sept. 12, 2014).

On December 12, 2014, the United States District Court for the Western District of Michigan became the first court in the country to rule on whether a Commission “waiver” from § 64.1200(a)(4)(iv) is enforceable in private TCPA litigation.⁵⁹ The district court held “[i]t would be a fundamental violation of the separation of powers for the administrative agency to ‘waive’ retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court.”⁶⁰ The district court held that “nothing in the waiver—even assuming the FCC ultimately grants it—invalidates the regulation itself” and that “[t]he regulation remains in effect just as it was originally promulgated” for purposes of determining whether a defendant violated the “regulations prescribed under” the TCPA, as directed by § 227(b)(3).⁶¹ The district court concluded, “the FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action; at most, the FCC can choose not to exercise its own enforcement power.”⁶²

The argument that the Commission is merely waiving “its own rules,” rather than the statutory private right of action fails because “[i]nsofar as the statute’s language is concerned, to violate a regulation that lawfully implements [the statute’s] requirements *is* to violate the statute.”⁶³ The Commission already ruled in the Opt-Out Order that the regulation lawfully implements the TCPA,⁶⁴ so a violation of the regulation *is* a violation of the statute.

⁵⁹ *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, --- F. Supp. 3d ---, 2014 WL 7109630 (W.D. Mich. Dec. 12, 2014).

⁶⁰ *Id.*, at *14.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Global Crossing Telecomm’s, Inc. v. Metrophones Telecomm’s, Inc.*, 550 U.S. 45, 54 (2007) (citing *MCI Telecomm’s Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995) (holding Commission rule “has the force of law” and the Commission “may therefore treat a violation of the prescription as a *per se*

The argument that a waiver of the opt-out regulation in a private right of action is permissible because “regulations can be applied retroactively” fails because “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.”⁶⁵ The TCPA does not expressly authorize the Commission to issue retroactive rules.⁶⁶ It authorizes it to “implement” the statute.⁶⁷ To “implement” is inherently prospective, meaning “to begin to do or use (something, such as a plan) : to make (something) active or effective.”⁶⁸

II. National Pen is not “similarly situated” to the petitioners covered by the Opt-Out Order.

A. There is no real “dispute” over “prior express invitation or permission” because National Pen admits it did not follow the Commission’s admonition to document it promptly.

The Opt-Out Order noted, “[t]he record indicates that whether some of the petitioners had acquired prior express permission of the recipient remains a source of dispute between the parties.”⁶⁹ In this case, there is no reasonable “dispute.” National Pen admits it “did not maintain any records of when and how it received permission from

violation of the requirement of the Communications Act that a common carrier maintain ‘just and reasonable’ rates’’).

⁶⁴ Opt-Out Order ¶ 19–20.

⁶⁵ *Bowen*, 488 U.S. at 208.

⁶⁶ 47 U.S.C. § 227(b)(2); *Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 102 (N.D. Ill. 2013).

⁶⁷ § 227(b)(2).

⁶⁸ See <http://www.merriam-webster.com/dictionary/implement>.

⁶⁹ Opt-Out Order ¶ 31, n.104.

customers,”⁷⁰ and that it was only after it was sued that it sought to obtain after-the-fact declarations from a handful of its targets.⁷¹

The Commission ruled in the 2006 Junk Fax Order that “[s]enders that claim their facsimile advertisements are delivered based on the recipient’s prior express permission must be prepared to provide clear and convincing evidence of the existence of such permission,” that “the burden of proof rests on the sender to demonstrate that permission was given,” and that fax advertisers should “take steps to promptly document that they received such permission.”⁷² National Pen admits it did not “promptly document” permission from anyone, and it cannot meet its burden of proof after the fact.

National Pen’s permission defense is really an just a dressed-up EBR defense, as demonstrated by its claims to have sent faxes only to its “customers.”⁷³ The Commission ruled in the Opt-Out Order that its waivers do “*not* extend to the similar requirement to include an opt-out notice on fax ads sent pursuant to an established business relationship as there is no confusion regarding the applicability of this requirement to such faxes.”⁷⁴ A waiver will do National Pen no good.

B. National Pen does not claim it was “confused” about whether opt-out notice was required or that it read footnote 154 or the notice of rulemaking.

⁷⁰ *Hicklin*, Nat’l Pen. Opp. Pl.’s Mot. Class Cert. (Doc.36) at 8.

⁷¹ *Id.* at 10.

⁷² *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Final Rule, 71 Fed. Reg. 25967, 25972 (May 3, 2006).

⁷³ Nat’l Pen Pet. at 6.

⁷⁴ Opt-Out Order ¶ 27, n.99.

If the standard for a waiver is that the petitioner was *actually* confused about whether opt-out notice was required on faxes sent with permission, National Pen’s petition must be denied. National Pen does not claim it was confused about the law.⁷⁵ Nor does it indicate one way or the other whether it was aware of the opt-out regulation or even the existence of any laws regarding fax advertising.⁷⁶ It does not claim that it read footnote 154 or the 2005 notice of rulemaking, the only sources of “confusion” identified in the Opt-Out Order.⁷⁷ Based on the record before the Commission, it is just as likely National Pen was simply ignorant of the law, which the Opt-Out Order held was insufficient for a waiver.⁷⁸

C. Plaintiff has a due-process right to inquire into whether National Pen had actual knowledge of the rules if that factor is dispositive of its private right of action.

If the standard for a waiver is that a petitioner is considered “presumptively” confused in the absence of evidence it “understood that [it] did, in fact, have to comply with the opt-out notice requirement,”⁷⁹ then Plaintiff has no evidence of actual knowledge at this time with which to rebut the presumption with respect to National Pen. Only National Pen has that information, and its Petition is silent on the issue.

Plaintiff has a due-process right to investigate whether National Pen had actual knowledge of the opt-out rules if that factor is dispositive of its private right of action under the TCPA, and the Commission should hold such “proceedings as it may deem necessary”

⁷⁵ Nat’l Pen Pet. at 1–8.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Opt-Out Order ¶ 26.

⁷⁹ Opt-Out Order ¶ 26.

for that purpose.⁸⁰ In the alternative, Plaintiff requests the Commission stay a ruling on National Pen's petition until Plaintiff has completed discovery regarding its actual knowledge (or lack thereof) before the United States District Court for the Middle District of Florida.

Conclusion

The Commission should deny National Pen's petition for waiver because the Commission has no authority to "waive" a regulation in a private right of action under the TCPA, and the Commission cannot change its rules implementing the TCPA retroactively. National Pen is also not "similarly situated" to the petitioners covered by the Opt-Out Order, since (1) there is no genuine "dispute" National Pen cannot prove its claim of prior express invitation or permission due to its failure to "promptly document" such permission, (2) National Pen does not claim it was actually "confused" about the law, and (3) National Pen was most likely simply ignorant of the opt-out regulation.

Respectfully submitted,

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⁸⁰ 47 C.F.R. § 1.1.

EXHIBIT A

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 3. _____

3. Color Choice
 Purple Red Black Blue Gunmetal Assorted

★ C15926504ES5B01 ★
 FAYE HICKLIN
 CLARK ROAD CHIROPRACTIC
 CTR
 3220 CLARK RD
 SARASOTA, FL 34231
 841-923-4367 8/6/14
 LAK

4. Ordered By Name and valid Phone Number required to process order.
 _____ () _____
 PRINT Your Name Area Code Day Phone Number Fax Number

Please allow a \$15.95 set up charge plus delivery/handling charge.
 If you would like to be removed from receiving future faxes, please call 855-684-2505

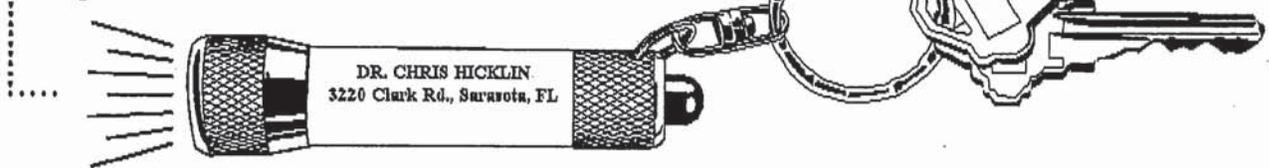


NATIONAL PEN COMPANY
*Your image is our business!*TM

END OF SUMMER SALE!!!

Take advantage of these great **Ultra Bright LED Flashlight and Key Chain** prices and boost sales and customer goodwill all year long during our **END OF SUMMER SALE!**

Bright LED Light



Hurry, place your order in the next 10 days, before supplies of the new LED Flashlight Key Chains are gone!

And here's our Special 10-Day Offer Reserved for

CLARK ROAD CHIROPRACTIC CTR

- **Personalized** with your lifetime laser engraved message!
- **Low minimum** and low, low price on our bestselling flashlight!
- **Available in** Blue, Black, Red, Purple, Gunmetal or **FREE Assortment!**

TO ORDER:

FAX the completed order form below to **800-854-7367** or

CALL me at **800-854-1000** or for fastest delivery go

ONLINE to **www.orderpens.com**. Enter your promo code: **2JZZEV1B**

Order today and get
FREE Gift Boxes
with your order!

Sincerely,
Dave Thompson

ORDER FORM
Toll Free Fax
800-854-PENS (7367)
342 Shelbyville Mills Road
Shelbyville, TN 37160
800-854-1000

YES! Please rush my new PERSONALIZED LED FLASHLIGHT KEY CHAINS. Bill me later. My satisfaction is 100% guaranteed!

Summer Sale!

1. QUANTITY (Check one only)	<input type="checkbox"/> 50	<input type="checkbox"/> 100	<input type="checkbox"/> 200	<input type="checkbox"/> 250	<input type="checkbox"/> 500	<input type="checkbox"/> 1000
Regular Price	\$1.59 ea.	\$1.56 ea.	\$1.54 ea.	\$1.52 ea.	\$1.49 ea.	\$1.45 ea.
Sale Price	99¢ ea.	99¢ ea.	99¢ ea.	99¢ ea.	99¢ ea.	99¢ ea.

2. Your Personalized Imprint

DR. CHRIS HICKLIN
3220 Clark Rd., Sarasota, FL
(941) 923-4357

Or Make Imprint Changes Here...
Up to 3 lines, 28 characters/spaces per line. Your imprint will be in all caps unless otherwise indicated below. Add your logo for just \$40. Please supply clean black & white artwork.

1. _____
2. _____
3. _____

3. Color Choice

Purple Red Black Blue Gunmetal Assorted

★ C15926504EV1B01 ★
FAYE HICKLIN
CLARK ROAD CHIROPRACTIC
CTR
3220 CLARK RD
SARASOTA, FL 34231
LAK 941-923-4357 9/9/14

4. Ordered By Name and valid Phone Number required to process order.

()
PRINT Your Name Area Code Day Phone Number Fax Number

Please allow a \$15.95 set up charge plus delivery/handling charge. If you would like to be removed from receiving future faxes, please call 855-684-2505

NATIONAL PEN COMPANY
Your image is our business!

**ALLURE PENS
LESS THAN
30¢ NET EA!**

FALL INTO SAVINGS EVENT!

Take advantage of these great **Allure Pen** prices and boost sales and customer goodwill all year long during our **FALL INTO SAVINGS EVENT!**



Hurry, place your order in the next 10 days, before supplies of the new Allure Pen are gone!

And here's our Special 10-Day Offer Reserved for

CLARK ROAD CHIROPRACTIC CTR

- Pay Only 30¢ Net Each!...Depending on quantity!
- Low minimum and low, low price on our bestselling pen!
- Available in Green, Pink, Orange, Yellow tips & tops with matching imprint or **FREE Assortment!**

TO ORDER:

FAX the completed order form below to **800-854-7367** or
CALL me at **800-854-1000** or for fastest delivery go
ONLINE to **www.orderpens.com**. Enter your promo code: **4MNEMEX9B**

Order Today for the
**LOWEST PRICE
OF THE YEAR**
Hurry, offer expires
in 10 days!

Sincerely,
Dave Thompson

ORDER FORM
Toll Free Fax:
800-854-PENS (7367)
342 Shelbyville Mills Road
Shelbyville, TN 37160
DR-1525
NATIONAL PEN COMPANY
Your image is our business!
Call toll free: 800-854-1000

YES! Please rush my new PERSONALIZED ALLURE PENS. Bill me later. My satisfaction is 100% guaranteed!

- 1. Quantity**
- 100 @ 89¢ + 200 FREE
 - 150 @ 89¢ + 300 FREE
 - 250 @ 89¢ + 500 FREE
 - 500 @ 89¢ + 1000 FREE

- 2. Pen Trim Colors (Check one only)**
- Assorted with White Imprint -- No Extra Charge
 - Assorted with Rainbow Imprint -- Add 5¢ extra per pen, including FREE pens
 - Assorted with Silver Imprint -- No Extra Charge
 - Neon Green
 - Neon Pink
 - Neon Orange
 - Neon Yellow

- 4. Ink Color**
- Blue
 - Black

★ **C15926504EX9B01** ★
FAYE HICKLIN
CLARK ROAD CHIROPRACTIC CTR
3220 CLARK RD
SARASOTA, FL 34231
941-923-4357
ALL 9/29/14

3. Your Personalized Imprint **Fall Sale Event!**

DR. CHRIS HICKLIN
3220 Clark Rd., Sarasota, FL
(941) 923-4357

Or Make Imprint Changes Here...

Up to 5 lines, 35 characters/spaces per line • Your Imprint will be in all caps unless otherwise indicated below • Add your logo for just \$25. Please supply clean black & white artwork.

1.	
2.	
3.	
4.	
5.	

5. Ordered By Name and valid Phone Number required to process order.

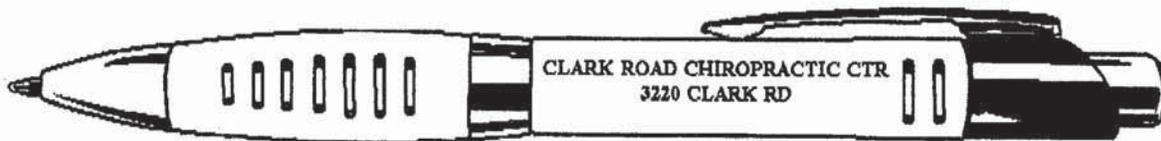
PRINT Your Name	()	Area Code	Day Phone Number	Fax Number
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Please allow a \$15.95 set up charge plus delivery/handling charge.
If you would like to be removed from receiving future faxes, please call 855-684-2505

NATIONAL PEN COMPANY
Your image is our business![™]

Special Offer Reserved For
CLARK ROAD CHIROPRACTIC CTR

OUR PRICES KEEP FALLING!



Take this opportunity to **SAVE BIG** on the **Ventus Pen** during our **FALLING PRICES SALE!**
Take advantage of these great Ventus Pen prices and boost sales and customer goodwill all year long!



And here's our special 10-Day Offer Reserved for
CLARK ROAD CHIROPRACTIC CTR

- **Innovative Design...**Colorful translucent barrels, matching vented rubber grip and shiny chrome accents.
- **Long Lasting Imprint...**Guaranteed to be crisp!
- **Pay Only 49¢ Each!**...Regardless of quantity!

Hurry, place your order in the next 10 days, before supplies of the new Ventus Pen Pens are gone!

TO ORDER:

FAX the completed order form below to **800-854-7367** or
CALL me at **800-854-1000** or for fastest delivery go
ONLINE to **www.orderpens.com**. Enter your promo code: **6K8KEX9C**

Sincerely,
Dave Thompson

Order today and get our
LOWEST PRICE OF THE YEAR!
Hurry, offer expires in 10 days!

ORDER FORM
Call toll free: 800-854-1000
800-854-PENS (7367)
NATIONAL PEN COMPANY 342 Shelbyville Mills Road
Shelbyville, TN 37160
CR-1526

YES! Please rush my new PERSONALIZED VENTUS PEN PENS.
Bill me later. My satisfaction is 100% guaranteed!

Fall Savings

1. QUANTITY (Check one only)	<input type="checkbox"/> 100	<input type="checkbox"/> 150	<input type="checkbox"/> 250	<input type="checkbox"/> 500	<input type="checkbox"/> 1000
Regular Price	98¢ ea.	96¢ ea.	94¢ ea.	92¢ ea.	90¢ ea.
Sale Price	49¢ ea.				

2. Your Personalized Imprint
CLARK ROAD CHIROPRACTIC CTR
3220 CLARK RD
SARASOTA, FL 34231

Or Make Imprint Changes Here...
Up to 5 lines, 27 characters/spaces per line. Your imprint will be in all caps unless otherwise indicated below. Add your logo for just \$25. Please supply clean black & white artwork.

1.	
2.	
3.	
4.	
5.	

3. Translucent Trim Color
 Black Blue Red Purple Assorted Black Ink, medium point only.

★ C15926504EX9C01 ★
 FAYE HICKLIN
 CLARK ROAD CHIROPRACTIC
 CTR
 3220 CLARK RD
 SARASOTA, FL 34231
 FVN 941-923-4367 10/1/14

4. Ordered By Name and valid Phone Number required to process order.

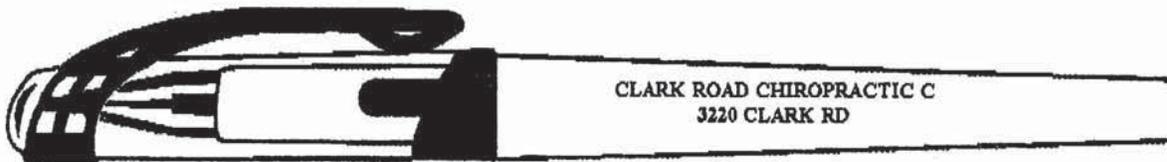
PRINT Your Name () Area Code Day Phone Number Fax Number

Please allow a \$15.95 set up charge plus delivery/handling charge.
If you would like to be removed from receiving future faxes, please call 855-684-2505

NATIONAL PEN COMPANY
Your image is our business!™

Special Offer Reserved For
CLARK ROAD CHIROPRACTIC CTR

"RAKE-IN" THE SAVINGS!



Take this opportunity to **SAVE BIG** on the **Metro Gel Pen** during our **FALLING PRICES SALE!**
Take advantage of these great Metro Gel Pen prices and boost sales and customer goodwill all year long!

And here's our special 10-Day Offer Reserved for
CLARK ROAD CHIROPRACTIC CTR



- **Easy-Writing Gel Ink...** Your customers won't put this pen down!
- **Innovative Design...** Black clip with 8 cut-outs accent a clear cap for an upscale, metropolitan flair.
- **Long Lasting Imprint...** Guaranteed to be crisp!
- **Pay Only 49¢ Each!**...Regardless of quantity!

Hurry, place your order in the next 10 days, before supplies of the new Metro Gel Pen Pens are gone!

TO ORDER:

FAX the completed order form below to **800-854-7367** or
CALL me at **800-854-1000** or for fastest delivery go
ONLINE to **www.orderpens.com**. Enter your promo code: **5749EX9D**

Sincerely,
Dave Thompson

Order today and get our
LOWEST PRICE OF THE YEAR!
Hurry, offer expires in 10 days!

ORDER FORM
Toll Free Fax: 800-854-1000 (7367)
NATIONAL PEN COMPANY 342 Shelbyville Mills Road
Shelbyville, TN 37160
800-854-1000

YES! Please rush my new PERSONALIZED METRO GEL PEN PENS.
Bill me later. My satisfaction is 100% guaranteed!

Fall Savings

1. QUANTITY (Check one only)	<input type="checkbox"/> 100	<input type="checkbox"/> 150	<input type="checkbox"/> 250	<input type="checkbox"/> 500	<input type="checkbox"/> 1000
Regular Price	98¢ ea.	96¢ ea.	94¢ ea.	92¢ ea.	90¢ ea.
Sale Price	49¢ ea.				

2. Your Personalized Imprint

CLARK ROAD CHIROPRACTIC C
3220 CLARK RD
SARASOTA, FL 34231

Or Make Imprint Changes Here...

Up to 3 lines, 25 characters/spaces per line. Your imprint will be in all caps unless otherwise indicated below. Add your logo for just \$25. Please supply clean black & white artwork.

1. _____
2. _____
3. _____

3. Trim Color

Black Blue Red Purple Assorted

4. Ink Color

Black Blue

★ C15926504EX9D01 ★

FAYE HICKLIN
CLARK ROAD CHIROPRACTIC
CTR
3220 CLARK RD
SARASOTA, FL 34231
PTG 941-923-4367 10/8/14

5. Ordered By Name and valid Phone Number required to process order.

()

PRINT Your Name Area Code Day Phone Number Fax Number

Please allow a \$15.95 set up charge plus delivery/handling charge.
If you would like to be removed from receiving future faxes, please call 855-684-2505

NATIONAL PEN COMPANY
Your image is our business!™

ROCK BOTTOM SALE!
BIG SAVINGS!

Big Savings Offer Reserved for
CLARK ROAD CHIROPRACTIC CTR

Bright LED Light



Last chance to take advantage of **BIG SAVINGS** on the **Ultra Bright LED Flashlight and Key Chain** before prices go up! The LED Flashlight will boost sales and customer goodwill....but you must order today to avoid spending more later!

America's Favorite Advertising Product!

And here's our special 10-Day Offer Reserved for
CLARK ROAD CHIROPRACTIC CTR

UP TO
55% OFF
THE BIG ROCK BOTTOM
SALE!

- **Personalized** with your lifetime laser engraved message!
- **Low minimum** and low, low price on our bestselling flashlight!
- **Available In** Blue, Black, Red, Purple, Gunmetal or **FREE Assortment!**

Hurry, place your order in the next 10 days, before supplies of the new LED Flashlight Key Chains are gone!

TO ORDER:

FAX the completed order form below to **800-854-7367** or

CALL me at **800-854-1000** or for fastest delivery go

ONLINE to **www.orderpens.com**. Enter your promo code: **2GTXEY2B**

Sincerely,
Dave Thompson

Order today and get
FREE Gift Boxes
with your order!

ORDER FORM
Toll Free Fax: **800-854-PENS (7367)**
Call toll free: **800-854-1000**
NATIONAL PEN COMPANY 342 Shelbyville Mills Road
Shelbyville, TN 37160
DIR-1560

YES! Please rush my new **PERSONALIZED LED FLASHLIGHT KEY CHAINS**. Bill me later. My satisfaction is 100% guaranteed!

Rock Bottom Sale!

1. QUANTITY (Check one only)	<input type="checkbox"/> 50	<input type="checkbox"/> 100	<input type="checkbox"/> 200	<input type="checkbox"/> 250	<input type="checkbox"/> 500	<input type="checkbox"/> 1000
Regular Price	\$2.20 ea.	\$2.18 ea.	\$2.16 ea.	\$2.14 ea.	\$2.12 ea.	\$2.09 ea.
Sale Price	99¢ ea.	99¢ ea.	99¢ ea.	99¢ ea.	99¢ ea.	99¢ ea.

2. Your Personalized Imprint

DR. CHRIS HICKLIN
3220 Clark Rd., Sarasota, FL
(941) 923-4367

Or Make Imprint Changes Here...
Up to 3 lines, 28 characters/spaces per line • Your Imprint will be in all caps unless otherwise indicated below • Add your logo for just \$40. Please supply clean black & white artwork.

1. _____

2. _____

3. _____

3. Color Choice

Purple Red Black Blue Gunmetal Assorted

★ C15926504EY2B01 ★

FAYE HICKLIN
CLARK ROAD CHIROPRACTIC
CTR
3220 CLARK RD
SARASOTA, FL 34231
LAK 941-923-4367 10/15/14

4. Ordered By Name and valid Phone Number required to process order.

() _____

PRINT Your Name Area Code Day Phone Number Fax Number

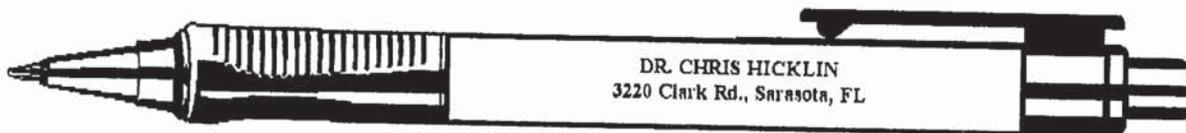
Please allow a \$15.95 set up charge plus delivery/handling charge.
If you would like to be removed from receiving future faxes, please call 855-684-2505

NATIONAL PEN COMPANY
Your image is our business!™



SPOOKY SAVINGS!

Take advantage of these great **Contour Pen** prices and boost sales and customer goodwill all year long during our **SPOOKY SAVINGS EVENT!**



Hurry, place your order in the next 10 days, before supplies of the Contour Pen are gone!
And here's our Special 10-Day Offer Reserved for
CLARK ROAD CHIROPRACTIC CTR

- Pay Only 45¢ Each!...Depending on quantity!
- Low minimum and low, low price on our bestselling pen!
- Available in...FULL-Color designs or solid colors!

TO ORDER:

FAX the completed order form below to **800-854-7367** or
 CALL me at **800-854-1000** or for fastest delivery go
 ONLINE to **www.orderpens.com**. Enter your promo code: **5566EX9F**

Sincerely,
 Dave Thompson



ORDER FORM
 Toll Free Fax: **800-854-PENS (7367)**
 Call toll free: **800-854-1000**
 NATIONAL PEN COMPANY 342 Shelbyville Mills Road
 Shelbyville, TN 37160

YES! Please rush my new PERSONALIZED CONTOUR PENS.
 Bill me later. My satisfaction is 100% guaranteed!

1. Quantity

<input type="checkbox"/> 100 @	\$1.49	49¢ ea.
<input type="checkbox"/> 150 @	\$1.45	48¢ ea.
<input type="checkbox"/> 250 @	\$1.45	47¢ ea.
<input type="checkbox"/> 500 @	\$1.39	46¢ ea.
<input type="checkbox"/> 1,000 @	\$1.35	45¢ ea.

2. Design (Check one only)

- Red Sparkler Holographic (NWY)
- Thank You for Choosing (CBI)
- We'll Keep You Smiling (IPY)
- We Don't Monkey Around (PG9)
- Compliments Of (HHD)
- Star Spangled Banner (HZ1)
- Other: _____ (list design code & name)

★ C15926504EX9F01 ★
 FAYE HICKLIN
 CLARK ROAD CHIROPRACTIC
 CTR
 3220 CLARK RD
 SARASOTA, FL 34231 10/15/14
 841-823-4357

3. Your Personalized Imprint SPOOKY SAVINGS!

DR. CHRIS HICKLIN
 3220 Clark Rd., Sarasota, FL
 (941) 923-4357

Or Make Imprint Changes Here...

Up to 5 lines, 35 characters/spaces per line - Your imprint will be in all caps unless otherwise indicated below - Add your logo for just \$25. Please supply clean black & white artwork.

1.
2.
3.
4.
5.

4. Ink Color

- Blue Black

5. Ordered By Name and valid Phone Number required to process order.

 PRINT Your Name () Area Code Day Phone Number Fax Number

Please allow a \$15.95 set up charge plus delivery/handling charge.
 If you would like to be removed from receiving future faxes, please call 855-684-2505