Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	CG Docket No. 02-278
	)	
Petition for Waiver	)	CG Docket No. 05-338
of Heska Corporation	)	

PETITION FOR WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission's ("FCC" or the "Commission") regulations, 47 C.F.R. § 1.3, Heska Corporation ("Heska") respectfully requests that the Commission grant Heska a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission's regulations, 47 C.F.R. § 64.1200(a)(4)(iv) (the "Opt-Out Rule") with respect to any facsimiles that have been transmitted by or on behalf of Heska prior to April 30, 2015.

This request for waiver is being submitted pursuant to the Commission's recent Order granting a retroactive waiver of the Opt-Rule and inviting "similarly situated parties" to seek similar waivers.[1] As the Commission has already determined that good cause exists for such retroactive waiver requests and grant of the waiver would serve the public interest, Heska respectfully requests that the Commission expeditiously grant its petition for waiver.[2]

I. BACKGROUND

Heska is a company that provides veterinary point-of-care diagnostic instrumentation, laboratory services, blood analyzers, heartworm testing and allergy assessments. Heska provides these valuable services to veterinarian clinics and other similarly situated facilities. Heska is a

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[1] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petition 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 No. 02-278, 05-338, Order, FCC 14-164, ¶30 (rel. Oct. 30, 2014) ("*Fax Order*").

[2] *See Fax Order* at ¶22; *see also WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

small company of approximately 350 employees, and has been in business since 1988. As part of its offerings, Heska provides important information about its products and services via facsimile to its customers with whom Heska has an established business relationship and who have consented to receive such communications.

The Telephone Consumer Protection Act ("TCPA"), enacted in 1991, prohibits the use of a fax machine to send an "unsolicited advertisement."[3] In 2005, Congress enacted the Junk Fax Prevention Act to "require the sender of an *unsolicited* fax advertisement to provide specified notice and contact information on the fax that allows recipients to 'opt out' of any future fax transmissions from the sender."[4] Therefore, Heska did not believe that any of its solicited facsimiles required opt-out notices. However, as a consequence of this regulatory uncertainty, Heska – like many other companies – now finds itself a defendant in a putative class action lawsuit filed in federal court which alleges, among other things, violations of the TCPA.[5]

The named plaintiff in that case, along with the putative class, seeks damages for alleged violations of the TCPA on the grounds that, among other things, Heska allegedly sent facsimile transmissions to the named plaintiff and the putative class which did not bear the opt-out notice required by the Opt-Out Rule.[6] This petition for waiver does not ask the Commission to resolve the factual and legal questions raised in the pending litigation; these issues properly remain within the jurisdiction of the district court. By this filing, Heska seeks only to obtain the same retroactive waiver of the Opt-Out Rule that the Commission granted to

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[3] Pub. L. No. 102-43, 105 Stat. 2394 (codified at 47 U.S.C. § 227).

[4] 47 C.F.R. § 64.1200(a)(4)(iv)(emphasis added); *see also* 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, fn. 154 ("*Junk Fax Order*") (2006) (stating that "the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements" (emphasis added)).

[5] See *Shaun Fauley v. Heska Corporation and John Does 1-10, Case No.* 1:15-cv-02171 (N.D. Ill). References to "Doc. __" refer to ECF docket entries in the case.

[6] Class Action Complaint, Doc. 1

multiple petitioners in the Fax Order.

II. GRANT OF THE HESKA RETROACTIVE WAIVER REQUEST IS IN THE PUBLIC INTEREST.

As the Commission concluded in the Fax Order, good cause exists for a retroactive waiver of the Opt-Out Rule insofar as it relates to the failure to comply with the Opt-Out Rule's opt-out notice requirements for facsimile transmissions sent with the prior express invitation or permission of recipients.[7]

The Commission recognized that this good cause is based, first, on the "inconsistency" between a footnote to the Junk Fax Order and the Opt-Out Rule; the Commission stated that this inconsistency has "caused confusion or misplaced confidence" regarding the applicability of the Opt-Out Rule to facsimiles sent with prior express permission.[8] This acknowledged inconsistency has contributed to substantial uncertainty surrounding the opt-out notice requirements for *solicited* fax advertisements. Like the petitioners granted retroactive waivers in the Fax Order, there is "nothing in the record here demonstrating that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so."[9] As a "similarly situated party" – *i.e.,* a defendant in a pending TCPA lawsuit – good cause exists to resolve this inconsistency by granting Heska's request for a retroactive waiver.

Grant of the retroactive waiver request would also be in the public interest. Heska notes that the Commission has already decided that such retroactive waivers will serve the public interest because the "confusion or misplaced confidence…left some businesses

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[7] *Fax Order* at ¶22.

[8] *Junk Fax Order* at fn. 154; *see also Fax Order* at ¶24.

[9] *Fax Order* at ¶26.

potentially subject to significant damage awards" and that "on balance…it serves the public interest…to grant a retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward."[10] Based on this finding, the FCC granted a retroactive waiver to all of the petitioners explicitly referenced in the Order and further invited other "similarly situated parties" to seek retroactive waivers as well.[11]

III. CONCLUSION

For the foregoing reasons, Heska respectfully requests that the Commission grant a retroactive waiver of 47 C.F.R. §64.1200(a)(4)(iv) effective through April 30, 2015.

Respectfully Submitted,

April 14, 2015

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[10] *Fax Order* at ¶27.
[11] *Id.* at ¶30.