Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	
Petition of Megadent, Inc., d/b/a Megadent Labs, Inc., d/b/a Megadent, d/b/a Megadent Laboratories, Kim Martinez (and John Does) For Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules	CG Docket No. 02-278 CG Docket No. 05-338

PETITION OF MEGADENT, INC., d/b/a MEGADENT LABS, INC., d/b/a MEGADENT, d/b/a MEGADENT LABORATORIES AND KIM MARTINEZ FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission's ("Commission") rules,[1] Megadent, Inc., d/b/a Megadent Labs, Inc., d/b/a Megadent, d/b/a Megadent Laboratories, and Kim Martinez (together, "Megadent")[2] respectfully request that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) (the "Rule") with respect to faxes transmitted by Megadent (or on its behalf) with the prior express consent or permission of the recipients or their agents after the effective date of the Rule.

On October 30, 2014, the Commission released FCC Order 14-164 (the "Fax Order"). The Fax Order granted a retroactive waiver of the Rule to a group of petitioners facing lawsuits that alleged, in part, that the petitioners had violated the Rule by failing to include specific opt-out language in their faxes even when the faxes were sent with the recipient's prior express invitation or permission. Based on confusion surrounding the Rule, the Commission determined

[1] 47 C.F.R. § 1.3.

[2] This request for waiver is also made on behalf of certain "John Doe" defendants named in *Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry v. Megadent, Inc.., et al.,* Case No. 4:15-cv-00929-ERW (United States District Court, Eastern District of Missouri, Eastern Division), the lawsuit that gives rise to this Petition.

that good cause supported a retroactive waiver, and such a waiver was in the public interest. The Commission also authorized other similarly situated entities to seek retroactive waivers.[3]

Megadent is similarly situated to the petitioners that received a retroactive waiver, because it is facing a putative class action lawsuit alleging Megadent sent faxes in violation of the Telephone Consumer Protection Act ("TCPA") during the relevant time period, and that the faxes failed to include an appropriate opt-out notice. The public interest would be harmed by requiring parties like Megadent to divert substantial capital and human resources from its economically productive activities to engage in unnecessary (and possibly ruinous) litigation because of past confusion over the Commission's regulations. A waiver is thus appropriate here.

The Fax Order requests that petitioners make "every effort" to pursue a retroactive waiver on or prior to April 30, 2015. Here, Megadent was served with the lawsuit at issue on May 13, 2015, and no responsive pleading has been filed. No discovery has been conducted and Megadent is still investigating the allegations, as discussed below. Megadent has made efforts to pursue this request as soon as possible after being served.[4]

I. BACKGROUND

Megadent is a full-service, FDA-registered dental laboratory company founded in 2010. Megadent custom-fabricates a variety of dental appliances for both dentists and dental labs including crowns, bridges, dentures, and orthodontic prostheses. In 2015, Megadent faxed its price list to certain individuals in the dental industry, including the plaintiff in the lawsuit giving rise to this request ("Degnen").

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[3] *See 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 October 30, 2014), ¶¶ 26-28.

[4] *See* Fax Order, ¶2.

A. Pending Litigation Against Megadent

Megadent was sued in a pending class action lawsuit styled *Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry v. Megadent, Inc., et al.*, Case No. 4:15-cv-00929-ERW (United States District Court, Eastern District of Missouri, Eastern Division) (the "Lawsuit"). A copy of the Petition is attached as Exhibit 1. The Lawsuit was filed by serial TCPA litigators Schultz and Associates, who have filed dozens (if not hundreds) of junk fax lawsuits throughout the country. The plaintiff Suzanne Degnen, D.M.D., P.C., d/b/a Sunset Tower Family Dentistry ("Degnen") is a serial TCPA Plaintiff.[5]

The Petition alleges Megadent sent faxes to the plaintiff and putative class that did not include the precise opt-out notice required by the Rule, among other claims. Megadent disputes that the faxes at issue constitute "advertisements" under the TCPA.[6] Megadent also disputes that the faxes were unsolicited. Further, although the Petition initially purports to challenge only unsolicited faxes, the class definition is unclear, as it apparently seeks to impose liability for any fax that did not display a proper opt-out notice, even for those faxes that were not unsolicited.[7] Megadent is not asking the Commission to resolve the factual and legal issues raised in the

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[5] *See Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry ("Degnen") v. Decision Software, et al.*, Case No. 4:15-cv-00450-JAR, U. S. District Court for the Eastern District of Missouri; *Degnen v. DentalFix RX LLC, et al.*, Case No. 15SL-CC00541, Circuit Court of St. Louis County, State of Missouri; *Degnen v. Practice Recruiters LLC f/k/a Practice Recruiters Inc., et al.*, Case No. 4:15-cv-00528, U. S. District Court for the Eastern District of Missouri; *Degnen v. Jose-Luis Ruiz, D.D.S., et al.*, Case No. 15SL-CC00547, Circuit Court of St. Louis County, State of Missouri; *Degnen v. Robert A Tripke, et al.*, Case No. 15SL-CC00548, Circuit Court of St. Louis County, State of Missouri; *Degnen v. Zimmer Dental, Inc. d/b/a Zimmer Dental, et al.*, Case No. 15SL-CC00587, Circuit Court of St. Louis County, State of Missouri; *Degnen v. Gregory L. Jack, et al.*, Case No. 15-SL-CC01274, Circuit Court of St. Louis County, State of Missouri; *and Degnen v. I Care Credit, LLC d/b/a ICare Financial, et al.* Case No. 15-SL-CC00340, Circuit Court of St. Louis County, State of Missouri; *Degnen v. Free Continuing Education Association, LLC d/b/a FCEA*, Case No. 4:15-cv-00527-RLW, U.S. District Court for the Eastern District of Missouri.

[6] By submitting this application for waiver, Megadent does not waive any defenses it may assert in the Lawsuit. Megadent is filing this application at the earliest opportunity, for the convenience of the Commission, while many key issues remain pending in the District Court, including but not limited to whether the faxes at issue constitute "advertisements" under the TCPA.

[7] *See* Ex. 1, ¶ 34

pending litigation, as these issues remain within the jurisdiction of the district court.[8] Rather, Megadent seeks the same retroactive waiver that the Commission granted to the petitioners in the Fax Order, in the event Plaintiffs claim that faxes sent with the express permission of the recipient(s) failed to include an opt-out notice that complied precisely with the Rule.

B. The Current Statutory and Regulatory Framework

The TCPA, as codified in 47 U.S.C. § 227 *et seq.*, and amended by the Junk Fax Prevention Act of 2005 ("JFPA"),[9] prohibits, under certain circumstances, the use of a fax machine to send an "unsolicited advertisement."[10] An "unsolicited advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[11]

The Regulation states a fax advertisement "sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice."[12] In addition to the Regulation, the Commission also adopted rules implementing the JFPA.[13] As explained in the Fax Order, a footnote in the rules led to industry-wide confusion regarding the Commission's intent to apply the opt-out notice to Solicited Faxes.[14] In addition, the Commission acknowledged that its notice of proposed rulemaking was unclear regarding the opt-out

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[8] The Commission declared that granting a waiver should not "be construed in any way to confirm or deny whether the petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action." *See* Fax Order, ¶ 31.

[9] *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); *see also* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). The TCPA and the JFPA are codified at 47 U.S.C. § 227 *et seq.*

[10] 47 U.S.C. §§ 227(a)(5) and (b)(1)(C).

[11] *Id.* § 227(a)(5).

[12] *See* 47 C.F.R. § 64.1200(a)(4(iv); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration*, 21 FCC Rcd at 3812, para. 48 (2006) (the "Junk Fax Order").

[13] *See generally* Junk Fax Order.

[14] *See* Junk Fax Order, 21 FCC Rcd at 3818, para. 42 n.154 ("We note that the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.") (emphasis added).

requirement on fax ads sent with the prior express permission of the recipient, which also created confusion.

In the Fax Order, the Commission "confirm[ed] that senders of fax ads must include certain information on the fax that will allow consumers to opt out, even if they previously agreed to receive fax ads from such senders."[15] Due to the aforementioned confusion, however, the Commission decided to grant retroactive waivers to parties affected by the confusion. As explained by the Commission:

> [W]e recognize that some parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether our requirement for opt-out notices applied to them. As such, we grant retroactive waivers of our opt-out requirement to certain fax advertisement senders to provide these parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by our rules.

* * *

> [W]e believe the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule.

The Commission stated that other affected parties similarly situated as the petitioners, like Megadent, have six months from the release of the Fax Order (October 30, 2014) to seek a waiver.[16]

II. THE COMMISSION SHOULD GRANT A LIMITED RETROACTIVE WAIVER OF THE RULE FOR ANY SOLICITED FAX SENT BY MEGADENT OR ON ITS BEHALF

As a result of the Lawsuit, Megadent is similarly situated to the petitioners that received retroactive waivers by the Fax Order, making a waiver appropriate here. Section 1.3 of the Commission's rules permits the Commission to grant a waiver if good cause is shown.[17] Generally, the Commission may grant a waiver if it would not undermine the policy objective of

[15] *See* Fax Order, ¶ 1.
[16] *See* Fax Order, ¶ 30.
[17] 47 C.F.R. § 1.3; *see also* 47 C.F.R. § 1.925(b)(3)(i)-(ii).

the pertinent rule and would otherwise serve the public interest.[18] Further, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than would strict adherence to the general rule.[19]

Here, special circumstances favor deviation from the general rule—rather than strict adherence. As detailed in the Fax Order, good cause has been established due to the inconsistent footnote in the Junk Fax Order, which indicated that the opt-out notice requirement applies only to unsolicited advertisements.[20] The Commission stated that this could reasonably be read to mean that a company like Megadent need not include an opt-out notice when sending solicited faxes.[21] In addition, the Commission's notice of proposed rulemaking also failed to provide explicit notice that the Commission was planning to require the opt-out notice for solicited faxes.[22] The Commission has already determined that "this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule."[23]

This is especially true here, given that the allegedly unlawful faxes contained contact information allowing Degnen (or any recipient) to opt-out of receiving future faxes. Further, Megadent is a small business and denial of a waiver could impose fatal consequences in the Lawsuit. The TCPA was not designed to impose crushing damage awards on small businesses in order to disproportionately benefit Plaintiffs' attorneys.

The Commission also determined that granting a waiver under these circumstances would serve the public interest.[24] Here, granting waiver to Megadent would not undermine the

[18] *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).
[19] *See Ne. Cellular Tel. Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990).
[20] *See* Fax Order, ¶ 26-27.
[21] *Id.* at ¶ 24.
[22] *Id.* at ¶ 26.
[23] *Id.*
[24] Fax Order, ¶ 27.

policy objective of the TCPA, which is "to allow consumers to stop unwanted faxes."[25] More broadly, unlike indiscriminate "fax blasters" to the general consumer public, Megadent did not send faxes to consumers but rather only to a limited select group of recipients -- dental professionals who operate in the industry and may have provided their express consent to receive information via fax.[26] Megadent has every incentive not to send unwanted faxes and risk offending potential customers. In fact, Megadent takes effort to ensure that entities who do not wish to be contacted do not receive Megadent's faxes or other communications. After receiving notice of the Fax Order, Megadent has taken steps to ensure that all of its fax advertisements contain the opt-out notice specified by the Rule.

Absent a waiver, companies like Megadent could be subjected to substantial expense and monetary damages for failing to comply with a rule the Commission has already determined was the subject of confusion. By granting a retroactive waiver, the Commission can ensure that the confusion does not expose companies like Megadent to potentially devastating liability. Denial of waiver could subject Megadent to significant money damages—the bulk of which would go to plaintiffs' lawyers—rather than further the TCPA's policy objective of preventing unwanted faxes. The public interest would be harmed by requiring parties like Megadent to divert substantial capital and human resources from its economically productive activities to engage in unnecessary (and possibly ruinous) litigation because of past confusion over the Commission's regulations.

III. CONCLUSION

Megadent is similarly situated to the entities that received a waiver by the Fax Order. For the reasons stated above, Megadent respectfully requests that the Commission grant Megadent a

[25] Junk Fax Order, ¶ 48.

[26] Megadent believes many of the faxes were sent with permission. Megadent was served with Degnen's lawsuit recently, on May 13, 2015, and its investigation into Degnen's allegations is ongoing.

limited retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited fax sent by Megadent(or on its behalf) after the effective date of the Regulation.

Dated: June 24, 2015

Respectfully submitted,

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