

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

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

**COMMENTS OF SUZANNE DEGNEN, D.M.D., P.C., ON 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**

I. INTRODUCTION

On October 30, 2014, the Commission granted “retroactive waivers” of 47 C.F.R. § 64.1200(a)(4)(iv)—the regulation requiring opt-out notices on fax advertisements sent with “prior express invitation or permission”—to defendants in TCPA actions and allowed “similarly situated” persons to seek waivers. The Commission noted that “all future waiver requests will be adjudicated on a case-by-case basis” and that the Commission did not “prejudge the outcome of future waiver requests in the order.” But it warned, “in light of our confirmation here that a fax ad sent with the recipient’s prior express permission must include an opt-out notice, we expect that parties will make **every effort** to file within six months of the release of this Order” (emphasis added).

The Petition of Megadent, Inc., d/b/a Megadent Labs, Inc., d/b/a Megadent, d/b/a Megadent Laboratories, Kim Martinez (and John Does) (Petitioners) requesting a retroactive waiver is one of numerous follow-on petitions filed after the October 30 Order. But this Petition differs drastically

from most of the follow-on petitions, because it was not timely filed and is an attempt to escape liability for faxes sent well after the October 30 Order. No good cause exists to grant the Petition.

II. DISCUSSION

A. **Petitioners made “no effort” rather than “every effort” to file their retroactive waiver petition within six months of the release of the October 30 Order.**

Petitioners failed make *any* effort to file their June 24, 2015 Petition until well after April 30, 2015. They are not claiming that they had hired counsel to file their Petition prior to April 30 or that someone forgot to file it by April 30. Rather, they made *no effort* to file under they got caught by Suzanne Degnen, D.M.D., P.C., a small dental practice in St. Louis County that is tired of receiving junk faxes and is not interested in purchasing Petitioners’ dental crowns, which are outsourced to Petitioner’s giant facility in Beijing, China, for cheap manufacturing. See <http://www.megadentlabs.com/about-us/our-facility> (last visited July 8, 2015). If the Commission were to grant the instant Petition, the requirement that junk-faxers make “every effort” to file by April 30, 2015—a generous six months after the October 30 Order was issued—would be rendered meaningless. Under Petitioner’s delay theory, they could have waited until 2019, the last year of the TCPA’s four-year statute of limitations, to see if they would get sued for their TCPA-violating actions, and could still argue that their delay in filing within six months of the October 30 Order should be excused.

B. **No good cause exists here to grant a retroactive waiver.** 1. **Petitioners were not confused.**

No good cause exists to grant Petitioners a retroactive waiver. They are

not “similarly situated” to others who were granted waivers. The waiver was intended only for those who were confused about whether opt-out notices were required in the first place. Petitioners have not claimed that **they** were confused as to the legal requirement for an opt-out notice, much less explained the basis for any such confusion. There is nothing in their Petition to indicate that prior to sending their junk faxes Petitioners had read or relied on 47 U.S.C. § 227, 47 C.F.R. § 64.1200, *Junk Fax Prevention Act of 2005*, Pub. L. No. 109-21, 119 Stat. 359 (2005), *Junk Fax Order, In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, or *Report and Order and Third Order on Reconsideration*, 21 FCC Rcd 3787 (2006). Likewise, there is also no evidence that Petitioners or anyone else that created or sent the faxes misunderstood anything about their obligation to include an opt-out notice. There was no opt-out notice, not even a deficient one, on the two-page fax Petitioners sent to Degnen’s dental office.¹ The Petition is not supported with any affidavit from anyone claiming knowledge of the TCPA, much less actual confusion, nor explaining how such person was confused about the opt-out requirement yet paid no heed to the October 30 Order even when the Commission dispelled any possible confusion. The waiver only applies to those who were confused about whether opt-out notices were required in the first place. (October 30 Order at 5, 8 ¶ 15, 11 ¶ 22, 12 ¶ 24, 13 ¶ 26 (simple ignorance of TCPA or Commission’s attendant regulations is not grounds for waiver)).

¹ Unlike most junk faxes which are one page, Petitioners’ fax was two pages, thus burdening its recipients with twice the paper and ink loss of the average unwanted fax.

2. Petitioners unreasonably delayed in filing their Petition and instead try to divert attention from their misdeeds by disparaging Degnen and Degnen’s counsel.

Not only did Petitioners fail to heed the Commission’s warning in the October 30 Order, they waited until June 24, 2015, more than five weeks after being served with Degnen’s lawsuit on May 13, 2015, before filing their Petition. Rather than explain why they waited until June 24, 2015 to file the Petition—other than stating that they filed after getting sued—Petitioners attempt to divert the Commission’s attention by disparaging Degnen and Degnen’s counsel.

Petitioners call Degnen a “serial TCPA plaintiff.” They call Degnen’s counsel “serial TCPA litigators” and suggest that such counsel may have filed “hundreds . . . of junk fax cases across the county.” That fact that Degnen has filed multiple TCPA cases is a testament to how widespread and problematic junk faxes are. By stepping up and filing TCPA cases, Degnen is carrying out Congressional intent. *Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC*, 2014 U.S. Dist. LEXIS 177222, at *8 (S.D. Fla. Dec. 23, 2014) (“The TCPA explicitly authorizes private parties to sue for violations and provides \$500 in statutory damages for each violation, which functions as a bounty to incentivize private enforcement actions.”). And the reckless comments about Degnen’s counsel are simply inaccurate. The undersigned counsel have filed nowhere close to one hundred TCPA cases, much less “hundreds” of junk-fax cases, and have not filed a single case outside of Missouri. Likewise, Petitioners contention that “[d]enial of a waiver could subject Megadent to significant money damages—the bulk of which would go to plaintiffs’ lawyers—rather than further TCPA’s policy

objective of preventing unwanted faxes” (Pet.at 7), is another exaggeration, as Petitioner’s counsel are experienced TCPA class-action defense attorney and know that any class-action settlement in Degnen’s suit would need to be approved by a federal judge and that successful plaintiffs’ counsel in these cases generally receive only a fraction of the money paid to the class by TCPA violators.

CONCLUSION

The Commission should deny Petitioners’ waiver petition because they made no effort to file the Petition until late June 2015, they were not confused about the opt-out requirement and submitted no evidence of confusion, rather than accept responsibility for their wrongdoing they disparage Degnen and its counsel, and they should be held financially accountable for their actions.

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CERTIFICATE OF SERVICE

I certify that on July 9, 2015, I served by email a true and correct copy of these Comments to the following:

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