

**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)	

Wilder Chiropractic, Inc.’s Comments on Scrip Inc.’s Petition for Retroactive Waiver

Wilder Chiropractic, Inc., is the Plaintiff in a private TCPA action against Petitioner Scrip Inc.¹ Scrip filed a petition on September 17, 2015, seeking a “retroactive waiver” of 47 C.F.R. § 64.1200(a)(4)(iv), which requires opt-out notice on fax advertisements sent with “prior express invitation or permission.”² The Consumer and Governmental Affairs Bureau sought comments on September 25, 2015.³ Plaintiff opposes the Scrip Petition because (1) the Commission has no authority to “waive” its regulations in a private right of action, (2) the Scrip petition is untimely, and (3) Plaintiff’s investigation into whether Scrip had actual knowledge of the opt-out rules when it sent its faxes is ongoing.

Procedural History

On October 30, 2014, the Commission issued the “Opt-Out Order” rejecting several challenges to the validity of § 64.1200(a)(4)(iv),⁴ but granting the covered petitioners

¹ *Wilder Chiropractic, Inc. v. Scrip Inc.*, No. 15-cv-5778 (N.D. Ill.).

² *Petition for Retroactive Waiver by Scrip, Inc.*, CG Docket Nos. 02-278, 05-338 (filed Sept. 17, 2015).

³ *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 (Sept. 25, 2015).

⁴ *In re Rules & Regulations Implementing the Tel. 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*,

retroactive “waivers.”⁵ The Commission allowed “similarly situated” parties to petition for similar waivers, but it stressed that “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.”⁶ The Commission directed the Bureau “to conduct outreach to inform senders of the opt-out notice requirement.”⁷ The Commission repeated, “[w]e expect parties making similar waiver requests to make every effort to file within six months of the release of this Order.”⁸

Factual Background

On June 30, 2015, Plaintiff filed suit under the TCPA in the Northern District of Illinois alleging Scrip sent Plaintiff and a class of other persons unsolicited fax advertisements, including a fax on August 5, 2013.⁹ The fax states it is from “Scrip” and advertises a “Fall Pre-Sale” on “Biofreeze,” stating recipients can “Save up to 23%” if they “Buy 20 Get 4 Free” or “Buy 38 Get 10 Free.”¹⁰ The fax is addressed to “our customers.”¹¹

CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014) ¶¶ 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).

⁵ *Id.* ¶¶ 22–31.

⁶ *Id.* ¶ 2.

⁷ *Id.* ¶ 2; *see also* Statement of Comm’r O’Rielly Concurring in Part and Dissenting in Part at 25 (“At my request, staff has committed to engage in significant outreach to ensure that fax senders, including those that might not normally follow FCC proceedings, will be aware of the opt-out requirement.”).

⁸ *Id.* ¶ 30.

⁹ *Wilder Chiropractic, Inc. v. Scrip, Inc.*, No. 15-cv-5778, Doc. 1 ¶¶ 11, 20.

¹⁰ *Id.*, Ex. A.

¹¹ *Id.*

The fax contains no opt-out notice.¹² The Complaint alleges that, because the fax lacks compliant opt-out notice, Scrip cannot claim “established business relationship” or “prior express invitation or permission.”¹³

On July 30, 2015, Scrip answered the Complaint through its counsel.¹⁴ Scrip asserts as an affirmative defense that “Plaintiff’s claims are barred because it provided, upon information and belief, express consent, invitation, and/or permission to receive information from Defendants.”¹⁵ Scrip denies that the fax “did not display a proper opt-out notice as required by 47 C.[F].R. § 64.1200.”¹⁶

On September 17, 2015, Scrip filed its petition.¹⁷ Scrip acknowledges the Opt-Out Order states, “[w]e expect that parties will make every effort to file within six months of the release of this order.”¹⁸ Scrip argues its “late filing” is justified because it “had no reason to seek a waiver prior to April 30, 2015, as it was unaware of any potential claim against it as of that date.”¹⁹ Scrip does not explain why it did not file its waiver petition until September 17, 2015, when it was served with the Complaint on July 9, 2015, and answered the Complaint on July 30, 2015.²⁰

¹² *Id.*

¹³ *Id.* ¶ 30.

¹⁴ *Id.*, Answer, Doc. 11, ¶ 31.

¹⁵ *Id.* at 16 (Eighth Aff. Defense).

¹⁶ *Id.* ¶ 18.

¹⁷ Scrip Pet. at 1.

¹⁸ *Id.* at 8 (citing Opt-Out Order ¶ 2).

¹⁹ *Id.*

²⁰ *Id.* at 1–9.

Argument

I. The Commission has no authority to “waive” violations of the regulations prescribed under the TCPA in a private right of action.

The TCPA creates a private right of action to sue “in an appropriate court” for “a violation of this subsection or the regulations prescribed under this subsection,”²¹ and directs the Commission to “prescribe regulations” to be enforced in those lawsuits.²² The Commission reaffirmed in the Opt-Out Order that § 64.1200(a)(4)(iv) is one of the “regulations prescribed under” 47 U.S.C. § 227(b)(2).²³ The “appropriate court” determines whether “a violation” has taken place.²⁴ If the court finds a violation, the TCPA awards \$500 in damages 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[].”²⁵

The TCPA does not authorize the Commission to “waive” its regulations in a private right of action.²⁶ It does not authorize the Commission to intervene in a private right of action.²⁷ It does not require a private plaintiff to notify the Commission it has filed a private lawsuit.²⁸ Nor does it limit a private plaintiff’s right to sue to cases where the Commission

²¹ 47 U.S.C. § 227(b)(3).

²² *Id.* § 227(b)(2).

²³ Opt-Out Order ¶¶ 19–20.

²⁴ *Id.* § 227(b)(3)(A)–(B).

²⁵ *Id.* § 227(b)(3).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *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).

declines to prosecute.²⁹ 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.³⁰

Similarly, the TCPA empowers state attorneys general to sue for violations of the regulations for \$500 per violation, which the court may increase for willful or knowing violations, as in the private right of action.³¹ Such actions must be brought in a federal district court.³² The TCPA requires the state to give notice of such an action to the Commission, which “shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.”³³

Finally, the Communications Act empowers the Commission to enforce the TCPA and the regulations through administrative forfeiture actions.³⁴ Taken together, Congress has created a tripartite enforcement scheme in which the Commission promulgates regulations that may be enforced by private citizens, the states, and the Commission, and where the Commission plays *some* role in state enforcement but plays *no* role in private TCPA litigation.³⁵ This scheme is similar to several other statutes, including the Clean Air Act,

²⁹ *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).

³⁰ 47 U.S.C. § 227(b)(3).

³¹ *Id.* § 227(g).

³² *Id.*

³³ *Id.* § 227(g)(3).

³⁴ *Id.* § 503(b).

³⁵ *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”).

which empowers the EPA to issue regulations imposing emissions standards³⁶ that are enforceable both in private “citizen suits”³⁷ and in administrative actions.³⁸

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*,³⁹ holding it is “the Judiciary” that “determines ‘the scope’—*including the available remedies*” of “statutes establishing private rights of action”⁴⁰ and that, consistent with that principle, the Clean Air Act “vests authority over private suits in the *courts*, not EPA.”⁴¹ TCPA Plaintiffs discussed *NRDC* extensively in a letter to the Commission after it was issued April 18, 2014,⁴² and in subsequent comments on petitions.⁴³ Neither the Opt-Out Order nor the Bureau’s August 28, 2015 order cites *NRDC*.

On December 12, 2014, the United States District Court for the Western District of Michigan ruled a Commission “waiver” from § 64.1200(a)(4)(iv) has no effect in private litigation.⁴⁴ 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

³⁶ 42 U.S.C. § 7412(d).

³⁷ 42 U.S.C. § 7604(a).

³⁸ 42 U.S.C. § 7413(d).

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

⁴⁰ *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)).

⁴¹ *Id.*

⁴² Letter of Brian J. Wanca, CG Docket No. 05-338 (May 19, 2014).

⁴³ 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).

⁴⁴ *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 498 (W.D. Mich. 2014).

requirements for a particular party in a case or controversy presently proceeding in an Article III court.”⁴⁵ The district court held the “[t]he regulation remains in effect just as it was originally promulgated” for determining whether a defendant violated the “regulations prescribed under” the TCPA.⁴⁶ 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.”⁴⁷

The Commission should deny Scrip petition on the basis that it cannot grant a “waiver” with the effect of relieving Scrip of liability in a private right of action under the TCPA. In the alternative, if the Commission grants Scrip a “waiver,” it should make clear it applies only in Commission enforcement proceedings.

II. The Scrip Petition is untimely.

Following the October 30, 2014 Opt-Out Order, the Bureau conducted significant outreach to inform fax senders of the opt-out notice requirements and their ability to seek “waivers” for non-compliant faxes sent prior to April 30, 2015. Over 100 petitioners filed waiver petitions by April 30, 2015.⁴⁸ Most petitioners were current defendants in private TCPA litigation, such as Stryker Lubricant Distributors, Inc., which filed on April 30, 2015, through its counsel, Rock Fusco & Connelly LLC.⁴⁹

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2015 WL 5120879, at *1 (CGAB Aug. 28, 2015) (“Bureau Order”).

⁴⁹ *Petition for Retroactive Waiver by Stryker Lubricant Distributors, Inc.*, CG Docket Nos. 02-278, 05-338, at 6 (filed Apr. 30, 2015).

But not all petitioners were currently being sued for opt-out-notice violations. For example, on April 28, 2015, Truckers B2B, LLC, filed a waiver petition explaining that, although it was not currently defending a private TCPA action, it sought a waiver because it was “concerned that it could one day face significant liability” for opt-out-notice violations.⁵⁰ On April 29, 2015, Wells Fargo filed a waiver petition, explaining it was not currently being sued for violating the opt-out-notice requirement but was seeking a waiver “as a prophylactic measure.”⁵¹ Both petitions were granted.⁵² The Bureau ruled there was no requirement “that faxers currently face lawsuits or potential liability to qualify for the waiver.”⁵³

In contrast, Scrip did not make “every effort” to file by April 30, 2015. Scrip made *no* effort to do so. Scrip argues its “late filing” is justified because it “had no reason to seek a waiver prior to April 30, 2015, as it was unaware of any potential claim against it as of that date,” since it was not served with the Complaint until July 9, 2015. But Scrip did, in fact, have a reason to seek a waiver by April 30, 2015: the Commission issued a final order stating it was “expect[ed]” to do so six months earlier. The same day, the Commission issued public notice announcing that “similarly situated parties may seek waiver requests,” “emphasiz[ing] that such parties should make every effort to file such requests prior to April 30, 2015,” and

⁵⁰ *Petition for Waiver by Truckers B2B, LLC*, CG Docket Nos. 02-278, 05-338, at 2 (filed Apr. 28, 2015).

⁵¹ *Petition of Wells Fargo & Co. for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules*, CG Docket Nos. 02-278, 05-338, at 5 (filed Apr. 29, 2015).

⁵² Bureau Order ¶ 24.

⁵³ *Id.* ¶ 19.

repeating that the Commission “expect[s] these parties to make every effort to file such requests prior to April 30, 2015.”⁵⁴

Scrip’s argument that its late filing should be excused because it did not have “notice of the claim against it” prior to April 30, 2015, fails because it makes no difference whether a petitioner “currently face lawsuits or potential liability.” Other petitioners who had not yet been sued for opt-out notice violations came forward and complied with the deadline, most likely due to the Bureau’s outreach efforts.

Finally, it would be inequitable to allow Scrip to evade the April 30 deadline because it did not file its petition immediately after being served with the Complaint on July 9, 2015. Nor did it file its petition immediately after filing its Answer denying Plaintiff’s opt-out-notice allegations on July 30, 2015, even though its attorneys filed the Stryker Lubricant Distributors petition on April 30. Instead, Scrip waited until September 17, 2015. This delay is inconsistent with the Commission’s expectations in the Opt-Out Order that waiver applicants would act as promptly as possible. Under these circumstances, the Commission should decline to excuse Scrip’s failure to file a waiver petition by April 30, 2015.

III. Plaintiffs have a due-process right to inquire into whether Petitioners had actual knowledge of the rules.

If the Bureau’s August 28, 2015 order is correct that the standard for a waiver is that a petitioner is considered “presumptively” confused in the absence of evidence it had actual knowledge of the opt-out-notice requirement, then Plaintiffs have no evidence of actual

⁵⁴ *FCC Confirms Opt-Out Notice Requirements Applicable to All Fax Advertisements*, 29 FCC Rcd. 13498, 13498 (Oct. 30, 2014).

knowledge at this time with which to rebut the presumption with respect to Scrip. Only Scrip has that information, and discovery in the private TCPA litigation is ongoing.

Plaintiff has a due-process right to investigate whether Scrip had actual knowledge of the opt-out rules when it sent its faxes if that factor is dispositive of Plaintiff's private right of action under the TCPA, and the Commission should hold such "proceedings as it may deem necessary" for that purpose.⁵⁵ In the alternative, the Commission should issue an order stating it will postpone ruling on the Scrip petition until Plaintiff can complete discovery in the underlying private action. Plaintiff cannot reasonably be expected to produce evidence of Scrip's state of mind without some kind of fact-finding taking place.

Conclusion

The Commission should deny the Scrip petition because the Commission has no authority to "waive" a regulation in private TCPA litigation. The Scrip petition is also untimely, having been filed four-and-a-half months after the April 30, 2015 deadline and 48 days after Scrip answered the Complaint through counsel, which is inconsistent with the Commission's expectation that waiver applicants act promptly. Finally, it would violate Plaintiff's due process rights to "waive" its private right of action based on a lack of evidence of Scrip's state of mind where Plaintiff's investigation into those facts is ongoing.

Dated: October 9, 2015

Respectfully submitted,

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⁵⁵ 47 C.F.R. § 1.1.

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