

**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)	

**Shaun Fauley’s Comments on Petitions for Retroactive Waiver filed by
Virbac Corp. and Petplan**

Commenter Shaun Fauley is the plaintiff in private TCPA actions pending in the United States District Court for the Northern District of Illinois against Virbac Corporation (“Virbac”) and Fetch, Inc. d/b/a Petplan (“Petplan”).¹ Virbac and Petplan have filed petitions 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 & Governmental Affairs Bureau sought comments on the Virbac and Petplan Petitions December 4, 2015.³ As discussed below, the petitions should be denied because (1) the Commission has no authority to “waive” a regulation in a private statutory cause of action, (2) Petplan admits simple ignorance of the law, and (3) it would violate Plaintiff’s due-process rights to “waive” his cause of action before he can investigate whether Virbac had actual knowledge of the opt-out-notice requirements.

¹ *Fauley v. Virbac Corp.*, No. 15-cv-09125 (N.D. Ill., filed Oct. 15, 2015); *Fauley v. Fetch, Inc. d/b/a Petplan*, No. 15-cv-09406 (N.D. Ill., filed Oct. 23, 2015).

² *Virbac Petition for Waiver*, CG Docket Nos. 02-278, 05-338 (filed Nov. 9, 2015); *Petplan Petition for Retroactive Waiver*, CG Docket Nos. 02-278, 05-338 (filed Nov. 25, 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 (Dec. 4, 2015).

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, 2015.⁴ The Commission invited “similarly situated” parties to petition for similar waivers by April 30, 2015, stating all future petitions would be “adjudicated on a case-by-case basis” and that the Commission did not “prejudge the outcome of future waiver requests in the order.”⁵

On August 28, 2015, the Consumer & Governmental Affairs Bureau issued an order granting 117 follow-on waiver petitions.⁶ The Bureau clarified that a petitioner need only “reference” footnote 154 of the 2006 Junk Fax Order to create a “presumption of confusion” justifying a waiver and that plaintiffs may “rebut” that presumption with evidence the petitioner “clearly understood the requirement and thus do[es] not deserve the presumption of confusion or misplaced confidence.”⁷

⁴ *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) (“Opt-Out Order”) ¶ 29.

⁵ Opt-Out Order ¶ 30 & n.102.

⁶ *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).

⁷ *Id.* ¶ 16.

On December 9, 2015, the Bureau ruled on eleven waiver petitions, granting five petitions and, for the first time, denying six petitions.⁸ The Bureau denied five petitions on the basis that “the petitioners admit a lack of awareness of the TCPA and/or Commission rules requiring them to include opt-out notices on faxes sent to recipients who provided prior express permission or consent.”⁹ The Bureau noted these petitioners stated, for example, that “prior to being sued, petitioner[s] had no understanding that opt-out notices were required,” or were otherwise simply “not aware of the opt-out requirement.”¹⁰ The Bureau ruled that the Opt-Out Order “made clear that ignorance of the law would not constitute grounds for a waiver” and “[b]ecause these five parties admit their ignorance of the law, their petitions must be denied.”¹¹

The Bureau denied the sixth waiver on the basis that the faxes were sent pursuant to an established business relationship (EBR) where the petitioner asserted “that because the faxes were sent to registered customers it ‘reasonably believed that they were within the provision of the Junk Fax Protection Act stating that the opt-out notice does not apply because the transmissions were not unsolicited.’”¹²

⁸ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2015 WL 8543949 (CGAB Dec. 9, 2015) (“December 9 Bureau Order”).

⁹ *Id.* ¶ 20.

¹⁰ *Id.* n.65.

¹¹ *Id.* ¶ 20.

¹² *Id.* ¶ 21.

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,”¹³ and directs the Commission to “prescribe regulations” to be enforced in those lawsuits.¹⁴ 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).¹⁵ The “appropriate court” determines whether “a violation” of the statute or the regulations has taken place.¹⁶ If the court finds a violation, the TCPA automatically awards a minimum \$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[].”¹⁷

The TCPA does not authorize the Commission to “waive” its regulations in a private right of action.¹⁸ It does not authorize the Commission to intervene in a private right of action.¹⁹ It does not require a private plaintiff to notify the Commission it has filed a private lawsuit.²⁰ Nor does it limit a private plaintiff’s right to sue to cases where the Commission

¹³ 47 U.S.C. § 227(b)(3).

¹⁴ *Id.* § 227(b)(2).

¹⁵ Opt-Out Order ¶¶ 19–20.

¹⁶ *Id.* § 227(b)(3)(A)–(B).

¹⁷ *Id.* § 227(b)(3).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *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.²¹ 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.²²

Similarly, the TCPA empowers state attorneys general to sue for violations of the TCPA or the regulations prescribed thereunder for \$500 per violation, which the court may increase for willful or knowing violations, as in the private right of action.²³ Such actions must be brought in a federal district court.²⁴ The state must give notice of the 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.”²⁵ Finally, the Communications Act empowers the Commission to enforce the TCPA through administrative forfeiture actions.²⁶ Neither private citizens nor state attorneys general have a role in that process, such as determining whether a violator acted “willfully or repeatedly.”²⁷

Thus, the TCPA and the Communications Act create 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

²¹ *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).

²² 47 U.S.C. § 227(b)(3).

²³ *Id.* § 227(g).

²⁴ *Id.*

²⁵ *Id.* § 227(g)(3).

²⁶ *Id.* § 503(b).

²⁷ *Id.*

enforcement activities but plays *no* role in private TCPA litigation.²⁸ This scheme is similar to several other statutes, including the Clean Air Act, which empowers the EPA to issue regulations imposing emissions standards²⁹ that are enforceable both in private “citizen suits”³⁰ and in administrative actions.³¹

The D.C. Circuit Court of Appeals has 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*,³² holding it is “the Judiciary” that “determines ‘the scope’—*including the available remedies*” of “statutes establishing private rights of action”³³ and that, consistent with that principle, the Clean Air Act “vests authority over private suits in the *courts*, not EPA.”³⁴ TCPA Plaintiffs discussed *NRDC* extensively in a letter to the Commission after it was issued April 18, 2014,³⁵ and in subsequent comments on waiver petitions.³⁶ Neither the Opt-Out Order, the Bureau’s August 28, 2015 order, nor the Bureau’s December 9, 2015 order cites *NRDC*.

²⁸ *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”).

²⁹ 42 U.S.C. § 7412(d).

³⁰ 42 U.S.C. § 7604(a).

³¹ 42 U.S.C. § 7413(d).

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

³³ *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)).

³⁴ *Id.*

³⁵ Letter of Brian J. Wanca, CG Docket No. 05-338 (May 19, 2014).

³⁶ 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 held a Commission “waiver” from § 64.1200(a)(4)(iv) is not enforceable in private TCPA litigation.³⁷ 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.”³⁸ 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).³⁹ 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.”⁴⁰

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.”⁴¹ The Commission already ruled in the Opt-Out Order that the regulation lawfully implements the TCPA,⁴² so a violation of the regulation *is* a violation of the statute.

³⁷ *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 498 (W.D. Mich. 2014).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *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.”⁴³ The TCPA does not expressly authorize the Commission to issue retroactive rules.⁴⁴ It authorizes it to “implement” the statute.⁴⁵ To “implement” is inherently prospective, meaning “to begin to do or use (something, such as a plan): to make (something) active or effective.”⁴⁶

II. Petplan admits simple ignorance of the law.

Petplan asserts it is “a small start-up venture” and therefore “had no basis upon which to believe there was any question regarding the legality of any solicited fax messages sent by or on behalf of Petplan.”⁴⁷ Petplan argues it was not “until it was very recently sued in a putative nationwide class action” that it learned of the opt-out regulations⁴⁸ and that “[p]rior to learning of the instant lawsuit regarding facsimiles allegedly sent well over three

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

⁴² Opt-Out Order ¶ 19–20.

⁴³ *Bowen*, 488 U.S. at 208.

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

⁴⁵ § 227(b)(2).

⁴⁶ See <http://www.merriam-webster.com/dictionary/implement>.

⁴⁷ Petplan Pet. at 4–5.

⁴⁸ *Id.* at 5.

years ago and retaining counsel, *Petitioner did not have any understanding that opt-out notices were required on solicited faxes.*⁴⁹

These statements are virtually identical to those in the five petitions denied in the December 9 Bureau Order.⁵⁰ Like those petitioners, Petplan “admit[s] a lack of awareness of the TCPA and/or Commission rules requiring them to include opt-out notices on faxes sent to recipients who provided prior express permission or consent.”⁵¹ And like those petitioners, Petplan’s request for waiver should be denied because the Opt-Out Order “made clear that ignorance of the law would not constitute grounds for a waiver.”⁵²

III. With respect to Virbac, Plaintiff has a due-process right to inquire into whether it 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 Plaintiff has no evidence of actual knowledge at this time with which to rebut the presumption with respect to Virbac. Only Virbac has that information, its petition is silent on the issue, and no discovery has taken place in the underlying private TCPA action.

Plaintiff has a due-process right to investigate whether Virbac had actual knowledge of the opt-out rules if that factor is dispositive of his private right of action under the TCPA,

⁴⁹ *Id.* at 7 (emphasis added).

⁵⁰ *E.g.*, Ohio National Petition at 6 (“Prior to learning of the instant lawsuit regarding facsimiles sent over two years ago and retaining counsel, Petitioners did not have any understanding that opt-out notices were required on solicited faxes.”); Athenahealth Waiver Petition at 6 (“Athena has never before been a party to a TCPA action, and consequently was not monitoring the FCC’s orders.”).

⁵¹ December 9 Bureau Order ¶ 20.

⁵² *Id.*

and the Commission should hold such “proceedings as it may deem necessary” for that purpose.⁵³ In the alternative, the Commission should issue an order stating it will postpone ruling on the Virbac petition until Plaintiff can complete discovery in the underlying private action. Plaintiff cannot reasonably be expected to produce evidence of Virbac’s state of mind without some kind of fact-finding taking place.

Conclusion

The Commission should deny the petitions because the Commission has no authority to “waive” a regulation in a private right of action under the TCPA. The Petplan petition should be denied because Petplan admits it was simply ignorant of the law, arguing that as a “small start-up venture” it “did not have any understanding that opt-out notices were required on solicited faxes” until it was sued. Finally, Virbac’s petition should be denied because it would violate Plaintiff’s due-process rights to “waive” his private right of action based on a lack of evidence of Virbac’s state of mind that Plaintiff has had no opportunity to investigate, either through discovery in the private litigation or before the Commission.

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Respectfully submitted,

By: s/Brian J. Wanca
Brian J. Wanca
Glenn L. Hara
Anderson + Wanca
3701 Algonquin Road, Suite 500
Rolling Meadows, IL 60008
Telephone: (847) 368-1500
Facsimile: (847) 368-1501

⁵³ 47 C.F.R. § 1.1.