

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

In the Matter of Fetch, Inc. d/b/a Petplan
Petition for Retroactive Waiver of 47 C.F.R.
§ 64.1200(a)(4)(iv)

CG Docket No. 02-278

CG Docket No. 05-338

Reply In Support of Petition For Retroactive Waiver

Fetch, Inc. d/b/a Petplan

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Summary

In its petition for retroactive waiver of Section 64.1200(a)(4)(iv) with regard to the opt-out notice requirement for solicited facsimile advertisements, Petitioner Fetch, Inc. d/b/a Petplan demonstrated that it is similarly situated to the petitioners granted waivers by the Commission on October 30, 2014, and therefore also entitled to waiver, because Petplan's petition referenced the confusion between the footnote and the rule in the Commission's 2006 Junk Fax Order and because no record evidence demonstrates that Petplan understood that it did, in fact, have to comply with the opt-out notice requirement for facsimile advertisements sent with prior express permission but nonetheless failed to do so.

Shaun Fauley, who is the plaintiff in a TCPA putative class action against Petplan, filed the lone comment in response. While Fauley opposes the granting of a waiver, he does not contest that Petplan referenced the confusion between the footnote and the rule, and does not present any evidence that Petplan understood that it did, in fact, have to comply with the opt-out notice requirement for facsimile advertisements sent with prior express permission but nonetheless failed to do so. Rather, he argues that the granting the waiver to *any* petitioner is impermissible because the granting of such a waiver violates the separation of powers vis-à-vis the judiciary. But the Commission and the Bureau have repeatedly rejected this argument with regard to the granting of waivers of the opt-out notice requirement of Section 64.1200(a)(4)(iv) for solicited facsimile advertisements, and the result should be no different here.

Fauley also argues that Petplan is not entitled to a waiver because Petplan supposedly admitted ignorance of the law, and the Bureau has denied petitions on that basis. But Petplan did no such thing. Petplan's petition was not intended to be read, and should not be read, as seeking a waiver based on ignorance of the law. Rather, Petplan used the same language as used by the

Commission and the Bureau in describing what a petitioner must assert to qualify for a waiver, and dozens of petitioners who previously used that language were granted waivers by the Commission and the Bureau. However, even if the Bureau chooses to read Petplan's petition as asserting a lack of awareness of the opt-out notice requirement for solicited faxes, Petplan is still entitled to a waiver because nothing in the record demonstrates that Petplan was aware of the opt-out notice requirement for solicited faxes and failed to comply nonetheless.

TABLE OF CONTENTS

Argument1

I. There Is No Merit To The Argument That The Commission Lacks The Authority To Grant Retroactive Waivers of 47 C.F.R. § 64.1200(a)(4)(iv)2

II. Petplan Is Seeking A Waiver Based On The Fact That It Is Similarly Situated To The Original Petitioners, Not Based On “Simple Ignorance Of The Law.”5

 A. Petplan’s Petition Was Not Intended To Be Read, And Should Not Be Read, As Seeking A Waiver Based On “Simple Ignorance” Of The Law6

 B. The Bureau Granted Petitions In The *December 9 Order* That Made The Same Assertions As Made In The Petplan Petition8

III. Even If The Bureau Chooses To Read Petplan’s Petition As Asserting A Lack Of Awareness Of The Opt-Out Notice Requirement For Solicited Faxes, Petplan Is Still Entitled To A Waiver Because Nothing In The Record Demonstrates That Petplan Was Aware Of The Opt-Out Notice Requirement And Failed To Comply Nonetheless10

Conclusion13

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CG Docket No. 02-278

CG Docket No. 05-338

Reply In Support Of Petition For Retroactive Waiver

Petitioner Fetch, Inc. d/b/a Petplan (“Petplan” or “Petitioner”), by and through its undersigned counsel, and pursuant to the Public Notice issued by the Federal Communications Commission (the “Commission”) on December 4, 2015 in Docket Nos. 02-278 and 05-338,¹ and Section 1.3 of the Commission’s Rules,² respectfully files this Reply in response to the lone comment³ (an opposition filed on December 18, 2015 (the “Comment”) by Shaun Fauley (“Fauley”)) filed by his counsel Anderson + Wanca in response to Petplan’s request (the “Petition”) that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) (the “Regulation”) of its Rules⁴ with regard to the opt-out notice requirement for solicited facsimiles sent by or on behalf of Petitioner.

Argument

In its Petition, Petplan demonstrated why the Commission should grant a retroactive waiver of the Regulation: The Commission already determined in the *2014 Anda Commission*

¹ *Consumer and Governmental Affairs Bureau Seeks Comments on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, Public Notice, FCC 15-1381 (rel. Dec. 4, 2015).

² 47 C.F.R. § 1.3.

³ Shaun Fauley’s Comments on Petitions for Retroactive Waiver filed by Virbac Corp. and Petplan, CG Docket Nos. 02-278, 05-338 (filed Dec. 18, 2015) (hereinafter “Comment”).

⁴ 47 C.F.R. § 64.1200(a)(4)(iv).

*Order*⁵ that good cause exists for a waiver of the Regulation; the Commission expressly invited parties “similarly situated” to the parties granted retroactive waivers in the *2014 Anda Commission Order* to file their own waiver requests; and Petplan is a similarly situated party and equally entitled to a waiver. Shaun Fauley, who is the plaintiff in a TCPA putative class action against Petplan, opposes the Petition, arguing that “[t]he 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” and that Petplan’s petition should be denied because “Petplan admits simple ignorance of the law.”⁶ As set forth below, neither argument has merit.

I. There Is No Merit To The Argument That The Commission Lacks The Authority To Grant Retroactive Waivers Of 47 C.F.R. § 64.1200(a)(4)(iv).

Plaintiff’s argument that the Commission lacks the authority to provide a waiver of 47 C.F.R. § 64.1200(a)(4)(iv), and that doing so would violate the separation of powers,⁷ rehashes the same points that Plaintiff’s counsel has repeatedly set forth in opposing other waiver requests, and that the Commission and the Consumer and Governmental Affairs Bureau (the “Bureau”) have repeatedly rejected. The outcome should be no different here.

In addressing several dozen petitions in the *2014 Anda Commission Order*, the Commission expressly rejected the same argument Plaintiff proffers here, stating “we reject any implication that by addressing the petitions filed in this matter while related litigation is pending, we have ‘violate[d] the separation of powers vis-à-vis the judiciary,’ as one commenter has suggested.”⁸ That “one commenter” was represented by the same counsel as represents Plaintiff

⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, 29 FCC Rcd. 13998 (2014) (the “*2014 Anda Commission Order*”).

⁶ Comment at 4, 8.

⁷ Comment at 4-8.

⁸ *2014 Anda Commission Order* at 14008, ¶ 21.

here—the law firm of Anderson + Wanca. In orders issued on August 28, 2015 and December 9, 2015, the Bureau reiterated the same point, stating “[a]t the outset, we dismiss arguments that by granting waivers while litigation is pending [, the Commission] violates the separation of powers as several commenters have suggested.”⁹ Those “several commenters” included the same counsel as represents Plaintiff here—the law firm of Anderson + Wanca.¹⁰

Plaintiff persists in making the same verbatim arguments here, which again should be rejected for the same reasons. The Petition does not (as Plaintiff suggests) require the Commission to waive any requirement of the statute itself or require the Commission to “issue retroactive rules.”¹¹ Rather, it simply asks the Commission to retroactively waive application of one of its own rules, which it is plainly empowered to do.

It is undisputed that “Congress provided the Commission authority as the expert agency” to issue rules under the TCPA and that “[t]he Commission may waive any of its rules for good cause shown.”¹² Plaintiff argues that the existence of a private lawsuit ties the Commission’s hands,¹³ but as the Bureau recently stated, “the mere fact that the TCPA allows for private rights of action to enforce rule violations does not undercut [its] authority, as the expert agency, to define the scope of when and how [its] rules apply.”¹⁴

⁹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-976 ¶ 13 (rel. Aug. 28, 2015) (hereinafter “*August 28 Order*”); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-1402 ¶ 12 (rel. Dec. 9, 2015) (hereinafter “*December 9 Order*”).

¹⁰ See, e.g., *August 28 Order* ¶¶ 9 & n.40; 13 & n.52 (listing commenters); *December 9 Order* ¶ 48.

¹¹ Comment at 8.

¹² *August 28 Order* ¶¶ 13, 14.

¹³ Comment at 5. Plaintiff’s proposed interpretation of the Commission’s authority based on a “tripartite enforcement scheme” (*id.* at 5-6) would result in the absurd situation where a private plaintiff is permitted to act *against* the public interest by enforcing Commission rules that the Commission has determined are in the public interest *not* to enforce.

¹⁴ *August 28 Order* ¶ 13; *December 9 Order* ¶ 12.

As its counsel, Anderson + Wanca, has done repeatedly, Plaintiff invokes in support of its arguments two cases which are plainly distinguishable. First, Plaintiff's reliance on the decision of the DC Circuit in *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014)¹⁵ is misplaced. That case concerned an entirely different statute and regulatory framework; unlike the Commission, the Environmental Protection Agency is not expressly authorized to waive or amend its own rules for good cause, and the Petition here requests waiver in a narrow circumstance limited to the application of the Commission's own rule, not a waiver or modification of the statute itself.

Plaintiff's invocation of the decision in *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 497-98 (W.D. Mich. 2015)¹⁶ is equally unavailing. The court cites no authority for its conclusion that "it 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," and fails to note the legion of authority affirmatively recognizing the Commission's authority to grant retroactive waivers of its own rules pursuant to 47 C.F.R. § 1.3.¹⁷ Moreover, the *Stryker* court

¹⁵ Comment at 6.

¹⁶ Comment at 7.

¹⁷ See, e.g., *Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009) ("[T]he Commission has authority under its rules . . . to waive requirements not mandated by statute where strict compliance would not be in the public interest, so long as it articulates identifiable standards for exercising that authority."); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("[A]n application for waiver has an appropriate place in the discharge by an administrative agency of its assigned responsibilities. The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances."), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Keller Commc'ns v. FCC*, 130 F.3d 1073, 1076 (D.C. Cir. 1997) ("The Commission's rules allow it 'at any time' to waive requirements for good cause.").

appears to have been under the mistaken impression that the opt-out notice requirements for solicited faxes are mandated by the statute, rather than by a rule created by the Commission.¹⁸

II. Petplan Is Seeking A Waiver Based On The Fact That It Is Similarly Situated To The Original Petitioners, Not Based On “Simple Ignorance Of The Law.”

In the *2014 Anda Commission Order*, the Commission granted petitioners’ requests for waiver of the solicited fax rule where (i) “no record evidence demonstrates that they 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” and (ii) “where the petitioners referenced the confusion between the footnote and the rule.”¹⁹ The Commission urged “similarly situated” parties to submit such waiver requests.²⁰ In its Petition, Petplan demonstrated that it was similarly situated (i) by stating that it “did not have any understanding that opt-out notices were required on solicited faxes,”²¹ (ii) because no record evidence rebuts this assertion,²² and (iii) by referencing the confusion caused by the inconsistency between the text in the body and the footnote of the Junk Fax Order.²³

Relying on the *December 9 Order*, Fauley argues that by Petplan asserting that it “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” and that it “did not have any understanding that opt-

¹⁸ *Stryker*, 65 F. Supp. 3d at 497 (“Congress and the FCC could reasonably conclude that the unequivocal requirement of a simple opt-out notice on every fax was the only way to give practical effect to the purpose of the TCPA.”).

¹⁹ *December 9 Order* ¶ 14 (citing *2014 Anda Commission Order* ¶¶ 24-26).

²⁰ *2014 Anda Commission Order* ¶¶ 2, 30.

²¹ Petition at 7.

²² See generally Petition and Comment.

²³ Petition at 3-4.

out notices were required on solicited faxes,” Petplan is admitting “simple ignorance of the law,” and that Petplan’s Petition should be denied on that basis.²⁴ Fauley is wrong.

A. Petplan’s Petition Was Not Intended To Be Read, And Should Not Be Read, As Seeking A Waiver Based On “Simple Ignorance” Of The Law.

As noted above, Petplan asserted that prior to being sued recently, “Petplan, a small start-up venture, 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” and that Petplan “did not have any *understanding* that opt-out notices were required on solicited faxes.”²⁵ Prior to the *December 9 Order*, the Commission and the Bureau had granted dozens of petitions for waiver that used the same language as was used by Petplan. For example, one of the initial petitioners granted a waiver by the *2014 Anda Commission Order*—Douglas Paul Walburg—stated that the faxes he sent “did not contain an opt-out notice because Mr. Walburg did not *believe* that such a notice was necessary if he had obtained the prior express consent of the recipient.”²⁶ The Bureau granted dozens of petitions using the same language.²⁷ Likewise, Petplan’s use of the phrase

²⁴ Comment at 8-9 (quoting Petition at 4-5, 7).

²⁵ Petition at 5, 7 (emphasis added). In his Comment, Fauley misleadingly characterizes the statements in Petplan’s petition, asserting that Petplan stated that “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’ and that “it was not ‘until it was very recently sued in a putative nationwide class action’ that it learned of the *opt-out regulations*.” Comment at 8 (emphasis added). But Petplan nowhere attributes its understanding of the opt-out notice requirements for solicited faxes to its size or status to, and nowhere asserts a blanket ignorance of the opt-out regulations in general. Rather, Petplan stated that it “had no cause to file such a petition for retroactive waiver . . . until it was very recently sued . . . [and that] [p]rior to that time, Petplan, a small start-up venture, 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.” Petition at 4-5.

²⁶ Petition of Douglas Paul Walburg and Richie Enterprises, LLC, at 5 n.13 (filed Aug. 19, 2013) (emphasis added). Fauley specifically notes in his Comment that Petplan asserts that it is a “small start-up venture.” This statement, too, was included based on similar assertions made by one of the original petitioners. *Compare* Petition of Power Liens LLC at 2 (filed Sept. 4, 2014) (“Power Liens is a small, two-year old startup”), *with* Petition at 5 (stating that Petplan is “a small start-up venture”).

²⁷ *See, e.g.*, Petition of McKesson Corporation at 2 (filed Nov. 25, 2014) (“McKesson and its wholly owned subsidiaries did not *believe* that these solicited facsimiles required opt-out notices.” (emphasis added)); Petition of American Power & Gas LLC, AP&G Holdings LLC, and Tom Cummins at 3 (filed Apr. 17, 2015) (“AP&G did not *believe* that any of its solicited facsimiles required opt-out notices.” (emphasis added)); Petition of Amicus

“understanding” mirrors the Commission’s and Bureau’s own use of that same word,²⁸ which was also used by many petitioners who were also granted waivers.²⁹

Mediation & Arbitration Group, Inc. and Hillary Earle at 2 (filed Nov. 13, 2014) (“Amicus did not *believe* that it was legally required to include an opt-out notice in faxes sent to recipients who gave prior express permission.” (emphasis added)); Petition of Electronic Funds Source LLC at 2 (filed Apr. 28, 2015) (“EFS did not *believe* that any of its solicited facsimiles required opt-out notices.” (emphasis added)); Petition of Greenway Health, LLC at 2 (filed Apr. 29, 2015) (“Greenway, and its predecessor, Sage, did not *believe* that these solicited fax transmissions required opt-out notices.” (emphasis added)); Petition of Henry Schein, Inc. at 3 (filed Dec. 17, 2014) (“Henry Schein did not *believe* that the opt-out notice requirements of 47 CFR 64.1200(a)(4)(iii) were applicable to those faxes sent with the prior express invitation or permission of the recipients.” (emphasis added)); Petition of Heska Corporation at 2 (filed Apr. 14, 2015) (“Heska did not *believe* that any of its solicited facsimiles required opt-out notices.” (emphasis added)); Petition of Jay Geier’s Scheduling Institute at 4 (filed Apr. 20, 2015) (“Scheduling Institute did not *believe* that the TCPA required an opt-out notice to be included on fax advertisements sent with prior express permission.” (emphasis added)).

Indeed, the language used by Petplan closely tracks the language used by Petitioner Joseph T. Ryerson & Son, Inc. (whose petition was granted in the *August 28 Order*), asserting that “Ryerson was not aware of any claims against it for violations of the TCPA until May 14, 2015 — two weeks after the expiration of the six-month period set forth in the October 30 Order. Ryerson therefore had no reason to file a petition within the original six-month period because it did not *believe* that there was any question about the legality of the faxes that it may have sent to its customers . . .” Petition of Joseph T. Ryerson & Son, Inc. at 3 (filed June 4, 2015) (emphasis added).

²⁸ *2014 Anda Commission Order* ¶ 26 (stating that petitioners are entitled to a waiver where no record evidence “demonstrate[s] that [they] *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” (emphasis added)); *December 9 Order* ¶ 14 (stating petitioners must “assert their general lack of *understanding* that the rules applied to solicited faxes” to be similarly situated (emphasis added)).

²⁹ *See, e.g.*, Petition of Consumer Energy Solutions, Inc. at 3 (filed Mar. 26, 2015) (“Petitioner did not *understand* the opt-out requirement to apply to such expressly-solicited faxes.” (emphasis added)); Petition of J.L. Barnes Insurance Agency, Inc. d/b/a/ JLBG Health at 3 (filed Dec. 5, 2014) (“JLBG did not *understand* that it had to comply with the opt-out notice requirement for facsimile advertisements sent with prior express permission.” (emphasis added)); Petition of Logistic Innovations, LLC at 4 (filed Apr. 24, 2015) (Petitioner “certainly did not *understand* that it did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission.” (alterations and internal quotations omitted) (emphasis added)); Petition of Medversant Technologies, LLC at 4 (filed Jan. 7, 2015) (Petitioner “certainly did not *understand* that it 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.” (alterations and internal quotations omitted) (emphasis added)); Petition of Royal Canin U.S.A., Inc. at 6 (filed Apr. 27, 2015) (Petitioner “did not *understand* that the opt-out requirements applied to solicited facsimiles.” (emphasis added)); Petition of Sunwing Airlines Inc., Vacation Express USA Corp, and Sunwing Vacations Inc. at 5 (filed Nov. 26, 2014) (Petitioners “did not *understand* the opt-out requirement to apply to solicited faxes.” (emphasis added)); Petition of United Stationers Inc., United Stationers Supply Co., and Lagasse LLC at 7 (filed May 18, 2015) (Petitioners “did not *understand* the opt-out requirement to apply to solicited faxes.” (emphasis added)); Petition of Zoetis, Inc., formerly known as Pfizer Animal Health, Zoetis LLC, and Zoetis Products, LLC at 5 (filed Jan. 16, 2015) (Petitioners “did not *understand* that they needed to comply with the opt-out notice requirement for faxed webinar invitations sent to its customers who had provided prior express invitation or permission (i.e., faxes that were ‘solicited’” (emphasis added)); Petition of Endo Pharmaceuticals Inc., Endo Pharmaceutical Solutions Inc., Endo Pharmaceuticals Valera Inc., Endo Health Solutions Inc., Endo Pharma LLC and Endo Pharma Delaware Inc. at 5 (filed Apr. 27, 2015) (Petitioners “did not *understand* the opt-out requirement to apply to solicited faxes.” (emphasis added)); Petition of Dongili Investment Group, Inc. and Label Tape Systems, Inc. at 3 (filed Jan. 23, 2015) (Petitioners “contend[ed] that faxes were sent with the prior express permission of the recipients and . . . did not *understand* the opt-out requirement to apply to solicited faxes.” (emphasis added)).

Because the *December 9 Order* was issued after Petplan filed its Petition, Petplan had no basis to believe that the wording in its Petition could possibly be construed as asserting “simple ignorance of the TCPA or the Commission’s attendant regulations” as the basis for its waiver request.³⁰ Indeed, based on the Commission’s and the Bureau’s prior rulings, Petplan’s Petition should not be read that way. To the extent necessary, Petplan clarifies that it was and is affirmatively *not* asserting “simple ignorance of the TCPA or the Commission’s attendant regulations” as the grounds for its Petition seeking a waiver of the Regulation as applied to solicited faxes. Rather Petplan is seeking a waiver based on the fact that it is similarly situated to the initial petitions, and therefore qualifies for a waiver, because (i) neither Petplan’s statements in its Petition and Reply nor anything in Fauley’s Comment present record evidence demonstrating that Petplan understood that it 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, and (ii) Petplan referenced the confusion between the footnote and the rule.

B. The Bureau Granted Petitions In The *December 9 Order* That Made The Same Assertions As Made In The Petplan Petition.

Fauley argues that Petplan’s Petition should be denied purportedly because the statements made by Petplan regarding what it believed and understood about the applicability of the opt-out notice requirements to solicited faxes “are virtually identical” to statements made in certain Petitions denied in the *December 9 Order*.³¹ This is inaccurate. Three of those petitions seeking a waiver of the Regulation for solicited faxes that were denied in the *December 9 Order* expressly asserted a “lack of awareness”: Ivoclar Vivadent, Inc. asserted that its “sales representative was *not aware* of the opt-out requirement . . . [for] faxes sent to the recipients who

³⁰ *December 9 Order* ¶ 20 n.66 (quoting 2014 *Anda Commission Order* ¶ 26).

³¹ Comment at 9.

requested the information”;³² Renaissance Systems and Services asserted that it was “*not aware* of the Commission’s October 30, 2014 Order or the need to seek a waiver from compliance with the Regulation, or it would have filed [its petition] at an earlier date”;³³ and Prevention Pharmaceuticals, Inc. asserted that its “sales representative was *not aware* of the opt-out requirement under the Regulation” and that it was “*not aware* of the Commission’s October 30, 2014 Order”³⁴ Another asserted that the petitioner “was not monitoring the FCC’s orders.”³⁵ Indeed, one of the petitions that was *granted* in the *December 9 Order* expressly asserted that the petitioner “was *not aware* of the need to seek a waiver from compliance with the Regulation.”³⁶ Petplan made no such assertions in its Petition.

Moreover, Fauley omits the fact that the Petplan Petition made assertions that are “virtually identical” to statements made in petitions that were *granted* in the *December 9 Order*. For example, Scrip, Inc. sought and was granted a waiver based on the fact that “at the time it sent the faxes at issue, in 2012 and 2013, Petitioner did not *understand* the opt-out notice requirement to apply to solicited faxes.”³⁷ Likewise, Dental Fix Rx LLC sought and was granted a waiver based on the fact that “Dental Fix did not *understand* that it needed to comply with the opt-out notice requirement for solicited faxed advertisements.”³⁸

³² Petition of Ivoclar Vivadent, Inc. at 2 (filed June 24, 2015) (emphasis added).

³³ Petition of Renaissance Systems and Services, LLC at 2 (filed June 25, 2015) (emphasis added).

³⁴ Petition of Prevention Pharmaceuticals, Inc. at 2, 5 (filed Aug. 26, 2015) (emphasis added).

³⁵ Petition of athenahealth, Inc. at 6 (filed Aug. 6, 2015) (emphasis added).

³⁶ Petition of Costco Wholesale Corporation at 3 (filed July 10, 2015) (emphasis added).

³⁷ Petition of Scrip, Inc. at 5 (filed Sept. 17, 2015) (emphasis added).

³⁸ Petition of Dental Fix Rx LLC at 4 (filed Sept. 11, 2015) (emphasis added).

III. Even If The Bureau Chooses To Read Petplan’s Petition As Asserting A Lack Of Awareness Of The Opt-Out Notice Requirement For Solicited Faxes, Petplan Is Still Entitled To A Waiver Because Nothing In The Record Demonstrates That Petplan Was Aware Of The Opt-Out Notice Requirement and Failed to Comply Nonetheless.

In the *2014 Anda Commission Order*, the Commission granted waivers to the petitioners based on its finding there was “good cause” for retroactive waiver of the Regulation and the waiver would serve the public interest.³⁹ The Commission explained that there were “two grounds” for its finding of “good cause”: (i) “the inconsistent footnote” in the Junk Fax Order and (ii) the “lack of explicit notice” that the opt-out requirement would apply to faxes ads sent with the prior express permission of the recipient.⁴⁰ The Commission further explained that *because* good cause existed, the granting of waivers was based on “special circumstances,” rather than ignorance of the law: “We emphasize, however, that simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver. Rather, it is the inconsistent footnote, combined with the [lack of explicit notice] . . . along with particular facts and concerns relevant to the public interest at this time . . . [that] warrants deviation from the rule.”⁴¹ In other words, the Commission presumed that the petitioners *were* unaware that the opt-out notice applied to solicited faxes because there was a “lack of explicit notice in the Junk Fax NPRM” to make the petitioners aware of the requirement, and “nothing in the record [] demonstrat[ed] that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement.”⁴²

³⁹ *2014 Anda Commission Order* ¶¶ 24-26.

⁴⁰ *Id.*

⁴¹ *Id.* ¶¶ 24, 26.

⁴² *See id.* ¶¶ 26, 28.

That this is the correct reading of the *2014 Anda Commission Order* is made plain by the Commission’s granting of the petition of Crown Mortgage Company—one of the “initial petitioners” to whom Petplan had to be “similarly situated” to be granted waiver.⁴³ In its Petition, Crown Mortgage Company asserted that it was entitled to a waiver because “*When the faxes were sent, nobody at Crown was aware of . . . the TCPA’s so-called ‘opt out language.’*”⁴⁴ Likewise, initial petitioners Staples, Inc. and Quill Corporation noted in their petition that they “*could not have known*” of the opt-out notice requirement for solicited faxes when the faxes at issue were sent because the Commission’s Notice of Proposed Rulemaking failed to mention the intent to apply the requirement to solicited faxes.⁴⁵ Thus, any subsequent petitioner who asserted that it was unaware of the opt-out language requirement for solicited faxes, absent record evidence to the contrary, would be “similarly situated” and therefore entitled to a waiver.

Applying this standard, in its *August 28 Order*, the Bureau granted waiver requests to numerous petitioners who expressly and unequivocally asserted that they were “unaware” that the opt-out notice applied to solicited faxes because there was nothing in the record demonstrating that those petitioners *were* aware of the opt-out notice requirement for solicited faxes and failed to comply notwithstanding. For example:

- Sinopec USA, Inc. asserted in its petition (which the Bureau granted) that it “was *not aware* that the requirement for opt-out language in the form required by Section 64.1200(a)(4)(iii) and (iv) applied to such faxes;”⁴⁶

⁴³ *2014 Anda Commission Order* ¶¶ 24-26.

⁴⁴ Petition of Crown Mortgage Company at 4 n.2 (filed Feb. 24, 2014) (emphasis added). Indeed, Crown asserted not only that it was unaware of the opt-out notice requirement for solicited faxes, but also that it was “unaware of the TCPA,” and still was granted a waiver by the Commission. *See id.* Notably, Petplan has not made the latter assertion.

⁴⁵ Petition of Staples, Inc. and Quill Corporation at 24 (filed July 19, 2013) (emphasis added).

⁴⁶ Petition of Sinopec USA, Inc. at 3 (filed Apr. 30, 2015) (emphasis added).

- Salix Pharmaceuticals, Inc. and Salix Pharmaceuticals, Ltd. asserted in their petition (which the Bureau granted) that they and their vendors “*did not know* they had to abide by th[e opt-out notice] requirements for solicited faxes.”⁴⁷
- United Stationers Inc., United Stationers Supply Co., and Lagasse LLC asserted in their petition (which the Bureau granted) that “Petitioners sent facsimiles to recipients who had provided their prior express invitation or permission and were *not aware* that opt-out notices were required on such faxes;”⁴⁸
- Meadowbrook Insurance Group, Inc. asserted in its petition (which the Bureau granted) that “Meadowbrook was *unaware* of the October 30, 2014 Order until after it was sued and had a chance to analyze the issues in the lawsuit;”⁴⁹
- GE Healthcare Inc. asserted in its petition (which the Bureau granted) that it and its vendors “*did not know* they had to abide by th[e opt-out notice] requirements for solicited faxes.”⁵⁰
- Northwood, Inc. asserted in its petition (which the Bureau granted) that it “was *not aware* of the Commission’s October 30, 2014 Order until recently when it retained counsel to assist it in responding to a demand letter from a putative plaintiff sent to an affiliated entity;”⁵¹
- Alma Lasers, Inc. asserted in its petition (which the Bureau granted) that “it sent certain faxes that were solicited or sent with express permission, and was *not aware* that the requirement for opt-out language in the form required by Section 64.1200(a)(4)(iii) and (iv) applied to those faxes.”⁵²
- Versa Cardio, LLC asserted in their petition (which the Bureau granted) that it and its vendors “*did not know* they had to abide by th[e opt-out notice] requirements for solicited faxes.”⁵³

Indeed, when assessing the significance of limited opt-out notices on solicited faxes, the

⁴⁷ Petition of Salix Pharmaceuticals, Inc. and Salix Pharmaceuticals, Ltd. at 3 (filed Apr. 27, 2015) (emphasis added).

⁴⁸ Petition of United Stationers Inc., United Stationers Supply Co. and Lagasse LLC at 9 (filed May 18, 2015) (emphasis added).

⁴⁹ Petition of Meadowbrook Insurance Group, Inc. and Meadowbrook, Inc. at 5 (filed May 29, 2015) (emphasis added).

⁵⁰ Petition of GE Healthcare, Inc. at 3 (filed Apr. 15, 2015) (emphasis added).

⁵¹ Petition of Northwood, Inc. at 5 (filed June 2, 2015) (emphasis added).

⁵² Petition of Alma Lasers, Inc. at 4 (filed Nov. 14, 2014) (emphasis added).

⁵³ Petition of Versa Cardio, LLC at 3 (filed Apr. 29, 2015) (emphasis added).

Bureau expressly stated in the *August 28 Order* that the presence of such limited opt-out notices suggested that such opt notices may have been included “as a matter of good business practice *rather than knowledge of the rule.*”⁵⁴ Thus, to the extent that the Bureau reads Petplan’s Petition as asserting that Petplan was unaware of the opt-out notice requirements for solicited faxes, Petplan is still entitled to a waiver of the rule since it is plainly “similarly situated” to the original petitioners, since there is “nothing in the record here demonstrating that [Petplan] understood that [it] did, in fact, have to comply with the opt-out notice requirements for fax ads sent with prior express permission but nonetheless failed to do so.”⁵⁵

Conclusion

Petitioner respectfully requests that the Commission grant this Waiver Petition and the request for a retroactive waiver for Petitioner from liability under 47 C.F.R. § 64.1200(a)(4)(iv).

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Respectfully submitted,

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⁵⁴ *August 28 Order* ¶ 18 (emphasis added).

⁵⁵ *2014 Anda Commission Order* ¶ 26.