

**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	)	

**TCPA Plaintiffs’ Sur-Reply Comments on Petition for Retroactive Waiver filed by Humana Insurance Co.**

Commenter Lawrence S. Brodsky submits this brief sur-reply to address a new argument raised in the reply comments of Petitioner Humana Insurance Co. (“Humana”).

On December 18, 2015, Humana filed its petition for “retroactive waiver” of 47 C.F.R. § 64.1200(a)(4)(iv), arguing the Commission’s requirement that parties “make every effort” to file such petitions by April 30, 2015,<sup>1</sup> was merely a “suggestion,” relying on an Order issued by the Consumer & Governmental Affairs Bureau granting waivers to some petitioners who filed after that date on August 28, 2015.<sup>2</sup>

On February 12, 2016, Brodsky filed comments in opposition to Humana’s petition, explaining that of the seven post-deadline petitioners granted waivers in the August 28, 2015 Bureau Order, six petitioners received notice of the allegations against them *after* April 30,

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<sup>1</sup> *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*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014) (“Opt-Out Order”) ¶¶ 2, 30 (“We expect parties making similar waiver requests to make every effort to file within six months of the release of this Order.”); Public Notice, *FCC Confirms Opt-Out Notice Requirements Applicable to All Fax Advertisements*, 29 FCC Rcd. 13498, 13498 (Oct. 30, 2014) (parties must “make every effort to file such requests prior to April 30, 2015”).

<sup>2</sup> *Petition for Retroactive Waiver by Humana Ins. Co.*, CG Docket Nos. 02-278, 05-338 at 5–6 (filed Dec. 18, 2015) (“Humana Petition”).

2015, and one was served 10 days before the deadline.<sup>3</sup> Brodsky explained he sued Humana for opt-out-notice violations on March 18, 2010, and the parties have been litigating over those allegations for nearly six years.<sup>4</sup>

On February 19, 2016, Humana filed reply comments arguing for the first time<sup>5</sup> that its petition was timely because the Bureau granted waivers to several post-April 30 petitioners in its Order of December 9, 2015.<sup>6</sup> Humana noted the Bureau observed that “all of the petitions resolved by this Order were filed after the six-month date (April 30, 2015) referenced in the *2014 Anda Commission Order*.”<sup>7</sup>

Plaintiff submits this sur-reply to point out that, of the 11 petitioners covered by the December 9, 2015 Bureau Order, nine were served with the complaint after April 30, 2015.<sup>8</sup>

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<sup>3</sup> *TCPA Pls.’ Comments on Petitions for Retroactive Waiver filed by Humana Ins. Co. and Weinberg & Assocs., Inc.*, CG Docket Nos. 02-278, 05-338 at 15–16 & nn. 82–83 (filed Feb. 12, 2016). Plaintiffs also argued, and continue to maintain, that being sued after April 30, 2015, does not excuse a late-filed petition because the triggering event for the period to seek a waiver was the Commission’s “confirmation here that a fax ad sent with the recipient’s prior express permission must include an opt-out notice,” not any petitioner’s being sued. *Id.* at 2, 21.

<sup>4</sup> *Id.* at 4–11 (tracing the years-long history of Humana’s attempts to challenge the validity of § 64.1200(a)(4)(iv) outside a Hobbs Act proceeding).

<sup>5</sup> The Humana Petition does not cite the December 9, 2015 Bureau Order.

<sup>6</sup> Humana Reply Comments at 4.

<sup>7</sup> *Id.* (quoting December 9, 2015 Bureau Order ¶ 18).

<sup>8</sup> *Petition of Megadent, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules*, CG Docket Nos. 02-278, 05-338 at 2 (June 24, 2015) (noting petitioner “was served with the lawsuit at issue on May 13, 2015”); *Petition of Dental Fix Rx LLC for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 at Ex. B, Complaint (Sep. 11, 2015) (complaint filed July 1, 2015); *Petition of Scrip Holding Co. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 at 8 (Sep. 17, 2015) (complaint “was not filed until June 30, 2015, and was not served on Petitioner until July 9, 2015”); *Petition of Ivoclar Vivadent, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 at 1 (June 24, 2015) (complaint filed “on May 29, 2015”); *Petition of Renaissance Sys. & Servs., LLC for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 at 1 (June 25, 2015) (complaint filed “on June 17, 2015”); *Petition of Zimmer Dental, Inc. & Amy Beth Gerzog for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 at 3 (July 16, 2015) (petitioners “served with the lawsuit in issue on June 17,

One petitioner, Costco Wholesale Corp., was served in two lawsuits, one on April 10, 2015, and one on May 15, 2015, and did not file a petition until July 22, 2015.<sup>9</sup> But Costco offered a reason for its late filing, arguing “[t]he timing of the filing of these lawsuits was such that it was not feasible for Costco to have filed the present Petition for Waiver by April 30, 2015,” since it first had to “conduct[] an initial investigation to determine the facts” surrounding the allegations of the complaint.<sup>10</sup>

Similarly, the final petitioner covered by the December 9, 2015 Bureau Order, SourceMedia LLC, was sued October 23, 2014, but did not file a petition until September 21, 2015.<sup>11</sup> However, like Costco, SourceMedia gave a reason for its late filing, explaining in its petition that its motion to dismiss the TCPA claim in the underlying case was not denied until September 11, 2015, and it promptly filed its petition 10 days later.<sup>12</sup> In addition, no comments were filed arguing the SourceMedia petition was untimely before the Bureau granted the petition.

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2015”); *Petition of athenahealth, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules*, CG Docket Nos. 02-278, 05-338 (Aug. 6, 2015) (acknowledging petition was “a bit beyond the April deadline,” but complaint was not filed until “July 10, 2015”); *Petition of Ohio Nat’l Mut., Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 at 5 (Aug. 21, 2015) (complaint filed “August 5, 2015”); *Petition of Prevention Pharms., Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 at 1 (Aug. 26, 2015) (complaint filed “June 11, 2015”).

<sup>9</sup> *Petition of Costco Wholesale Corp. for Retroactive Waiver or in the Alternative for Declaratory Ruling*, CG Docket Nos. 02-278, 05-338 at 3, n.9 (filed July 22, 2015).

<sup>10</sup> *Id.*

<sup>11</sup> *Petition of SourceMedia LLC for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (filed Sep. 21, 2015).

<sup>12</sup> *Id.* at 3.

In contrast to Costco and SourceMedia, Humana has declined to offer any reason for filing nearly eight months after the deadline.<sup>13</sup> Nor does Humana dispute that it had actual knowledge of the opportunity to seek a waiver for more than a year before filing its petition.<sup>14</sup> Instead, Humana insists it is not “required to offer reasoning for the timing of the Petition” and it is “irrelevant” whether a petitioner makes “every effort” (or any effort at all) to file by April 30, 2015.<sup>15</sup> No post-April 30 petitioner in these proceedings has been granted a waiver under these circumstances, not in the August 28, 2015 Bureau Order and not in the December 9, 2015 Bureau Order.

Dated: February 23, 2016

Respectfully submitted,

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<sup>13</sup> Humana Reply at 3–4.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 3.