

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

In the Matter of Wedgewood Village Pharmacy,)
Inc.'s Petition for Retroactive Waiver of 47 C.F.R.)
§ 64.1200(a)(4)(iv) of the Commission's Rules) C.G. Docket No. 02-278
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) C.G. Docket No. 05-338
)
_____)

PETITION FOR RETROACTIVE WAIVER

Petitioner, Wedgewood Village Pharmacy, Inc. (“Wedgewood” or “Petitioner”), by and through its undersigned counsel, and pursuant to Section 1.3 of the Federal Communication Commission’s (“Commission”) rules,¹ respectfully requests that the Commission grant Wedgewood a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s rules (the “Opt-Out Rule”)² with respect to faxes transmitted by Wedgewood (or on its behalf) with the prior express consent or permission of the recipients or their agents after the effective date of the Opt-Out Rule.

This request for waiver is submitted pursuant to the Commission’s October 30, 2014 Order (the “October 30 Order”)³ granting a retroactive waiver of the Opt-Out Rule to a group of petitioners facing class action lawsuits that alleged, in part, that the petitioners had violated the Opt-Out Rule by failing to include specific opt-out language in their faxes even when the faxes were sent with the recipient’s prior express invitation or permission. Based on confusion surrounding the Opt-Out Rule, the Commission determined that good cause supported a

¹ 47 C.F.R. § 1.3.

² 47 C.F.R. § 64.1200(a)(4)(iv).

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 14-164 (rel. Oct. 30, 2014).

retroactive waiver, and that such a waiver was in the public interest. The Commission invited other “similarly situated parties” to seek similar retroactive waivers.

Wedgewood is similarly situated to the petitioners that received a retroactive waiver, because it is facing a putative class action lawsuit alleging that Wedgewood sent faxes in violation of the Telephone Consumer Protection Act (“TCPA”) during the relevant time period, and that the faxes failed to include an appropriate opt-out notice. The public interest would be harmed by requiring parties like Wedgewood to divert substantial capital and human resources from its economically productive activities to engage in unnecessary (and possibly ruinous) litigation because of the past confusion over the Commission’s Opt-Out Rule. A waiver is thus appropriate here.⁴

The October 30 Order requests that petitioners make “every effort” to pursue a retroactive waiver on or prior to April 30, 2015. Here, Wedgewood was served with the lawsuit at issue on April 4, 2016, and no responsive pleading has been filed. No discovery has been conducted and Wedgewood is still investigating the allegations. Wedgewood has made efforts to pursue this request as soon as possible after being served.⁵

I. BACKGROUND

A. Pending Litigation Against Wedgewood

Wedgewood is a compounding pharmacy that provides animal-health prescribers with custom-compounded medicines for their animal patients. On April 4, 2016, Petitioner was named as the defendant in a putative class action in the District Court for the Northern District of Illinois, under the auspices of violations of the TCPA (the “Fauley Action”).⁶ The lawsuit was

⁴ October 30 Order, ¶ 22; *see also* *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

⁵ October 30 Order, ¶ 2.

⁶ *See Fauley v. Wedgewood Village Pharmacy, Inc.*, No. 16-cv-03996 (N.D. Ill. Apr. 4, 2016)(attached hereto as Exhibit A.)

filed by serial TCPA litigants Anderson + Wanca, who have filed dozens (if not hundreds) of junk fax lawsuits throughout the country. The plaintiff, Shaun Fauley (“Plaintiff”), is a serial TCPA plaintiff.⁷

Plaintiff in the Fauley Action asserts a claim under the TCPA (as amended by the Junk Fax Prevention Act of 2005) arising out of five faxes that were allegedly disseminated to Plaintiff between 2012 and 2014. Plaintiff alleges, *inter alia*, that Wedgewood is liable to Plaintiff under the TCPA because those facsimiles were advertisements and did not display proper opt-out notices. Plaintiff claims that these alleged facsimiles were sent to him without express invitation or permission. Plaintiff seeks to certify a nationwide class of recipients that includes both recipients of solicited *and* unsolicited fax advertisements on the basis that they failed to display proper opt-out notices.

Wedgewood disputes that the faxes at issue constitute “advertisements” under the TCPA and disputes that the faxes were unsolicited. Wedgewood is not, however, asking the Commission to resolve the factual and legal issues raised in the pending litigation, as those issues remain within the jurisdiction of the district court.⁸ Rather, Wedgewood seeks the same retroactive waive that the Commission granted to the petitioners in the October 30 Order, in the event that Plaintiff claims that faxes sent with the express permission of the recipient(s) failed to include an opt-out notice that complied precisely with the Opt-Out Rule.

⁷ See, e.g., *Fauley v. Fetch, Inc.*, No. 15-cv-09406 (N.D. Ill. Oct. 23, 2015); *Fauley v. Virbac Corp.*, No. 15-cv-09125 (N.D. Ill. Oct. 15, 2015); *Fauley v. C. Specialties, Inc.*, No. 15-cv-05581 (N.D. Ill. June 23, 2015); *Fauley v. Vetspecs, Inc.*, No. 15-cv-02529 (N.D. Ill. Mar. 25, 2015); *Fauley v. Bio Health Solutions, LLC*, No. 15-cv-02544 (N.D. Ill. Mar. 25, 2015); *Fauley v. Royal Canin U.S.A., Inc.*, No. 15-cv-02170 (N.D. Ill. Mar. 12, 2015); *Fauley v. Heska Corp.*, No. 15-cv-02171 (Mar. 12, 2015). Anderson + Wanca represents Fauley in all of these cases.

⁸ The Commission declared that granting a waiver should not “be construed in any way to confirm or deny whether the petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.” See October 30 Order, ¶ 30.

B. The Current Statutory and Regulatory Framework

The Telephone Consumer Protection Act of 1991 (“TCPA”) prohibits the use of a fax machine to send *unsolicited* fax advertisements, *i.e.*, fax advertisements that are sent without the recipient’s prior express consent or permission.⁹ In 2005, Congress enacted the Junk Fax Prevention Act of 2005 (“JFPA”), which provides an exception to the prohibition on unsolicited fax advertisements to the extent that the unsolicited fax is sent to a recipient that has an “established business relationship” with the sender, and the fax contains specific language permitting the recipient to opt-out of receiving future faxes.¹⁰ In addition to the JFPA, the Commission promulgated rules implementing the JFPA in its Junk Fax Order.¹¹ As explained in the October 30 Order, a footnote in the Commission’s Junk Fax Order led to industry-wide confusion regarding the Commission’s intent to apply the opt-out notice to solicited faxes.¹² In addition, the Commission acknowledged that its notice of proposed rulemaking was unclear regarding the opt-out requirement on fax advertisements sent with the prior express permission of the recipient, which also created confusion.¹³

In the October 30 Order, the Commission “confirm[ed] that senders of fax ads must include certain information on the fax that will allow consumers to opt out, even if they

⁹ Pub. L. No. 102-243, 105 Stat. 2394, § 3(a) (1991) (codified at 47 U.S.C. § 227).

¹⁰ Pub. L. No. 109-21, 119 Stat. 359 (2005) (codified at 47 U.S.C. § 227); 47 C.F.R. § 64.1200(a)(4)(iv); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3738, fn. 153 (2006) (the “Junk Fax Order”) (stating that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements”(emphasis added)).

¹¹ *Id.*

¹² *See* October 30 Order, ¶¶ 10-13; there was significant confusion from inconsistent language in the Junk Fax Order itself, wherein a footnote stated that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements,” *see Junk Fax Order*, 21 FCC Rcd at 3810, n 154 (emphasis added), coupled with inadequate notice of the Commission’s intent to adopt the Opt-Out Rule to fax advertisements sent with the prior express permission of the recipient, *see Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act*, CG Docket No. 02-278 and 05-338, Notice of Proposed Rulemaking, 20 FCC Rcd 19758, 19767-70, paras. 19-25 (2005).

¹³ *Id.*

previously agreed to receive fax ads from such senders.”¹⁴ Recognizing the confusion and misplaced confidence on the part of the petitioners, the Commission found that special circumstances warranted deviation from the general rule and granted retroactive waivers to the petitioners.¹⁵ As explained by the Commission:

[W]e recognize that some parties who have sent fax ads with the recipient’s prior express permission may have reasonably been uncertain about whether our requirements for opt-out notices applied to them. As such, we grant retroactive waivers of our opt-out requirement to certain fax advertisement senders to provide these parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by our rules.

[W]e believe the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule.¹⁶

The Commission invited parties similarly situated to those petitioners to seek similar waiver relief, and instructed those “parties making similar waiver requests to make every effort to file within six months of the release of this Order.”¹⁷ The Commission, nevertheless, stressed that “all future waiver requests will be adjudicated on a case-by-case basis and [the Commission does] not prejudge the outcome of future waiver requests in this Order.”¹⁸

Thereafter, on August 28, 2015, the Commission granted 117 additional petitions for retroactive waiver filed by parties similarly situated to the original petitioners.¹⁹ The Commission again granted such relief on December 9, 2015 to petitioners that filed for waivers through September 21, 2015.²⁰

¹⁴ October 30 Order, ¶ 1.

¹⁵ *Id.* ¶¶ 24-26.

¹⁶ October 30 Order, ¶¶ 1, 22

¹⁷ *Id.* ¶¶ 28-30.

¹⁸ *Id.* ¶ 30 & n. 102.

¹⁹ *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, ¶ 11 (rel. Aug. 28, 2015)(the “August 28 Order”).

²⁰ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-1402, ¶ 1 (rel. Dec. 9, 2015)(the “December 9 Order”).

II. THE COMMISSION SHOULD GRANT A LIMITED RETROACTIVE WAIVER OF THE OPT-OUT RULE FOR ANY SOLICITED FAX SENT BY WEDGEWOOD OR ON ITS BEHALF

As a result of the Fauley Action, Wedgewood is similarly situated to the petitioners that received retroactive waivers by the October 30 Order, making a waiver appropriate here. Section 1.3 of the Commission's rules permits the Commission to grant a waiver if good cause is shown.²¹ Generally, the Commission may grant a waiver if it would not undermine the policy objective of the pertinent rule and would otherwise serve the public interest.²² Further, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than would strict adherence to the general rule.²³

Here, special circumstances favor deviation from the general rule – rather than strict adherence. As detailed in the October 30 Order, good cause has been established due to the inconsistent footnote in the Junk Fax Order, which indicated that the opt-out notice requirement applies only to unsolicited advertisements.²⁴ The Commission stated that this could reasonably be read to mean that a company like Wedgewood need not include an opt-out notice when sending solicited faxes.²⁵ In addition, the Commission's notice of proposed rulemaking also failed to provide explicit notice that the Commission was planning to require the opt-out notice for solicited faxes.²⁶ The Commission has already determined that “this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule.”²⁷

This is especially true here, given that the allegedly unlawful faxes contained contact information allowing Fauley (or any recipient) to opt-out of receiving future faxes. Further,

²¹ 47 C.F.R. § 1.3; *see also* 47 C.F.R. § 1.925(b)(3)(i)-(ii).

²² *See WAIT v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

²³ *See Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁴ October 30 Order, ¶¶ 26-27.

²⁵ *Id.* ¶ 24.

²⁶ *Id.* ¶ 26.

²⁷ *Id.*

Wedgewood is a small business and denial of a waiver could impose fatal consequences in the Fauley Action. The TCPA was not designed to impose crushing damage awards on small businesses in order to disproportionately benefit Plaintiff's attorneys.

The Commission also determined that granting a waiver under these circumstances would serve the public interest.²⁸ Here, granting waiver to Wedgewood would not undermine the policy objective of the TCPA, which is "to allow consumers to stop unwanted faxes."²⁹ More broadly, unlike indiscriminate "fax blasters" to the general consumer public, Wedgewood did not send faxes to consumers but rather only to a limited select group of recipients – pharmaceutical professionals who operate in the industry and who may have provided their express consent to receive information via fax.³⁰ Wedgewood has every incentive not to send unwanted faxes and risk offending potential customers. In fact, Wedgewood takes great effort to ensure that entities that do not wish to be contacted do not receive Wedgewood's faxes or other communications.

Absent a waiver, companies like Wedgewood could be subjected to substantial expense and monetary damages for failing to comply with a rule the Commission has already determined was the subject of confusion. By granting a retroactive waiver, the Commission can ensure that the confusion does not expose companies like Wedgewood to potentially devastating liability. Denial of waiver could subject Wedgewood to significant money damages – the bulk of which would go to Plaintiff's lawyers – rather than further the TCPA's policy objective of preventing unwanted faxes. The public interest would be harmed by requiring parties like Wedgewood to divert substantial capital and human resources from its economically productive activities to

²⁸ October 30 Order, ¶ 27.

²⁹ Junk Fax Order, ¶ 48.

³⁰ Wedgewood believes that many of its faxes were sent with permission. Wedgewood was served with the Fauley Action recently, and its investigation into the allegations therein remains ongoing.

