

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

In the Matter of)	
)	
Petition of HomeoPet, LLC, for)	CG Docket No. 02-278
Retroactive Waiver of)	CG Docket No. 05-338
47 C.F.R. § 64.1200(a)(4)(iv))	

PETITION FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission’s (“Commission”) rules, HomeoPet, LLC (“HomeoPet”) respectfully requests that the Commission grant it a retroactive waiver from 47 C.F.R. § 64.1200(a)(4)(iv) (the “Opt-out Requirement”), with respect to any fax advertisements that were sent or may be alleged to have been sent by HomeoPet before April 30, 2015, without the opt-out notices required by that rule, to recipients that had provided prior express invitation or permission. HomeoPet is similarly situated to other parties which the Commission has already granted waiver requests.¹ Specifically, HomeoPet is alleged to have sent faxes without compliant opt-out provisions to recipients who had previously provided permission or consent to receive the faxes and HomeoPet should not be subject to TCPA liability because there was industry-wide confusion caused by contradictory statements

¹ See *Rules and 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 Fax Opt-Out Requirements*, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd 13998 (2014) (“2014 Anda Commission Order”); *Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) Regarding the Commission’s Opt-Out Notice Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 30 FCC Rcd 8598 (2015) (*August 2015 Order*); *Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission’s Opt-Out Notice Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 30 FCC Rcd 14057 (2015) (“December 2015 Order”).

contained in a footnote in a 2006 FCC Order that contradicted the plain wording of the statute.² Good cause exists for granting HomeoPet a waiver.

Background

The Telephone Consumer Protection Act (“TCPA”), enacted in 1991, prohibits the use of “any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an *unsolicited* advertisement,” subject to various exceptions.³ The Junk Fax Prevention Act was passed in 2005, amending the TCPA to “require[] the sender of an *unsolicited* fax advertisement to provide specified notice and contact information on the fax that allows recipients to ‘opt out’ of any future fax transmissions from the sender.”⁴ The Commission later promulgated a rule stating that a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice”⁵—but then, in its guidance regarding that rule, the Commission stated that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”⁶ This apparent conflict led to considerable confusion in the industry.

Given this conflict, the Commission has recognized that due to the contradictory footnote in the *Junk Fax Order*, some parties that had sent fax advertisements with the recipients’ prior express permission may have reasonably been uncertain about whether the Op-out Requirement

² See 47 C.F.R. § 64.1200(a)(4)(iv); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, App. A (2006) (“*Junk Fax Order*”).

³ 47 U.S.C. § 227(b)(1)(C) (emphasis added).

⁴ 47 U.S.C. § 227(b)(1)(C)(iii), (b)(2)(D) (emphasis added).

⁵ 47 C.F.R. § 64.1200(a)(4)(iv).

⁶ *Junk Fax Order*, ¶ 24 (emphasis in original).

applied to them.⁷ Accordingly, the Commission granted a retroactive waiver of the Opt-Out Requirement to certain petitioners facing lawsuits premised, in part, on the failure to include opt-out language in faxes sent with prior express invitation or permission.⁸ The Commission afforded those similarly-situated to request a retroactive waiver and encouraged parties to make every effort to file waiver requests within six months of the release date, *i.e.*, April 30, 2015. However, April 30, 2015, was *not* a firm deadline, and waivers have been granted on petitions filed after this date.⁹

Notably, in the *December 2015 Order*, the Consumer and Governmental Affairs Bureau (“the Bureau”) rejected the argument that petitions for a waiver should be denied solely on the basis that they were filed after the six-month filing date referenced in the *2014 Anda Commission Order*.¹⁰ The Bureau noted:

[W]e decline to reject petitions solely on the basis that they were filed after April 30, 2015. We observe 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*. We examined these petitions, as we did each petition filed, independently. These petitions sought waiver for faxes sent prior to the April 30, 2015 deadline imposed by the *2014 Anda Commission Order* for compliance by the waiver recipients there. As such, granting waivers to the five parties here *does not contradict the purpose or intent of the initial waiver order because these parties are similarly situated to the initial waiver recipients*.¹¹

Since the *Anda Commission Order*, the Commission has granted over 130 retroactive waivers of the Opt-out Requirements to parties that have asserted in waiver requests that (1) the

⁷ *2014 Anda Commission Order*, ¶¶ 24-26.

⁸ *Id.* ¶¶ 1, 26-27.

⁹ *See, e.g., December 2015 Order*, ¶ 18.

¹⁰ *Id.*

¹¹ *Id.* (emphasis added).

subject faxes were sent without compliant opt-out provisions to recipients who had previously provided permission or consent to received them; and (2) that such faxes should not be subject to TCPA liability because there was industry-wide confusion caused by the seemingly contradictory statements contained in a footnote in the *Junk Fax Order* and the Opt-out Requirement.¹²

The Dairyland Lawsuit

HomeoPet is a family owned business that produces a line of natural and homeopathic remedies for animals. The company was established in 1994 to meet the increasing demand for alternative chemical free treatments for common pet conditions that, while not life-threatening, cause suffering in animals. Previous treatments for such conditions were expensive and often used harmful drugs that had significant side effects. HomeoPet treatments are targeted to provide support to the animals own natural healing system and bring relief without the side effects. HomeoPet distributes its products through veterinarians, pet stores, and online. From time to time, and only for individuals or entities that requested to receive notices about HomeoPet's products, HomeoPet sends notices regarding its products or business.

On March 8, 2016, HomeoPet was sued in the Western District of Wisconsin for alleged violations of the TCPA.¹³ The suit alleges that HomeoPet is liable under the TCPA for sending Dairyland Animal Clinic, S.C., ("Dairyland") a facsimile advertisement in January 2015. that did not display the proper opt-out language.¹⁴ The one page fax provided both a toll free number and an email address that any recipient could use to be removed from the fax contact list.¹⁵

¹² *Id.* ¶¶ 8, 13 n.55.

¹³ *Dairyland Animal Clinic, S.C. v. HomeoPet, LLC, et al.*, Case No. 16-CV-147.

¹⁴ Compl. ¶ 11.

¹⁵ *See* Compl., Ex. A.

Nonetheless, Dairyland alleges the fax was unlawful, and seeks class certification for all other persons who received the fax in which HomeoPet did not have prior express permission or invitation or received the facsimile message without the proper opt-out notice.¹⁶ This is at least the fourth TCPA class action complaint that Dairyland has filed against various defendants in the last two years.

This Petition does not request that the Commission resolve the factual or legal questions raised in the pending litigation, including whether any particular recipient provided prior express permission. Those issues remain within the jurisdiction of the Court, as the Bureau indicated in the *December 2015 Order*.¹⁷ Rather, HomeoPet asks for a waiver insofar as it failed to comply with the opt-out notice requirement for fax advertisements sent with the prior express invitation or permission of the recipient prior to April 30, 2015 – the same relief afforded to over 130 petitioners in the *2014 Anda Commission Order*, *August 2015 Order*, and *December 2015 Order*.

HomeoPet Should be Granted a Waiver

As the Commission has explained, it may grant a waiver where “(1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.”¹⁸ HomeoPet is entitled to a waiver under this standard, for the same reasons as previous petitioners.

First, there are “special circumstances” that “warrant deviation from the general rule” here, in that there are “two grounds that . . . led to confusion among affected parties (or

¹⁶ Compl. ¶ 17.

¹⁷ *December 2015 Order*, ¶ 16 (“We reiterate the Commission’s statement that the granting of a waiver does not confirm or deny that the petitioners had the prior express permission of the recipients to send the faxes. That remains a question for triers of fact in the private litigation.”).

¹⁸ *Id.* ¶ 13.

misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient).”¹⁹ Specifically, the Commission has noted that its order accompanying the opt-out notice regulation stated that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements” and that the notice of proposed rulemaking issued in advance of that regulation “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.”²⁰ Similar circumstances exist here with respect to HomeoPet. There is “nothing in the record here demonstrating that [they] understood that they did, in fact, have to comply with the opt-out notice requirement” for faxes “sent with prior express permission but nonetheless failed to do so.”²¹ To the contrary, HomeoPet would not knowingly or willfully violate any requirements of the statute.²² Rather, HomeoPet did not understand the TCPA, or the Commission’s inconsistent messaging contained in the Commission’s order accompanying the opt-out notice regulation, to require additional opt-out language in the faxes at issue. Accordingly, as the Commission has recognized in similar cases, there is a presumption that good cause exists for HomeoPet to be granted a waiver.

Second, granting HomeoPet “a retroactive waiver would serve the public interest.”²³ In the *2014 Anda Order*, the Commission found this requirement satisfied where petitioners could be subjected to “potentially substantial damages” as a result of failure to comply with the rule

¹⁹ *Id.*

²⁰ *Id.*

²¹ *2014 Anda Order*, ¶ 26.

²² The fact that the alleged infringing fax was sent in January of 2015 – and after the *2014 Anda Order* – is not significant, since the Commission specifically allowed for a six month time period for parties to learn of the *2014 Anda Order* and to include opt-out language on all faxes. The fax at issue in the Dairyland litigation was sent within this six month grace period.

²³ *2014 Anda Order*, ¶ 27; *December 2015 Order*, ¶ 13.

and that “confusion or misplaced confidence . . . left some businesses potentially subject to significant damage awards under the TCPA’s private right of action” and the “TCPA’s legislative history makes clear our responsibility to balance legitimate business and consumer interests.”²⁴ Based on these circumstances, the Commission concluded that, on balance, the public interest was served by “grant[ing] a retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protects afforded by the rule going forward.”²⁵ The same public interest supports granting HomeoPet a waiver in this case.

* * *

For these reasons, HomeoPet respectfully requests that the Commission grant it a retroactive waiver of the opt-out notice requirement of 47 C.F.R. § 64.1200(a)(4)(iv) with respect to any fax sent prior to April 30, 2015 with the invitation or permission of the recipient but that did not include the type of opt out notice specified by that rule.

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Respectfully submitted,

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²⁴ *2014 Anda Order*, ¶ 27.

²⁵ *Id.*