

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of: Petition of Crown Mortgage Company for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver)	CG Docket No. 02-278
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CROWN MORTGAGE COMPANY'S COMMENTS TO PUBLIC NOTICE

Crown Mortgage Company ("Crown"), established in 1975, is the Chicago land area's oldest privately owned residential mortgage bank. It is one of the largest Veterans Administration mortgage lenders in the Chicago land area. Crown sent faxes promoting its mortgage-based products to Lanciloti Law Office and Irish Sisters, Inc. on August 21 and 28, 2008, respectively. Lanciloti and Irish Sisters filed separate class action suits in the Circuit Court of Cook Count, Illinois, against Crown which alleged that Crown sent the facsimiles without Plaintiffs' express consent. While no evidence has been uncovered to suggest that Lanciloti or Irish Sisters provided "express invitation or permission" to receive a mortgage services based facsimile (or otherwise "solicited" such a fax), it is undisputed that both of the putative class representatives transacted real estate at various points in time. Crown believes, but it cannot prove, that it had a prior business relationship with each putative class representative.

The two suits were eventually consolidated. During class certification briefing, Crown argued that it had existing business relationships with a vast majority of the proposed class members. Notably, unlike most so-called "junk fax" cases, Crown **did not** purchase a list of *potential* customers and send out a bulk "blast fax." Instead, the vast majority of the putative

class members who were sent facsimiles identifying Crown's mortgage services after the recipients (actual or prospective clients of Crown) "solicited" (or otherwise provided "express invitation or permission" for) the subject faxes. Furthermore, unlike the typical "junk fax", the subject faxes were sent by one or two Crown employees who entered the telephone numbers (digit-by-digit) into a stand-alone fax machine (not a computer). **Accordingly, no bulk, computer based fax blasting took place.**

In their class certification reply brief, the putative class representatives argued that a class should be certified because none of the subject faxes contained statutory opt out language.¹ Essentially, the putative class representatives' amended class certification definition sought to avoid the fact that Crown had existing business relations with a majority of the putative class members. And notably, the original complaints filed by both plaintiffs never even mentioned the lack of opt out language. Crown objected to the putative class representatives' attempt to create a new class definition in their reply brief by filing a motion to strike.

On July 20, 2011, Judge Carolyn Quinn of the Circuit Court of Cook County, Illinois, denied Crown's motion to strike and certified the following class:

All persons who were sent one or more facsimiles from Crown Mortgage Company: (1) during the period from March 9, 2005 until July 8, 2005, promoting the commercial availability of Crown Mortgage Company's property, goods or services, without their prior express invitation or permission and without any prior established business relationship with Crown Mortgage Company; or (2) during the period from July 9, 2005 until March 2, 2011, promoting the commercial availability of Crown Mortgage Company's services, [a] without having given their prior express invitation or permission and [b] without an opt-out notice.

¹ When the faxes were sent, nobody at Crown was aware of the TCPA, let alone the TCPA's so-called "opt out language."

See July 20, 2011, Order, pp., 1, 5, 2011 WL 4433665. The order held that “[w]hile it is true that the evidence shows that Defendant had a previous business relationship with some of the recipients, Defendant did not include the ‘opt-out’ notice required by the TCPA.” *Id.* at p. 4. Judge Quinn went on to conclude that “[w]here a defendant fails to include the required ‘opt-out’ notice, the defendant is liable for violation of the TCPA regardless of the existence of an established business relationship.” *Id.* at p. 5. The case was then transferred to Judge Peter Flynn.

Crown eventually moved to decertify, relying on the district court's decision in *Nack v. Walburg* which held that the TCPA's opt out language did not apply to a vast majority of the faxes at issue because recipients (actual or prospective clients of Crown) provided asked for or solicited the transmission of the faxes. *Nack v. Walburg*, 2011 U.S. Dist. LEXIS 8266, at *11 (E.D. Mo. Jan. 28, 2011). During decertification briefing, the Eighth Circuit reversed the district court, relying on the position that the Commission adopted in its amicus brief. *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2012). Judge Flynn denied Crown's motion to decertify, in part, holding that he felt compelled to follow the Eight Circuit's decision.

Crown is facing a class action which seeks millions of dollars in damages for sending faxes to clients *who expressly asked to receive them* simply because these "solicited" faxes do not contain statutory opt out language. Section 64.1200(a)(3)(iv) requires that opt-out language appear on faxes. As discussed in Crown's Petition, a 2006 Commission Regulation interpreting this Section is unclear as part of the rule expressly limits its reach to *unsolicited* faxes, while also referencing recipients that have *agreed* to receive such faxes. This has led to a cottage industry of litigation for the plaintiffs' class action bar.

Crown faces millions of dollars in liability, not because it blast-faxed prospective customers purchased from the internet, but because it did not place opt out language on the faxes that it sent to current and potential customers who had specifically asked to be sent faxes containing information regarding Crown's mortgage based products. Under these circumstances, Crown may go bankrupt, not because it violated the TCPA by blast-faxing individuals, but because of a seemingly "technical violation" of the TCPA.

Accordingly, Crown requests that the Commission resolve this uncertainty by declaring that Section 64.1200(a)(3)(iv)'s ambiguous language should be limited to unsolicited faxes, as that reading best accords with the TCPA's language and legislative history, and avoids an interpretation that would render the rule unlawful under basic principles of administrative law and the First Amendment. *See* Crown's contemporaneously filed Petition for Declaratory Relief and/Waiver under 02-278 and 05-388.

Alternatively, the Commission should provide Crown with a waiver, excusing it from liability. A waiver is appropriate given the fact that the Commission only recently clarified its position when it filed an amicus in the case or *Nack v. Walburg*. *See* Crown's contemporaneously filed Petition for Declaratory Relief and/Waiver under 02-278 and 05-388.

Here, with limited exceptions, Crown sent faxes only to individuals that had expressly asked to be sent the subject fax. Thus, even assuming that the goal of Section 64.1200(a)(3)(iv) is to allow consumers "to stop unwanted faxes in the future", that goal would not be served where the vast majority of the subject faxes were sent as a result of the direct *solicitation* as opposed to an EBR based fax. An EBR based fax is different to the extent that it is being sent because of a *prior* or existing business relationship. Here, the vast majority of subject faxes were sent as a result of the recipient asking Crown to send him or her an informational fax. The

distriction is significant as a person receiving an unsolicited fax based upon an EBR is far different than a person specifically asking (soliciting) to receive an advertising fax. With the case of the EBR based fax, there should be a statutory mechanism to say "stop sending me faxes." Why should Crown be required to include information about stopping unwanted faxes when the subject fax is being sent in response to the request of the recipient?² To recap, while other petitioners may have sent out EBR based faxes, the vast majority of the faxes in this case were sent in response to direct requests and/or solicitations.

Second, requiring strict compliance with Section 64.1200(a)(3)(iv) with respect to solicited faxes in these circumstances would be inequitable, unduly burdensome, and contrary to the public interest. Crown is embroiled in a million-dollar-plus class action lawsuit for an alleged failure to include appropriate opt-out notices on faxes sent to class members *who asked to be sent faxes*. As a result, the class members have suffered no actual harm. Where, as here, recipients of faxes explicitly requested or agreed to receive them and never expressed any interest or desire to opt out, requiring strict compliance with Section 64.1200(a)(3)(iv) would be both tremendously burdensome and inequitable. It would also be contrary to the public interest, as exposing Crown to massive class action liability for engaging in consensual communications with its customers would work an economic injustice on a local business that is providing a valuable service to its clients – both lawyers and real estate agents.

Robert Biggerstaff's February 14, 2014, comments suggest that there is no basis to issue a waiver because other companies have utilized opt out language. What Mr. Biggerstaff ignores is that under those circumstances the faxes were sent as a result of EBRs. Under those circumstances, it was natural to include opt out language because the TCPA regulates unsolicited

² Crown adopts the comments submitted by Anda, Inc., on February 14, 2014, at pages 11-14 of its comments.

faxes. There would be no reason to include opt out language when a customer *asks* to be sent a fax – as is the case here. Moreover, Mr. Biggerstaff ignores the fact that it was only when the Eight Circuit addressed the scope of opt out language in Nack that the Commission commented that opt out language applies to all faxes. Accordingly, until the Eight Circuit ruled, Crown had not reason to believe that opt out language is required for "solicited" faxes – or where the faxes were sent at with the express invitation and/or permission of the recipient. Because the law was (and still is) less than clear, Crown should be provided with a waiver.³

Respectfully submitted,

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³ See Crown's Petition for Declaratory Rulings and/or Waiver, filed on 2/21/14.

CERTIFICATE OF SERVICE

The undersigned certifies that on February 21, 2014, a copy of Crown Mortgage Company's Petition for Declaratory Rulings and/or for Waiver was served upon counsel of record at the following address via First Class Mail and email service.

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The undersigned certifies that on February 21, 2014, he filed, by mail and internet service, Crown Mortgage Company's Petition for Declaratory Rulings and/or Waiver with the Federal Communications Commission, Office of the Secretary, 445 12th Street, SW, Washington, D.C. 20554

/s/ James C. Vlahakis
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