

**BEFORE THE
FEDERAL COMMUNICATIONS DIVISION
WASHINGTON, D.C. 20554**

In the matter of:

CG Docket No.: 02-278

CG Docket No.: 05-338

**Petitions Concerning Commissions's Rule
On Opt-Out Notices on Fax Advertisements**

**RESPONSE OF TCPA PLAINTIFFS TO PETITION
FILED BY S&S FIRESTONE, INC., d/b/a S&S TIRE
SEEKING A DECLARATORY RULING AND/OR WAIVER**

Petitioner, S&S Firestone, Inc., d/b/a S&S Tire, has moved this Commission for a declaratory ruling and/or waiver very similar to those requested in the Petitions submitted by All Granite & Marble Corp. on October 28, 2013 and Crown Mortgage Company submitted on February 14, 2014. Additionally, S&S Firestone incorporates portions of the Petitions recently filed by Magna Check, Inc. filed on March 28, 2014 and the Petition of Perdue Pharma filed on December 12, 2013.

**I. THE COMMISSION SHOULD NOT ENTER EITHER
OF THE REQUESTED DECLARATORY RULINGS.**

In its Petition, S&S Firestone argues that the Commission should issue a declaratory ruling directing that fax advertisements sent with express consent are not required to contain opt-out notices. Alternatively, S&S Firestone requests this Commission to clarify that the statutory basis for 47 C.F.R. 65.1200(a)(4)(iv) is not 47 U.S.C. § 227(b).

A. S&S offers no new arguments.

To its credit, S&S Firestone does not pretend to advance any new arguments. It simply incorporates those of All Granite & Marble Corp., Crown Mortgage, Magna Check, and Perdue Pharma. The arguments advanced by those entities have been completely answered by Brian Wanca on behalf of a number of other TCPA Plaintiffs. Accordingly, and rather than belaboring

the record, these Plaintiffs adopt and incorporate the TCPA Plaintiffs' Reply Comments Concerning the Commission's Rule on Opt-Out Notices on Fax advertisements filed on February 21, 2014. In addition, the Plaintiffs also incorporate and rely upon The Comments of Robert Biggerstaff on the Petitions Concerning the Commission's Rule on Opt-out Notices on Fax Advertisements submitted on February 14 and 21, 2014. These Plaintiffs also incorporate the follow-up Comments of other Mr. Wanca. Here, we offer only a summary of some of the responses already made as they apply to the Petition of S&S.

S&S first joins the other Petitioners in arguing that this Commission should resolve uncertainty in the application of 47 C.F.R. 64.1200(a)(4)(iii) and (iv). S&S asks that the Commission "clarify" that the section applies only to unsolicited faxes – given their position that the Commission only had authority under the TCPA to promulgate regulations relating to unsolicited faxes. This argument cannot carry the day, as it completely fails to address this Commission's Order in *Anda*. In that matter, which raised identical claims, the Commission held that there was no "controversy" or "uncertainty" that the Commission adopted the regulation pursuant to § 227. The Commission also held that challenge was an untimely collateral attack on the statutory basis for the rule. Finally, the Commission rejected the challenge on the merits because the opt-out rule is part of the proper role of the Commission in defining statutory terms; here, "prior express invitation or permission." *Petition for Declaratory Ruling to Clarify that 47 U.S.C. § 227(b) Was Not the Statutory Basis for the Commission's Rule Requiring an Opt-out Notice for Fax Advertisements Sent with the Recipient's Prior Express Permission, Order, CG Docket No. 5-338 May 2, 2012 (The "Anda Order")*. See also, TCPA Plaintiffs Reply Comments dated February 12, 2014, p. 3. See also, Comments of Robert Biggerstaff on the Petitions Concerning the Commission's Rule on Opt-out Notices on Fax

Advertisements filed on February 14, 2014 at pp. 4-6 (demonstrating that the Commission's rules are authoritative in terms of interpreting the TCPA). The Commission is given the authority by Congress to flesh out the details of the operation of the statute. The Commission's interpretation of "prior express invitation or permission" is well within that authority.

S&S also joins with the other Petitioners in seeking clarification from the Commission that the statutory basis for § 64.1200(a)(4)(iv) is not 47 U.S.C. § 227(b). Again, there is no controversy or uncertainty that the Commission adopted the rule under § 227, so there is no need for clarification. The Petition filed by S&S offers no new reason for this purported lack of clarity.

These Plaintiffs also rely upon the decision of the Eighth Circuit United States Court of Appeals in *Nack v. Walburg* 715 F. 3d 680 (8th Cir. 2013) *cert. denied*, 134 S. Ct. 1539 (2014). In that case, the Court opined that 47 C.F.R. §64.1200(a)(3)(iv), "as written requires the senders of fax advertisements to employ the above-described opt-out language even if the sender received prior express permission to send the fax." The Court went on to note:

This plain language interpretation of the regulation is consistent with the FCC's proffered interpretation of its own regulation and is largely consistent with the 2006 Order (other than the confusing passage identified by the District Court). In this circumstance, we must defer to the FCC's plain language interpretation of its own regulation unless the regulation is 'contrary to unambiguous statutory language' or 'application of the regulation is arbitrary or capricious.'

Nack, 715 F. 3d at 685.

The *Nack* Court refused to hear a direct challenge to the validity of the regulation, saying that the Hobbs Act precludes the Court from entertaining such a challenge given the then posture of the case. *Id.* The Court further held that although the challenge to the regulation was brought in the context of private litigation, to rule otherwise would "permit an end-run around the administrative review mandated by the Hobbs Act." *Id.*

The Eighth Circuit acknowledged that Anda, Inc., an *amicus* participant in that action, had pursued administrative resolution of its claims before the FCC. The Court noted that this Commission dismissed Anda's administrative petition on procedural grounds, holding that Anda's petition "identifies no controversy to terminate, or uncertainty to remove, a condition precedent to the Commission issuing a declaratory ruling." 715 F. 3d at 684. The significance of the Eighth Circuit acknowledging this Commission's ruling dismissing the Petition of Anda is simple: S&S Firestone makes exactly the same allegations, and for the same reasons, and perhaps for stronger reasons still, should suffer the same fate. Neither S&S Firestone, nor any other Petitioner, has advanced any other argument compelling a different outcome with regard to the procedural ruling made in the Anda case.

This Commission made its position clear when it wrote as an *amicus curiae* in the *Nack* case. The Commission explained the purpose of its rule and its interpretation at pages 17-18 of its brief:

Congress concluded that a prohibition on unsolicited facsimile advertisements is "the *minimum* necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner's uses of his or her fax machine... By mandating a ban on the transmission of unsolicited facsimile advertisements, Congress did not preclude the FCC from adopting measures not expressly mandated by statute to protect consumers from receiving unwanted facsimile advertisements. Instead, Congress was silent on the mechanism by which consumers would be notified of their right to withdraw their consent to receive facsimile advertisements. "Congress's mandate in one context with its silence in another suggests... simply a decision not to mandate any solution in the second context, i.e., to leave the question to the Agency's discretion."

Chaney RR Co. v. ICC, 902 F. 2d 66, 69 (D.C. Cir. 1990).¹

¹ The Commission also explained the purported conflict between the text and the footnote in the Agency Order from 2006: "The text of the Agency's decision controls." *Id.* There is no confusion, there is no uncertainty, the suggestions to the contrary are simply incorrect.

Since the Petition for Writ of Certiorari filed by Walburg has been denied, the Eighth Circuit's opinion is the extent of law. 134 S.Ct. 1539 (March 24, 2014).

II. THE REQUESTED RETROACTIVE WAIVER IS INAPPROPRIATE.

S&S Firestone, like the Petitioners before it, asks this Commission to grant it a retroactive waiver of Section 64.1200(a)(4)(iv). S&S Firestone offers no additional or new reasons as to why such a waiver should be granted. Prior Respondents, including the TCPA Plaintiffs and Mr. Biggerstaff, have commented already that no such broad brush relief has ever been afforded by this Commission. *See*, TCPA Plaintiffs Reply dated February 21, 2014, Comments of Biggerstaff of February 14, 2014 at p. 10. Indeed, to do so would violate the doctrine of separation of powers.

S&S behaves as if what it seeks is not extraordinary. Nevertheless, the relief requested, a complete waiver, is unique in its scope and in its complete inattention to constitutional concerns. Such inattention to these concerns is particularly troubling given that S&S Firestone did not make any effort to comply with the regulation – there is no opt-out notice whatsoever on any of S&S Firestone's faxes.² Moreover, S&S Firestone, like the other Petitioners, never asked this Commission for permission to fax without the imposition of liability before it undertook the faxing. It is only upon being sued in private litigation that S&S Firestone started seeking forgiveness rather than permission. S&S Firestone has offered no reason for its failure to even attempt to comply with § 64.1200(a)(4)(iv). The truth is that it is now facing substantial damages under the Act for its failure to comply with the law. Rather than defend itself in the civil action, S&S asks this Commission to usurp the role of the federal courts and essentially eliminate a cause of action permitted by the statute. Such an Act is likely unconstitutional, certainly not within the spirit of the Act, and it made for purely selfish reasons. S&S seeks to

² Therefore, obviously, S&S Firestone cannot make any "substantial compliance" argument.

avoid its liability. Curiously absent from the Petition is any analysis of these issues. S&S does not begin to address potential constitutional issues such as the violation of the separation of powers doctrine and violation of due process. S&S does not address how its requested relief furthers the purposes of the Act – informing consumers of their rights as to receiving faxes. S&S does not address the issues because it seeks only to avoid liability for its violation of the regulations. S&S seeks absolution yet never even suggests that it will, or should, change its conduct. Affording it the relief it seeks is therefore completely contrary to the spirit and purpose of the TCPA.

CONCLUSION

The S&S Firestone petition should be rejected. There exists no lack of clarity in § 64.1200(a)(4)(iv). The “confusion” and “uncertainty” are made of whole cloth in an attempt to avoid individual corporate liability. Nothing more.

The requested waiver is extraordinary. S&S asks the Commission to take on the role of the Courts. This, the Commission should not do. This petition should be denied.

Respectfully submitted this the ____ day of _____, 2014.

/s/ Samuel M. Hill
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