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Before the
FEDERAL COMMUNICATIONS COMISSION
Washington, D.C. 20554

In the Matter of:	CG Docket No. 02-278
Petition of Cartridge World North America, LLC For Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules	CG Docket No. 05-338

PETITION OF CARTRIDGE WORLD NORTH AMERICA, LLC FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission's (the "Commission") rules, 47 C.F.R. § 1.3, Cartridge World North America, LLC ("Cartridge World") respectfully requests that the Commission grant a retroactive waiver of 47 CFR § 64.1200(a)(4)(iv) (the "Regulation") with respect to faxes that have been transmitted by Cartridge World, or on Cartridge World's behalf, with the prior express invitation or permission of the recipients or their agents ("Solicited Faxes") but did not include opt-out notices or which included opt-out notices that did not conform to the requirements of the Regulation. For the reasons stated below, Cartridge World respectfully submits that a waiver is appropriate.

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I. INTRODUCTION

Cartridge World specializes in the sale of affordable printing products and is a leader in sales of ecologically-friendly ink and toner printer cartridges. In February 2016, the company was targeted by plaintiffs' firm Anderson + Wanca, which has gained notoriety for filing scores of Telephone Consumer Protection Act lawsuits and has been reprimanded by the United States Court of Appeals for the Seventh Circuit[1] for unethical conduct in the solicitation of TCPA clients. Cartridge World is defending itself in a putative class action lawsuit styled *Whiteamire*

[1] *See Reliable Money Order, Inc. v. McKnight Sales Co.*, 704 F.3d 489 (7th Cir. 2013).

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Clinic, P.A., Inc. v. Cartridge World North America, LLC, Case No. 1:16-cv-00226, United States District Court for the Northern District of Ohio.

In the lawsuit, Plaintiff Whiteamire Clinic, P.A, Inc. ("Plaintiff") alleges that Cartridge World has violated the TCPA's fax provisions by sending unsolicited fax advertisements that did not include proper opt-out notices; *Plaintiff further claims that Cartridge World is precluded from arguing that its faxes were solicited because faxes did not include adequate opt-out language*.[2] Plaintiff now seeks to certify a class consisting of:

> All persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising the commercial availability or quality of any property, goods, or services by or on behalf of Defendants, and (3) which Defendants did not have prior express invitation or permission, or (4) *which did not display a proper opt-out notice*.[3]

Among other defenses, Cartridge World contends that all faxes were *solicited* and sent only after proper consent was obtained – whether Cartridge World is granted the waiver that it now seeks is thus critical to the pending litigation.

As discussed in greater detail below, Cartridge World satisfies the requirements for a retroactive waiver of Section 64.1200(a)(4)(iv) with respect to faxes that have been transmitted by Cartridge World, or on Cartridge World's behalf, with the prior express consent or permission of the recipients or their agents. Special circumstances – namely confusion over whether opt-out requirements applied to solicited faxes – warrant a waiver. A waiver would also best serve the

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[2] Plaintiff alleges, for example, that Cartridge World is "precluded from asserting any prior express invitation or permission . . . because of the failure to comply with the Opt-Out Notice Requirements in connection with such transmissions." First Amended Complaint, Dkt. # 18 ("FAC") at ¶ 31.

[3] FAC at ¶ 18. Plaintiff further alleges that "[c]ommon questions of law and fact apply to the claims of all class members," including "[w]hether the faxes contain an 'opt-out notice' that complies with the requirements of § (b)(1)(C)(iii) of the Act, and the regulations promulgated thereunder, and the effect of the failure to comply with such requirements." *Id.* at ¶ 20(h). As to typicality, Plaintiff claims that Cartridge World has "sen[t] Plaintiff and each member of the class the same faxes or faxes which did not contain the proper opt-out language or were sent without prior express invitation or permission." *Id.* at ¶ 21

public interest because Cartridge World now faces the possibility of substantial damages in the pending litigation.

II. THE CURRENT STATUTORY AND REGULATORY FRAMEWORK

The TCPA, as codified in 47 U.S.C. § 227 *et seq.*, and amended by the Junk Fax Prevention Act of 2005 ("JFPA"),[4] prohibits, under certain circumstances, the use of a fax machine to send an "unsolicited advertisement."[5] An "unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[6]

As relevant to this Petition, the Regulation states 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."[7] In addition to the Regulation, the Commission also adopted rules implementing the JFPA in 2006 (the "Junk Fax Order").[8] As explained in the Commission's October 30, 2014 Order (the "Fax Order"), a footnote in the Junk Fax Order led to industry-wide confusion regarding the Commission's intent to apply the opt-out notice requirements to solicited faxes.[9] The Commission clarified this important issue in the Fax Order.

Pursuant to the Fax 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

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[4] *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); *see also* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). The TCPA and the JFPA are codified at 47 U.S.C. § 227 *et seq.*

[5] 47 U.S.C. §§ 227(a)(5) and (b)(1)(C).

[6] *Id.* § 227(a)(5).

[7] *See* 47 C.F.R. § 64.1200(a)(4)(iv); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration,* 21 FCC Rcd at 3812, para. 48 (2006) (the "Junk Fax Order").

[8] *See generally* Junk Fax Order.

[9] *See* Junk Fax Order, 21 FCC Rcd at 3818, para. 42 n.154 ("We note that the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.") (emphasis added).

previously agreed to receive fax ads from such senders."[10] Due to the aforementioned confusion,[11] the Commission decided to grant retroactive waivers to affected parties; affected parties are those, like Cartridge World and its vendors, who sent faxes with the recipient's prior express permission and were reasonably uncertain about opt-out notice requirements for such faxes. As explained by the Commission:

> [W]e recognize that some parties who have sent fax ads with the recipients prior express permission may have reasonably been uncertain about whether our requirement for opt-out notices applied to them. As such, we grant retroactive waivers of our opt-out requirements to certain fax advertisements 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.

The Commission stated that other affected parties similarly situated as the petitioners could seek a waiver.[12]

Thereafter, on August 28, 2015, the Consumer and Governmental Affairs Bureau (the "Bureau") issued an Order in which it granted over 100 additional petitions for opt-out waivers

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[10] *See* Fax Order, para. 1.

[11] The Commission detailed the reasons for uncertainty in the Fax Order: "Specifically, there are two grounds that we find led to confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient), the combination of which present us with special circumstances warranting deviation from the adopted rule. The record indicates that inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission. Specifically, the footnote stated that 'the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.' The use of the word 'unsolicited' in this one instances may have caused some parties to misconstrue the Commission's intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient. We note that all petitioners make reference to the confusing footnote language in the record. Further, some commenters question whether the Commission provided adequate notice of its intent to adopt [the Regulation]. Although we find the notice adequate to satisfy the requirements of the Administrative Procedure Act, we acknowledge that the notice provided did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient." *See* Fax Order, para. 24-25 (internal footnotes omitted).

[12] *See* Fax Order, para. 30.

for solicited faxes sent before April 30, 2015 (the "2015 Fax Order").[13] In the 2015 Fax Order, the Bureau rejected a variety of arguments set forth by commenters – the Bureau noted:

> [O]ppositions fall into several categories: petitioners did not actually get consent; petitioners had actual knowledge of the requirement as evidenced, e.g., by the opt-out notices that did include on their faxes or lawsuits against them alleging violation of the rule; petitioners have not argued actual confusion; and, petitioners face insufficient liability for TCPA violations to qualify for a waiver.[14]

In the 2015 Fax Order, the Bureau "address[ed] each argument . . . and f[ou]nd that none merit denying the requested waivers.[15] The Bureau also noted that some petitions "were filed in May and June of this year, after the six-month (April 30, 2015) date referenced in the *2014 Anda Commission Order*. . . . [G]ranting waivers to these parties does not contradict the purpose or intent of the initial waiver order as the parties involved are similarly situated to the initial waiver recipients."[16]

III. CARTRIDGE WORLD SHOULD BE GRANTED A RETROACTVE WAIVER

Cartridge World respectfully requests that the Commission grant a limited retroactive waiver of the Regulation for any solicited faxes sent by Cartridge World, or sent on its behalf, after the effective date of the Regulation. Section 1.3 of the Commission's rules permits the Commission to grant a waiver if good cause is shown.[17] In its August 28, 2015 Order, in the context of retroactive waivers of opt-out notices, the Commission noted that good cause is shown and a waiver should therefore be granted if: (1) special circumstances warrant a deviation from

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[13] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Order,* DA 15-976 (Aug. 28, 2015).
[14] 2015 Fax Order, DA 15-976, para. 16.
[15] 2015 Fax Order, DA 15-976, para. 16.
[16] 2015 Fax Order, DA 15-976, para. 20.
[17] 47 C.F.R. § 1.3; *see also* 47 C.F.R. § 1.925(b)(3)(i)-(ii).

the general rule and (2) the waiver would better serve the public interest than would application of the rule.[18] These requirements are satisfied here.

A. Special Circumstances Warrant a Deviation from the General Rule

The Commission previously found that special circumstances warranted deviation from the general rule requiring opt-out notices. "Specifically, the Commission found two reasons for confusion or misplaced confidence among affected parties that the opt-out notice rule did not apply to fax ads sent with recipient consent: (1) inconsistency between a *Junk Fax Order* footnote and the rule, and (2) the notice provided prior to the rule did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient."[19] Noting these special circumstances, the Commission in its August 28, 2015 Order granted limited retroactive waivers to 117 petitioners. Cartridge World is similarly situated as the faxes now at issue in the pending litigation were sent before the Commission clarified that the opt-out requirements apply to solicited faxes.

B. A Waiver Would Better Serve the Public Interest

The second requirement – that a waiver would better serve the public interest – is also satisfied here. As the Commission has explained, this second requirement is satisfied when "failure to comply with the rule – which . . . could be the result of reasonable confusion or misplaced confidence – could subject parties to potentially substantial damages."[20] This requirement is precisely the case here as Cartridge World and its vendors received confusing information regarding the applicability of the opt-out requirement to solicited faxes and Cartridge World is now defending itself against the possibility of crippling damages.

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[18] 2015 Fax Order, DA 15-976, para. 14.
[19] 2015 Fax Order, DA 15-976, para. 14.
[20] Fax Order, para. ¶ 27.

Cartridge World is currently defending a putative class action lawsuit pending in the United States District Court for the Northern District of Ohio – *Whiteamire Clinic, P.A., Inc. v. Cartridge World North America, LLC*, Case No. 1:16-cv-00226. Plaintiff filed its complaint on February 1, 2016 and in its current amended pleading alleges that Cartridge World violated the TCPA's Junk Fax provisions by sending unsolicited fax advertisements that did not include proper opt-out notices – Plaintiff further alleges that *Cartridge World is precluded from arguing that its faxes were solicited because the faxes did not include adequate opt-out language.*[21] Plaintiff, moreover, seeks to certify a class consisting of:

> All persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising the commercial availability or quality of any property, goods, or services by or on behalf of Defendants, and (3) which Defendants did not have prior express invitation or permission, or (4) *which did not display a proper opt-out notice.*[22]

Cartridge World's request for a waiver bears directly on the pending litigation – among other defenses, Cartridge World contends that all faxes that were sent were *solicited* and sent only after obtaining each recipient's consent. Consequently, if Cartridge World's request for a waiver is not granted, Cartridge World could be subject to potential liability as well as defense costs and fees in addition to those already incurred.

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[21] Plaintiff alleges, for example, that Cartridge World is "precluded from asserting any prior express invitation or permission . . . because of the failure to comply with the Opt-Out Notice Requirements in connection with such transmissions." FAC at ¶ 31.

[22] FAC at ¶ 18. Plaintiff also alleges that "[c]ommon questions of law and fact apply to the claims of all class members," including "[w]hether the faxes contain an 'opt-out notice' that complies with the requirements of § (b)(1)(C)(iii) of the Act, and the regulations promulgated thereunder, and the effect of the failure to comply with such requirements." FAC at ¶ 20(h). As to typicality, the Plaintiff claims that Cartridge World has "sen[t] Plaintiff and each member of the class the same faxes or faxes which did not contain the proper opt-out language or were sent without prior express invitation or permission." FAC at ¶ 21.

IV. CONCLUSION

For the reasons stated above, Cartridge World respectfully requests that the Commission grant a limited retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited faxes sent by Cartridge World, or by its vendors, with the recipient's prior express invitation or permission after the effective date of the Regulation.

Dated: August 19, 2016

Respectfully submitted,

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