

Before the

FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of:

Petition of Surefire Fulfillment Services, Inc. d/b/a Surefire Health and Gary Mills for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules

PETITION OF SUREFIRE FULFILLMENT SERVICES, INC. d/b/a SUREFIRE HEALTH AND GARY MILLS FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission's ("Commission") rules, Surefire Fulfillment Services, Inc. d/b/a Surefire Health and Gary Mills ("Surefire Health") respectfully request that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) (the "Regulation") with respect to faxes that have been transmitted by Surefire Health (or on its behalf) with the prior express consent or permission of the recipients or their agents ("Solicited Faxes") after the effective date of the Regulation. For the reasons stated, a waiver is appropriate here.

I. INTRODUCTION.

Surefire Fulfillment Services is a small company founded by Gary Mills in March of 2002. Also in March of 2012, Surefire Health was added as a d/b/a. Surefire Health produces in Utah a high quality pain relief cream called Elation Pain Cream and supplies this cream to Chiropractors and Massage Therapists all over the nation to help increase the relief that can be offered to the patient by these organizations. Chiropractors and Massage Therapists are contacted by Surefire Health that supplies a call center with a company name, company phone number, company address and sometimes a contact name. The call center calls the company and gives a brief summary of the product and states that if they are interested, we will send a fax with more information. The call center gets the name of who the fax should be addressed to, the fax number the fax is to be sent to and the contact name that gave us the approval to send the fax. We then input the information into a fax program and send the fax. We do not maintain a fax list or any list that you can opt out of. It is a one-time fax sent once we have received permission so we can keep the time required with each group to a minimum and still get them the pertinent information.

At the Moment, Surefire Health currently is facing a putative class action lawsuit seeking potentially multi-millions of dollars in damages. The lawsuit was brought by one particular Chiropractor from whom the call center had received consent to send the fax. After a year and a half goes by, the Chiropractor claims he did not give consent and files the lawsuit. The basis for this lawsuit is the Telephone Consumer Protection Act ("TCPA").

On October 30, 2014, the Commission released FCC Order 14-164 (the “Fax Order”). Prior to the Fax Order’s release, various petitioners had challenged the Commission’s Authority to issue the Regulation and alternatively sought retroactive waivers of its opt-out notice requirement for Solicited Faxes. In response to the admitted uncertainty about whether the opt-out notice applied to Solicited Faxes the Commission granted retroactive waivers to certain fax advertisement senders to provide temporary relief from any past obligation to provide opt-out notices. The waivers granted in the Fax Order apply to the identified petitioners, and the Commission made clear that other, similarly-situated entities, like Surefire Health, may also seek such waivers.

Specifically, there is no public interest in strict enforcement of the Regulations against business who are confused by the Regulation and therefore did not include appropriate opt-out notices to fax recipients who had provided “prior express invitation or permission” to be sent faxes. In contrast, the public interest would be harmed by requiring parties, like Surefire Health, to divert substantial capital and human resources from its economically productive activities to engage in unnecessary (and possibly ruinous) litigation because of past confusion over the Commission’s regulations. A waiver is thus appropriate here.

## II. BACKGROUND.

### A. The Current Statutory and Regulatory Framework.

The TCPA, as codified in 47 U.S.C. 227 and amended by the Junk Fax Prevention Act of 2005 (“JFPA”), prohibits, under certain circumstances, the use of a fax machine to send an “unsolicited advertisement.” An “unsolicited advertisement” is “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.”

As relevant to this Petition, the Regulation states a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice. In addition to the Regulation, the Commission also adopted rules implementing the JFPA. As explained in 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 to Solicited Faxes. The Commission clarified this important issue in the Fax Order.

Pursuant to the Fax Order, the Commission “confirmed that senders of fax ads must include certain information on the fax that will allow consumers to opt out, even if they previously agreed to receive fax ads from such senders.” Due to the aforementioned confusion, however, the Commission decided to grant retroactive waivers to parties affected by the confusion. Affected parties are those, like Surefire Health, who have sent fax ads with the recipient’s prior express permission and may reasonably have been uncertain about opt-out notice requirements for such fax ads. As explained by the Commission:

“We recognize that some parties who have sent fax ads with the recipient’s 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 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.”

“We 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, like Surefire Health, have six months from the release of the Fax Order (October 30, 2014) to seek a waiver. Surefire Health’s Petition is thus timely.

B. Surefire Health is Being Sued For Allegedly Violating the TCPA.

Surefire Health is being sued based on alleged violations of the TCPA’s fax provisions. The pending class action lawsuit, ARWA CHIROPRACTIC, P.C., v. SUREFIRE FULFILLMENT SERVICES, INC. d/b/a SUREFIRE HEALTH, GARY MILLS, AND JOHN DOES 1-12, Case No. 14-cv-05604 (Illinois) (the “ARWA case) was filed by serial TCPA litigator Phillip A. Bock of Bock & Hatch, LLC whose law firm has filed dozens (and perhaps hundreds) of junk fax lawsuits throughout the country. Although the faxes at issue in the ARWA case were solicited and/ or sent with prior express initiation or permission, plaintiff argues Surefire Health failed to provide an appropriate opt-out notice.

III. Discussion.

A. The Commission Should Grant a Limited Retroactive Waiver to Section 64.1200(a)(4)(iv) for any Solicited Fax sent by Surefire Health or on its Behalf.

Surefire Health respectfully requests that the Commission grant a limited retroactive waiver of the Regulation for any Solicited Faxes sent by Surefire Health (or 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. Generally, the Commission may grant a waiver of its rules in a particular case if the waiver would not undermine the policy objective of the pertinent rule and would otherwise serve the public interest. 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. As shown, both rationales apply.

B. Waiver Would Not Undermine the TCPA's Policy Objective.

Granting a waiver to Surefire Health would not undermine the policy objective of the TCPA which is "to allow consumers to stop unwanted faxes." This policy is not undermined where, as here, the faxes were wanted. The plaintiff – going through Surefire Health's fax number retrieval procedures and giving consent to receive the informational fax – had given Surefire Health express permission to send the pre-explained content fax advertisement.

More broadly, unlike indiscriminate "fax blasters" to the general consumer public, Surefire Health does not send faxes to general masses but rather only to a limited group who were personally called, received a brief explanation and description of the product, and granted permission to send a fax, provided a contact person's name and a fax number to send the pre-explained fax. Once Surefire Health received a company name, contact name, and fax number the fax was only sent out once and the company and contact information was never used again respecting the business time and resources. Seems how there was not a list maintained to opt-out of and the faxes sent were done so by express consent a waiver manifestly would not undermine a policy objective to stop unwanted faxes.

C. Special Circumstances Suggest Deviation is Appropriate.

As the Commission has explained, special circumstances counsel in favor of deviation from the general rule – rather than strict adherence. As detailed in the Fax Order, there was industry-wide confusion as to whether Solicited Faxes must include an opt-out notice based, in part, on the special circumstance of a confusing footnote in the Junk Fax Order. Surefire Health, like many other companies, was reasonably confused as to whether Solicited Faxes must include an opt-out notice. Moreover, in Surefire Health's situation, waiver strongly is in the public interest because denial of waiver could subject Surefire Health to potentially unsustainable money damages – the bulk of which would go to the plaintiffs' lawyers – rather than further the TCPA's policy objective. Surely the basis of this rule and the purposes for it were not intended to destroy productive commercial enterprises by subjecting them to serial TCPA plaintiffs' lawyers. Indeed, the Commission made clear that the public interest favors not subjecting businesses that understandably were confused by the Regulation and inadvertently (and Allegedly) acted outside of it, like Surefire Health, to potentially ruinous damages.

The record in this proceeding demonstrates that a failure to comply with the rule - which as noted above could be the result of reasonable confusion or misplaced confidence – could subject parties to potentially substantial damages . . . . This confusion or misplaced confidence, in turn, left some businesses potentially subject to significant damage awards under the TCPA's private right of action or possible Commission enforcement. We acknowledge that there is an offsetting public interest to consumers through the private right of action to obtain damages to

defray the cost imposed on them by unwanted fax ads. On balance, however, we find it serves the public interest in this instance to grant a retroactive waiver to ensure that any such confusion did not result in advertent violations of this requirement while retaining the protections afforded by the rule going forward.

Surefire Health sent fax ads to personally called companies who gave express consent to receive a fax ad on a product that was briefly described over the phone, gave a contact name to address the fax to and the company fax number the fax was to be sent. Surefire Health receiving this consent was reasonably uncertain about whether opt-out notices were required on such a fax ad. Therefore, Surefire Health is similarly situated similar to the petitioners identified in the Fax Order and equally entitled to a limited retroactive waiver. Such a waiver would not undermine the TCPS policy objective to prevent unwanted faxes because the faxes sent by Surefire Health were wanted by the recipients. Finally, Surefire Health submits that the public interest would be better served by the FCC's granting waiver rather than exposing Surefire Health to potential catastrophic money damages that would serve mainly to enrich the plaintiffs' lawyers.

#### IV. CONCLUSION.

For the reasons stated above, Surefire Health respectfully requests that the Commission grant Surefire Health a limited retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited fax sent by Surefire Health (or on its behalf) after the effective date of the Regulation.

Dated: December 12, 2014

Respectfully submitted,

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