

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

In the Matter of )  
) CG Docket No. 02-278  
Junk Fax Prevention Act 2005 )  
) CG Docket No. 05-338  
Rules and Regulations Implementing the )  
Telephone Consumer Protection Act of 1991 )

**COMMENTS OF ARWA CHIROPRACTIC, P.C. ON THE PETITION FOR  
RETROACTIVE WAIVER OF SUREFIRE FULFILLMENT SERVICES, INC. d/b/a  
SUREFIRE HEALTH AND GARY MILLS**

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## **EXECUTIVE SUMMARY**

On October 30, 2014, the Commission granted “retroactive waivers” of 47 C.F.R. § 64.1200(a)(4)(iv)—the regulation requiring opt-out notices on fax advertisements sent with “prior express invitation or permission”—to defendants in private TCPA actions and allowed “similarly situated” persons to seek waivers. The Commission stressed that “all future waiver requests will be adjudicated on a case-by-case basis” and that the Commission did not “prejudge the outcome of future waiver requests in the order.” The petition by Surefire Fulfillment Services, Inc. d/b/a Surefire Health (“Surefire”) and Gary Mills (“Mills”) (collectively “Petitioners”) requesting a similar retroactive waiver is one of numerous follow-on waiver petitions contemplated by the October 30 Order. The Commission should deny the petition.

No good cause exists here to grant Petitioners’ request for a retroactive waiver. First, the Commission should deny Petitioners’ request for a waiver because Petitioners are not “similarly situated” to other petitioners who were granted waivers. Petitioners were not confused about whether a fax sent with the consent of the recipient was required to contain an opt-out notice, but rather about whether an opt-out notice was required in the absence of a fax list from which recipients could opt-out. In such a case, regardless of whether Petitioners obtained the recipient’s consent, they still placed the burden on the consumer to attempt to figure out how to stop receiving further fax ads from Petitioners. Petitioners do not meet the requirements for a waiver because the waiver only applies to those who were

confused about whether or not opt-out notices were required on faxes sent with the “prior express permission” of recipients, not to those who were confused because they deleted their list once they sent their advertisements.

Second, if the Commission entertains the petition, it should clarify the standard for a retroactive “waiver” from 47 C.F.R. § 64.1200(a)(4)(iv). The October 30 order is unclear whether a petitioner must show it was *actually* confused about the law or whether the Commission will *presume* a petitioner was confused in the absence of evidence that a petitioner was merely ignorant of the law or had actual knowledge of the opt-out rules. Regardless of the standard, the Commission should deny the petition.

If the standard is actual confusion, the Commission should refuse to issue a waiver because—although Petitioners claim they were confused because they supposedly received consent—they do not say that they actually read or were aware of the contents of the confusing footnote in the *Junk Fax Order* and were confused by it.<sup>1</sup> If the standard is a rebuttable presumption of confusion, then the Commission should consider Petitioners’ own statements in their petition that indicate they were merely ignorant of the law, not confused, as rebuttal to any presumption of confusion. Finally, if the Commission does not determine that Petitioners’ own statements rebut a presumption of confusion, then the Commission should allow Plaintiff to determine through investigation, either before the

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<sup>1</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket No. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3810, n. 154 (2006) (“Junk Fax Order”).

Commission or in court, that Petitioners were not aware of the opt-out rules when it sent its faxes.

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Petitioner Arwa Chiropractic, P.C. (“Plaintiff”) is the plaintiff in a private TCPA action pending in the United States District Court for the Northern District of Illinois against petitioners Surefire Fulfillment Services, Inc. d/b/a Surefire Health (“Surefire”) and Gary Mills (“Mills”) (collectively “Petitioners”).<sup>2</sup> Petitioners filed a petition on January 6, 2015, seeking a retroactive waiver of the regulation requiring an opt-out notice on fax advertisements sent with “the prior express consent or permission of the recipients or their agents”.<sup>3</sup>

The Commission issued an order on 24 similar petitions on October 30, 2014.<sup>4</sup> That order rejected the challenges to the validity of the Commission’s ability to promulgate and enact the opt-out regulation, but granted retroactive “waivers”

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<sup>2</sup> See *Arwa Chiropractic, P.C. v. Surefire Fulfillment Services, Inc. d/b/a Surefire Health, et al.*, 14-cv-5604 (N.D. Ill.) (“TCPA action.”)

<sup>3</sup> *Petition of Surefire Fulfillment Services, Inc. d/b/a Surefire Health and Gary Mills for Retroactive Waiver*, CG Docket No. 05-338 (filed Jan. 6, 2015) (the “Surefire petition.”)

<sup>4</sup> *In re Rules & 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 the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014) (“Opt-Out Order”).

purporting to relieve the 24 petitioners of liability in private TCPA litigation.<sup>5</sup> The Opt-Out Order allowed other “similarly situated” parties to request waivers, and invited comments on those requests.<sup>6</sup> Plaintiff requests the Commission deny Petitioners’ request for a waiver.

### **FACTUAL BACKGROUND**

Few of the relevant facts are known to Plaintiff, since discovery has not yet commenced. On July 22, 2014, Plaintiff filed a Class Action Complaint in the United States District Court for the Northern District of Illinois, challenging Petitioners’ practice of faxing unsolicited advertisements in violation of the TCPA.<sup>7</sup> The complaint alleges that Petitioners sent an unsolicited fax ad to Plaintiff on May 8, 2013.<sup>8</sup> Plaintiff asserts that it did not invite or give permission to Petitioners, or anyone, to send the fax to it.<sup>9</sup> Plaintiff alleges, on information and belief, that Petitioners sent fax advertisements to more than 39 other recipients without first receiving the recipients’ “express permission or invitation.”<sup>10</sup> Plaintiff further alleges that the faxes do not contain the proper opt-out notice pursuant to the

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<sup>5</sup> *Id.* ¶¶ 19–20, 32 and n.70.

<sup>6</sup> *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Nov. 28, 2014) (“Public Notice”) (“With this Public Notice, we seek comment on the Petitions as described below. Specifically, the Petitioners seek retroactive waivers of the opt-out notice requirement for fax ads they sent where prior express invitation or permission had been obtained from the recipient”).

<sup>7</sup> Class Action Complaint, TCPA action, Doc. 1.

<sup>8</sup> *Id.*, ¶ 15.

<sup>9</sup> *Id.* at ¶ 18.

<sup>10</sup> *Id.* at ¶ 19.

TCPA, as the faxes completely omit any information by which a recipient can request to opt-out of receiving any future advertisements by fax.<sup>11</sup>

Petitioners answered the Class Action Complaint on January 7, 2015.<sup>12</sup> Petitioners deny that they did not have Plaintiff's consent to send faxes.<sup>13</sup> Petitioners also deny sending fax advertisements to others without their prior express permission or invitation.<sup>14</sup> Petitioners further deny that its failure to include an opt-out notice violated the TCPA.<sup>15</sup>

On January 6, 2015, Petitioners filed their petition with the Commission. The Surefire petition claims that Petitioners hired a call center to contact each fax recipient to obtain permission to send their fax ads and that each advertisement was only sent once.<sup>16</sup> Petitioners also contend that, because they only sent their fax ads once, there is no fax list from which recipients may opt-out.<sup>17</sup> Petitioners argue that under these circumstances they were "reasonably uncertain about whether opt-out notices were required."<sup>18</sup> However, Petitioners' assertions do not demonstrate

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<sup>11</sup> *Id.* at ¶¶ 25(e), 26, 38, 41, 43.

<sup>12</sup> Defendant Gary Mills' Answers and Affirmative Defenses to Plaintiff's Class Action Complaint, TCPA action, Doc. 20; Defendant Surefire Fulfillment Services, Inc.'s Answer and Affirmative Defenses to Plaintiff's Complaint, TCPA action, Doc. 21.

<sup>13</sup> *Id.* at ¶ 18.

<sup>14</sup> *Id.* at ¶ 19.

<sup>15</sup> *Id.* at ¶ 38.

<sup>16</sup> Petition of Surefire Fulfillment Services, Inc. d/b/a Surefire Health and Gary Mills for Retroactive Waiver, p. 1.

<sup>17</sup> *Id.* at 1, 4.

<sup>18</sup> *Id.* at 5.

that they confused about whether an opt-out notice was required because they had obtained the recipient's consent. Rather, Petitioners have shown that their confusion actually stemmed from the fact that they did not maintain a list from which recipients could request exclusion.<sup>19</sup>

## ARGUMENT

**I. No good cause exists to grant the Surefire petition because Petitioners are not “similarly situated” to other petitioners who were granted waivers.**

In its Opt-Out Order, the Commission found that “good cause” existed to grant the 24 waivers because an “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.”<sup>20</sup> No good cause exists to grant the Surefire petition because Petitioners were not confused about the footnote, but rather about whether an opt-out notice is required if they do not maintain a list of fax recipients.

Petitioners may have been confused about whether an opt-out notice was required, but it was not because they had purportedly received consent. Rather, Petitioners appear to have been confused because they claim that they did not maintain a list of fax numbers from which recipients could request exclusion.<sup>21</sup> Petitioners' argument misses the point. Even if Petitioners did not maintain a list from which recipients could request exclusion, they still “place[d] the burden on the

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<sup>19</sup> *Id.* at 1, 4.

<sup>20</sup> Opt-Out Order, ¶24.

<sup>21</sup> Petition of Surefire Fulfillment Services, Inc. d/b/a Surefire Health and Gary Mills for Retroactive Waiver, pp. 1, 4.

consumer to find an effective means to revoke such consent” and ensure that they would not receive any advertisements by fax in the future.<sup>22</sup> The Commission found that providing consumers with a “cost-free, simple way to withdraw previous consent is good policy.”<sup>23</sup> From the perspectives of the recipients of Petitioners’ fax ads, there was no way to know whether Petitioners maintained a fax list or whether Petitioners would continue to send advertisements. Thus, regardless of whether Petitioners maintained a list, they still placed the burden on the consumer to figure out how to stop receiving future fax ads by not including the required opt-out notice.<sup>24</sup>

Petitioners’ waiver request is based on their erroneous belief that because, purportedly, they did not intend to send additional fax advertisements and did not maintain a fax list, they were not required to include an opt-out notice at all. This is not grounds for a waiver here. The Commission emphasized, “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.”<sup>25</sup> Petitioners’ confusion here does not constitute “good cause” to grant it a waiver of the requirement that faxes sent with “prior express permission” must contain opt-out notices. Therefore, the petition should be denied.

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<sup>22</sup> Opt-Out Order, ¶20.

<sup>23</sup> *Id.*

<sup>24</sup> *See Id.*

<sup>25</sup> Opt-Out Order, ¶26.

II. The Commission should clarify whether the standard for a waiver from §64.1200(a)(4)(iv) is *actual* confusion or *presumed* confusion, but the Surefire petition fails either standard.

The public notice seeks comments “consistent with the guidelines set forth in the *Fax Order*.” But it is unclear what the guidelines are. The Opt-Out Order states that the lack of notice in the 2005 rulemaking and an inconsistent footnote in the 2006 *Junk Fax Order* “led to confusion or misplaced confidence on the part of petitioners,” justifying a waiver.<sup>26</sup> It also states these factors “caused businesses mistakenly to believe that the opt-out notice requirement did not apply.”<sup>27</sup> These statements suggest the Commission found that the 24 petitioners covered by the order were entitled to waivers because, prior to sending their faxes, they did in fact (1) receive inadequate notice, (2) read the regulation and the footnote, and (3) suffer actual “confusion or misplaced confidence” as a result.<sup>28</sup>

At the same time, however, the order states these factors “*may have* contributed to confusion or misplaced confidence,” that the combination of factors “*presumptively* establishes good cause for retroactive waiver,” and that “nothing in the record here demonstrat[es] that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement . . . but nonetheless failed to do so.”<sup>29</sup> The Commission also emphasized that “simple ignorance” of the law “is not

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<sup>26</sup> Opt-Out Order, ¶26.

<sup>27</sup> *Id.* at ¶27.

<sup>28</sup> Plaintiff does not concede that any of the 24 petitioners met these standards.

<sup>29</sup> Opt-Out Order, ¶¶25-26 (emphasis added).

grounds for a waiver.”<sup>30</sup> These statements suggest the Commission found the regulation objectively “confusing,” giving rise to a *presumption* that the 24 petitioners were “confused,” and that Plaintiff failed to rebut that presumption with evidence the petitioners knew opt-out notices were required or were simply ignorant of the regulation.

A significant number of TCPA defendants have petitioned the Commission for waivers from § 64.1200(a)(4)(iv), and it is reasonable to expect many more will continue to petition over the next few months. The Commission should clarify the standard under which it issued its waivers from § 64.1200(a)(4)(iv) for both the ensuing fax-waiver petitions, as well as the many non-fax-waiver petitions the Commission will be presented with over the coming months.

Regardless of the standard, however, the Surefire petition must be denied.

**A. If the standard is *actual* confusion, the Surefire petition should be denied because Petitioners do not claim confusion.**

Petitioners claim that “receiving this consent was reasonably uncertain [sic] about whether opt-out notices were required on such a fax ad.”<sup>31</sup> Petitioners recite the Commission’s statement about “industry-wide confusion” based on a confusing footnote in its Junk Fax Order and claim that because they purportedly received consent to send their fax ads, they are similarly situated to those persons who were granted retroactive waivers.<sup>32</sup> However, Petitioners do not claim that they actually

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<sup>30</sup> *Id.* at ¶26.

<sup>31</sup> Petition of Surefire Fulfillment Services, Inc. d/b/a Surefire Health and Gary Mills for Retroactive Waiver, p. 5.

<sup>32</sup> *Id.*

reviewed the Junk Fax Order and were confused by the footnote, or that they were aware of the law whatsoever.<sup>33</sup> Rather, to justify their Petition, Petitioners simply rely on their argument that they sent fax ads with consent for the proposition that they are similarly-situated to the other parties granted retroactive waivers.<sup>34</sup>

As the Commission has stated, “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver . . . [r]ather, it is the inconsistent footnote, combined with the other factors . . . that led to confusion or misplaced confidence.”<sup>35</sup> If the standard is actual confusion, the Surefire petition should be denied on this ground alone.

**B. If the standard is *presumed* confusion, then discovery is warranted to determine whether that presumption is rebutted.**

If the standard is that those advertise by fax are presumed confused about the opt-out regulations, then Plaintiff requests that the Commission either engage in fact-finding proceedings to determine what Petitioners knew about the opt-out notice rules or stay a ruling on the Surefire petition until Plaintiff conducts discovery regarding Petitioners’ knowledge of the faxing regulations, or lack thereof, prior to sending their faxes.

While the waiver petition itself casts serious doubt on the premise that Petitioners were confused about the opt-out rules, but instead indicates that Petitioners were simply ignorant of the law, Plaintiff does not have *evidence* to

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Opt-Out Order, ¶26.

rebut a presumption that Petitioners were confused when they sent the faxes at issue. The underlying lawsuit was filed in July 2014, and Petitioners have only just appeared and answered Plaintiff's complaint. Therefore, discovery has not yet commenced that will assist determining whether Petitioners were aware of the opt-out notice requirements before they sent the faxes at issue.

The Surefire petition does not state whether Petitioners were aware of the opt-out notice rules before they sent the faxes. Plaintiff has a due process right to investigate whether Petitioners were aware of the opt-out notice rule if that factor is dispositive of its private right of action under the TCPA.<sup>36</sup> The Commission may initiate proceedings "for the purpose of obtaining information necessary or helpful in the determination of its policies".<sup>37</sup> Here, because the Surefire petition seeks a determination of the Commission's policies regarding retroactive waivers regarding opt-out notices, Plaintiff respectfully requests that before the Commission attempts to absolve Petitioners of liability in Plaintiff's lawsuit prior to any fact-finding, the Commission either hold such proceedings as described, or stay a ruling on the Surefire petition until Plaintiff has conducted discovery regarding Petitioners' knowledge of the opt-out rules.

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<sup>36</sup> See, e.g., *Applications of Comcast Corp. and Time Warner Cable Inc. For Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57; *Applications of AT&T, Inc. and DIRECTV For Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Dissenting Statement of Commissioner Pai (arguing Commission violated petitioners' "due process rights" by denying "serious arguments that merit the Commission's thoughtful consideration" in "cursory two-page order").

<sup>37</sup> 47 C.F.R. § 1.1.

## CONCLUSION

The Commission should deny the Surefire petition for waiver because Petitioners were not confused about the opt-out requirement because they received consent, but rather were unaware that they needed to include an opt-out notice whatsoever when they did not maintain a list of fax recipients. If the Commission entertains the petition, it should clarify whether the standard for a waiver is *actual* confusion or *presumed* confusion. If actual confusion is required, the Commission should deny the petition because Petitioners do not establish that they were actually confused by the Junk Fax Order. If the standard is presumed confusion that may be rebutted with evidence of ignorance of the law or an intentional violation, the Commission should allow Plaintiff to investigate whether Petitioners were aware of the opt-out rules, either before the Commission or in court, before the Commission purports to absolve Petitioners of civil liability on that basis.

Respectfully submitted,

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