

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of:

Petition of Senco Brands, Inc. For Waiver of  
Section 64.1200(a)(4)(iv) of the Commission's Rules

CG Docket No. 05-338

**REPLY COMMENT OF SENCO BRANDS, INC. TO CRAFTWOOD  
LUMBER CO.'S COMMENT ON SENCO'S PETITION FOR WAIVER**

Senco Brands, Inc. ("Senco") offers this Reply Comment in support of its Petition for Waiver,<sup>1</sup> and in response to the Comment<sup>2</sup> filed by Scott Z. Zimmermann on behalf of Craftwood Lumber Co. ("Craftwood"). For the reasons stated below, and in the Senco Petition, Senco is entitled to a retroactive administrative waiver of the opt-out requirement under Section 64.1200(a)(4)(iv) (the "Regulation") as to faxes transmitted by Senco (or on its behalf) with the prior express permission of the recipients or their agents ("Solicited Faxes") after the effective date of the Regulation.

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<sup>1</sup> *Petition of Senco Brands, Inc. for Retroactive Waiver*, CG Docket No. 05-338 (Dec. 10, 2014) (the "Senco Petition").

<sup>2</sup> *Comment of Craftwood Lumber Co.*, CG Docket No. 05-338 (Jan. 13, 2015) (the "Craftwood Comment").

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## I. INTRODUCTION.

Craftwood’s “kitchen-sink” style Comment fails to provide any basis whatsoever to deny Senco’s timely request for a limited retroactive waiver pursuant to this Commission’s October 30, 2014, Order.<sup>3</sup> Riddled with misstatements, misdirection, and inherent contradiction, Craftwood’s Comment is simply devoid of merit. It is entitled to no weight.

As discussed in greater detail below, the Craftwood Comment consists primarily of three main arguments—all of which inexorably fail on account of the facts, the law or both.

*First*, Craftwood challenges this Commission’s very authority to “waive” the Regulation. Craftwood is mistaken; this Commission has such authority to be exercised where, as here, “good cause” is shown. In support of its position, Craftwood relies on distinguishable authority regarding the EPA, and, incredibly, a case involving *the Civil War*. Such authority cannot save Craftwood’s effort to deny this Commission its congressionally-mandated purpose and role.

*Second*, Craftwood claims Senco is not “similarly situated” to the petitioners who obtained retroactive waivers from this Commission via the Fax Order. The stated reasons being that Senco: (a) has not maintained it had Craftwood’s prior express permission to send the fax; (b) gives no reason why it did not include any opt-out notice on the fax; and (c) fails to establish “good cause” for this Commission to waive the Regulation. Craftwood is wrong on all accounts.

For one, Craftwood’s lack of “prior express permission” argument relies entirely on a hyper-technical interpretation of a 2009 bankruptcy proceeding involving Senco’s predecessor-in-interest, Senco Products, Inc.—from which Senco assumed all customers, contracts, employees

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<sup>3</sup> See *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) (the “Fax Order”). Craftwood’s Comment refers to the Fax Order as the “Opt-Out Order.”

and offices as part of an asset sale. Such extraneous bankruptcy proceedings cannot, and do not, have any impact on Senco’s ability to assert that Craftwood provided it prior express permission.

Craftwood’s next argument—*i.e.*, that Senco never claimed it was “similarly situated”—both ignores the contents of the Senco Petition, and attempts to foist a higher standard upon subsequent petitioners than those listed in the Fax Order. This approach is patently improper.

Moreover, Craftwood’s two-part challenge to Senco’s asserted “good cause” to waive argument is equally unavailing. Indeed, this Commission has already balanced the public interest involved in granting waivers in light of consumer concerns (and decided to do so). Craftwood also misinterprets Senco’s claims about the “unfair liability” that would result from enforcing the Regulation as a challenge to the validity of the Regulation itself; Senco makes no such argument.

*Third*, Craftwood asserts that granting the Senco Petition would be “contrary to public policy.” This argument too makes little sense, and is entirely undercut by the contents of the Senco Petition. Despite Craftwood’s efforts to pigeonhole Senco’s Petition as addressing only the “established business relationship” Senco had with Craftwood, Senco *also* asserted it had Craftwood’s “prior express permission” to send the faxes. As such, the public policy behind waving the Regulation for “similarly situated” petitioners applies.

At core, Craftwood has failed to supply any basis whatsoever to deny Senco a retroactive waiver. This Commission should therefore grant such a waiver in accordance with the Fax Order.

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## II. DISCUSSION.

### A. **The Commission Has The Authority To Waive Certain Requirements Under Its Regulations.**

#### 1. *The Commission Has Authority To “Waive” The Opt-Out Requirement.*

Craftwood’s argument that this Commission lacks authority to grant the relief sought in the Senco Petition is unavailing, as it relies on misrepresentations of the TCPA and inapposite case law analyzing a *different* agency’s authority under a completely *different* statutory scheme. The Commission has already found it has the authority required to waive the Regulation.

As support for its position, Craftwood erroneously analogizes the TCPA’s structure (and the FCC’s enforcement thereof) to the statutory scheme presented in *Natural Res. Def. Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014)—a case which held the EPA had exceeded its authority by adopting an affirmative defense to a private right of action under the Clean Air Act (“CAA”).

*NRDC* has no bearing on this Commission’s authority in the present proceedings. *NRDC* involved a fundamentally different regulatory scheme, and the EPA also did not enjoy the express waiver authority this Commission possesses under Section 1.3 of its Rules. Nor could the EPA rely on the well-established precedent underpinning this Commission’s express waiver authority.

Tellingly, the court’s decision in *NRDC* relies on the definite limits to the EPA’s authority—which are not applicable to this Commission. For example, the *NRDC* court emphasized how the EPA lacked any specific authority whatsoever to create an affirmative defense to the CAA’s private right of action; therefore, the EPA’s “ability to determine whether penalties should be assessed for [CAA] violations extends only to administrative penalties.”<sup>4</sup>

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<sup>4</sup> See *NRDC*, 749 F.3d at 1063; see also *id.* at 1064 (the “EPA cannot rely on its gap-filling authority to supplement the Clean Air Act’s provisions when Congress has not left the agency a gap to fill.”).

Unlike the EPA, however, this Commission *does* possess express and broad authority to waive its Rules.<sup>5</sup> In fact, pursuant to the Code of Federal Regulations governing this Commission:

The provisions of this chapter may be suspended, revoked, amended, *or waived for good cause shown, in whole or in part, at any time by the Commission*, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. *Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.*<sup>6</sup>

Indeed, the same court that issued the *NRDC* opinion also agreed that where, as here, a requirement is not mandated by statute, this Commission “has authority under [Rule 1.3] to waive requirements . . . where strict compliance would not be in the public interest.” *See Nat’l Ass’n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009).

Apart from *NRDC*’s failure to address anything analogous to this Commission’s waiver authority, Senco’s Petition seeks entirely different relief from the affirmative defense in *NRDC*. Senco seeks a retroactive waiver of the Commission’s rule on the ground that it would serve the public interest. (Pet. at 5-7.) More specifically, Senco seeks a limited waiver that this Commission already established it had the authority to issue pursuant to the statutory scheme. Here, unlike *NRDC*, the requested relief would not force this Commission to establish a new affirmative defense to a statutory violation, or decide whether penalties are appropriate in a private civil suit.<sup>7</sup>

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<sup>5</sup> *See* 47 U.S.C. § 227(b)(2); *Northeast Cellular v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (“The FCC has authority to waive its rules if there is ‘good cause’ to do so”); *see also* 47 C.F.R. § 1.3. (“The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.”).

<sup>6</sup> *See* 47 C.F.R. § 1.3 (emphasis added). This is in stark contrast with the EPA’s more limited ability to simply “compromise, modify, or remit . . . any administrative penalty.” *Cf.* 42 U.S.C. § 7413(d)(2)(B).

<sup>7</sup> (Pet. at 6). The Commission has, in fact, already rejected these arguments. *See* Fax Order ¶ 21 (“[T]he mere fact that the TCPA allows for private rights of action based on violations of our rules implementing that statute in certain circumstances does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply.”).

2. *The Separation Of Powers Is Not Implicated By Senco's Waiver Request.*

Granting the requested waiver will not implicate the separation of powers.<sup>8</sup> In deciding whether to grant the Senco Petition, this Commission is engaging in the very act for which Congress expressly delegated its authority: To be the “authoritative interpreter” of the TCPA.<sup>9</sup>

Notably, this Commission has already determined that: (1) special circumstances warrant a deviation from the general rule; and (2) a waiver would better serve the public interest than a strict application of the Rule.<sup>10</sup> This Commission then *invited* other similarly situated parties, like Senco, to seek such retroactive waivers.<sup>11</sup>

Unlike in *United States v. Klein*, 80 U.S. 128 (1872), cited by Craftwood, and *NRDC*, this Commission is not arbitrarily creating conclusive evidence of guilt or an affirmative defense to deprive the courts of the ability to direct their own findings, thereby violating the separation of powers. Rather, this Commission has only clarified and provided a vehicle to prevent injustice to those who may have been reasonably confused by the Commission’s comments and regulations relating to the TCPA. In addition, courts presiding over private actions, like the one initiated by Craftwood in the *Senco* case, are encouraged to “*defer* to [the] agency’s interpretations . . . unless [courts] find that a ‘regulation is contrary to unambiguous statutory language, that the agency’s interpretations of its own regulation is plainly erroneous or inconsistent with the regulation, or that application of the regulation [is] arbitrary or capricious.’” *See, e.g., Nack v. Walburg*, 715 F.3d

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<sup>8</sup> (Cmt. at 12-19.)

<sup>9</sup> *See* Fax Order ¶ 21; *NCTA v. Brand X*, 545 U.S. 967, 984 (2005); *id.* at 980 (“Congress has delegated to the Commission the authority to ‘execute and enforce’ the Communications Act, . . . and to ‘prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions’ of the Act.”) (citations omitted); *see also* 47 U.S.C. § 227(b)(2) (“The Commission shall prescribe regulations to implement the requirements of this subsection.”); 47 C.F.R. § 1.2.

<sup>10</sup> Fax Order ¶ 23.

<sup>11</sup> Fax Order ¶ 30.

680, 684 (8th Cir. 2013) (emphasis added). This Commission is neither directing, nor divesting, courts of their ability to determine if a TCPA violation occurred.<sup>12</sup>

3. *Craftwood's Comment Is An Improper Vehicle To Challenge This Commission's Authority.*

Craftwood's separation of powers argument also fails for an entirely separate reason: Comments to Petitions are not the proper vehicle by which to challenge the Commission's power or to appeal the Fax Order. Instead of utilizing the proper channels, Craftwood now erroneously attacks the Commission's decision on a piecemeal basis—claiming Senco's intended waiver would purportedly violate the separation of powers. *See Nack*, 715 F.3d at 685 (a “party challenging an FCC regulation as *ultra vires* must first petition the agency itself and, if denied, appeal the agency's disposition directly to the Court of Appeals as provided by the statute.”) (internal citations omitted). This Commission should not condone such a blatant effort to skirt procedure and the discretion afforded by the Hobbs Act, 48 U.S.C. § 2342.

Craftwood seeks to convolute what should otherwise be a simple determination as to whether Senco is similarly situated to the Fax Order petitioners. As shown, because this Commission possesses the statutory authority to issue a waiver—and no “separation of powers” argument could prevail—a waiver is appropriate.

**B. Senco Is Entitled To A Retroactive Waiver Because It Is Similarly Situated To The Petitioners Listed In The Fax Order.**

To block Senco's Petition, Craftwood must show Senco is somehow not “similarly situated” to the petitioners in the Fax Order. This it cannot do. Section 1.3 of the Commission's rules permits this Commission to grant a waiver whenever “good cause” is shown. (*See* Pet. at 5)

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<sup>12</sup> Indeed, all the Commission is doing is granting a waiver of one requirement under its Regulations. Ultimately, the court presiding over the *Senco* case will decide whether the faxes at issue were indeed solicited (*i.e.*, sent with prior express permission or invitation) such that the waiver would apply. Craftwood's attempt at litigating the issue of consent here before the FCC is improper and should be rejected.

(citing 47 C.F.R. § 1.3; 47 C.F.R. § 1.925(b)(3)(i)-(ii)). Critically, “good cause” *does not* require Senco to definitively prove it had Craftwood’s “prior express permission” to send faxes—although it can, and it did. As all parties agree, this Commission was clear that the granting of a retroactive waiver does not imply the existence of “prior express permission.” (Pet. at 4 n.13; Cmt. at 20 n.84) (citing Fax Order ¶ 31). Thus, this Commission need *only* decide if “good cause” to waive exists because Senco is “similarly situated” to the petitioners in the Fax Order.<sup>13</sup> For the petitioners, this “good cause” was the undeniable inconsistent footnote in the Junk Fax Order, *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 3787 (2006), combined with the other factors cited therein. This is the same basis upon which Senco relies. (Pet. at 5-7.) And despite Craftwood’s improper invitation to the contrary, this Commission need not conduct a searching factual inquiry nor hold Senco to a standard higher than that to which the initial petitioners were held. *See* Section II.B.2, *infra*.

As shown, Senco, like the prior petitioners, was confused and/or possessed misplaced confidence as to whether the Regulation applied to recipients, like Craftwood, who Senco believed gave their “prior express permission” to receive faxes.

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<sup>13</sup> This low standard is met where, as here, a waiver of the Commission’s rules in a particular case would not undermine the policy objective of the rule in question, and would otherwise serve the public interest. (*Id.*) (citing *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).) Waiver is also 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. (*Id.*) (citing *Ne. Cellular Tel. Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990).)

1. *Senco Has Demonstrated That It Obtained Prior Express Permission From Craftwood.*

Unable to contend that it did **not** provide Senco with its “prior express permission” in 2006, 2007, and again in January 2012, (*see* Pet. at 6),<sup>14</sup> Craftwood instead asserts that Senco cannot claim it had such permission because, prior to June 2009, Senco was technically operating under the name “Senco Products, Inc.”—which Craftwood describes as a “different and unrelated corporation.” (Cmt. at 19.) This argument is nonsensical, legally unsupported and ultimately fails.

Craftwood boldly asserts that just because a company undergoes a corporate restructuring in an effort to continue its **existing** business operations, it has, in effect, vitiated any prior express permission obtained to date. This is simply not the law.

In support, Craftwood cites a single case: *Satterfield v. Simon & Shuster, Inc.*, 569 F.3d 946 (9th Cir. 2009), for the proposition that a “defendant cannot take advantage of express consent extended to unaffiliated party.” (Cmt. at 20 n.83.) For one, Senco is **not** an “unaffiliated party” of Senco Products, Inc. On the contrary, Senco is the successor-in-interest to Senco Products, Inc., and assumed all of its customers, contracts, employees and offices as part of an asset sale. More importantly, from the **customer’s perspective** there is no cognizable distinction between

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<sup>14</sup> Craftwood unabashedly claims “[d]ue-process precludes [Senco] from offering any additional or different facts than those contained in its petition.” (Cmt. at 8 n.31.) And goes on to request that this Commission simply “ignore” any “additional or different facts that [Secno] may proffer in its reply.” (*Id.*) Aside from being completely devoid of any authority for such a sweeping “due-process” argument, this request simply highlights Craftwood’s fear that this Commission may be willing to look beyond its paltry and unsupported Comment. So too is such a request overtly hypocritical—in that Craftwood sought to attach **eighty-three (83) pages** of “additional . . . facts” to its Comment, including the pleadings from the *Senco* case from the Northern District of Illinois, and extraneous bankruptcy filings. (*See Declaration of Eric M. Kennedy in Support of Craftwood Lumber Company’s Comments on the Petition For Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by Senco Brands, Inc.* [hereinafter “Kennedy Declaration”]). In light of such self-serving assertions, Senco has attached a supplemental affidavit by Lynn Broderick, one of Senco’s inside sales representatives, that was filed in the *Senco* case at Docket No. 41 (the “Broderick Affidavit”) as Attachment A. As the Broderick Affidavit makes clear, Craftwood **voluntarily** provided its consent to receive promotional material via fax multiple times since 2001, as stated in the *Senco* Petition. (Broderick Aff. at ¶ 4.)

providing “Senco Brands, Inc.” or “Senco Products, Inc.” with permission to send faxes. Tellingly, Craftwood has not, and cannot, argue it was confused as to which entity it dealt with.

The recent case of *Van Patten v. Vertical Fitness Group, LLC*, 2014 WL 2116602 (S.D. Cal. May 20, 2014)—which Craftwood fails to even mention—is illustrative of this point. In *Van Patten*, the plaintiff provided his telephone number to Gold’s Gym when he went in for a tour and signed up for a membership. *Id.* at \*1. The gym manager filled in plaintiff’s membership agreement for plaintiff to sign, which he did. *Id.* Three days later, plaintiff canceled his membership. *Id.* at \*2. Notably, the Gold’s Gym at which plaintiff signed up was owned by an LLC that later rebranded the gym as Xperience Fitness. *Id.* The LCC used the brand from defendant Vertical Fitness. *Id.* Importantly, it was Vertical Fitness that sent out the text messages to all members (past and present) announcing the change in the gym’s name. *Id.* Based on these facts, the court granted summary judgment for Vertical Fitness on its affirmative defense that the plaintiff had consented to receive texts when he provided his number to Gold’s Gym upon joining.<sup>15</sup> *Id.* at \*9. In so doing, *Van Patten* discussed ***and distinguished Satterfield*** from situations where, as here, the party sued is “essentially the very same party to whom the phone number was given.” *Id.* at \*7. Critically, the court held plaintiff’s argument that “any consent given to Gold’s Gym didn’t transfer to Vertical Fitness is a non-starter . . . Vertical Fitness ***is simply a different brand name on the very same gym with the very same ownership.***” *Id.* at

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<sup>15</sup> Notably, the *Van Patten* court discussed various cases in which providing a phone number constituted consent to receive advertisements. *See id.* at \*4-6 (citing *Emanuel v. Los Angeles Lakers, Inc.*, 2013 WL 1719035 (C.D. Cal. Apr. 18, 2013); *Roberts v. PayPal, Inc.*, 2013 WL 2384242 (N.D. Cal. May 30, 2013); *Murphy v. DCI Biologicals Orlando, LLC*, 2013 WL 6865772 (M.D. Fla. Dec. 31, 2013); *Baird v. Sabre Inc.*, 2014 WL 320205 (C.D. Cal. Jan. 28, 2014); *Kolinek v. Walgreen Co.*, 2014 WL 518174 (N.D. Ill. Feb. 10, 2014); *Steinboff v. Star Media Co., LLC*, 2014 WL 1207804 (D. Minn. Mar. 24, 2014); *Andersen v. Harris & Harris*, 2014 WL 1600575 (E.D. Wisc. Apr. 21, 2014). (*Cf.* Cmt. 6 n.25.) It then went on to discuss the type of “consent” envisioned by this Commission in its 1992 FCC Order versus the term’s narrower dictionary definition and common usage. *See id.* at \*6 (citing *In re Rules & Reg’s Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C.R. 8752, 8769 (Oct. 16, 1992)).

\*8 (emphasis added). The *Van Patten* court also observed how the text message at issue “related to the original reason Van Patten provided his number: gym membership.” *Id.*

Here, because Senco is merely a different brand name on the same power tool designer, manufacturer and retailer, and because the fax at issue related to the same reason Craftwood provided its number to Senco *Products*, Inc. (*i.e.*, to buy power tools) the same result in *Van Patten* is warranted. Craftwood’s bankruptcy argument is nothing more than a “red-herring.”<sup>16</sup>

2. *This Commission Should Reject Craftwood’s Attempt To Impose Greater Requirements On Senco Than It Did For The Petitioners In The Fax Order.*

In the Fax Order, this Commission found “good cause” to grant retroactive waivers to the twenty-four petitioners and encouraged “similarly situated entities” to “request retroactive waivers from the Commission, as well.”<sup>17</sup> This Commission noted that the lack of explicit notice about the required language in its Notice of Proposed Rulemaking “may have contributed to confusion or misplaced confidence about th[e opt-out] notice requirement.”<sup>18</sup> This Commission also explained how parties may have been confused by an inconsistency between a footnote in the Junk Fax Order that specifically referred to *unsolicited* ads and the Commission’s Rules.<sup>19</sup>

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<sup>16</sup> From a policy perspective, Craftwood’s argument would also render the entire concept of “prior express permission” entirely untenable. Indeed, under Craftwood’s formulation, every time Company “A” rebranded itself Company “B,” Company B would have to reconfirm the permissions obtained from every single person or entity it has ever dealt with. Such an interpretation is as unfounded as it is unworkable in the modern world. If this argument held true here, for example, customers or others who were communicating or placing orders and inquiries with Senco Products, Inc. before the restructuring should have had no reasonable expectation that such inquiries, communications and orders would be honored by Senco Brands, Inc. post name-change.

<sup>17</sup> Fax Order ¶¶ 22, 26, 26 n.93, 30.

<sup>18</sup> *Id.* ¶¶ 25, 26 n.93.

<sup>19</sup> *Id.* ¶ 24.

Despite recognizing such confusion, this Commission did not engage in any fact-finding as to the petitioners on the issue of confusion; nor did it request comments.<sup>20</sup> Instead, it found the widespread nature of the confusion itself was alone a reasonable basis to grant such a waiver.<sup>21</sup>

Here, Craftwood argues Senco “makes no attempt” to claim it is similarly situated to petitioners in the Fax Order because it does not “offer any reason for its failure to provide an opt-out notice” on its faxes. (Cmt. at 21.) This is untrue; Senco explained exactly why any opt-outs were missing from faxes sent to recipients like Craftwood: Senco, like the rest of the industry, was confused “regarding the Commission’s intent to apply the opt-out notice [in the Regulation] to Solicited Faxes sent with the prior express permission of the recipient.” (See Pet. at 3.)

In arguing Senco is not so similarly situated, Craftwood erroneously creates a new, higher standard than that adopted by this Commission and applied to the prior petitioners.<sup>22</sup> The Commission should reject Craftwood’s attempt to create and apply a higher standard. The Commission did not hold the twenty-four prior petitioners to this standard, and holding Senco to a higher (or even different) standard for a later-filed petition would be both patently unfair and a

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<sup>20</sup> Notably, in the first Public Notice issued requesting public comments on a petition for retroactive waiver after the Fax Order, this Commission stated it “granted retroactive waivers of this requirement to several individual petitioners because of the **claimed** uncertainty about whether the opt-out notice applied to ‘solicited’ faxes.” See *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 05-338, 02-278 (Nov. 4, 2014) (emphasis added).

<sup>21</sup> See Fax Order ¶ 27 (noting “a failure to comply with the rule . . . could be the result of reasonable confusion or misplaced confidence”).

<sup>22</sup> Craftwood boldly argues it has its own “due process right to investigate” whether Senco was aware of the opt-out rules. (Cmt. at 21 n.86.) (citing *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 (Nov. 10, 2014), Dissenting Statement of Commissioner Ajit Pai). The dissent upon which Craftwood relies is inapposite to this issue. The Pai dissent concerns whether the Commission provided sufficient time for content companies to take action to prevent third parties from accessing confidential documents. *Id.* In contrast, Craftwood’s argument presumes that it has the right to investigate Senco’s knowledge of the opt-out rules, even though the determinative factor in the Commission’s decision to grant waivers was legitimate industry-wide confusion over the Junk Fax Order, *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 3787 (2006).

violation of due process and Constitutional rights. Similarly-situated entities like Senco must be afforded the same treatment in order to comport with due process considerations. Further, Senco should not be disadvantaged based on the timing of its petition vis-à-vis the procedural stance of the *Senco* case. Doing so would nullify the purpose behind this Commission’s six-month window in allowing similarly-situated parties to come forth and receive the same retroactive relief.<sup>23</sup>

No matter which standard this Commission chooses to apply, it can take comfort in the knowledge that Senco was actually and reasonably confused about the required opt-out language and is similarly situated to the Fax Order petitioners. (*See* Pet. at 3-4, 6-7.) Like the petitioners, Senco is not claiming simple ignorance. Therefore, Senco is entitled to the same retroactive waiver the petitioners received.

Despite the foregoing, Craftwood separately claims Senco was required to “offer . . . proof” as to the amount of its potential liability, and did not even claim that the judgment sought by Craftwood would be “ruinous” to Senco. (Cmt. at 21 n.87.) As stated, none of the Fax Order petitioners were required to provide such “proof” of potential liability and financial hardship.<sup>24</sup> Nor did this Commission conduct individual analyses; rather, it simply explained that the public interest was better served by a finding that the Junk Fax Order footnote created “confusion or misplaced confidence, [which] in turn, left some businesses potentially subject to significant damage awards under the TCPA’s private right of action or possible Commission enforcement.”<sup>25</sup> The Commission balanced this confusion against competing public interests, which it found were

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<sup>23</sup> *See* Fax Order ¶¶ 22, 26, 26 n.93, 30. Craftwood’s conclusory allegation that it is prejudiced by the timing of the Fax Order and the Illinois District Court’s Order staying the case pending Senco’s Petition should be disregarded. With three months into the litigation and no substantive discovery having taken place, the Illinois Court found no such prejudice to Craftwood.

<sup>24</sup> Fax Order ¶ 27.

<sup>25</sup> *Id.*

satisfied, and would still be served by the fact that the Regulation was not waived indefinitely.<sup>26</sup> And regardless, Senco *did* explain how significant and substantial the impact of the *Senco* case could be on its bottom line. (Pet. at 1) (“Senco is currently facing a putative class action lawsuit seeking *potentially multi-millions of dollars* in damages because it allegedly sent faxes to existing customers who had consented to receive them.”). A fact Craftwood itself repeatedly confirms throughout its Comment. (*See* Cmt. 5 n.24) (Craftwood seeks “minimum statutory damages of \$1 million and to have such damages increased by three times”); *see also id.* at 9 n.33).

### 3. *Senco Has Demonstrated Why There Is Good Cause For A Waiver.*

Craftwood asserts two arguments for why there is no “good cause” for a waiver, neither of which requires any consideration by this Commission. First, Craftwood’s concern<sup>27</sup> over the competing “public interest” based on the perceived difficulties in opting out of fax advertisements in the absence of a proper opt-out notice was squarely addressed—and rejected—by this Commission in the Fax Order.<sup>28</sup>

Second, Craftwood wholly mischaracterizes Senco’s argument regarding “unfair liability” under the Regulation.<sup>29</sup> In expressing concern over “claims Congress never intended to create,” Senco was clearly referring to a situation where the Junk Fax Order was applied to Solicited Faxes. (Pet. at 3, 6.) Senco has never challenged the Regulation’s validity; Craftwood is simply mistaken.

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<sup>26</sup> *Id.* ¶¶ 27-28 (“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 inadvertent violations of this requirement while retaining the protections afforded by the rule going forward . . . . Because we do not waive the rule indefinitely, consumers will not, as a result of our action, be deprived of the rule’s value.”).

<sup>27</sup> (Cmt. at 22-23.)

<sup>28</sup> Fax Order ¶¶ 1, 22. Moreover, Craftwood’s attempt to cast doubt on whether Senco currently provides opt-out notices on fax advertisements should be rejected. Senco is in compliance with the opt-out requirements pursuant to the Commission’s Rules, Regulations and Orders.

<sup>29</sup> (Cmt. at 23.)

**C. Public Interest Considerations Also Support The Granting Of A Waiver.**

In a last-ditch effort to oppose Senco’s Petition, Craftwood claims it would be against “public interest” to grant a limited waiver in instances where Senco would otherwise be required to include opt-out language “simply because *some* recipients might have given prior express permission.” (*See* Cmt. at 24) (emphasis supplied). This argument makes no sense.

In support, Craftwood notes how, in the *Senco* case, Senco alleged it had an “established business relationship” with Craftwood. (Cmt. at 23.) And that the Fax Order held the existence of such an “established business relationship” is not a sufficient basis to waive the Regulation’s requirement to include opt-out notices. (*Id.*) (citing Fax Order ¶ 2 n.2). From this, Craftwood claims Senco “had to provide opt-out notices on fax ads sent to Craftwood (and anyone with [which] it claims an established business relationship).” (*Id.*) But that is not the situation here.

Here, the Senco Petition—and Senco’s Amended Answer in the *Senco* case<sup>30</sup>—make clear that Senco has alleged *both* an “established business relationship” *and* “prior express permission” with respect to Craftwood. (*See* Pet. at 6) (stating Craftwood “placed at least one order directly with Senco in 2006, and *expressly provided permission* to Senco in 2007 to receive fax advertisements, which it did in 2007 (without objection) and again in January 2012.”) (emphasis added); (*see also* Attachment A). Indeed, Craftwood *concedes* this point early on in its Comment. (*See* Cmt. at 7) (acknowledging how “Senco . . . asserts that Craftwood ‘expressly provided permission to Senco in 2007 to receive fax advertisements.’”). So it simply does not follow that Craftwood would try to oppose Senco’s limited waiver request because other, unnamed recipients *also* gave their “prior express permission” to receive fax advertisements. As stated, the effect of

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<sup>30</sup> (*See* Cmt. 23 n.92 (citing Amended Answer ¶ 11); Kennedy Decl. at 27; *see also* Kennedy Decl. at 36-37 (“Here, Plaintiff [Craftwood] provided prior express invitation or permission.”)); (Pet. at 5) (“recipient of the fax [i.e., Craftwood] had given permission to Senco to send a fax advertisement, and importantly, was capable of contacting Senco for purposes of opting out of future communications.”).

the waiver would simply excuse Senco’s confusion and/or misplaced confidence with respect to whether it had to include opt-out language on faxes sent to people/entities with which it had “prior express permission.” (*See* Pet. at 3.) That the waiver would not apply to entities Senco is not seeking to have it apply to cannot provide a basis for denial. Because Senco has aptly demonstrated its confusion and/or misplaced confidence with respect to the Regulation, “good cause” exists to grant a waiver in that Senco is “similarly situated” to the Fax Order petitioners.

### **III. CONCLUSION.**

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

Dated: January 20, 2015

Respectfully submitted,

**SENCO BRANDS, INC.**

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**CERTIFICATE OF SERVICE**

I, Jeffrey N. Rosenthal, certify that on January 20, 2015, I caused a true and accurate copy of Senco Brands, Inc.'s Reply Comment to be served via email and U.S. Mail upon the following:

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