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

In the Matter of:	)	
	)	CG Docket No. 02-278
Petition of Kaberline Healthcare	)	
Informatics, Inc. For Waiver of Section	)	CG Docket No. 05-338
64.1200(a)(4)(iv) of the Commission's Rules	)	

PETITION OF KABERLINE HEALTHCARE INFORMATICS, INC.
FOR RETROACTIVE WAIVER

Pursuant to the Order issued by the Federal Communication Commission on October 30, 2014, in the above-referenced dockets,[1] and pursuant to Section 1.3 of the Commission's rules,[2] Kaberline Healthcare Informatics, Inc. ("Kaberline") respectfully requests that the Commission grant a retroactive wavier of 47 C.F.R. 64.1200(a)(4)(iv) and all prior versions of such regulation (collectively, the "Regulation") with respect to faxes that have been transmitted by or on behalf of Kaberline with the prior consent, invitation, or permission of the recipients or their agents ("Solicited Faxes") after the effective date of the Regulation. The Commission recently granted a number of such waivers and invited similarly situated parties to file requests for the same relief.[3] Kaberline is a similarly situated party, and for the reasons stated below, good cause exists for providing it a waiver.

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[1] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Order, 29 FCC Rcd 13,998 (2014) ("Order").

[2] 47 C.F.R. § 1.3

[3] *See* Order ¶¶ 22-31.

I. Background

A. The TCPA and the Regulation

The Telephone Consumer Protection Act ("TCPA"),[4] as amended by the Junk Fax Prevention Act of 2005, *inter alia*, prohibits the sending of certain unsolicited advertisements via facsimile—including those sent without the recipient's prior express consent.[5] The TCPA also provides an exception to this prohibition for advertisements faxed pursuant to an Established Business Relationship between the sender and the recipient.[6] At issue here, the Commission has construed the Regulation to impose an opt-out notice requirement on faxes sent with the recipient's prior express consent—for *solicited* faxes.[7] When issuing the Regulation, however, the Commission stated that "the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements."[8]

In recent years, countless putative class action lawsuits have been filed against companies for alleged violations of the TCPA's fax provisions and related Commission regulations. Such suits can be highly lucrative for plaintiffs because the TCPA authorizes statutory "damages" for a violation of § 227(b) of the Act or the regulations prescribed under that sub-section.[9] It is not uncommon for class action lawsuits to seek millions of dollars or more in statutory damages for

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[4] 47 U.S.C. § 227.

[5] 47 U.S.C. § 227(b)(1)(C).

[6] *Id.*

[7] 47 C.F.R. § 64.1200(a)(4)(iv).

[8] Order, ¶ 24 (emphasis added).

[9] 47 U.S.C.(b)(3) ("A person or entity may . . . bring in an appropriate court of that State—(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to . . . $500 in damages for each such violation . . . , or (C) both such actions"). § 227(b)(3) goes on to state that "[i]f the court finds the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award" available under § 227(b)(3)(B) by three times, i.e., up to $1,500 for each violation.

alleged violations that, as a practical matter, have a negligible to non-existent effect on consumers and businesses. Such is the case with respect to suits filed in recent years targeting *Solicited* Faxes based on alleged violations of the Regulation.

Recently, in an order addressing numerous petitions for relief from the Regulation, the Commission recognized that the process by which it promulgated the Regulation caused justifiable confusion among fax senders regarding the rule's application.[10] Accordingly, although the Commission asserted that § 227(b) is the proper statutory basis for the Regulation, the Commission agreed to waive the Regulation with respect to Solicited Faxes that certain petitioning parties sent or will send through April 30, 2015.[11] Furthermore—and in particular importance to the present petition—the Commission invited "other, similarly situated entities [to] request retroactive waivers from the Commission, as well."[12] Similarly situated entities are those, such as Kaberline, who have sent fax offers or advertisements with the recipient's prior permission, consent, and/or invitation and may reasonably have been uncertain about opt-out notice requirements for such faxes. As explained by the Commission:

> [W]e recognize the some parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether our requirements for opt-out notices applied to them. As such, we grant retroactive waivers for 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.[13]

B. Kaberline

Kaberline is an innovative small business located in St. Louis County, Missouri, with 4 full-time employees and 1 part-time employee. Kaberline contracts primarily with healthcare

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[10] Order, ¶ 15.

[11] *Id.* at ¶¶ 14, 36.

[12] *Id.* at ¶ 22.

[13] *Id.* at ¶ 1.

providers to assist with billing software issues and to serve as a value-added resource for the software billing programs that its customers purchase and use. On occasion, Kaberline provides information about software product updates, insurance payer requirements, regulatory requirements, and offers via email, mail, and facsimile to customers and to other entities that have requested or consented to receive such information and offers by those methods.

C. The lawsuit against Kaberline for allegedly violating the TCPA

Kaberline is currently defending a putative class action brought by a customer.[14] In that case, the Plaintiff, Alan Presswood, D.C., P.C. ("Plaintiff")—a serial TCPA plaintiff represented by a serial plaintiff's counsel—seeks statutory damages under the TCPA based on its contention that facsimiles sent by Kaberline, and dating back to 2011, violated the TCPA. The proposed class definition is as follows:

> All persons who (1) on or after four years prior to the filing of this action, (2) were sent by or on behalf of Defendants any telephone facsimile transmissions of material making known the commercial existence of, or making qualitative statements regarding any property, goods, or services (3) with respect to whom Defendants cannot provide evidence of prior express permission or invitation for the sending of such faxes, (4) with whom Defendants does not have an established business relationship **or (5) which did not display a proper opt out notice.**[15]

Although the Complaint in the lawsuit initially purports to challenge only the "practice of sending unsolicited facsimile advertisements," subparagraph (5) of the proposed class definition seeks to impose liability for any fax that did not display a proper opt out notice, even for those faxes that were not unsolicited, but were sent with the consent, invitation, and/or permission of the recipient. The Complaint attaches eight faxes allegedly received by the Plaintiff. Each fax

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[14] *Alan Presswood, D.C., P.C. v. Kaberline Healthcare Informatics, Inc.*, currently pending as Case No. 4:15-cv-00536-CEJ in the United States District Court for the Eastern District of Missouri. The case was initially filed in Missouri state court and was timely removed to federal court on Mar. 26, 2015.

[15] *See* Class Action Petition, Dkt. No. 4, *Alan Presswood, D.C., P.C. v. Kaberline Healthcare Informatics, Inc.*, Case No. 4:15-cv-00536-CEJ (emphasis added).

attached to the Complaint includes a toll-free phone number and/or email address that the Plaintiff could have used to make a request to stop receiving future faxes. Plaintiff alleges that the faxes did not contain a "proper" opt out notice.

II. Discussion

A. Kaberline should be granted a retroactive waiver.

Kaberline respectfully requests that the Commission grant a limited retroactive waiver of the Regulation for any Solicited Faxes sent by Kaberline after the effective date of the Regulation. Kaberline files this petition to ensure that it obtains the same protection as other similarly situated parties to whom the Commission has already granted waivers from the Regulation.

As the Commission has explained, it may grant a waiver where "(1) special circumstances warrant a deviation from the general rule and (2) the wavier would better serve the public interest than would application of the rule."[16] Both rationales apply in this instance.

Here, granting a waiver to Kaberline would not undermine the policy objective of the TCPA, which is to stop unwanted faxes. The faxes sent by Kaberline were transmitted with the consent, permission, and/or invitation of the recipients. The Plaintiff and its agent, for example, voluntarily provided its fax number and its consent to receive faxes, has been a customer of Kaberline's since at least 2001, and on more than one occasion has communicated with Kaberline via fax. The Plaintiff and his agent utilized services offered by Kaberline, were in repeated communications with Kaberline throughout the years, invited Kaberline to their offices to service their billing software, and, notably, never requested that Kaberline refrain from sending faxes. Kaberline is not an indiscriminate "fax broadcaster" that sends fax

[16] Order, ¶ 23; *see* C.F.R. § 1.3.

advertisements to the general public, but only sends faxes to entities it believed provided consent, invitation, or permission to receive faxes, including by voluntarily providing their fax number to Kaberline in order to receive fax communications and offers. Kaberline takes effort to ensure that other entities that do not wish to be contacted do not receive faxes or other communications from it.

The special circumstances of this case warrant a waiver. As the Commission has previously noted, the notice regarding the Regulation did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient. Order, ¶25. The Commission also stated that "in combination with the confusion caused by inconsistency in the *Junk Fax Order*, the lack of explicit notice may have contributed to confusion or misplaced confidence about this requirement." *Id.* Kaberline was no different. Like many companies, Kaberline reasonably understood that it was not required to include an opt-out notice on faxes it sent to recipients who provided their consent, permission, or invitation to receive fax advertisements. It is worth noting, however, that the faxes allegedly received by the Plaintiff did contain a toll-free number and/or an email address that Plaintiff, or any recipient, could have utilized, cost-free, to inform Kaberline that it no longer wished to receive faxes, and indeed several customers did utilize that information to opt out of future faxes. Plaintiff, a serial TCPA plaintiff knew perfectly well how to prevent receiving the faxes, but rather than contact Kaberline, Plaintiff and its attorneys waited nearly four years and then filed a putative class action lawsuit.

Finally, Kaberline is a small business. Denial of a waiver could impose catastrophic, and unwarranted, statutory penalties in the pending lawsuit against Kaberline. The intent of and policy reasons that underlie the TCPA and Regulation are certainly not to impose crushing

money awards on small, innovative business in order to disproportionately benefit TCPA plaintiffs' attorneys.[17]

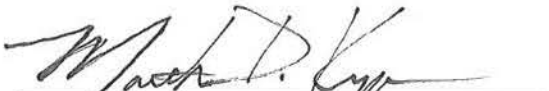
III. Conclusion

For the reasons stated above, Kaberline respectfully requests that the Commission grant it the same waiver the Commission granted to the parties in the Order: a retroactive waiver of § 64.1200(a)(4)(iv) for any Solicited Faxes sent by Kaberline (or on its behalf) after the effective date of the Regulation.

Dated: April 22, 2015

Respectfully submitted,

HUSCH BLACKWELL LLP



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[17] Kaberline does not waive its right to, or concede that proper relief should not also include: a declaratory ruling that the Regulation was not promulgated under 47 U.S.C. § 227(b), was time-barred, *ultra vires*, or otherwise procedurally improper, and should be repealed or declared void, and/or a declaratory ruling that the Regulation cannot support a private cause of action for money damages against parties such as Kaberline.