

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 2054

In the Matter of)	CG Docket No. 02-278
Petition of Versa Cardio, LLC)	
for Retroactive Waiver of)	CG Docket No. 05-338
47 C.F.R. §64.1200(a)(4)(iv))	
)	

VERSA CARDIO, LLC, PETITION FOR WAIVER

Pursuant to Section 1.3 of the Commission's rules, 47 C.F.R. §1.3, and Paragraph 30 of the Commission's Order, CG Docket No. 02-278 and 05-338, FCC 14-164 (rel. Oct. 30, 2014)(the "FCC Order"), Petitioner Versa Cardio, LLC ("Versa") respectfully request that the Commission grant it a retroactive waiver of 46 C.F.R. §64.1200(a)(4)(iv) (the "Rule") insofar as Versa or its vendors may have sent facsimile advertisements before April 30, 2015 with opt-out notices that did not repeat verbatim the language specified in the Rule to recipients who provided their prior express invitation or permission.

I. The FCC Order

On October 30, 2014, the Commission issued Order FCC 14-164 finding that opt-out notices conforming to the rules adopted by the Commission's 2006 Junk Fax Order, 47 C.F.R. §64.1200(a)(4)(iv) ("Junk Fax Order"), must be included on fax advertisements, regardless of whether a fax was sent with the recipient's prior express permission. The Commission, however, granted retroactive waivers of the opt-out requirement to twenty-four senders of fax advertisements to provide "temporary relieve from any past obligation to provide the opt-out notice to such recipients required by [Commission's] rules". FCC Order, ¶ 1. The FCC Order expressly provided that other "similarly-situated parties" may seek their

own retroactive waivers within a six-month window running through April 30, 2015. *Id.*, ¶30.

As noted in the FCC Order, the Commission is permitted to waive any of its rules for good cause shown. See 47 C.F.R. § 1.3. In its October 30, 2014 Order, the Commission found good cause to granted the retroactive waivers because, among other factors, there was confusion in the interpretation of the Junk Fax Order, and misplaced confidence on the part of businesses that an opt-out notice was not required on faxes that were "solicited." Specifically, the Commission noted that:

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.

* * *

Further, some commenters question whether the Commission provided adequate notice of its intent to adopt section 64.1200 (a)(4)(iv). 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. *FCC Order*, ¶¶24-25 (citations omitted).

The Commission found that granting the requested retroactive waivers would serve the public interest, noting that the "TCPA's legislative history makes clear that our responsibility to balance legitimate business and consumer interests" *Id.*, ¶ 27. Because there may have been a mistaken belief by some parties that the opt-out notice requirement did not apply, the "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." *Id.* (citations omitted). The Commission further found that these "factual circumstance ma[de] enforcing the rule unjust or inequitable." *Id.*, ¶ 28.

The Commission directed other similarly-situated parties seeking their own retroactive waivers to "make every effort to file within six months of the release of this Order" – April 30, 2015. *Id.*, ¶ 30.

II. Versa Should be Granted a Waiver

Versa is entitled to a retroactive waiver because it is similarly situated business to the twenty-four other petitioners granted waivers by the FCC Order. As explained in the FCC Order, the Commission may grant a waiver where "(1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest that would application of the rule." *Id.*, ¶ 22. Here Versa meets both requirements for the same reasons that the parties who were granted waivers in the FCC Order received them.

First, the "special circumstances" that warrant a deviation from the Rule here are the same as those explained in the FCC Order. The footnote contained in the Junk Fax Order stated that the opt-out notice requirement only applied to communications that constituted *unsolicited* advertisements. *See* Junk Fax Order, 21 FCC Rcd at 3810, n. 154. Likewise, the notice of proposed rulemaking issued in advance of adopting the regulation at issue "did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient." FCC Order, ¶ 25. Thus, Versa and its vendors received confusing information about the applicability of the opt-out requirement to solicited faxes and they did not know they had to abide by those requirements for solicited faxes.

Second, granting Versa a retroactive waiver would serve the public interest. As explained in the FCC Order, this 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." *Id.*, ¶ 27. Here, Versa faces potential liability as the named defendants in a putative class action lawsuit currently pending in the United States District Court for the Middle District of Pennsylvania, *Robert W. Mauthe, M.D., P.C., et al, vs. Versa Cardio, LLC*, Civil Action No. 3:15-cv-00657-JMM (filed on April 2, 2015). In *Mauthe*, the plaintiff alleges that Versa violated the TCPA by including opt-out language on facsimiles that did not mirror the language set forth in Section 64.1200(a)(4)(iii). The plaintiff in *Mauthe* seeks to certify a nationwide class of all persons in the United States who were sent one or more facsimiles by or on behalf of Versa after January 22, 2011, whether solicited or unsolicited, which contained an allegedly deficient opt-out notice. A copy of the *Maude* Complaint is attached hereto as Exhibit "A".

The plaintiff alleges that, regardless of whether a facsimile was solicited or unsolicited, Versa's opt-out notice is insufficient to meet the requirements under the TCPA and seeks statutory damages of \$500 to \$1,500 for every facsimile sent by, or on behalf of Versa that contains this allegedly inadequate opt-out notice. Thus, although Versa disputes liability and intends to vigorously defend its position, Versa will be subject to the significant cost of defending against a class action litigation with the possibility of being subject to ruinous liability. As with the twenty-four petitioners who have already been granted limited retroactive waivers, this Petition demonstrates that Versa should be granted a waiver for its alleged failure to comply with the Rule for those recipients who provided prior express permission to receives these facsimiles.

III. Conclusion

For all the foregoing reasons, Versa Cardio, LLC, respectfully request a retroactive waiver from liability under the TCPA for all faxes that its or its vendors may have sent with the recipient's prior express invitation or permission.

Dated: April 29, 2015

Respectfully submitted,

By: (s) Andrew M. Schwartz
Andrew M. Schwartz
MARSHALL DENNEHEY WARNER
COLEMAN AND GOGGIN, PC
2000 Market Street, Suite 2300
Philadelphia, PA 191013
T – 215-575-2765
F – 215-575-0856
AMSchwartz@mdwgcg.com

*Counsel for Petitioner VERSA
CARDIO, LLC*