Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	
Petition of Free Continuing Education Association, LLC d/b/a FCEA, Daniel Nava, Michael McHenry (and John Does) For Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules	CG Docket No. 02-278 CG Docket No. 05-338

PETITION OF FREE CONTINUING EDUCATION ASSOCIATION, LLC d/b/a FCEA FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission's ("Commission") rules,[1] Free Continuing Education Association, LLC d/b/a FCEA, Daniel Nava, and Michael Keith McHenry (together, "FCEA")[2] respectfully request that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) (the "Rule") with respect to faxes transmitted by FCEA (or on its behalf) with the prior express consent or permission of the recipients or their agents after the effective date of the Rule.

On October 30, 2014, the Commission released FCC Order 14-164 (the "Fax Order"). The Fax Order granted a retroactive waiver of the Rule to a group of petitioners facing lawsuits that alleged, in part, that the petitioners had violated the Rule by failing to include specific opt-out language in their faxes even when the faxes were sent with the recipient's prior express invitation or permission. Based on confusion surrounding the Rule, the Commission determined

[1] 47 C.F.R. § 1.3.
[2] This request for waiver is also made on behalf of certain "John Doe" defendants named in *Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry v. Free Continuing Education Association, LLC d/b/a FCEA, et al.*, Case No. 4:15-cv-00527-RLW (United States District Court, Eastern District of Missouri, Eastern Division), the lawsuit that gives rise to this Petition.

that good cause supported a retroactive waiver, and such a waiver was in the public interest. The Commission also authorized other similarly situated entities to seek retroactive waivers. [3]

FCEA is similarly situated to the petitioners that received a retroactive waiver, because it is facing a putative class action lawsuit alleging FCEA sent faxes in violation of the Telephone Consumer Protection Act ("TCPA") during the relevant time period, and that the faxes failed to include an appropriate opt-out notice. The public interest would be harmed by requiring parties like FCEA 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.

I. BACKGROUND

FCEA plans, organizes, and presents continuing education seminars for dentists and chiropractors around the country. FCEA helps these professionals enhance the quality of service to their patients by providing them with access to top industry experts training on current topics. FCEA has delivered over 17,000 continuing education credits to dentists and chiropractors in at least 15 states. Through corporate sponsorships, FCEA is also able to offer the continuing education seminars at low costs to professionals. FCEA's team is made up of about 25 employees working in promotions, marketing, and management who put together the seminars.

FCEA sends faxes to dental and chiropractic professionals for the purpose of providing them with details about upcoming continuing education courses located in their geographic area and the information needed to register for such events. Prior to the spring of 2014, employees in FCEA's call center sent faxes to professionals interested in FCEA's services and programs. These faxes were sent only to dental and chiropractic professionals who provided express

[3] *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 October 30, 2014), ¶¶ 26-28.

consent to FCEA's call center employees. Although faxes sent directly by FCEA did not contain an opt-out notice containing all the language set forth in the Rule, they did include telephone and Internet contact information for FCEA. In spring 2014, FCEA additionally started using a third-party marketing service to send faxes on behalf of FCEA to individuals and businesses interested in FCEA's services. The marketing service sent most, if not all, of the faxes to individuals and businesses FCEA had contacted previously, and which had given express consent to receiving faxes from FCEA. Faxes sent by the marketing services featured information on how to "unsubscribe," including contact information for telephone, fax, and the Internet.

A. <u>Pending Litigation Against FCEA</u>

FCEA was sued in a pending class action lawsuit styled *Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry v. Free Continuing Education Association, LLC d/b/a FCEA, et al.*, Case No. 4:15-cv-00527-RLW (United States District Court, Eastern District of Missouri, Eastern Division). A copy of the Petition is attached as Exhibit 1. The lawsuit was filed by serial TCPA litigators Schultz and Associates, who have filed dozens (if not hundreds) of junk fax lawsuits throughout the country. The plaintiff Suzanne Degnen, D.M.D., P.C., d/b/a Sunset Tower Family Dentistry ("Degnen") is a serial TCPA Plaintiff.[4]

The lawsuit alleges FCEA sent faxes to the plaintiff and putative class that did not include the precise opt-out notice required by the Rule, among other claims. The Petition

[4] *See Suzanne Degnen, D.M.D., P.C. d/b/a Sunset Tower Family Dentistry ("Degnen") v. Decision Software, et al., Case No. 4:15-cv-00450-JAR, U. S. District Court for the Eastern District of Missouri; Degnen v. DentalFix RX LLC, et al., Case No. 15SL-CC00541, Circuit Court of St. Louis County, State of Missouri; Degnen v. Practice Recruiters LLC f/k/a Practice Recruiters Inc., et al., Case No. 4:15-cv-00528, U. S. District Court for the Eastern District of Missouri; Degnen v. Jose-Luis Ruiz, D.D.S., et al., Case No. 15SL-CC00547, Circuit Court of St. Louis County, State of Missouri; Degnen v. Robert A Tripke, et al., Case No. 15SL-CC00548, Circuit Court of St. Louis County, State of Missouri; Degnen v. Zimmer Dental, Inc. d/b/a Zimmer Dental, et al., Case No. 15SL-CC00587, Circuit Court of St. Louis County, State of Missouri; Degnen v. Gregory L. Jack, et al., Case No. 15-SL-CC01274, Circuit Court of St. Louis County, State of Missouri; and Degnen v. I Care Credit, LLC d/b/a ICare Financial, et al. Case No. 15-SL-CC00340, Circuit Court of St. Louis County, State of Missouri.*

attaches two faxes allegedly received by Degnen.[5] The first of these faxes was sent on June 3, 2014. FCEA's records confirm this fax was sent directly from FCEA to Degnen, following a phone call between Degnen and FCEA in which Degnen provided express consent to receive fax advertisements. After providing express consent and receiving the first fax, no representative of Degnen ever contacted FCEA to complain that the faxes were interrupting business or damaging a fax machine. Rather, representatives of Degnen continued to collect at least one additional fax in anticipation of filing another class action lawsuit. The Complaint alleges that the faxes did not contain a "proper" opt-out notice.

The lawsuit alleges these faxes were unsolicited, but this issue is disputed. Further, although the Complaint initially purports to challenge only unsolicited faxes, the class definition is unclear, as it apparently seeks to impose liability for any fax that did not display a proper opt-out notice, even for those faxes that were not unsolicited.[6] FCEA is not asking the Commission to resolve the factual and legal issues raised in the pending litigation, as these issues remain within the jurisdiction of the district court.[7] Rather, FCEA seeks the same retroactive waiver that the Commission granted to the petitioners in the Fax Order, in the event Plaintiffs claim that faxes sent with the express permission of the recipient(s) failed to include an opt-out notice that complied precisely with the Rule.

B. <u>The Current Statutory and Regulatory Framework</u>

The TCPA, as codified in 47 U.S.C. § 227 *et seq.*, and amended by the Junk Fax Prevention Act of 2005 ("JFPA"),[8] prohibits, under certain circumstances, the use of a fax

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[5] *See* Ex. 1.
[6] *See* Ex. 1, ¶ 38.
[7] The Commission declared that granting a waiver should not "be construed in any way to confirm or deny whether the petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action." *See* Fax Order, ¶ 31.
[8] *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); *see also* Junk Fax

machine to send an "unsolicited advertisement."[9] 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."[10]

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."[11] In addition to the Regulation, the Commission also adopted rules implementing the JFPA.[12] As explained in the Fax Order, a footnote in the rules led to industry-wide confusion regarding the Commission's intent to apply the opt-out notice to Solicited Faxes.[13] In addition, the Commission acknowledged that its notice of proposed rulemaking was unclear regarding the opt-out requirement on fax ads sent with the prior express permission of the recipient, which also created confusion.

In the Fax Order, the Commission "confirm[ed] 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."[14] Due to the aforementioned confusion, however, the Commission decided to grant retroactive waivers to parties affected by the confusion. As explained by the Commission:

> [W]e recognize that some parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether our

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Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). The TCPA and the JFPA are codified at 47 U.S.C. § 227 *et seq.*

[9] 47 U.S.C. §§ 227(a)(5) and (b)(1)(C).

[10] *Id*. § 227(a)(5).

[11] *See* 47 C.F.R. § 64.1200(a)(4(iv); *see also 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 at 3812, para. 48 (2006) (the "Junk Fax Order").

[12] *See generally* Junk Fax Order.

[13] *See* Junk Fax Order, 21 FCC Rcd at 3818, para. 42 n.154 ("We note that the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.") (emphasis added).

[14] *See* Fax Order, ¶ 1.

> 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.
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> [W]e 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 FCEA, have six months from the release of the Fax Order (October 30, 2014) to seek a waiver.[15]

II. THE COMMISSION SHOULD GRANT A LIMITED RETROACTIVE WAIVER OF THE RULE FOR ANY SOLICITED FAX SENT BY FCEA OR ON ITS BEHALF

As a result of the pending class action lawsuit described above, FCEA is similarly situated to the petitioners that received retroactive waivers by the Fax Order, making a waiver appropriate here. Section 1.3 of the Commission's rules permits the Commission to grant a waiver if good cause is shown.[16] Generally, the Commission may grant a waiver if it would not undermine the policy objective of the pertinent rule and would otherwise serve the public interest.[17] 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.[18]

Here, special circumstances favor deviation from the general rule—rather than strict adherence. As detailed in the Fax Order, good cause has been established due to the inconsistent footnote in the Junk Fax Order, which indicated that the opt-out notice requirement applies only

[15] *See* Fax Order, ¶ 30.
[16] 47 C.F.R. § 1.3; *see also* 47 C.F.R. § 1.925(b)(3)(i)-(ii).
[17] *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).
[18] *See Ne. Cellular Tel. Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990).

to unsolicited advertisements.[19] The Commission stated that this could reasonably be read to mean that a company like FCEA need not include an opt-out notice when sending solicited faxes.[20] In addition, the Commission's notice of proposed rulemaking also failed to provide explicit notice that the Commission was planning to require the opt-out notice for solicited faxes.[21] The Commission has already determined that "this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule."[22]

This is especially true here, given that several of the allegedly unlawful faxes contained opt-out language, along with a toll-free number and website allowing Degnen (or any recipient) to opt-out of receiving future faxes cost-free. Further, FCEA is a small business and denial of a waiver could impose fatal consequences in the pending lawsuit. The TCPA was not designed to impose crushing damage awards on small businesses in order to disproportionately benefit Plaintiffs' attorneys.

The Commission also determined that granting a waiver under these circumstances would serve the public interest.[23] Here, granting waiver to FCEA would not undermine the policy objective of the TCPA, which is "to allow consumers to stop unwanted faxes."[24] This policy is not undermined where, as here, the faxes were *wanted.* FCEA's records indicate that Degnen provided express permission to send the faxes. More broadly, unlike indiscriminate "fax blasters" to the general consumer public, FCEA does not send faxes to consumers but rather only to a limited select group of recipients -- dental and chiropractic professionals who have provided their express consent to receive information via fax. FCEA has every incentive

[19] *See* Fax Order, ¶ 26-27.
[20] *Id.* at ¶ 24.
[21] *Id.* at ¶ 26.
[22] *Id.*
[23] Fax Order, ¶ 27.
[24] Junk Fax Order, ¶ 48.

not to send unwanted faxes and risk offending potential customers. In fact, FCEA takes effort to ensure that entities who do not wish to be contacted do not receive FCEA's faxes or other communications. After receiving notice of the Fax Order, FCEA has taken steps to ensure that all of its fax advertisements contain the opt-out notice specified by the Rule.

Absent a waiver, companies like FCEA could be subjected to substantial expense and monetary damages for failing to comply with a rule the Commission has already determined was the subject of confusion. By granting a retroactive waiver, the Commission can ensure that the confusion does not expose companies like FCEA to potentially devastating liability. Denial of waiver could subject FCEA to significant money damages—the bulk of which would go to plaintiffs' lawyers—rather than further the TCPA's policy objective of preventing unwanted faxes. The public interest would be harmed by requiring parties like FCEA 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.

III. CONCLUSION

FECA is similarly situated to the entities that received a waiver by the Fax Order. For the reasons stated above, FCEA respectfully requests that the Commission grant FCEA a limited retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited fax sent by FCEA (or on its behalf) after the effective date of the Regulation.

Dated: April 30, 2015

Respectfully submitted,

STINSON LEONARD STREET LLP

By: *_____/s/ Andrew J. Scavotto_____*

Andrew J. Scavotto, #57826MO
Cicely I. Lubben, #53897MO
7700 Forsyth Blvd., Suite 1100
St. Louis, Missouri 63105
(314) 863-0800 – Telephone
(314) 863-9388 – Facsimile
andrew.scavotto@stinsonleonard.com
cicely.lubben@stinsonleonard.com

Attorneys for Defendant Free Continuing Education Association, LLC d/b/a FCEA