

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

In the Matter of	)	
	)	
Petition of Creditsmarts Corp. for Waiver of	)	CG Docket No. 02-278 Section
64.1200(a)(4)(iv) of the Commission’s	)	
Rules	)	CG Docket No. 05-338

**CREDITSMARTS CORP. OBJECTIONS TO EXTENSION OF TIME AND COMMENTS**

**I. INTRODUCTION.**

Creditsmarts Corp. (“Creditsmarts”) filed a Petition on January 29, 2015 for retroactive waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) (the “Regulation”) with respect to faxes that have been transmitted by Creditsmarts with the prior express consent or permission of the recipients or their agents (“Solicited Faxes”) after the effective date of the Regulation.

On February 27, 2015, the Commission issued a public notice seeking comment on Creditsmarts’ petition. The public notice set a due date of March 13, 2015 for comments. On or about April 30, 2015, Select Auto Sales, Inc. (“City Select”) filed an Extension of Time to File Comments on the Petition for Waiver of Creditsmarts Corp. and filed its Comments as well. Pursuant to 47 C.F.R. §1.46(b), motions for extension of time are due seven days prior to the filing deadline (March 6, 2015).

City Select is the Plaintiff in a TCPA facsimile class action lawsuit referred to in Creditsmarts’ Petition (Select Auto Sales, Inc. v. Creditsmarts Corp., et al., Civil Action No. 13-cv-4595-NLH-JS, United States District Court for the District of New Jersey (filed July 30, 2013)). All matters in the lawsuit are complete and the parties are waiting for the Court to make a decision.

## **II. OBJECTION TO MOTION FOR EXTENSION OF TIME.**

It is clear and uncontested City Select's Motion for an Extension of Time to File Comments on the Petition for Waiver of Creditsmarts Corp. is untimely. The Motion filed April 30, 2015 is several weeks past the March 6, 2015 deadline for extensions.

It is equally clear the unspecified "docketing miscommunication" does not constitute an "emergency situation" where the Commission may consider motions for acceptance of comments made after the due date for comments pursuant to 47 C.F.R. Section 146 (b). In fact, there was no docketing miscommunication or emergency and City Select does not allege there was. City Select admits that notwithstanding the public notice given by the Commission establishing a due date for comments of March 13, 2015, its counsel did not review or did not understand the FCC's standard rules. City Select's counsel's ignorance or inadvertence is not good grounds for such a Motion.

Similarly, City Select does not allege any fault or wrongdoing by the Commission or Creditsmarts. City Select's counsel was well aware Creditsmarts' filed its Petition from the documents filed with the Court and the copies provided to City Selects' counsel. Lastly, City Select does not allege it was lacking any information or records or that there were any other issues that precluded it from timely filing it Comments like everyone else was required to do.

## **III. OBJECTION TO COMMENTS.**

Creditsmarts is a small private company. It has no history of any FCC complaints, TCPA lawsuits or any notices or complaints from any recipient of a facsimile other than City Select.

In addition to being untimely, City Select's Comments are inaccurate, incomplete, vigorously disputed by Creditsmarts and not supported by the facts in the record in this lawsuit. City Select's lawsuit was filed in July 2013 well before the October 30, 2014 Order. The allegations and claims in the lawsuit and consequently Creditsmarts defenses and the evidence in the record do not deal directly with Solicited and Unsolicited Facsimiles and Creditsmarts' confusion and whether it was reasonably affected by the confusion.

Creditsmarts failure to respond or react to an issue not raised by City Select is not be construed as an admission. Creditsmarts' Motions, oral arguments in City Select's counsel's presence and other papers filed in the lawsuit clearly state it was confused and reasonably affected by the confusion and was filing a Petition with the Commission.

City Select's ad hoc Comments repeat the confusion the FCC Order addresses and do not even begin to complete the record. The statements made by City Select's counsel in the Comments do not deal with the inherent ambiguity of the opt-out notice requirements to Solicited Facsimiles. There is no testimony or other evidence relating to this distinction between Solicited Facsimiles and Unsolicited Facsimiles. City Select's Complaint, the testimony and other evidence in the record do not distinguish between such facsimiles. Creditsmarts was not asked and did not respond to the specific question as to whether it was confused by the conflicting positions taken by the Commission and reasonably affected by the situation.

The random, incomplete and out of context slices of deposition testimony (taken well before the October 2014 FCC Order) from Petitioner's president and former employee do not discuss confusion nor do they establish that the purported factual basis for the Petition is factually not true or include the testimony contradicting this. City Select is merely spewing out a portion of its argument out of context that it attempted to make to the Court in its lawsuit with Creditsmarts.

However, as set forth in the FCC Order, it is not necessary for the Commission to consider that dispute for that specific facsimile in acting on this Petition. The Commission expressly noted 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."<sup>1</sup>

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1 *See* Fax Order, para. 31.

Due to the confusion,<sup>2</sup> however, the Commission decided to grant retroactive waivers to parties affected by the confusion. Affected parties are those who have sent fax ads with the recipient's prior express permission and may reasonably have been uncertain about the opt-out notice requirements for such fax ads. The Commission stated:

“We recognize that 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 of our opt-out requirement to certain fax advertisement senders to provide those parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by our rules.

“We believe the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule.”

Fax Order, para. 1.

Regardless of what City Select may believe or attempt to comment upon with respect to the facsimile it received and the circumstances surrounding its receipt, the FCC Order and Creditsmarts' Petition address the *all* (emphasis added) of the fax ads Creditsmarts sent with the recipients' prior express permission and where it may reasonably have been uncertain about the opt-out notice requirements for such fax ads.

City Select's contested, incomplete and out of context arguments related to the facsimile it received from Creditsmarts. There is no “undisputed evidence shows that Petitioner was not confused about whether a fax sent with the consent of the recipient was required to contain an

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<sup>2</sup> The Commission detailed the reasons for such confusion in the Fax Order: “Specifically, there are two grounds that we find led to confusion among affected parties that the opt-out notice did not apply to fax ads sent with the prior express permission of the recipient, the combination of which presents us with special circumstances warranting deviation from the rule. The record indicates that inconsistency between a footnote contained in the Junk Fax Order (only unsolicited advertisements) and the rule (all advertisements) caused confusion regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission. Further, the notice of intent to adopt the Regulation did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with prior express permission of the recipient.” Fax Order, para. 24-25 (emphasis in original).

opt-out notice” or evidence “Petitioner has admitted in private litigation that it did know that it was required to include opt-out notices on solicited faxes”. Further, this still does not alter or adversely impact the stated purpose of the FCC Order and the rights of senders to seek waivers. Creditsmarts has affirmatively stated that it was reasonably affected by the confusion. City Select’s facsimile received from Creditsmarts and the narrow time period and scope of its TCPA claims make it impossible for City Select to state or comment whether or to what extent Creditsmarts may have been confused on the City Select facsimile and more importantly on all of the other facsimiles Creditsmarts sent before and after that facsimile that are not a part of the City Select lawsuit and for which City select has no knowledge.

#### **IV. CONCLUSION.**

Creditsmarts is not required to respond to Comments untimely filed or to retry the disputed facts and merits of the lawsuit with the FCC. Creditsmarts has stated it is similarly situated to those parties who were granted waivers in the Fax Order and in good faith is seeking the same retroactive waiver of the Regulation in order to provide Creditsmarts with the same temporary relief other petitioners were granted. For these reasons, Creditsmarts respectfully requests that the Commission strike the Comments and / or otherwise grant it a limited retroactive waiver of Section 64.1200(a)(4)(iv) for any Solicited Faxes sent by Creditsmarts (or on its behalf) after the effective date of the Regulation.

Respectfully submitted,            May 9, 2015

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