

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

In the Matter of)
Petition for Waiver of First Index, Inc.)
) CG Docket No. 02-278
)
) CG Docket No. 05-338
)
)

**REPLY OF FIRST INDEX, INC. IN SUPPORT OF ITS
PETITION FOR RETROACTIVE WAIVER**

Pursuant to 47 C.F.R. § 1.3 and the Commission’s Order, CG Docket Nos. 02-278, 05-338, FCC 14-164, 29 FCC Rcd 13998 (Oct. 30, 2014) (the “Waiver Order”), Petitioner First Index, Inc. (“First Index”) respectfully submits the following reply in support of its Petition for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules, 47 C.F.R. § 64.1200(a)(4)(iv) (the “Regulation”), to the extent the Regulation might apply to any faxes transmitted by First Index (or on its behalf) with the prior express permission of the recipients or their agents.

The Commission has clarified that an opt-out notice is required under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA” or “Act”), and the Regulation, 47 C.F.R. § 64.1200(a)(4)(iv), for facsimile advertisements sent with the recipients’ prior express permission or invitation and that the opt-out notice must comply with the requirements of 47 U.S.C. § 227(b)(1)(C) and (2)(D) and 47 C.F.R. § 64.1200(a)(4)(iii). Waiver Order at ¶ 1. Simultaneously, the Commission recognized that “good cause”—specifically, the state of justified, industry-wide confusion that gave rise to inadvertent violations, potentially resulting in substantial liability or costs—exists for granting a retroactive waiver of this requirement. *Id.* at ¶¶ 23-28, 48, *ref.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 2005, Report and Third Order on Reconsideration*, 21 FCC Rcd 3787, 3812, n. 154 (2006)

(“Junk Fax Order”). Accordingly, the Commission retroactively waived its Regulation for twenty-seven petitioners and invited “similarly-situated” parties to seek the same relief.

First Index is similarly situated to parties who were already granted retroactive waivers. First Index is a defendant in a putative class action lawsuit in which the representative plaintiff and a proposed intervenor now seek to assert claims based on First Index’s failure to include compliant opt-out notices on certain faxes.¹ *Chapman v. First Index, Inc.*, No. 09-cv-05555 (N.D.Ill.) (filed Sep. 8, 2009) *on appeal*, Nos. 14-2773 and 14-2775 (7th Cir.) (“*Chapman*”).

One of the First Index’s defenses is that the alleged recipients of the faxes at issue provided their prior express invitation or permission to receive such faxes—indeed, the district court found that First Index provided ample evidence of express consent. *See Chapman v. First Index, Inc.*, No. 09 C 5555, 2014 WL 840565, at *1 (N.D. Ill. Mar. 4, 2014).

Only one party submitted comments specifically opposing First Index’s Petition: the named plaintiff in the putative class action pending against First Index. *See* Arnold Chapman’s Comments On The First Index, Inc. Petition For Waiver (“Comments”); *see also* TCPA Plaintiffs’ Comments on Thirty-One Petitions for Retroactive Waiver Filed on or Before April 30, 2015. For the reasons set forth below, and in First Index’s Petition, the Commission should reject the Respondents’ arguments, and grant the retroactive waiver sought by First Index.

I. First Index Is Similarly Situated To The Parties To Whom The Commission Has Already Granted Retroactive Waivers.

First Index is in the same position as those who were granted waivers in the Commission’s Order.

¹ The representative plaintiff in *Chapman* originally excluded persons who had consented to receive faxes from First Index from the class. *Chapman v. First Index, Inc.*, No 09 C 5555, 2014 WL 3511227, *3 (N.D. Ill. July 16, 2014). After the case had been pending for more than four years, and the court denied plaintiff’s motion for class certification, the representative plaintiff and a proposed intervenor sought to pursue an amended class definition that included persons who had provided prior express permission to First Index to send the fax advertisements at issue. *Id.*, at *3-*4.

Initially, contrary to Chapman’s assertion, First Index was subject to the same reasonable confusion and “misplaced confidence” regarding the applicability and scope of the Regulation—regardless of its business decision to give customers some means of opting out of the subject faxes. Comments at 7-8. Indeed, the Commission has already granted waivers to at least five parties that, similarly, allowed fax recipients to opt out of future faxes. *See e.g.*, Waiver Order at ¶¶ 33, 36. Each petition described faxes which contained a “clearly legible notice on the first page informing the recipient of the ability and means to avoid future faxes,” by calling a specified phone number or faxing a request to a specified fax number—both of which were cost-free and available 24 hours a day, 7 days a week. *See e.g.*, Petition for Declaratory Ruling and/or Waiver Regarding Substantial Compliance of Forest Pharmaceuticals, Inc. at 9; Petition for Declaratory Ruling and/or Waiver of Gilead Sciences, Inc. at 8; Petition for Declaratory Ruling and/or Waiver of Masimo Corporation at 8; Petition of Magna Check, Inc. for Declaratory Ruling and/or Waiver at 3; Petition for Declaratory Ruling and/or Waiver of Purdue Pharma, L.P. at 14-15. The language First Index included on a number of the subject faxes, similarly, provided recipients with a means of opting out of receiving future faxes. Specifically, its faxes stated: “You are receiving this fax due to a request of information you made previously. If you have received this fax in error, please fax with ‘Remove’ in the company along with your company name and fax number to 509 570 0415.” *See e.g.*, Comments at Exh. A.

First Index provided recipients with a means of communicating their desire not to receive faxes for a variety of business reasons—none of which demonstrate an understanding of the Regulation or its scope. For example, this “opt out” language avoided wasted time and effort on the part of First Index: customers could choose not to communicate via fax and non-customers could provide First Index with notice of any erroneous transmissions. Similarly,

allowing customers the opportunity to avoid future faxes furthers customer relations by providing customers the option to communicate via some other means. In short, despite its business decision to include such language, First Index had the same “misplaced confidence” and reasonable confusion regarding the Regulation—arising from the contradictory footnote and lack of notice—as the original petitioners. Petition at 5; Waiver Order at ¶¶ 24-26.

Moreover, like the petitioners to whom retroactive waivers have already been granted, First Index has been accused of sending faxes without the requisite opt-out notice prior to April 30, 2015. Petition at 2; *see also* Waiver Order at ¶ 1. First Index has also asserted that the subject faxes were sent with the recipients’ prior express permission. Petition at 2; *Chapman*, 2014 WL 840565, at *1; Waiver Order at ¶ 11. Finally, but-for a retroactive waiver of the Regulation, First Index could potentially face costs or liability—that is potentially substantial and class-wide—for sending faxes after obtaining the recipients’ prior express permission based solely on the lack of adequate opt-out language. Petition at 2, n. 8, 5, n. 27; Waiver Order at ¶ 27.

Simply put, First Index is “similarly situated” to the original petitioners with respect to all material circumstances considered by the Commission in granting prior waiver and, as a result,, should be granted a retroactive waiver of the Regulation.

II. Good Cause Exists To Grant First Index’s Petition.

The Comments do nothing to rebut the good cause which exists for granting First Index’s petition.

First, the Commission has *already* determined that good cause exists for granting a waiver to petitioners that “substantially complied” with the opt-out provisions. Waiver Order at ¶¶ 33, 36; *supra* at 3-4. Second, as First Index previously asserted: the special circumstances detailed in the Order weigh in favor of waiver in its case. Petition at 6. Specifically, the

“confusing situation” following the Junk Fax Order—caused by the inconsistent footnote and lack of explicit notice—left First Index with “no legal certainty that an opt-out notice is required for solicited faxes.” *Id.* Its business decision to provide its customers with the means to choose not to receive future faxes in no way contradicts this fact. Simply: First Index was “confused” as to whether, and in which specific situations, it was required to include an opt-out notice on faxes sent with prior express permission. *Id.*

Second, the public interest favors waiving the Regulation in First Index’s case. Specifically, First Index’s alleged failure to include compliant opt-out notices on the faxes—which it sent to its customers after receiving prior express permission—could leave First Index vulnerable to substantial costs or liability despite its reasonable confusion regarding the applicability and scope of the Regulation. In light of First Index’s “reasonable confusion,” brought about by inconsistencies in the implementing order and lack of notice, the public interest requires waiver in this case.

III. Actual, Individualized Evidence of Subjective Confusion Is Not Required.

The Commission has made explicit that confusion is *presumed* based on the contradictory footnote and lack of clear notice. Contrary to Respondents’ assertions, the Order is not unclear in this regard. *Cf.*, Comments at p. 6.

Specifically, the Commission clearly articulated the sole basis of its decision to grant the original petitioners retroactive waiver of the Regulation: that the “lack of explicit notice . . . and the ensuing contradictory footnote . . . resulted in a confusing situation for businesses,” generally. Waiver Order at ¶ 27. The combination of these factors “*presumptively* establishes good cause for retroactive waiver of the rule.” *Id.* at ¶ 26 (emphasis added). That “confusing situation”—not individualized evidence of particular petitioners’ confusion—warrants the grant of a waiver. *Id.*

The Commission did not make any factual findings concerning individual, subjective confusion on the part of the original petitioners at issue in the Waiver Order, nor did it require or describe any evidence concerning the state of mind of the original petitioners. Waiver Order at ¶¶ 22-31. To the contrary, the Commission pointed primarily to the fact that “all petitioners make reference to the confusing footnote language” in their petitions, *id.* at ¶ 24, and to the fact that “we find nothing in the record here demonstrating that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so.” *Id.* at ¶ 26.

In short: evidence of actual, subjective confusion is not required. Instead, the contradictory footnote and lack of notice, combined with the potential for substantial liability, is sufficient to *presume* confusion for petitioners—including First Index—regardless of whether recipients were provided with a means to opt-out of future faxes.

For all of these reasons, Petitioner First Index, Inc., respectfully requests that the Commission grant it the same retroactive waiver of Section 64.1200(a)(4)(iv) granted to the parties in the Waiver Order, dated October 30, 2014.

Respectfully submitted,

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