

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

In the Matter of)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 02-278
)	
Rules and Regulations Implementing the)	CG Docket No. 05-338
Telephone Consumer Protection Act of 1991)	

**Carradine Chiropractic Center, Inc.’s Comment on Petition
for Retroactive Waiver of Posture Pro, Inc.**

Carradine Chiropractic Center, Inc. (“Carradine Chiropractic”) respectfully submits the following Comment to Petitioner Posture Pro, Inc.’s Petition for Retroactive Waiver and requests that the Petition be denied. This Comment is supported by three attachments.

Respectfully submitted,

/s/Matthew E. Stubbs

GEORGE D. JONSON (0027124)
MATTHEW E. STUBBS (0066722)
MONTGOMERY, RENNIE & JONSON
36 E. Seventh Street, Suite 2100
Cincinnati, Ohio 45202
(513) 241-4722
(513) 241-8775 (fax)
Email: gjonson@mrjlaw.com
mstubbs@mrjlaw.com

Counsel for Carradine Chiropractic Center, Inc.

STATEMENT OF FACTS

Carradine Chiropractic is the plaintiff in a civil suit filed against Posture Pro, Inc. (“Posture Pro”) that arose from Carradine Chiropractic’s receipt of several, similar advertisements from Posture Pro via Carradine Chiropractic’s office facsimile machine. These ads, which were all quite similar, were received by Carradine Chiropractic from of December of 2011 through April of 2012.¹ The advertisement received by Carradine Chiropractic in April of 2012 (“the April 2012 Fax Ad²”) depicted various products manufactured by Posture Pro, touted the “Sale Prices” that currently applied to these products, and provided Posture Pro’s contact information to facilitate transactions with prospective buyers. There is little question this constituted an “advertisement” within the meaning of the Junk Fax Prevention Act (“JFPA”).³

Posture Pro had not sought Carradine Chiropractic’s permission to use its fax machine to transmit advertisements, and Carradine Chiropractic would have declined such permission if requested. While Carradine Chiropractic had purchased a few products from Posture Pro in the past, none of the fax ads – including the April 2012 Fax Ad – contained an opt-out notice that complied with the requirements set forth in 47 U.S.C. § 227(D)(i)-(iv). Consequently, Carradine Chiropractic filed suit against Posture Pro for violating the JFPA. Approximately three months later, Posture Pro petitioned the Federal Communication Commission (“the Commission”) to

¹ A true and accurate copy of the facsimile advertisements received by Carradine Chiropractic from Posture Pro are being submitted as Exhibit A with this Comment.

² A true and accurate copy of the April 2012 Fax Ad is being submitted as Exhibit C with this Comment.

³ The JFPA defines an “unsolicited advertisement” as “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, in writing or otherwise.” 47 U.S.C. § 227(a)(5).

“grant it a retroactive waiver from liability under the TCPA and the FCC’s regulations and orders relating to fax advertisements”⁴

The Commission should not grant this request for the following reasons: (1) Posture Pro was ignorant of the JFPA and the regulations pertaining to fax advertising; and (2) Posture Pro believed faxes sent to customers were “solicited” and, therefore, exempt from the JFPA.

ARGUMENT

The Commission has acknowledged that “inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the applicability of [the opt-out notice] requirement to faxes sent to those recipients who provided prior express permission.”⁵ In light of this confusion, the Commission has granted waivers of the requirement to include opt-out notices on faxes sent with the prior express invitation or permission of the recipient (“permission-based faxes”) to numerous parties. However, the Commission has consistently denied opt-out waiver requests under two circumstances. First, the Commission has denied opt-out waiver requests when the petitioners had “a lack of awareness of the TCPA and/or Commission rules . . . [as] ignorance of the law would not constitute grounds for a waiver.”⁶ Second, the Commission has denied opt-out waiver requests when the petitioners had sent fax ads not based on permission, but on the basis of a business relationship between the sender and the recipient. As shown herein, both of these circumstances exist with regard to Posture Pro and the fax advertisements it sent to Carradine Chiropractic. Consequently, the Commission should deny the Petition for Retroactive Waiver of Posture Pro.

⁴ Petition for Retroactive Waiver of Posture Pro, Inc. (“Posture Pro’s Waiver Petition”), p. 7

⁵ 29 FCC Rcd 13998, *14009.

⁶ 29 FCC Rcd 13998, *14009.

A. Posture Pro Was Ignorant of the JFPA and the Regulations Pertaining to Fax Advertising.

Posture Pro was not confused with regard to the regulations pertaining to facsimile advertising; it was completely oblivious to these rules. Denise Pauck, the Chief Operating Officer of Posture Pro, was responsible for Posture Pro's facsimile advertising activities. On March 24, 2016, she was deposed as the corporate representative of Posture Pro on a single topic: "Posture Pro, Inc.'s knowledge, familiarity, and/or confusion relative to the federal statute and regulations pertaining to facsimile advertisements."⁷ Ms. Pauck testified that she was capable of addressing this topic and, in fact, was the only person with such knowledge at Posture Pro:

Q. And do you believe you are capable of addressing all of the issues with regard to that topic?

A. To the best of my ability, yes.⁸

* * *

Q. Would you agree that you are the person who would be most familiar with the legal regulations or requirements that pertain to fax advertising?

A. Yes.

Q. Is there anyone, other than you, at Posture Pro that would have any information about that?

A. Not that I could think of.⁹

Despite being the only person at Posture Pro with knowledge of the legal rules regarding facsimile advertising, Ms. Pauck had little or no such knowledge:

⁷ Deposition of Denise Pauck, p. 7. The quoted portions of Ms. Pauck's deposition testimony are being submitted along with this Comment as Exhibit B.

⁸ Deposition of Denise Pauck, p. 7

⁹ Deposition of Denise Pauck, p. 15.

Q. . . . Do you think you've ever personally read the Telephone Consumer Protection Act or the Junk Fax Prevention Act?

A. Various parts of it. It's very confusing.

Q. When do you think you had first done that?

A. Well, back then I probably went through some of it just -- but I can't recall. It was so long ago. I mean, it's all those legal terms, which is, you know, very, very confusing.¹⁰

* * *

Q. Okay. You had mentioned earlier that you may have looked up fax advertising on the Internet. I should have asked you a few questions about that. So let me do that now. Were you doing that for the purpose of understanding the legal requirements relative to it [or] how to do it [and] who you could hire to do it for you?

A. No. Never who to do it for [us]. We sent out our own faxes to a very small database. We're a very small company. . . . So this is just very confusing. I don't get it. I don't know how we fit into the unsolicited fax thing at all. I just don't know how.¹¹

* * *

Q. . . . Is there any particular federal regulation that you have found to be confusing with regard to facsimile advertising? Any particular one?

A. Not that I'm aware of, other than what I said before, that still, we don't fall in the junk fax section. . . . So yeah, I'm totally confused. I'm confused to this moment. I don't even know why I'm here. I'm that confused right now.¹²

As this testimony makes clear, Posture Pro never had any real knowledge or understanding of the JFPA or the regulations that pertained to fax advertising. As such, it could not have been confused by the apparent contradiction between Footnote 154 and Paragraph 48 in

¹⁰ Deposition of Denise Pauck, p. 18.

¹¹ Deposition of Denise Pauck, pp. 25-26.

¹² Deposition of Denise Pauck, p. 50.

21 FCC Rcd 3787 (referred to by the Commission as “*the Junk Fax Order*”). Rather, it was totally unaware of this regulation¹³ and the Commission’s subsequent clarification of this regulation.¹⁴

B. Posture Pro Believed Faxes Sent to Customers Were Solicited and, therefore, Exempt from the JFPA.

Posture Pro was not only ignorant of the actual rules that govern facsimile advertising, the understanding it did have was incorrect. Specifically, Posture Pro believed that any fax it sent to a customer was “solicited” and, therefore, exempt from the JFPA. Ms. Pauck explained this as follows:

A. Well, when we were beginning to send our faxes out, we were sending solicited faxes. And we were very careful to not send unsolicited faxes out. So we were very careful about that. . . . We’re very careful to not send unsolicited faxes.¹⁵

* * *

Q. Okay. Maybe we should get clear on a couple of those legal terms. You used the term “solicited fax” and “unsolicited fax.” Can you just explain to me what you mean by those?

A. What I mean by them . . . is that the faxes that we sent were to clients that were customers [in] our database, where we had a relationship with them and they willingly gave us their fax number. And that is all we sent faxes to. End of story.

¹³ In her deposition, Ms. Pauck was presented with the various regulations pertaining to facsimile advertising, including 21 FCC Rcd 3787. Ms. Pauck testified that “I don’t recall reading this [regulation] specifically.” (Deposition of Denise Pauck, p. 28)

¹⁴ Posture Pro’s failure to submit its Petition for Retroactive Waiver by the presumptive deadline further demonstrates its obliviousness to the regulations pertaining to fax advertising. The Commission set a presumptive deadline of April 30, 2015 for the filing of opt-out waiver requests. 9 FCC Rcd 13998 (Release Date 10/30/2014), ¶ 30 (“We expect parties making [opt-out] waiver requests to make every effort to file within six months of the release of this Order.”) While Posture Pro has offered no explanation for its failure to meet this deadline, it will likely claim that it was unaware of the Commission’s regulations regarding facsimile advertising and, therefore, only became aware of the rules (and the presumptive deadline) after being named in a civil suit in November of 2015. Such ignorance of the law is neither a basis to excuse Posture Pro’s failure to meet the presumptive deadline nor grounds for excusing its apparent failure to include a compliant opt-out notice on all of its facsimile advertisements.

¹⁵ Deposition of Denise Pauck, p. 16.

Q. Okay. So the people who had willingly given you their number, that you had a [business] relationship to, that – if you sent that person a fax, you understand that to be a solicited fax?

A. That is correct.

Q. Okay. So an unsolicited fax – I just want to make sure I understand how you use these terms – that would just be to somebody with whom Posture Pro has no relationship at all?

A. That we weren't doing business with, right.¹⁶

Posture Pro's misunderstanding of the JFPA is critical in evaluating whether Posture Pro should be granted a waiver of the opt-out requirement for permission-based faxes. The JFPA does not use the term "solicited" fax or "solicited" advertisement. Rather, it defines an "unsolicited advertisement" as "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, in writing or otherwise."¹⁷ By inference, a 'solicited' fax is a fax in which the recipient has provided prior express invitation or permission to the sender for such faxes.

What Ms. Pauck was describing as a "solicited" fax is properly understood as an unsolicited advertisement that may be lawful if it falls within the established-business-relationship exception (or "EBR defense"). For purposes of the JFPA, the term "established business relationship" has been defined as follows:

The term "established business relationship" means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a [fax recipient] with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the [fax recipient]

¹⁶ Deposition of Denise Pauck, pp. 18-19.

¹⁷ 47 U.S.C. § 227(a)(5).

regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.¹⁸

Importantly, the existence of such a business relationship is not sufficient to establish the EBR defense. On the contrary, the JFPA imposes two additional requirements. First, “the sender [must have] obtained the number of the telephone facsimile machine through . . . the voluntary communication of such number . . . from the recipient of the unsolicited advertisement, or . . . a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number.”¹⁹ Second, the “advertisement contains a[n opt-out] notice meeting the requirements under paragraph (2)(D)”²⁰

Posture Pro’s explanation of a “solicited fax” squares neatly with the first two elements of the EBR defense; *i.e.*, the existence of a business relationship between the sender and recipient and the recipient’s voluntary communication of their fax number to the sender. As such, any faxes Posture Pro sent to customers who had voluntarily provided their fax numbers to Posture Pro would be lawful – *so long as the fax ads displayed a proper opt-out notice*. But the Commission should not grant Posture Pro an opt-out waiver for permission-based faxes when Posture Pro’s faxes were, by its own description, not based on permission.

This is the precise circumstance presented to the Commission by several previous petitioners. For clarity, the Commission’s description and resolution of that issue was as follows:

. . . we deny Zimmer Dental, Inc. d/b/a/ Zimmer Dental, Amy Beth Gerzog and John Does 1-10’s petition on the ground that a waiver is not appropriate for the failure to include the opt-out notice on faxes sent

¹⁸ 47 C.F.R. § 64.1200(f)(5).

¹⁹ 47 U.S.C. § 227(b)(1)(C)(ii).

²⁰ 47 U.S.C. § 227(b)(1)(C)(iii); *see also Vandervort v. Balboa Capital Corp.*, 287 F.R.D. 554, 561 (C.D. Cal. 2012)(“The [TCPA] therefore unambiguously requires a compliant opt-out notice on an unsolicited fax, notwithstanding the existence of an established business relationship.”)

pursuant to an existing business relationship. In its petition, Zimmer asserts that because the faxes were sent to registered customers it “reasonably believed that they were within the provision of the Junk Fax Protection Act stating that the opt-out notice does not apply because the transmissions were not unsolicited.” Not only does this assertion establish that the petitioner was ignorant of the law – which provides independent grounds to deny the petition – but the *2014 Anda Commission Order* was clear in stating that a waiver will not be extended to the requirement to include opt-out language on faxes pursuant to an existing business relationship, which it said was clear and without controversy.²¹

The testimony of Ms. Pauck makes clear that Posture Pro has the same misunderstanding of the legal rules regarding fax advertising; engaged in the same fax advertising misconduct; and is making the same argument for an opt-out waiver as Zimmer Dental. Consequently, the Commission should deny Posture Pro’s request for an opt-out waiver as well.

CONCLUSION

For all of the foregoing reasons, Carradine Chiropractic Center, Inc. respectfully requests that the Commission deny the Petition for Retroactive Waiver of Posture Pro, Inc.

Respectfully submitted,

/s/Matthew E. Stubbs

GEORGE D. JONSON (0027124)
MATTHEW E. STUBBS (0066722)
MONTGOMERY, RENNIE & JONSON
36 E. Seventh Street, Suite 2100
Cincinnati, Ohio 45202
(513) 241-4722
(513) 241-8775 (fax)
Email: gjonson@mrjlaw.com
mstubbs@mrjlaw.com

Counsel for Carradine Chiropractic, Inc.

²¹ 29 FCC Rcd 13998, *14009.