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

In the Matter of: Petition of Posture Pro, Inc. For Retroactive Waiver of 47 C.F.R. §64.1200(a)(4)(iv)	CG Docket No. 02-278 CG Docket No. 05-338

REPLY TO CARRADINE CHIROPRACTIC CENTER, INC.'S COMMENT RE PETITION FOR RETROACTIVE WAIVER

Petitioner Posture Pro, Inc. ("Petitioner" or "Posture Pro") hereby submits its reply to the Comment by Carradine Chiropractic Center, Inc. ("Carradine") in response to Posture Pro's Petition for Retroactive Waiver.

I. INTRODUCTION

On February 23, 2016, Posture Pro filed its Petition for Retroactive Waiver of 47 C.F.R. section 64.1200(a)(4)(iv) ("Petition"), CG Docket Nos. 02-278, 05-338. On March 25, 2016, the FCC's Consumer and Governmental Affairs Bureau invited comments on the Petition and other petitions by April 8, 2016.[1] On or about April 8, 2016, Carradine filed a comment to Posture Pro's Petition.

Carradine's Comment states that Carradine objects to the Petition because Petitioner "was ignorant of the JFPA and the regulations pertaining to fax advertising" and "believed faxes sent to customers were 'solicited' and, therefore, exempt from the JFPA."[2] Carradine attempts to support its arguments by misleadingly citing to specific portions of an unsigned deposition

[1] FCC Public Notice, DA 16-317 (Mar. 25, 2016).
[2] Carradine Chiropractic Center, Inc.'s Comment ("Carradine Comment") at 3.

transcript that the deponent has not yet seen, much less reviewed.[3] Carradine's selective citation to this deposition wholly ignores testimony that establishes Posture Pro was not ignorant of the law and only sent faxes to customers who supplied their facsimile numbers to Posture Pro after providing express permission.

Posture Pro vigorously denies Carradine's arguments, objects to Carradine's mischaracterizations, and emphasizes that it seeks a retroactive waiver of 47 C.F.R. section 64.1200(a)(4)(iv) ("2006 Order" or "Junk Fax Order") with respect to faxes that have been transmitted by Petitioner with the prior express consent or permission of the recipients or their agents after the effective date of the 2006 Order, but prior to the full compliance deadline of April 30, 2015. As Carradine's statements in its Comment patently show, its objections are based purely on disputed factual issues. The FCC has already expressly stated that it declines to conduct a factual analysis as to such issues, and already rejected prior arguments that it require actual, specific claims of confusion in order to grant a waiver.[4]

Accordingly, Carradine's Comment fails to provide any basis for denial of the Petition. Therefore, Posture Pro respectfully requests that the FCC grant Posture Pro's Petition in its entirety.

II. FACTUAL DISPUTES ARE NOT A BASIS FOR DENYING THE PETITION.

Carradine's Comment makes clear that Carradine is basing its objections to the Petition on factual disputes. That is not a basis for denial of the Petition.

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[3] The relevant deposition transcript referred to in Carradine's Comment was received by Petitioner's counsel on April 14, 2016. As of the signing of this Reply, the deponent has not yet reviewed the deposition transcript.

[4] *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, DA 15-1402, 2015 WL 8543949 (F.C.C. Dec. 9, 2015) ("December 2015 Order") ¶¶ 16, 17.

The FCC has expressly stated that "we decline to conduct a factual analysis to determine whether the petitioners actually obtained consent. We reiterate the Commission's statement that the granting of a waiver does not confirm or deny that the petitioners had the prior express permission of the recipients to send the faxes. That remains a question for triers of fact in the private litigation."[5]

Moreover, the FCC has also stated that "we reject arguments that the Commission made actual, specific claims of confusion a requirement to obtain a waiver. The Commission did not require petitioners to plead specific, detailed grounds for individual confusion, and we therefore cannot impose that requirement now."[6]

Thus, Carradine's arguments are meritless, as shown in detail below.

A. Carradine's Argument that Posture Pro Was Ignorant of the Junk Fax Order Is Wrong.

Carradine's first argument as a basis for denial of the Petition is that Posture Pro was purportedly ignorant of the Junk Fax Order.[7] Not so.

Posture Pro obtained advice in regards to the Junk Fax Order and relevant regulations. The transcript of the relevant deposition to which Carradine cites shows this to be the case:

> 4 Q. Has Posture Pro ever sought legal advice from any
> 5 attorney, with regard to the requirements that pertain
> 6 to fax advertising?
> 7 A. This was years ago. And I cannot recall where we
> 8 got the advice from for the opt-out notices. But I know
> 9 the advice that we were given was that we were solicited
> 10 faxes. And we knew that -- we were told that
> 11 unsolicited faxes were a whole different set of
> 12 requirements. So we were extremely cautious and
> 13 extremely careful to send only to our very small
> 14 database of clients that were doing business with us and

[5] *Id.* at ¶ 16.
[6] *Id.* at ¶ 17.
[7] Carradine Comment at 4-6.

15 that whom gave us their fax numbers. We were very
16 specific about that.[8]

Just because a Posture Pro officer claims confusion does not mean that Posture Pro was "ignorant" of the law. As shown above, Carradine mischaracterizes the deposition transcript by selecting only those portions of the transcript which conform with its arguments, and omitting those portions which refute its arguments. Due to the confusion as to senders' obligations under the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, as amended by the Junk Fax Prevention Act of 2005, to include opt-out notices on solicited faxes as referenced above, Petitioner did not understand the opt-out notice requirement to apply to solicited faxes. The FCC has recognized that there was confusion over the application of a provision of the 2006 Order. Confusion is certainly not a basis for denial of the Petition.[9]

B. Carradine's Argument that Posture Pro Did Not Send Solicited Faxes Is Wrong.

Carradine's second argument is that Posture Pro purportedly misunderstood the meaning of "solicited faxes."[10] In its argument, Carradine likens Posture Pro's Petition to that of Zimmer Dental, Inc. ("Zimmer") as referenced in the FCC's December 2015 Order,[11] and claims that the Petition should be denied because Posture Pro purportedly is claiming that a solicited fax is merely a fax that was sent to a recipient with a business relationship with the sender. Wrong again.

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[8] Deposition of Denise Pauck, as yet unreviewed by deponent ("Pauck Depo."), 17:4-16.
[9] *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, FCC 14-164, Order, 29 F.C.C. Rcd. 13998 (F.C.C. Oct. 30, 2014) ("October 2014 Order") ¶ 24.
[10] Carradine Comment at 6-9.
[11] *See* December 2015 Order ¶ 2, fn.8.

First of all, solicited faxes are faxes sent to the recipient who provided prior express permission to receive the faxes.[12] The FCC denied Zimmer's petition because Zimmer argued that "because the faxes at issue were sent to those parties with whom it had an existing business relationship, they were solicited and a waiver is appropriate."[13] Thus, Zimmer did not receive prior permission from recipients before sending the faxes to them, and Zimmer was not seeking a retroactive waiver on the same basis as that of Posture Pro.

Unlike the facts in Zimmer, Posture Pro did receive prior permission from fax recipients before sending the faxes:

17 Q. . . . Are you familiar with the
18 phrase "prior express invitation or permission"? Does
19 that mean anything to you?
20 A. Yes.
21 Q. What does that mean to you?
22 A. That, for example, if they've given us their fax
23 number. As did Lisa at Carradine, specifically gave
24 their fax number to Patti Clark so that they could be
25 included to receive these right here. That is the only
1 way we got their fax number.
. . .
12 Q. Okay. So just generally what do you understand
13 that term to be with regard to fax advertising?
14 A. That if they gave us their agreement -- they gave
15 us their fax number knowing that they were going to be
16 receiving faxes.
17 Q. Okay. That's it? That if they gave you their
18 fax number voluntarily, then that's prior express
19 invitation or permission?
20 A. No. ***They were asked if they wanted to receive***
21 ***product information from Posture Pro***. If they did, then
22 they would give us their fax number. That's the only

[12] October 2014 Order ¶ 24 (quoting *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Protection Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3810 n.154 (2006)); *see also* ¶ 28.
[13] December 2015 Order ¶ 2, fn.8.

23 way we got these people's fax numbers. It's a simple
24 story. It's the only way we got it.[14]

Secondly, Posture Pro's Petition is not seeking the same relief as the petition by Zimmer. Posture Pro's Petition requests that Posture Pro be granted a retroactive waiver with respect to faxes that have been transmitted by Petitioner with the prior express consent or permission of the recipients or their agents after the effective date of the 2006 Order, but prior to the full compliance deadline of April 30, 2015. Zimmer's petition asked for a retroactive waiver based on its assertion 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.'"[15]

Thus, the Zimmer petition is not at all similar to Posture Pro's Petition. The granting of the Petition has nothing to do with Zimmer's petition.

C. Posture Pro's Petition Was Timely.

In a footnote, Carradine claims that Posture Pro's Petition was untimely.[16] Again, Carradine is wrong.

The December 2015 Order expressly stated that it declined to reject petitions solely on the basis that they were filed after April 30, 2015.[17] As referenced in the Petition, the FCC granted numerous waivers, including waivers of petitions filed after April 30, 2015.[18] The

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[14] Pauck Depo., 42:17– 43:1, 43:12-24 (emphasis added).
[15] December 2015 Order ¶ 21.
[16] Carradine Comment at 6, fn. 14.
[17] December 2015 Order ¶ 18.
[18] *See* Posture Pro, Inc. Petition at 4; December 2015 Order ¶ 18.

December 2015 Order clarified that petitions for retroactive waiver that were filed after April 30, 2015 may also be granted.[19]

Consequently, Carradine's untimeliness argument has no merit.

III. CONCLUSION

Carradine has failed to show any valid basis why the Petition should not be granted. For all of the foregoing reasons and the reasons stated in its Petition, Petitioner respectfully requests that the Commission grant it a retroactive waiver from liability under the TCPA and the FCC's regulations and orders relating to fax advertisements sent prior to April 30, 2015 to recipients who had provided prior permission or consent to receive such faxes, but where such fax advertisements did not contain opt-out notices in compliance with 47 C.F.R. section 64.1200(a)(4)(iv).

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Respectfully submitted,

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[19] December 2015 Order ¶ 18.