

**Before the**  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, DC 20554**

In the Matter of: )  
  
Petition of S&S Firestone, Inc., )  
d/b/a S&S Tire )  
For Declaratory Ruling To Clarify )  
Scope and/or Statutory Basis for )  
Rule 64.1200(a)(3)(iv) and/or for )  
Waiver )

**PETITION OF S&S FIRESTONE, INC., d/b/a S&S TIRE FOR  
DECLARATORY RULING AND/OR WAIVER**

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May 7, 2014

**Before the**  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, DC 20554**

In the Matter of:	)	
Petition of S&S Firestone, Inc.,	)	CG Docket No. 02-278
d/b/a S&S Tire	)	CG Docket No. 05-338
For Declaratory Ruling To Clarify	)	
Scope	)	
and/or Statutory Basis for	)	
Rule 64.1200(a)(3)(iv) and/or for	)	
Waiver	)	

**PETITION OF S&S FIRESTONE, INC., d/b/a S&S TIRE FOR**  
**DECLARATORY RULING AND/OR WAIVER**

Pursuant to Section 1.2 of the Federal Communications Commission (“Commission” or “FCC”) rules, S&S Firestone, Inc., d/b/a S&S Tire (“S&S” or “Petitioner”) respectfully requests that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of the Commission’s rules does not apply to fax advertisements sent with the prior express consent or permission of the recipient (hereinafter “solicited faxes”). In the alternative, Petitioner respectfully requests that the Commission clarify that the statutory basis for Section 64.1200(a)(4)(iv) is not 47 USC Section 227(b). If the Commission declines to issue either declaratory ruling, Petitioner respectfully requests that, pursuant to Section 1.3 of the FCC’s rules, the Commission grant retroactive waivers of Section

64.1200(a)(4)(iv) with respect to faxes which have been transmitted by Petitioner with the express prior consent or permission of the recipients.

## **I. INTRODUCTION AND BACKGROUND**

### **A. History of S&S and its Customer, Special Occasions.**

S&S is a family-owned corporation formed in the State of Kentucky. S&S has three divisions: (1) a wholesale tire division operating from nine locations in the Southeast; (2) a commercial division which operates eighteen commercial truck tire centers and three tire retreading plants; and (3) one retail tire and auto service center located in central Kentucky. In January 2014, S&S was sued by M.P.G. Tent Rentals, Inc., d/b/a Special Occasions (“Special Occasions”) for violations of the Telephone Consumer Protection Act. (“TCPA”). On March 6, 2014, S&S removed that case from the Circuit Court of Jefferson County, Alabama, to the United States District Court for the Northern District of Alabama, where it is now pending. In the Complaint, Special Occasions seeks to represent a class of persons or entities that received fax advertisements from S&S from March 28, 2011, to the date of filing of the Complaint, that did not contain an opt-out notice. *See* Complaint, attached hereto as Exhibit A.

Special Occasions is a business located in Birmingham. Special Occasions was a customer of S&S and bought tires for its commercial vehicles. Special Occasions voluntarily provided its fax number to S&S when it submitted a business

credit application. Jim Bailey, a Customer Service Representative (“CSR”) at S&S’s Birmingham, Alabama, location, was assigned to handle Special Occasions’ account. As set forth in his affidavit attached hereto as Exhibit B, Mr. Bailey specifically requested and obtained approval from Special Occasions to provide it with advertisements by fax. At different times in 2013 and early 2014, Mr. Bailey faxed special tire deal advertisements (“special tire deals”) created by the S&S store manager in Birmingham to notify customers of special deals on tires. S&S believes that Mr. Bailey faxed these special tire deals to other accounts assigned to him. Mr. Bailey only faxed the special tire deals to customers which had provided him consent to receive advertisements by fax.

Special Occasions attached to its Complaint 18 special tire deals that it contends it received from S&S. None of the special tire deals contained an opt-out notice. Thus, it appears (given that this is a purported nationwide class action) that there may be hundreds, if not thousands, of faxes sent from the Birmingham S&S location, as well as other locations, to S&S customers advertising special tire deals. Accordingly, S&S’s exposure for special tire deals sent by fax pursuant to current Commission rules could be in the millions. A judgment in this amount may well result in this family-owned business being unable to operate as a going concern.

Special Occasions contends in its nationwide class action Complaint that S&S violated FCC regulations implementing the TCPA, specifically, 47 C.F.R.

64.1200(a)(4)(iii) and (iv) because the special tire deals did not contain an opt-out notice. The TCPA, though, only prohibits the sending of “unsolicited advertisements.” FCC regulation 64.1200(a)(4)(iv) goes further than the statute by mandating that an opt-out notice must be present not only on “unsolicited advertisements,” but also on “solicited advertisements.” Uncertainty over the scope and validity of section 64.1200(a)(4)(iv) has led to disputes across the country and numerous petitions filed with this Commission.

S&S joins in other similar petitions filed with the Commission and requests that the FCC resolve this uncertainty by clarifying that Section 64.1200(a)(4)(iv) applies only to unsolicited faxes as the Commission only had the authority under the TCPA to promulgate regulations relating to unsolicited faxes. Alternatively, S&S requests clarification from the Commission that the statutory basis for Section 64.1200(a)(4)(iv) is not 47 U.S.C. § 227(b). Through either of these actions, the Commission can ensure that its rules are consistent with Congressional intent. If the Commission declines to issue either declaratory ruling, S&S asks for retroactive waivers of the requirements of section 64.1200(a)(4)(iv) with respect to solicited faxes sent by it to its customers. Neither the Commission’s goals nor the public interest are served by subjecting S&S’s business to multi-million dollar lawsuits from plaintiffs, like Special Occasions, who consented to receive this

advertising material.<sup>1</sup>

**B. The TCPA Only Applies to “Unsolicited” Fax Advertisements.**

The TCPA prevents the use of a telephone facsimile machine to send an “unsolicited advertisement.” 47 U.S.C. § 227(b)(1)(c). The TCPA 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.” 47 U.S.C. § 227(a)(5). In 2005, Congress enacted the Junk Fax Prevention Act of 2005 (“JFPA”), and amended the TCPA to provide that unsolicited fax advertisements are permissible if the sender has an established business relationship with the recipient and the advertisement contains an appropriate opt-out notice. The FCC was directed to prescribe regulations “that a notice contained in an unsolicited advertisement” must contain an opt-out notice provision. 47 U.S.C. § 227(b)(2)(D). Importantly, however, the TCPA, as amended, continues to cover only fax advertisements that are transmitted without an individual’s “express invitation or permission.” 47 U.S.C. §227(a)(5). Thus, by its terms, the TCPA’s general

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<sup>1</sup> S&S adopts and incorporates pp. 2-5 of the Petition of Purdue Pharma, which details the growth of abusive TCPA litigation. Special Occasions is also a serial TCPA litigator having filed at least 2 other TCPA lawsuits seeking the same damages as sought here. *See M.P.G. Tent Rental, Inc. v. Taymark, Inc.*, in the United States District Court for the Northern District of Alabama, 2:11-cv-03498-RDP; *M.P.G. Tent Rentals, Inc. v. Wasatch Tees of Atlanta, Inc.*, in the United States District Court for the Northern District of Alabama, 2:08-cv-02218-LSC.

prohibition against fax advertisements and the exception to that prohibition (allowing unsolicited faxes to be sent to recipients to whom the sender has an established business relationship, if they contain an appropriate opt-out notice) are inapplicable to *solicited* fax advertisements, that is, fax advertisements transmitted with the recipient's prior express consent.

Following passage of the JFPA, the Commission sought comment on proposed implementing regulations and, in 2006, issued a final order ("JFPA Order") that provided amendments to the Commission's rules on *unsolicited* facsimile advertisements. FCC Report and Order, FCC 06-42 dated 04/05/06 (available at <http://transition.fcc.gov/cgb/policy>). Despite the TCPA's express limitation to unsolicited faxes, one of the rules adopted by the Commission, Section 64.1200(a)(4)(iv), references opt-out notices for faxes "sent to a recipient that has provided prior express invitation and permission." 47 C.F.R. § 64.1200(a)(4)(iv). The scope of that provision is unclear, however, as it is a subsection of a rule that applies to *unsolicited* faxes. 47 C.F.R. § 64.1200(a)(4) (prohibiting "[u]se of a telephone facsimile machine ... to send an unsolicited advertisement to a telephone facsimile machine unless ..."). The JFPA Order also contains contradictory language regarding the scope of Section 64.1200(a)(4)(iv), simultaneously explaining that "the opt-out notice requirement only applies to communications that constitute unsolicited advertisements" and that an opt-out notice is required for

solicited faxes “to allow consumers to stop unwanted faxes in the future.” FCC Order dated 04/05/06, at pp. 24, n.154; p. 26. The administrative record sheds no light on the scope of the rule because the Commission never sought comment on applying the TCPA to solicited faxes. Although the Office of the General Counsel has argued that Section 64.1200(a)(4)(iv) should be read to apply to solicited faxes, the Commission itself has yet to opine on the issue.

Meanwhile, application of Section 64.1200(a)(4)(iv), has resulted in businesses being susceptible to class action lawsuits where fax advertisements to customers did not contain an opt-out notice. Indeed, notwithstanding the facts that solicited faxes are expressly excluded from coverage under the TCPA, plaintiffs suffering no actual harm have seized upon Section 64.1200(a)(4)(iv)’s reference to solicited faxes to bring class action lawsuits under Section 227(b) of the TCPA, which authorizes a private right of action to recover statutory damages based on a violation of “this subsection or the regulations prescribed under this subsection.” 47 C.F.R. § 227(b)(3)(A)-(B). Many of these lawsuits seek millions of dollars in damages, despite the fact that plaintiffs expressly agreed to receive the faxes. Instead, these lawsuits are premised solely on the fact that the fax advertisements at issue do not contain opt-out notices or contain opt-out notices that plaintiffs deem inadequate.

## II. ARGUMENT

### **A. S&S Requests that the Commission Issue a Declaratory Ruling That Fax Advertisements Sent with Express Consent Are Not Required to Contain an Opt-Out Notice.**

S&S requests that the Commission issue a declaratory ruling that solicited faxes sent by it did not need to contain an opt-out notice. As set forth above, the TCPA only prohibited the sending of “unsolicited” faxes. The TCPA did not extend its statutory prohibition to “solicited faxes.” In support of its argument, S&S adopts and incorporates all pending petitions on this issue, including, (1) Petition of All Granite & Marble Corp., pp. 6-7, filed on 10/28/2013; and (2) Petition of Crown Mortgage, filed on 2/24/2014, at pp. 11-13.

### **B. Alternatively, the FCC Should Clarify that the Statutory Basis for 47 C.F.R. 64.1200(a)(4)(iv) is not 47 U.S.C. § 227(b).**

If the FCC declines to find that 47 C.F.R. 64.1200(a)(4)(iv) does not apply to “solicited” advertisements, S&S requests, in the alternative, that the FCC issue a declaratory ruling that § 64.1200(a)(4)(iv) was not promulgated under section 227(b), and, accordingly, cannot be the basis for a private right of action under section 227(b)(3). In support of this argument, S&S adopts and incorporates (1) the Petition of Magna Chek, Inc., filed 3/28/2014, at pp. 5-8; (2) the Petition of Perdue Pharma, dated 12/12/2013, at pp. 8-13.

**C. Alternatively the FCC Should Grant S&S a Retroactive Waiver of Section 64.1200(a)(4)(iv).**

Should the Commission decline to issue a broader declaratory ruling, S&S respectfully requests a retroactive waiver of Rule 64.1200(a)(4)(iv) for the solicited special tire deals that it sent to its customers. This retroactive waiver is authorized by Rule 1.3 which provides “[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.” 47 C.F.R. § 1.3. In support of this argument, S&S adopts and incorporates the Reply Comments of All Granite & Marble Corp. filed with the Commission on 2/21/2014. Specifically, S&S avers that good cause exists to provide a retroactive waiver applicable to all parties because the rule that requires an opt-out notice on solicited advertisements is an invalid rule.

In addition, S&S states that good cause exists because, as set forth in the affidavit of Jim Bailey, he specifically asked the S&S customers assigned to him if they consented to receiving advertisements by fax. Those who indicated their consent were faxed special tire deals. Those who did not indicate their consent were removed from the fax list.

Further, granting a retroactive waiver as requested here would be in the public interest. S&S is facing a multi-million dollar lawsuit for communicating with its customers in a manner of which they approved. The amount of damages sought by Special Occasions will likely mean that S&S is out of business. It may

be forced to file for bankruptcy. Such a result will cost jobs; jobs that are scarce in the current economy. The Commission should not allow a technical violation, over an ambiguous regulation without statutory support, to drive a family-owned business into the ground.<sup>2</sup>

### **CONCLUSION**

Petitioner respectfully requests that the Commission issue a declaratory ruling clarifying that Rule 64.1200(a)(4)(iv) does not apply to solicited fax advertisements. Alternatively, Petitioner respectfully requests that the Commission issue a declaratory ruling clarifying that 47 U.S.C. § 227(b) is not the statutory basis for promulgation of 64.1200(a)(4)(iv). In the event that the Commission declines the former two requests, the Petitioner asks that the Commission grant it a retroactive waiver of Rule 64.1200(a)(4)(iv) for any faxes sent by Petitioner with the recipient's prior express consent.

DATED this 7th day of May, 2014.

[Signature on following page]

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<sup>2</sup> S&S further adopts and incorporates the Reply Comments of Staples, Inc. and Quill Corporation filed on 2/21/2014.

*/s/ Mac B. Greaves*

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