

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

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

**Physicians Healthsource, Inc.’s Comments on Allscripts Petition
seeking “Retroactive Waiver” of the Commission’s Rule Requiring
Opt-Out Notices on Fax Advertisements Sent With Permission**

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Executive Summary

In its order of October 30, 2014, the Commission granted retroactive “waivers” of 47 C.F.R. § 64.1200(a)(4)(iv) purporting to absolve the 24 petitioners of civil liability in private litigation and allowed other TCPA defendants to seek similar waivers until April 30, 2015. The Commission stressed that “all future waiver requests will be adjudicated on a case-by-case basis” and that the Commission did not “prejudge the outcome of future waiver requests in the order.” The Allscripts petition (along with the Francotyp-Postalia petition) is the first of the follow-on waiver petitions contemplated by the October 30 order.

First, Plaintiff asks that the Commission not grant Allscripts prospective immunity to send fax advertisements without opt-out mechanisms until April 30, 2015, as it did with the petitioners subject to the October 30 order. Plaintiff’s counsel have sued Allscripts twice, once in 2009 and once in 2012, for targeting physicians and other medical-health professionals with fax advertisements. When Congress enacted the TCPA, it found that unrestricted advertising can be “a risk to public safety” when it involves “an emergency or medical assistance telephone line.” Two doctors commented in these proceedings that they use fax technology to transmit and receive time-sensitive patient information and that unwanted fax advertisements threaten their patients’ health. Giving Allscripts immunity for the next six months would create an unacceptable risk to public safety.

Second, the Commission should clarify the standard for a retroactive “waiver” from 47 C.F.R. § 64.1200(a)(4)(iv). The October 30 order is unclear whether a petitioner must show it was *actually* confused about the law or whether the Commission will *presume* a

petitioner to be confused in the absence of evidence that the petitioner was merely ignorant of the law or had actual knowledge of the opt-out rules.

Finally, the Commission should deny the Allscripts petition no matter what the standard. Allscripts does not claim it was “confused” about the law, and Plaintiff can prove that Allscripts continued sending non-compliant faxes for years after Plaintiff’s counsel filed the first class action lawsuit alleging opt-out-notice violations, some of them after Allscripts settled the first case. Alternatively, the Commission could deny the petition because Allscripts admits it does not “maintain[] a record of persons who provided express consent to receive advertisements by facsimile transmission,” so it cannot carry its burden of proving permission, meaning a waiver would be useless.

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Commenter Physician’s Healthsource, Inc., is the plaintiff in a private TCPA action pending in the United States District Court for the Northern District of Illinois against petitioners Allscripts-Misy’s Healthcare Solutions, Inc., Allscripts, LLC, Allscripts Healthcare Solutions, Inc., and Allscripts Healthcare, LLC (“Allscripts”).¹ Allscripts filed a petition on September 30, 2014, seeking a “retroactive waiver” of the regulation requiring opt-out notice on fax advertisements sent with “prior express invitation or permission.”² The Consumer and Governmental Affairs Bureau sought comments on the petition November 4, 2014.³

The Commission issued an order on 24 similar petitions on October 30, 2014 (“Opt-Out Order”).⁴ That order rejected the challenges to the validity of the opt-out regulation

¹ See *Physicians Healthsource, Inc. v. Allscripts-Misy’s Healthcare, et al.*, No. 12-cv-3233 (N.D. Ill.).

² *Petition of Allscripts-Misy’s Healthcare Solutions, Inc., Allscripts, LLC, Allscripts Healthcare Solutions, Inc., and Allscripts Healthcare, LLC for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (Sept. 30, 2014).

³ *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Nov. 4, 2014) (“Public Notice”).

⁴ *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express*

raised in the Allscripts petition,⁵ but granted retroactive “waivers” purporting to relieve the 24 petitioners of liability in private TCPA litigation.⁶ As instructed by the Public Notice, Physicians Healthsource will not address the requests for declaratory relief in these comments and will address only Allscripts’s request for a waiver.⁷

Factual Background

Allscripts is a serial junk faxer with a history of targeting physicians and other healthcare professionals with unsolicited fax advertisements. Allscripts has never been the subject of Commission enforcement to Plaintiff’s counsels’ knowledge, but Plaintiff’s counsel have sued Allscripts twice (so far) for its illegal fax campaigns, once in 2009 and again in 2012, after Plaintiff’s counsel discovered Allscripts sent many fax advertisements during the pendency of the 2009 litigation that it failed to disclose before settling that case in 2011. These cases are detailed below.

Permission, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014) (“Opt-Out Order”).

⁵ *Id.* ¶¶ 19–20, 32 & n.70 (ruling Commission issued regulation under its statutory authority to “implement” the TCPA by empowering consumers to “halt unwanted faxes” and regulation is enforceable through the TCPA’s private right of action, and refusing to repeal regulation because it reflects “good policy,” given that “opt-out notice is not only necessary but essential to further the governmental interest in protecting consumer[s] from unwanted fax ads”).

⁶ Plaintiff’s counsel opposed these “waivers,” arguing the Commission has no authority to interfere in private TCPA litigation and that such an order would violate the separation of powers and due process and constitute a taking without just compensation. Plaintiff will not repeat those arguments here. On November 10, 2014, Plaintiff appealed the waiver portion of the order to the D.C. Circuit Court of Appeals in *Sandusky Wellness Center, LLC v. FCC*, No. 14-1235 (D.C. Cir. Nov. 10, 2014).

⁷ Public Notice at 2 (stating “we find it unnecessary to seek additional comment on the Petitioners’ request for declaratory ruling” and seeking comment only on the “requests for waiver consistent with the guidance” in the Opt-Out Order).

A. The *Geismann* litigation.

Plaintiff's counsel first filed suit against Allscripts in Illinois state court on July 17, 2009. Allscripts removed to the Northern District of Illinois on August 20, 2009.⁸ The plaintiff in the first case, Radha Geismann, M.D., P.C., a medical practice in St. Louis, Missouri, owned by internist Dr. Radha Geismann, alleged Allscripts sent it an unsolicited fax advertisement for “repackaged medications” on April 9, 2008.⁹ The fax contained no opt-out notice whatsoever.¹⁰

Dr. Geismann alleged that Allscripts “faxed the same or similar advertisements to Plaintiff and more than 39 other recipients without first receiving the recipients’ express permission or invitation,” making class certification appropriate.¹¹ Dr. Geismann filed a First Amended Complaint in federal court on October 13, 2009, making the same allegations and naming additional Allscripts entities as defendants.¹²

Allscripts answered Dr. Geismann’s allegations on April 9, 2010, asserting that “Plaintiff’s claims are barred due to an existing business relationship,” but did not claim Allscripts ever obtained Dr. Geismann’s “prior express invitation or permission” to send fax advertisements.¹³ The case was heavily litigated for the next year and a half, including an attempt by Allscripts to “pick off” Dr. Geismann’s individual claim for \$1,500 in order to

⁸ *Geismann v. Allscripts Healthcare Solutions, Inc.*, No. 09-cv-5114 (N.D. Ill.) (hereinafter “*Geismann*”), Notice of Removal (Doc. 1).

⁹ *Geismann*, Compl. (Doc. 1-2) ¶¶ 12–13.

¹⁰ *Id.* at 15.

¹¹ *Id.* ¶ 13.

¹² *Geismann*, First Amended Class Action Compl. (Doc. 14) ¶¶ 10–12.

¹³ *Geismann*, Amended Answer & Aff. Defenses to First Amended Class Action Compl. (Doc. 53), Fourth Defense.

“moot” the entire class action, a tactic the district court ultimately denied, holding that “more than the named plaintiff’s interests are at stake” and that “at least in a limited sense, the interests of the unnamed class members are before the court,” as well.¹⁴

On September 28, 2010, Dr. Geismann moved for class certification, arguing that, among other common issues, the court could determine on a classwide basis that the Allscripts fax “violates the TCPA because it does not contain the ‘opt-out notice’ required by the TCPA and FCC regulations,” citing 47 U.S.C. § 227(b)(2)(D) and 47 C.F.R. § 64.1200(a)(4)(iv).¹⁵

During discovery, Plaintiff’s counsel determined Allscripts successfully sent the same fax it sent to Dr. Geismann “3,778 times to 3,736 different fax numbers between February 11, 2008 and April 26, 2008,” including the fax to Dr. Geismann on April 9, 2008.¹⁶ Beginning in April 2011, the parties entered into settlement negotiations overseen by Magistrate Judge Sidney I. Schenkier and reached an agreement in October 2011.

On November 1, 2011, Dr. Geismann filed an unopposed motion for preliminary approval of the class settlement, explaining that Allscripts had agreed to settle the class claims for \$1.9 million.¹⁷ The motion explained the settlement was strictly limited to faxes

¹⁴ *Radha Geismann, M.D., P.C. v. Allscripts Healthcare Solutions, Inc.*, 764 F. Supp. 2d 957, 960 (N.D. Ill. 2011) (citing *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 869 (7th Cir. 1978)).

¹⁵ *Geismann*, Pl.’s Mot. Strike Offer of Judgment or, in the Alternative, Amended Mot. Class Certification (Doc. 72) ¶ 22.

¹⁶ *Geismann*, Pl.’s Unopposed Mot. Prelim. Approval of Class Action Settlement & Notice to Settlement Class (Doc. 132) ¶ 2.

¹⁷ *Id.* ¶ 3.

sent “between February 11, 2008 and April 26, 2008” because that was the only time period for which Allscripts had produced evidence of its faxing activity.¹⁸

The agreement provided for sending notice and claim forms to the class and provided that each class member submitting a timely claim would receive a pro rata share of the settlement fund not to exceed \$500 per fax.¹⁹ The agreement provided for attorney fees of 30% of the settlement fund, subject to the district court’s approval.²⁰ Allscripts agreed to the entry of an injunction, as contemplated by § 227(b)(3), prohibiting future violations of the TCPA.²¹ On February 16, 2012, the district court granted final approval of the settlement, noting that no class member objected to the settlement and ruling the settlement terms were fair and reasonable.²² The court ordered that “Allscripts is enjoined from future violations of the TCPA.”²³

B. The *Physicians Healthsource* litigation.

After final approval of the *Geismann* settlement, Plaintiff’s counsel discovered that Allscripts had sent at least 36 fax advertisements to Physicians Healthsource, Inc., a medical practice in Cincinnati, Ohio, from July 9, 2008, to December 5, 2011.²⁴ Allscripts did not produce these faxes during discovery in *Geismann*.

¹⁸ *Id.* ¶ 5(a).

¹⁹ *Id.* ¶ 5(c)–(d).

²⁰ *Id.* ¶ 5(h).

²¹ *Id.* ¶ 5(i).

²² *Geismann*, Final Approval Order (Doc. 142) ¶ 9.

²³ *Id.* ¶ 17.

²⁴ Ex. A, *Physicians Healthsource, Inc. v. Allscripts-Misy’s Healthcare, et al.*, No. 12-cv-3233 (N.D. Ill.) (hereinafter “*Physicians Healthsource*”), Compl. (Doc. 1) ¶ 11.

Of the 36 faxes Allscripts sent to Physicians Healthsource, 27 were sent after the *Geismann* case was filed on July 17, 2009, and 25 were sent after Allscripts removed the *Geismann* case to federal court through counsel on August 20, 2009.²⁵ Four of the faxes were sent after Allscripts began negotiating the *Geismann* settlement before the magistrate judge in April 2011.²⁶ Three were sent after the filing of the motion for preliminary approval of the \$1.9 million class settlement in *Geismann*.²⁷

Of the 36 faxes, 21 contain no opt-out notice whatsoever.²⁸ These faxes were sent first, from July 9, 2009, through March 4, 2010.²⁹ For the 15 remaining faxes, beginning April 2, 2010—one week before Allscripts would assert an EBR defense in the *Geismann* case—Allscripts began adding in fine print at the bottom of its faxes, “If you no longer wish to receive fax messages from this sender, please call” a toll-free number and dial an extension (which varied).³⁰ The fax sent December 2, 2012, states, “To unsubscribe from faxes, please call (800) 771-6747, ext. 2.”³¹ This language fails to (1) inform the consumer of the right to opt out, (2) state that a failure to honor an opt-out within 30 days is unlawful, (3) provide a fax number and phone number for opt outs, (4) inform the consumer an opt-out request must identify the fax number to which it relates, (5) inform the consumer an opt-out request must be made using the means identified by the sender, or (6) state an opt-out

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* (Doc. 1-2), Page ID 18–32.

²⁹ *Id.*

³⁰ *Id.* Page ID 33, 34, 37, 39, 40–45, 47–49, 51–53.

³¹ *Id.* Page ID 46.

request is revoked if the consumer later gives permission to the sender.³² It is also not “clear and conspicuous,” being in miniscule text at the bottom of the fax.³³

On May 1, 2012, Plaintiff’s counsel filed suit against Allscripts on behalf of Physicians Healthsource in the Northern District of Illinois.³⁴ The Complaint explains that “[t]his is the second case that challenges Defendants’ practice of faxing unsolicited advertisements,” that the *Geismann* settlement covered “faxes sent between February 11, 2008 and April 26, 2008,” and that the *Physicians Healthsource* faxes “were not disclosed in the *Geismann* case, not provided to Geismann in written or oral discovery and not part of the earlier settlement.”³⁵

The Complaint alleges Allscripts “faxed the same and similar unsolicited facsimiles to Plaintiff and more than 39 other recipients without first receiving the recipients’ express permission or invitation” after April 26, 2008, and that class certification was appropriate.³⁶ Also on May 1, 2012, Plaintiff filed a “placeholder” motion for class certification to guard against another pick-off attempt from Allscripts.³⁷ That same day, May 1, 2012, “before even entering an appearance,” Allscripts sent Plaintiff’s counsel a letter offering to pay Physicians

³² 47 C.F.R. 64.1200(a)(4)(iii).

³³ *Physicians Healthsource*, Compl. (Doc. 1-2) at Page ID 33, 34, 37, 39, 40–49, 51–53.

³⁴ *Id.*

³⁵ *Id.* ¶ 1.

³⁶ *Id.* ¶ 13.

³⁷ *Physicians Healthsource*, Pl.’s Mot. Class Certification (Doc. 4).

Healthsource \$1,500 per fax in an attempt to avoid class-action liability by buying off the named plaintiff.³⁸ Physicians Healthsource refused.

On June 20, 2012, Physicians Healthsource issued discovery requests asking Allscripts to “[d]escribe in detail how Defendant obtained or developed a list of persons and/or telephone numbers” to which it sent its fax advertisements.³⁹ On November 29, 2012, the district court denied the pick-off attempt Allscripts made five-and-a-half months earlier.⁴⁰ Allscripts moved to certify that decision for interlocutory appeal, which took another three months before the motion was denied March 28, 2013.⁴¹

On April 19, 2013, nearly a year into the case, Allscripts answered the Complaint pursuant to court order.⁴² Unlike the answer in the *Geismann* litigation, which alleged only an EBR, the *Physicians Healthsource* Answer asserts that “Plaintiff’s claims are barred because it provided express consent, invitation and/or permission to receiving information from Allscripts.”⁴³

On August 20, 2013, Allscripts answered the discovery Physicians Healthsource issued more than a year earlier, stating that it “culled the list of persons and entities who received facsimile transmissions . . . from Allscripts’ ‘Sales Force’ database, which compiles

³⁸ *Physicians Healthsource, Inc. v. Allscripts-Misy’s Healthcare Solutions, Inc.*, No. 12 C 3233, 2012 WL 5989203, at *1 (N.D. Ill. Nov. 29, 2012).

³⁹ Ex. B, Allscripts Objections & Responses to Pl.’s First Set of Interrogs., No. 17.

⁴⁰ *Physicians Healthsource*, 2012 WL 5989203, at *1.

⁴¹ *Physicians Healthsource*, Order (Doc. 55).

⁴² Answer (Doc. 59).

⁴³ *Id.* at 13 (Fifteenth Defense).

information about all customers with whom Allscripts has an EBR.”⁴⁴ Plaintiff asked Allscripts to admit that it “maintains a record of persons who provided express consent to receive advertisements by facsimile,” and Allscripts stated that it maintains records of persons “with whom Allscripts has a business relationship,” but “denies that it maintains a record of persons who provided express consent to receive advertisements by facsimile transmission.”⁴⁵ Asked to admit that Allscripts “did not contact Plaintiff and receive Plaintiff’s express consent before sending” its faxes, Allscripts answered that “the information presently known is insufficient to enable Allscripts to admit or to deny this request,” given that it does not maintain records of permission.⁴⁶

On January 13, 2014, Allscripts filed an Answer to Plaintiff’s First Amended Complaint (which added parties), asserting the same defense of “express consent, invitation and/or permission.”⁴⁷ On January 28, 2014, Physicians Healthsource moved to strike Allscripts’s affirmative defense of permission or for a more definite statement, arguing the defense was “so vague or ambiguous” that Plaintiff could not respond.⁴⁸ On May 9, 2014, Allscripts filed an Amended Answer, amending its affirmative defense to state, “Plaintiff’s claims are barred because, upon information and belief, it provided express consent, invitation and/or permission to receiving facsimile transmissions from Allscripts in the

⁴⁴ Ex. B, Objections & Resp. Pl.’s First Interrogs., No. 17 & 15.

⁴⁵ Ex. C, Objections & Resp. Pl.’s First Req. Admissions, No. 12.

⁴⁶ *Id.* No. 11.

⁴⁷ *Physicians Healthsource*, Answer to First Amended Compl. (Doc. 80) at 13 (Fifteenth Defense).

⁴⁸ *Physicians Healthsource*, Pl.’s Combined Mot. Strike and/or for More Definitive Pleading (Doc. 84) at 10–11.

course of the parties' commercial relationship."⁴⁹ Allscripts has never amended its discovery responses admitting that it does not "maintain[] a record of persons who provided express consent to receive advertisements by facsimile transmission."⁵⁰

Argument

I. The Commission should clarify whether the standard for a waiver from § 64.1200(a)(4)(iv) is *actual* confusion or *presumed* confusion, but the Allscripts petition fails either standard.

The public notice seeks comments "consistent with the guidelines set forth in the *Fax Order*."⁵¹ But it is unclear what the guidelines are. The Opt-Out Order states that the lack of notice in the 2005 rulemaking and an inconsistent footnote in the 2006 Junk Fax Order "led to confusion or misplaced confidence on the part of petitioners," justifying a waiver.⁵² It also states these factors "caused businesses mistakenly to believe that the opt-out notice requirement did not apply."⁵³ These statements suggest the Commission found that the 24 petitioners covered by the order were entitled to waivers because, prior to sending their faxes, they did in fact (1) receive inadequate notice, (2) read the regulation and the footnote, and (3) suffer actual "confusion or misplaced confidence" as a result.⁵⁴

At the same time, however, the order states these factors "*may have* contributed to confusion or misplaced confidence,"⁵⁵ that the combination of factors "*presumptively*

⁴⁹ *Physicians Healthsource*, Amended Answer & Aff. Defenses to First Amended Complaint (Doc. 98)

⁵⁰ Ex. C, Objections & Resp. Pl.'s First Req. Admissions, No. 12.

⁵¹ Public Notice at 2.

⁵² Opt-Out Order ¶ 26.

⁵³ *Id.* ¶ 27.

⁵⁴ Plaintiffs do not concede that any of the 24 petitioners met these standards.

⁵⁵ Opt-Out Order ¶ 25.

establishes good cause for retroactive waiver,” and that “nothing in the record here demonstrat[es] that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement . . . but nonetheless failed to do so.”⁵⁶ The Commission also emphasized that “simple ignorance” of the law “is not grounds for a waiver.”⁵⁷ These statements suggest the Commission found the law objectively “confusing,” giving rise to a *presumption* that the 24 petitioners were “confused,” and that Plaintiffs failed to rebut that presumption with evidence the petitioners knew opt-out notice was required or were simply ignorant of the law.

Plaintiff’s counsel expect several dozen TCPA defendants to petition the Commission for waivers from § 64.1200(a)(4)(iv) in the next six months. Five waiver petitions have been filed since the Opt-Out Order was issued October 30, 2014.⁵⁸ In addition, defendants in non-fax TCPA litigation, such as telemarketing and junk-text cases, will petition for waivers from various regulations. A defendant in a text-message case filed one such waiver petition before the Opt-Out Order was issued.⁵⁹ On November 17, 2014, a commenter on a separate petition for declaratory ruling argued the Commission should create a “path for retroactive waiver” from the telemarketing rules.⁶⁰ The Commission should clarify the standard under which it issued its waivers from § 64.1200(a)(4)(iv) for both

⁵⁶ *Id.* ¶ 26 (emphasis added).

⁵⁷ *Id.*

⁵⁸ See Petitions of Howmedica Osteonics Corp. (Nov. 7, 2014); The Emery Wilson Corp. (Nov. 10, 2014); ACT, Inc. (Nov. 12, 2014); Amicus Mediation & Arbitration Group, Inc. (Nov. 13, 2014); and Alma Lasers, Inc. (Nov. 14, 2014).

⁵⁹ See Petition of Bijora, Inc. (Oct. 7, 2014).

⁶⁰ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling of the Consumer Bankers Association*, Comments of ACA International (Nov. 17, 2014) at 2 & 10.

the ensuing fax-waiver petitions, as well as the many non-fax-waiver petitions the Commission will be presented with over the coming months and years.

With respect to the Allscripts petition, however, the waiver must be denied no matter what the standard. As argued below, Allscripts does not claim it was confused or misguided and Allscripts knew exactly what the law was when it sent the faxes at issue, having already been sued for violating the opt-out notice requirement. So even if there is a presumption of “confusion or misguided confidence,” that presumption is rebutted here.

A. If the standard is *actual* “confusion or misguided confidence,” then the Allscripts petition must be denied because Allscripts does not make such a claim and Allscripts knew about the opt-out-notice regulation when it sent its faxes.

Allscripts does not claim it was “confused” or had “misplaced confidence” about whether opt-out notice was required when it sent its 36 fax advertisements to Physicians Healthsource from July 9, 2008, to December 5, 2011.⁶¹ Allscripts claims the regulation is objectively “unclear,” “uncertain[],” or “confusing,” but it does not claim that *it* was actually confused at any point in time.⁶²

Moreover, as detailed above, Allscripts sent Physicians Healthsource 27 of the faxes for which it now seeks a waiver after it had been sued by Dr. Geismann in 2009, an action Dr. Geismann sought to certify as a class action based, in part, on the common issue of whether the fax “violate[d] the TCPA because it does not contain the ‘opt-out notice’

⁶¹ Allscripts Pet. at 1–11.

⁶² *Id.* at 6.

required by the TCPA and FCC regulations.”⁶³ Allscripts hired highly experienced counsel and vigorously litigated the case. Four of the *Physicians Healthsource* advertisements were sent after Allscripts had begun negotiating a classwide settlement in *Geismann*, three of them after the motion for preliminary approval on November 1, 2011.

Under these circumstances, the Commission cannot reasonably find that Allscripts was actually confused or misguided about the opt-out requirement. Allscripts had actual knowledge of the law when it sent the faxes at issue and chose not to comply. Granting a retroactive “waiver” would incentivize such conduct with regard to Allscripts specifically and with respect to TCPA violators in general.

B. If the standard is *presumed* “confusion,” then Plaintiff has rebutted the presumption by showing Allscripts had actual knowledge of the regulation when it sent its faxes.

If the standard for a waiver from § 64.1200(a)(4)(iv) is that petitioners are considered “presumptively” confused in the absence of evidence they were simply ignorant of the law or that “they understood that they did, in fact, have to comply with the opt-out notice requirement,”⁶⁴ then the Allscripts petition must be denied because the presumption is rebutted. Allscripts “understood” that it “did, in fact, have to comply” with the regulation, given that 27 of the 36 faxes at issue were sent after Allscripts had been sued in a class action for violating that regulation. Given how easy it is to comply with the notice requirements, the only reasonable conclusion is that Allscripts knew that it “did, in fact, have to comply”

⁶³ *Geismann*, Pl.’s Mot. Strike Offer of Judgment or, in the Alternative, Amended Mot. Class Certification (Doc. 72) ¶ 22.

⁶⁴ *Id.* ¶ 26.

but made a conscious decision not to. No matter what the applicable standard, Allscripts is not entitled to a waiver on this record.

II. The Allscripts petition should be denied because Allscripts admits it has no evidence to carry its burden of proving prior express invitation or permission.

The Opt-Out Order warns it should not “be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.”⁶⁵ The Commission noted, “[t]he record indicates that whether some of the petitioners had acquired prior express permission of the recipient remains a source of dispute between the parties,” citing a letter from Plaintiff’s counsel.⁶⁶

In this case, there is no “source of dispute” over whether Allscripts obtained Plaintiff’s permission to send fax advertisements. Allscripts asserts permission as an affirmative defense, but it admits it does not “maintain[] a record of persons who provided express consent to receive advertisements by facsimile transmission.”⁶⁷ The Commission addressed this scenario in the 2006 Junk Fax Order, ruling that “the burden of proof rests on the sender to demonstrate that permission was given” and so senders should “promptly document that they received such permission.”⁶⁸

⁶⁵ Opt-Out Order ¶ 31.

⁶⁶ *Id.* n.104.

⁶⁷ Ex. C, Objections & Resp. Pl.’s First Req. Admissions, No. 12.

⁶⁸ *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report & Order & Third Order on Reconsideration, 21 FCC Rcd 3787 ¶ 46 (rel. Apr. 6, 2006) (“2006 Junk Fax Order”).

The Commission put the burden on the sender because it was “concerned” that allowing oral permission would “result in some senders erroneously claiming they had the recipient’s permission to send facsimile advertisements.”⁶⁹ That turns out to have been an understatement. The problem is not that “some” senders erroneously claim permission; it is that *nearly every* sender erroneously claims permission, even where, like Allscripts, they have no evidence to support the claim. The Commission should not reward this tactic by granting Allscripts the extraordinary relief it seeks.

III. Giving Allscripts immunity from § 64.1200(a)(4)(iv) until April 30, 2015, would endanger public health and safety, given Allscripts’s history of targeting medical professionals, who use fax machines to receive and transmit time-sensitive patient information.

No petitioner needs six months to come into compliance with § 64.1200(a)(4)(iv), given they were all sued for violating that regulation months or years ago and the burden of compliance is de minimis. When the regulation was issued in 2006, the Commission ruled the “adequate time for senders to come into compliance” was “90 days of date of publication in the Federal Register.”⁷⁰

Allscripts should receive no grace period at all, even if the Commission grants it a “retroactive waiver.” When Congress enacted the TCPA in 1991, it found that unrestricted advertising “can be an intrusive invasion of privacy and, *when an emergency or medical assistance telephone line is seized, a risk to public safety.*”⁷¹ Allscripts has a history of targeting doctors and

⁶⁹ *Id.* ¶ 46.

⁷⁰ 2006 Junk Fax Order ¶ 57.

⁷¹ Telephone Consumer Protection Act of 1991, Pub. L. 102–243, § 2(5) (Dec. 20, 1991) (emphasis added).

other medical professionals with its faxes. Seizing “medical assistance telephone lines” appears to be part of its business model.

Two doctors commented in these proceedings that they use fax technology to transmit and receive time-sensitive patient information and that unwanted fax advertisements threaten public health and safety. First, on February 19, 2014, Dr. John Lary, M.D., a medical doctor in Huntsville, Alabama, filed comments stating, in part, the following:

My office receives many unsolicited and unwanted faxes. My cell phone receives many unsolicited and unwanted advertising calls and text messages, all of which are disruptive and potentially dangerous (such as cell calls received while I am performing an intricate medical procedure that requires intense concentration). I receive many unsolicited and unwanted pre-recorded calls to my home phone.

I have sued TCPA violators on a number of occasions. The legislative history shows that (at least some of) the TCPA’s sponsors incorrectly predicted that TCPA violators would see the error of their ways when brought to court (even small claims court), pay the suing victim, and cease making prohibited calls. My experience has been that TCPA violators will usually hire an attorney, who will then proceed to raise all sorts of frivolous “defenses” to justify their prohibited conduct. You can be sure that any FCC order or rule weakening the TCPA’s protections will result in defense attorneys attempting to “stretch” the FCC’s new language in such a way as to permit conduct that the FCC did not intend.

Second, on August 25, 2014, Dr. Richard Maynard, a chiropractor in the Washington, D.C., area met with Commission staff by telephone. As explained in Plaintiff’s ex parte notice, Dr. Maynard stated fax advertisements jeopardize his patients’ health. Dr. Maynard explained his office is often *required* to send and receive patient information by fax, for example, to schedule patients for MRI scans. Dr. Maynard explained his office is often also *required* to fax documents pertaining to Medicare and Medicaid coverage, as well as state workers compensation benefits. Receiving fax advertisements, Dr. Maynard stated, takes

significant staff time that distracts from legitimate business. Dr. Maynard also stated there can be a “domino effect” in terms of patient health, where care is delayed because information cannot be sent or received by fax and the patient’s health worsens.

To date, Allscripts has been sued twice by healthcare providers (Dr. Geismann and Physicians Healthsource) that it targeted with non-compliant fax advertisements. Dr. Geismann’s suit did not deter Allscripts from violating the notice requirement again, since it continued sending non-compliant faxes during the pendency of the first action (even after settling the case). Rewarding Allscripts with prospective immunity to violate the opt-out-notice requirements for the next six months would threaten public health and safety.

Conclusion

The Commission should clarify whether the standard for a waiver is *actual* confusion or *presumed* confusion. In either case, the Commission should deny the Allscripts petition for waiver because Allscripts does not claim it was confused and it had actual knowledge of the regulation, having sent the vast majority of the faxes for which it seeks a waiver after it was sued for sending non-compliant fax advertisements. In the interest of public health and safety, the Commission should not grant Allscripts immunity to send non-compliant fax advertisements to doctors and other healthcare professionals for the next six months.

Respectfully submitted,

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