

Before the
Federal Communications Commission
Washington, DC 20554

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

**RESPONSE OF STRYKER ENTITIES TO TCPA PLAINTIFF’S
SUPPLEMENTAL COMMENTS ON STRYKER PETITION FOR WAIVER**

Physicians Healthsource, Inc. (“PHI”) and its attorneys, Anderson + Wanca, recently submitted Supplemental Comments to the Federal Communications Commission (the “Commission”), arguing that the Stryker Entities’ Petition for Waiver¹ should be denied based on the recent ruling by the District Court in *PHI v. Stryker*.² As a threshold matter, the Commission should simply disregard PHI’s supplemental comments because they were filed after the December 19, 2014 deadline set in the Commission’s Public Notice seeking comment on the Stryker Entities’ Petition for Waiver.³ Even if the Commission proceeds to consider the substance of the Supplemental Comments, however, PHI is wrong, and none of its arguments to the Commission warrant denial of the Petition for Waiver for the reasons described below.

¹ Petition for Waiver of Howmedica Osteonics Corporation, Stryker Corporation, Stryker Sales Corporation, and Stryker Biotech, LLC, CG Docket Nos. 02-278, 05-338 (filed Nov. 7, 2014)(“Petition for Waiver”).

² All references herein to “*PHI v. Stryker*” refer to the Court’s recent opinion on the parties’ cross-motions for summary judgment in *Physicians Healthsource, Inc. v. Stryker Sales Corporation, et al.*, Case No. 1:12-cv-0729, 2014 WL 7109630 (W.D. Mich. Dec. 12, 2014)(attached hereto as Exhibit A).

³ See *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions for Waiver of the Commission’s Rule on Opt-Out Notice on Fax Advertisements*, Public Notice, DA 14-1717 (Nov. 28, 2014), setting the Comment Date as December 12, 2014 and the reply comment date as December 19, 2014.

I. The Recent Summary Judgment Decision in *PHI v. Stryker*.

In *PHI v. Stryker*, the District Court recently held that issues of fact regarding whether the facsimile at issue was an “advertisement” precluded summary judgment for either party.⁴ With regard to the issue of whether the facsimile was “unsolicited,” the District Court held that the lack of opt-out language on the facsimile rendered the facsimile “unsolicited” as a matter of law.⁵ *Id.* at *13. Contrary to PHI’s erroneous suggestion to the Commission in its Supplemental Comments, the District Court did **not** hold that Stryker failed to obtain “prior express invitation or permission.”⁶ The Court held that “even assuming...express consent from [PHI’s employee] Dr. Martinez in 2003,” the lack of opt-out notice on the facsimile precludes the Stryker Entities’ consent defense as a matter of law.⁷

II. The Decision in *PHI v. Stryker* is Immaterial to the Stryker Entities’ Petition for Waiver.

PHI now argues to the Commission that the recent decision in *PHI v. Stryker* means that the Stryker Entities are no longer “similarly situated” to the Original Petitioners⁸, thus warranting the Commission’s denial of their Petition for Waiver. PHI is wrong.

⁴ See *PHI v. Stryker*, 2014 WL 7109630 at *5-*10.

⁵ *Id.* at *12-*13.

⁶ Supplemental Comments at 1.

⁷ See *PHI v. Stryker*, 2014 WL 7109630 at *12-*13.

⁸ References to “Original Petitioners” refer to petitioners that were originally granted waiver of the opt-out regulations by the Commission in *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; *Junk Fax Protection Act of 2005*; *Application for Review filed by Anda, Inc.*; *Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirements for Faxes Sent with the Recipient’s Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014)(“Fax Order”).

A. The Stryker Entities are Similarly Situated to the Original Petitioners, Regardless of the Decision in *PHI v. Stryker*.

In the Stryker Entities' previous filings in support of their Petition for Waiver, they established that they are similarly situated to the Original Petitioners because, like them, the Stryker Entities cited the potential for confusion caused by: (i) the inconsistency between footnote 154 of *the Junk Fax Order*⁹ and the Rule and (ii) the ambiguity in the Notice of Proposed Rulemaking.¹⁰ When considering whether to grant a waiver of a Commission regulation, the Commission is obliged to consistently apply a reasonable and clear standard.¹¹ Singling out the Stryker Entities by delving into the possible effect of waiver on private, civil litigation would not only go well beyond the purview of the Commission, but would moreover disadvantage the Stryker Entities relative to the treatment the Commission afforded the Original Petitioners. Simply put, the Commission did not delve into the potential effect of waiver on civil litigation when considering waiver for the Original Petitioners and should not do so here.

B. The Issue of Express Permission Remains a Source of Dispute in *PHI v. Stryker*.

PHI erroneously attempts to differentiate the Stryker Entities from the Original Petitioners based on the faulty premise that the issue of express consent was still a "source of dispute" for the Original Petitioners, and suggesting that this is no longer the case for the Stryker Entities. PHI is wrong on both counts. First, contrary to PHI's suggestion, the Commission's decision to grant waiver to the Original Petitioners clearly did not turn on the fact that express

⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration*, 21 FCC Rcd 3787, fn. 154 ("*Junk Fax Order*") (2006) (stating that "the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements" (emphasis added)).

¹⁰ See Stryker Entities' Petition for Waiver at pp. 2-4; see also Fax Order at ¶¶24-30.

¹¹ See, e.g., *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

consent was a “source of dispute.” The Commission merely noted, in a footnote, that this was the case for “*some* of the petitioners.”¹² The Fax Order makes clear that the Commission’s decision to grant waiver was based on the sources of confusion discussed at length in the Fax Order and not on the position of any individual petitioner in private civil litigation.

Second, whether the Stryker Entities obtained PHI’s prior express consent and whether such consent is sufficient to avoid liability under the TCPA remains an active “source of dispute” in *PHI v. Stryker*. Preliminarily, the District Court’s holding relating to consent is not final. As an interlocutory order, the Court may change its mind. The Court’s ruling is, moreover, subject to appellate review. Additionally, to the extent that the Court’s ruling suggested that the consent given by PHI’s employee was, in any respect, inadequate to bind PHI and preclude its claim against the Stryker Entities, the Court’s analysis did not follow the legal standard established by the FCC and a plethora of federal courts that “consent” can be manifested in many different ways.¹³ Express consent and its effect on liability thus remain hotly contested in *PHI v. Stryker*.

Finally, while the Commission’s decision on the Stryker Entities’ Petition for Waiver should be made irrespective of the Court’s decision in *PHI v. Stryker*, the Stryker Entities believe that the District Court’s ruling was plainly erroneous. The FCC has authority to waive its rules

¹² See Fax Order at ¶31 fn. 104 (emphasis added).

¹³ See *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 Junk Fax Prevention Act of 2005*, 21 F.C.C. Rcd. 3787, 3811 (2006) (“[w]e expect that written permission will take many forms.”); See also, e.g., *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 725 (7th Cir. 2011) (finding the fact that plaintiff “signed a form that both authorized the publication of its fax number . . . and authorized the other subscribers . . . to communicate with it, including via fax”); *Chapman v. Wagener Equities, Inc.*, No. 09 C 07299, 2014 WL 540250, at *14 (N.D. Ill. Feb. 11, 2014) *leave to appeal denied sub nom. Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities Inc.*, 747 F.3d 489 (7th Cir. 2014) (finding the voluntary provision of a fax number by signing up for a listing a strong indicator of consent); *Practice Mgmt. Support Servs., Inc. v. Appeal Solutions, Inc.*, No. 09-cv-1937, 2010 WL 748170, at *2-3 (N.D. Ill. Mar. 1, 2010) (“[P]laintiff’s voluntarily communication of its fax number precludes Practice Management from asserting that the faxes were unsolicited under the TCPA.”); *Landsman & Funk, P.C. v. Lorman Bus. Ctr., Inc.*, No. 08-cv-481, 2009 WL 602019, at *1-2 (W.D. Wis. Mar. 9, 2009) (same).

under 47 C.F.R. §1.3.¹⁴ Indeed, this is undoubtedly why PHI and its lawyers believe it necessary to oppose the Stryker Entities' request for waiver, notwithstanding their argument to the Commission that the District Court's interlocutory ruling is dispositive of the consent issue.

III. Conclusion

For the reasons set forth in these Supplemental Comments, as well as those set forth in the Stryker Entities' prior submissions to the Commission, the Stryker Entities respectfully request that the Commission disregard the Supplemental Comments as untimely filed and, in any event, grant the Stryker Entities' Petition for Waiver pursuant to the Fax Order.

Respectfully Submitted,

**HOWMEDICA OSTEONICS CORP, STRYKER
CORPORATION, STRYKER SALES
CORPORATION, AND STRYKER BIOTECH,
LLC**

By: /s/ Anthony J. Anscombe

One of Their Attorneys

¹⁴ See also *WAIT Radio*, 418 F.2d at 1157 (“The agency’s discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.”). Likewise, the Commission should reject PHI’s attempt to rely upon the District Court’s ruling that it would be a fundamental violation of the separation of powers for the Commission to grant a retroactive waiver of its rules for a particular case or controversy presently proceeding in an Article III Court. See Supplemental Comments at 3. The District Court’s ruling on this issue appears to be at odds with *Brand X* and similar cases granting the Commission wide latitude to interpret statutes and requiring the Article III courts to abide by those interpretations. See, e.g., *National Cable & Telecommunications Assoc. v. Brand X Internet Serv.*, 125 S. Ct. 2688 (2005). Try as they might, PHI cannot take away the Commission’s ability to grant waiver requests that serve the public interest like the Stryker Entities’ Petition for Waiver.

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