

Before the  
Federal Communications Commission  
Washington, DC 20554

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

**ZOCDOC, INC.'S REPLY COMMENTS IN SUPPORT  
OF ITS PETITION FOR WAIVER**

Blaine C. Kimrey  
bkimrey@vedderprice.com  
Bryan K. Clark  
bclark@vedderprice.com  
VEDDER PRICE P.C.  
222 N. LaSalle St.  
Chicago, IL 60601  
T: (312) 609-7500  
F: (312) 609-5005

Attorneys for ZocDoc, Inc.

Dated: January 20, 2015

Petitioner ZocDoc, Inc. (“ZocDoc”), through its counsel, respectfully submits these reply comments in response to the comments filed by a group of TCPA<sup>1</sup> plaintiffs (the “TCPA Plaintiffs”) represented by TCPA class action attorney Brian Wanca and his law firm, Anderson + Wanca.<sup>2</sup> Included in the group is Radha Geismann, M.D., P.C. (“Geismann”), an internal medicine practice and serial TCPA plaintiff in St. Louis, Missouri, that has pursued TCPA litigation against ZocDoc. But the real party in interest is Anderson + Wanca, which is opposing petitions for waiver here as part of a desperate effort to avoid waivers that could deal a considerable blow to what has become a lucrative business model.<sup>3</sup> The Plaintiffs’ Comments cite the estimated 2,069 private TCPA lawsuits filed in 2014 to suggest that the Commission might face a heavy burden in addressing the many Petitions for Waiver that are likely to follow the Commission’s October 30, 2014 Order (the “Opt-Out Order”). What that number really shows, however, is why these waivers are critical — the TCPA plaintiffs’ bar has made a cottage industry of suing unaware and unsuspecting businesses for trivial violations of the TCPA opt-out notice provisions. As the Commission acknowledged in the Opt-Out Order, confusion regarding the opt-out regulations created the risk of significant damages for these business. That is precisely why the retroactive waivers are so important.

The TCPA Plaintiffs’ arguments to the contrary are unavailing. First, as the Commission already determined in the Opt-Out Order, it has the power to grant retroactive waivers of the opt-

---

<sup>1</sup> Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”).

<sup>2</sup> See *TCPA Plaintiffs’ Comments on Petitions for Waiver of the Commission’s Opt-Out Notices on Fax Advertisements Filed by EatStreet Inc., McKesson Corp., Philadelphia Consolidated Holding Corp., St. Luke’s Center for Diagnostic Imaging, LLC, Sunwing Vacations, Inc., and ZocDoc, Inc.*, CG Dockets No. 02-278, 05-338 (filed Jan. 13, 2015) (the “Plaintiffs’ Comments”).

<sup>3</sup> See also *Sandusky Wellness Center, LLC, et al. v. FCC, et al.* Case No. 12-1235 (D.C. Cir.) (challenging the Commission’s authority to issue waivers).

out regulations. The case law cited by the TCPA Plaintiffs is not to the contrary. Second, ZocDoc is similarly situated to the entities that have already received waivers. Third, the 2006 reconsideration proceedings cited by the TCPA Plaintiffs are irrelevant to ZocDoc's petition. And finally, the TCPA Plaintiffs' arguments against the grant of a prospective waiver are meaningless because ZocDoc has not requested such a waiver (and even if it had, the TCPA Plaintiffs' arguments are meritless). Thus, the Commission should grant ZocDoc's Petition for Waiver.<sup>4</sup>

### **I. Procedural Background of Litigation**

As an initial matter, the Plaintiffs' Comments fail to completely and accurately describe the underlying litigation between ZocDoc and Geismann.<sup>5</sup> The case is no longer pending in the United States District Court for the Southern District of New York because the court entered judgment in favor of Geismann and against ZocDoc for \$6,000, pursuant to ZocDoc's offer of judgment.<sup>6</sup> The district court then found that Geismann's individual claims had been satisfied and the allegations related to the putative class allegations were therefore moot, so the case was dismissed.<sup>7</sup> This matter is now on appeal and fully briefed before the Second Circuit Court of Appeals, but there are no ongoing activities in the district court — that case is closed and will remain so unless the Second Circuit overturns the district court's order. ZocDoc has tendered

---

<sup>4</sup> Although the Plaintiffs' Comments also discuss the petitions of EatStreet, Inc., McKesson Corp., Philadelphia Consolidated Holding Corp., St. Luke's Center for Diagnostic Imaging, LLC, and Sunwing Vacations, Inc., this Reply is submitted only on behalf of ZocDoc.

<sup>5</sup> *Geismann v. ZocDoc, Inc.*, Case No. 14-3708 (2d Cir.).

<sup>6</sup> *Geismann v. ZocDoc, Inc.*, 2014 U.S. Dist. LEXIS 143272 (S.D.N.Y. Sept. 26, 2014).

<sup>7</sup> *Id.*

payment of the \$6,000 judgment to Geismann (based on its receipt of *two* allegedly unsolicited faxes), but Geismann’s counsel rejected the check.

As the TCPA Plaintiffs acknowledge, Geismann’s complaint alleges that it did not consent to the receipt of the faxes.<sup>8</sup> It is therefore unclear why Geismann believes a waiver of the opt-out requirements as to solicited faxes sent by ZocDoc would harm it at all. Even if the Second Circuit were to reverse the district court’s ruling, the requested waiver would have no impact on Geismann’s individual claims given Geismann’s allegations that it did not consent to the receipt of faxes.

Finally, on the issue of consent, the Plaintiffs’ Comments disingenuously state that “[i]n its motion to dismiss, ZocDoc did not claim it obtained ‘prior express invitation or permission’ from Dr. Geismann or any other class member.”<sup>9</sup> This is, of course, because a motion to dismiss must take the allegations in the complaint<sup>10</sup> as true — consent is a factual issue that cannot be addressed at that stage.

## **II. The Commission has authority to grant retroactive waivers of the opt-out requirements.**

There is no reason for the Commission to accept the TCPA Plaintiffs’ invitation to revisit its decision on the scope of its authority to grant retroactive waivers. This is just another attempt by the TCPA Plaintiffs to revive an argument that has already been considered and rejected. In the Opt-Out Order, the Commission unequivocally stated that:

[W]e reject any implication that by addressing the petitions filed in this matter while related litigation is pending, we have “violate[d] the separation of powers

---

<sup>8</sup> *Geismann v. ZocDoc, Inc.*, Case No. 14-cv-472 (S.D.N.Y.), ECF No. 39.

<sup>9</sup> Plaintiffs’ Comments at p. 17.

<sup>10</sup> *Geismann v. ZocDoc, Inc.*, Case No. 14-cv-472 (S.D.N.Y.), ECF No. 39 (“Defendants sent 2 *unsolicited* facsimiles to Plaintiff”) (emphasis added)

vis-à-vis the judiciary,” as one commenter has suggested.<sup>11</sup> By addressing requests for declaratory ruling and/or waiver, the Commission is interpreting a statute, the TCPA, over which Congress provided us authority as the expert agency.

Likewise, the mere fact that the TCPA allows for private rights of action based on violations of our rules implementing that statute in certain circumstances does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply.

Opt-Out Order at ¶ 21.

The TCPA Plaintiffs’ argument that “[t]he Commission plays no role in determining whether a violation has taken place”<sup>12</sup> is illogical — but for the Commission’s enactment of the rules, there would be no “violation.” Thus, if the Commission has the power to make the rule regarding opt-out requests, it must also have the power to grant waivers of the rule.

The case law cited by the TCPA Plaintiffs does not change this reality. The TCPA Plaintiffs analogize to *Natural Res. Def. Council v. E.P.A.*, 749 F.3d 1055, 1064 (D.C. Cir. 2014) (“*NRDC*”), where the D.C. Circuit held that the EPA exceeded its authority by adopting an affirmative defense to a private right of action under the Clean Air Act (“CAA”). But *NRDC* involved a fundamentally different regulatory scheme, and the EPA does not enjoy the express waiver authority this Commission possesses under Section 1.3 of its rules. The court’s decision in *NRDC* relied on specific limits to the EPA’s authority, which are not applicable to the Commission. For example, the court emphasized that the EPA lacked any specific authority to create an affirmative defense to the CAA’s private right of action and therefore the EPA’s

---

<sup>11</sup> Not surprisingly, the commenter referred to was Brian Wanca of Anderson + Wanca. Opt-Out Order at n. 77.

<sup>12</sup> Plaintiffs’ Comments at p. 19.

“ability to determine whether penalties should be assessed for [CAA] violations extends only to administrative penalties.”<sup>13</sup>

But the Commission possesses express authority to waive its rules under 47 C.F.R. § 1.3, which states that “[t]he provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.” Analyzing this regulation in a context similar to this one, the D.C. Circuit has held that the Commission “has authority under [Rule 1.3] to waive requirements . . . where strict compliance would not be in the public interest.” *Nat’l Ass’n of Broadcasters v. F.C.C.*, 569 F.3d 416, 426 (D.C. Cir. 2009).

The Plaintiffs’ Comments then turn to *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 2014 U.S. Dist. LEXIS 175425 (W.D. Mich. Dec. 12, 2014), which recently became the first (but presumably not the last) court to rule on the impact of the Commission’s waiver in private TCPA litigation. But this is not the first time a court has addressed the Commission’s ability to issue a waiver, and circuit-level case law suggests that *Stryker Sales* was wrongly decided.<sup>14</sup> Thus, based on an incorrect ruling by one district court, the Commission has no reason to question its earlier decision that it has authority to issue waivers.

---

<sup>13</sup> *NRDC*, 749 F.3d at 1063.

<sup>14</sup> *See, e.g., Northeast Cellular v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“The FCC has authority to waive its rules if there is ‘good cause’ to do so. 47 C.F.R. § 1.3. The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.”); *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“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.”).

### **III. ZocDoc is similarly situated to entities that already have received retroactive waivers.**

To argue that ZocDoc is not similarly situated to the parties that already received retroactive waivers, the TCPA Plaintiffs attempt to graft onto the Opt-Out Order an evidentiary standard for obtaining a retroactive waiver that does not exist. The Commission's order made clear its belief that the lack of explicit notice in its Notice of Proposed Rulemaking "may have contributed to confusion or misplaced confidence about th[e opt-out] notice requirement."<sup>15</sup> The Commission also noted that the inconsistency between footnote 154 of the Junk Fax Order<sup>16</sup> 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."<sup>17</sup> Based on these findings alone, the Commission found good cause to grant waivers to the original petitioners. The Commission did not engage in any case-by-case fact-finding or require the parties to demonstrate actual confusion.

The TCPA Plaintiffs acknowledge that they have no evidence of actual knowledge to rebut the reasonable presumption of confusion, but nonetheless contend that ZocDoc's petition should be denied because ZocDoc "has been silent on the issue in the underlying litigation and before the Commission."<sup>18</sup> The Commission should see this for the transparent fishing expedition that it is. ZocDoc has been "silent" in the underlying litigation because an individual judgment was awarded for Geismann pursuant to ZocDoc's offer of judgment and the class

---

<sup>15</sup> Opt-Out Order at ¶ 25

<sup>16</sup> *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 (2006) ("Junk Fax Order").

<sup>17</sup> *Id.* at ¶ 24.

<sup>18</sup> Plaintiffs' Comments at p. 32.

claims were dismissed before discovery began. There is nothing nefarious about that. Apparently unsatisfied with a recovery of more than Geismann could possibly have received at trial, Geismann's counsel has appealed that ruling to the Second Circuit and is attempting to use this proceeding before the FCC to gain improper discovery.

The Plaintiffs' Comments argue that Geismann "has a due-process right to investigate whether ZocDoc was aware of the opt-out rules,"<sup>19</sup> but this ignores the fact that Geismann's individual claim was satisfied by the entry of judgment in the Southern District of New York; therefore, Geismann has no unsatisfied due process rights in connection with the litigation.<sup>20</sup> In reality, ZocDoc's due process rights are at risk. The individual fact-finding proposed by the TCPA Plaintiffs would require more of ZocDoc than was required of the original petitioners. This would violate ZocDoc's due process rights because ZocDoc is entitled to the same treatment that the Commission gave to the original petitioners.

Finally, the TCPA Plaintiffs' argument regarding the "significance" of ZocDoc's potential liability is inconsistent with Geismann's own prior assessments of ZocDoc's potential liability and inconsistent with the Commission's analysis of the original petitions. On appeal to the Second Circuit, Geismann has argued that ZocDoc must pay damages for each alleged violation of the TCPA, meaning that "ZocDoc would have to offer \$12,000 to cover 'each such violation' of the TCPA and its implementing regulations, given the eight independent opt-out-

---

<sup>19</sup> *Id.*

<sup>20</sup> Moreover, the request that the Commission "stay a ruling on the ZocDoc petition until Plaintiff has completed discovery on the issue before the United States District Court for the Southern District of New York," Plaintiffs' Comments at p. 32, is misleading. The litigation never reached the discovery phase and judgment has been entered for Geismann. Barring reversal by the Second Circuit, Geismann will never "complete discovery" in this case. *See Geismann v. ZocDoc, Inc.*, Case No. 14-cv-472 (S.D.N.Y.), ECF No. 55 ("Accordingly, upon the entry of this judgment in accordance with the terms of the Rule 68 offer, there remains no case or controversy before the Court.").

notice violations in the two faxes.”<sup>21</sup> Using this figure, Geismann’s actual calculation of ZocDoc’s potential liability is more than \$492,000 (a minimum of 41 persons<sup>22</sup> x \$12,000). The TCPA Plaintiffs offer no explanation for how they would define “significant” liability, but certainly it is reasonable that potential liability of at least half a million dollars would be significant to any company.

Regardless, the Commission did not conduct individual analyses of the potential liability and financial hardship of each petitioner in drafting the Opt-Out Order and granting the original waivers. The Commission explained that the public interest was better served by a finding that the Junk Fax Order footnote created “confusion or misplaced confidence, [which] in turn, left some businesses potentially subject to significant damage awards under the TCPA’s private right of action or possible Commission enforcement.”<sup>23</sup> The Commission weighed this against competing public interests and was satisfied that those interests still would be served because the waivers are not indefinite.<sup>24</sup>

Accordingly, ZocDoc is similarly situated and the petition for waiver should be granted.

#### **IV. The 2006 reconsideration proceedings are irrelevant.**

The TCPA Plaintiffs discuss at length the proceedings of the 2006 Junk Fax Order, but those proceedings are entirely irrelevant. The Plaintiffs’ Comments argue that because some parties allegedly understood that the opt-out rules applied to solicited faxes and sought reconsideration, it is impossible for other parties to later contend that those rules were confusing.

---

<sup>21</sup> Appellant’s Brief, *Geismann v. ZocDoc, Inc.*, Case No. 14-3708 (2d Cir.), Ecf. No. 40, pp. 28-29.

<sup>22</sup> Plaintiffs’ Comments at p. 33.

<sup>23</sup> Opt-Out Order at ¶ 27.

<sup>24</sup> *Id.*

But ZocDoc was not a party to the 2006 reconsideration proceedings — nor could it have been, given that ZocDoc was not even founded until April 2007.<sup>25</sup> The TCPA Plaintiffs have not alleged any connection between the parties in those proceedings and ZocDoc (there is none), nor have they explained how the purported mental state and knowledge of those parties in 2006 could have any impact on ZocDoc at the time of its founding in 2007, at the time the alleged faxes were sent in 2012, or today. The TCPA Plaintiffs’ argument is directly at odds with the findings in the Opt-Out Order, in which the Commission unequivocally found that there *was* confusion.

This argument is yet another example of Anderson + Wanca’s efforts to seek reconsideration of the Opt-Out Order by any means, and in any forum, possible. Advancing such an argument under the guise of opposing ZocDoc’s waiver petition is not appropriate. Counsel for the TCPA Plaintiffs was heavily involved in the proceedings leading up to the Opt-Out Order and could have raised the issue of the 2006 proceedings with the Commission at any time. Given the TCPA Plaintiffs’ contention that “the Commission has not yet considered [the 2006 reconsideration proceedings] on a waiver petition,” it appears the TCPA Plaintiffs failed to previously raise the 2006 proceedings.<sup>26</sup> Accordingly, the Commission should disregard these arguments.

**V. ZocDoc does not request a prospective waiver, and even if it did, such a waiver would not endanger public health and safety.**

In a final effort to persuade the Commission not to grant ZocDoc’s petition for waiver, the TCPA Plaintiffs advance a series of arguments, each more absurd than the one before it, cautioning against the “dangers” of granting *prospective* relief to ZocDoc and its fellow

---

<sup>25</sup> See <http://www.zocdoc.com/aboutus> (last visited January 16, 2015).

<sup>26</sup> Plaintiffs’ Comments at p. 33.

petitioners. As an initial matter, this argument does not even apply to ZocDoc because ZocDoc clearly seeks “a waiver from the opt-out notice requirements of 47 C.F.R. §64.1200(a)(4)(iv) for all facsimiles sent by ZocDoc after the regulation’s effective date *and before the date of this Petition* for which ZocDoc had the recipient’s consent.”<sup>27</sup>

Even if ZocDoc requested prospective relief, the TCPA Plaintiffs’ arguments are without merit. First, ZocDoc does not pose “a risk to public safety.”<sup>28</sup> In fact, ZocDoc is helping build a better healthcare system. ZocDoc is an online medical care scheduling service, providing a free of charge medical care search facility for end users by integrating information about medical practices and doctors’ individual schedules in a central location. There is no evidence that ZocDoc has ever “seized” emergency or medical assistance telephone lines. Geismann’s claims are based on the alleged receipt of two faxes — one in July 2012 and the other in October 2012.<sup>29</sup> Geismann has not identified any other members of the putative class, nor has it alleged that ZocDoc’s faxes were so pervasive that they prevented the medical practice from functioning. Dr. Radha Geismann is a general practice internist whose office is never open earlier than 8:00 a.m. or later than 5:00 p.m., and is not open on weekends.<sup>30</sup> Dr. Geismann specializes in immigration exams and aviation medical exams, which are not the types of services likely to yield “emergencies.”<sup>31</sup> In short, even if ZocDoc’s *two* faxes briefly tied up Geismann’s fax line

---

<sup>27</sup> ZocDoc’s Petition for Waiver at p. 4 (emphasis added).

<sup>28</sup> Plaintiffs’ Comments at p. 38.

<sup>29</sup> *Geismann v. ZocDoc, Inc.*, Case No. 14-cv-472 (S.D.N.Y.), ECF No. 39, Exh. A & B.

<sup>30</sup> See <http://doctor.webmd.com/doctor/radha-geismann-md-f2bb6eab-1010-4fbe-a785-8b7889b34c9d-appointments> (last visited January 15, 2015).

<sup>31</sup> See <https://www.immigrantphysicals.com/dr-radha-geismann/> (last visited January 15, 2015); <http://www.faadr.com/07686-radha-geismann.html> (last visited January 15, 2015).

in 2012 (which ZocDoc does not concede), it is highly unlikely that any of Geismann's patients would have faxed her (or called her) in an emergency situation anyway. The same presumption can be applied to other faxes ZocDoc may send. On the whole, ZocDoc clearly does more to promote health and public safety than to detract from it.

The TCPA Plaintiffs' next argument relies on wild speculation and hyperbole, contending that a prospective waiver would allow a petitioner to fax a doctor's line "continuously" until April 30, 2015.<sup>32</sup> In addition to being unsupported by any evidence — for example, Geismann alleges that it received a total of *two* faxes from ZocDoc over a span of several months in 2012 and no faxes since then — it is completely illogical. There is absolutely no reason for a party sending fax advertisements to engage in the conduct discussed by the TCPA Plaintiffs because it would defeat the purpose of sending fax advertisements (a doctor presumably would not do business with a company that behaved in this fashion) and it would be incredibly expensive to send that many faxes. Because the fantastical situation set forth in the Plaintiffs' Comments will never come to pass, the Commission need not consider it.

Finally, the TCPA Plaintiffs make the absurd argument that "[i]f there is no opt-out notice, there is no way to revoke permission."<sup>33</sup> This once again defies logic and requires the assumption that all parties who send fax advertisements have no interest in customer service or actually building business relationships with the fax recipients. As set forth above, there is no reason for companies to intentionally send faxes to an individual once he or she has expressed a desire to opt out — there simply is no return on investment. The reality is that most faxes contain information for consumers to opt out. For example, the two faxes that Geismann

---

<sup>32</sup> Plaintiffs' Comments at p. 39.

<sup>33</sup> *Id.*

allegedly received each included language displayed in bold letters on the faxes stating: “To stop receiving faxes, please call (866) 975-3308.”<sup>34</sup> But Geismann has never alleged that it attempted to opt out. Instead, it collected the faxes from ZocDoc and, nearly two years later, filed a putative class action lawsuit alleging that the opt-out notices were not adequate. The picture painted by the Plaintiffs’ Comments of ruthless businesses sending faxes with reckless abandon is not how the world exists, but how the TCPA Plaintiffs want it to be. If the TCPA Plaintiffs accepted the fact that there are numerous ways to opt out of receiving faxes, there would be no reason for that plaintiffs’ bar to file more than 2,000 lawsuits a year under the TCPA.

Accordingly, the Commission should disregard these arguments as well.

## **VI. Conclusion**

For the foregoing reasons, ZocDoc respectfully request that the Commission disregard the arguments raised by the TCPA Plaintiffs and grant ZocDoc a waiver from the opt-out notice requirements of 47 C.F.R. §64.1200(a)(4)(iv) for all facsimiles sent by ZocDoc after the regulation’s effective date and before the date of this Petition for which ZocDoc had the recipient’s consent.

Dated: January 20, 2015

VEDDER PRICE, P.C.

By: /s/ Blaine C. Kimrey

Blaine C. Kimrey  
bkimrey@vedderprice.com  
Bryan K. Clark  
bclark@vedderprice.com  
222 N. LaSalle St.  
Chicago, IL 60601  
T: (312) 609-7500  
F: (312) 609-5005

Attorneys for ZocDoc, Inc.

---

<sup>34</sup> *Geismann v. ZocDoc, Inc.*, Case No. 14-cv-472 (S.D.N.Y.), ECF No. 39, Exh. A & B.

**CERTIFICATE OF SERVICE**

I, Blaine C. Kimrey, hereby certify that on this 20th day of January, 2015, a true and correct copy of the foregoing was served by U.S. mail to the following parties:

Brian J. Wanca, Esq.  
Glenn L. Hara, Esq.  
David Max Oppenheim, Esq.  
Anderson + Wanca  
Suite 760  
3701 Algonquin Road  
Rolling Meadows, IL 60008

Aytan Bellin, Esq.  
Bellin & Associates LLC  
85 Miles Avenue  
White Plains, NY 10606

Max G. Margulis, Esq.  
Margulis Law Group  
28 Old Belle Monte Road  
Chesterfield, MO 63017

*/s/ Blaine C. Kimrey*

\_\_\_\_\_

An attorney for ZocDoc, Inc.