

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

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

**REPLY COMMENT OF MEDVERSANT TECHNOLOGIES, L.L.C.
TO COMMENTS OF EDWARD SIMON AND AFFILIATED HEALTH CARE
ASSOCIATES, P.C. ON MEDVERSANT’S PETITION FOR WAIVER OF THE OPT-
OUT REQUIREMENTS FOR FAXES SENT WITH PRIOR EXPRESS PERMISSION**

Medversant Technologies, L.L.C. (“Medversant”), through counsel, offers this Reply Comment in support of its Petition for Waiver,¹ and in response to the Comments filed by Scott Z. Zimmerman on behalf of Edward Simon (“Simon”)² and Edelman, Combs, Lattuner & Goodwin, LLC, on behalf of Affiliated Health Care Associates, P.C. (“AHC”).³ For the reasons stated below, and in the Medversant Petition, Medversant is entitled to a retroactive administrative waiver of the opt-out requirement under Section 64.1200(a)(4)(iv) of Title 47 of the Code of Federal Regulations (the “Regulation”) as to faxes transmitted by Medversant with prior express permission of the recipients or their agents (“Solicited Faxes”) prior to April 30, 2015.⁴

¹ *Petition of Medversant Technologies, L.L.C. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278 and 05-338 (Jan. 8, 2015) (the “Medversant Petition”).

² *Edward Simon’s Comment on Petition for Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278 and 05-338 (Feb. 13, 2015) (the “Simon Comment”).

³ *Comment of Affiliated Health Care Associates, P.C. to Petition of Medversant Technologies, LLC*, CG Docket Nos. 02-278 and 05-338 (Feb. 13, 2015) (the “AHC Comment”).

⁴ Medversant is *not* seeking a waiver of the opt-out requirement based on its existing business relationship defense. The Commission should disregard AHC’s and Simon’s arguments on this point (AHC Comment at 2; Simon Comment at 23-24).

I. Introduction.

Simon challenges the Medversant Petition on three grounds, several of which are also asserted by AHC. None have merit.

Simon first argues that the Commission has no authority to waive violations of any regulations prescribed under the Telephone Consumer Protection Act (“TCPA”) in a private right of action. Of course, Medversant is not seeking a waiver of any violation of the TCPA – just a waiver of the Regulation’s opt-out requirements for Solicited Faxes. Simon’s argument is procedurally improper, has been previously considered and rejected by the Commission, and lacks legal support. The Code of Federal Regulations gives the Commission express and broad authority to waive its rules.

Simon and AHC both claim that Medversant is not “similarly situated” to the petitioners who obtained retroactive waivers from this Commission in *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 61 Communications Reg. (P&F) 671 (F.C.C. Oct. 30, 2014) (the “*Fax Order*”).⁵ Simon’s and AHC’s argument misconstrues the standard applied by the Commission to the petitioners in the *Fax Order*, a standard that Medversant easily meets. Medversant need not provide evidence of prior express permission at this procedural juncture – but it can, and will, before a court of competent jurisdiction.

Finally, Simon asserts that it would be against public interest to waive Medversant’s liability under the Regulation. Again, Medversant is not seeking a waiver of liability – just a waiver of the opt-out requirements for Solicited Faxes. In any event, as it did for the petitioners in the *Fax Order*, the public interest factor favors Medversant in this instance.

The Commission should grant the relief sought in the Medversant Petition.

⁵ In his Comment, Simon refers to the *Fax Order* as the “*Opt-Out Order*.”

II. The Commission Has Authority To Grant Retroactive Waiver Of The Regulation's Opt-Out Requirements For Solicited Faxes.

Simon first challenges the Medversant Petition on grounds that the Commission does not have the authority to waive violations of the regulations prescribed under the TCPA in a private right of action. In particular, Simon points to 47 U.S. Code § 227 and contends that the Commission has no role in determining, among other things, whether a violation has taken place or was willful or knowing. Simon further asserts that a waiver would violate the separation of powers.

Setting aside the point, previously mentioned, that Medversant is not seeking a waiver of liability, Simon's arguments lack merit for several reasons.

First, Simon's challenge is procedurally improper. Commenting on a petition is not the proper vehicle to appeal the *Fax Order* or to challenge the Commissioner's power. A "party challenging an FCC regulation as *ultra vires* must first petition the agency itself and, if denied, appeal the agency's disposition directly to the Court of Appeals as provided by the statute." *Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir. 2013) (internal citations omitted). The Commission should disregard the Simon Comment for this reason alone.

Second, Simon's arguments are redundant in that the Commission has already considered and rejected them. In the *Fax 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 vis-à-vis the judiciary," as one commenter has suggested. 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.

Fax Order at ¶ 21.

Third, Simon’s contentions are simply wrong. Although Simon argues otherwise, the Code of Federal Regulations gives the Commission express and broad authority to waive its rules:

The 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.⁶

Simon references several cases to support his claims. All three are inapposite.

Simon first cites to *Natural Res. Def. Council v. E.P.A.*, 749 F.3d 1055, 1064 (D.C. Cir. 2014) (“*NRDC*”) in order to compare the Commission’s authority to that of the Environmental Protection Agency (“EPA”). In *NRDC*, 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. However, *NRDC* involved a fundamentally different regulatory scheme, and the EPA did not enjoy the express waiver authority this Commission possesses under Section 1.3 of its rules.⁷ Further, the same court that issued the *NRDC* opinion agreed that where, as here, a requirement is not mandated by statute, this Commission “has authority under [Rule 1.3] to waive requirements . . . where strict compliance would not be in the public interest.” *See Nat’l Ass’n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009).

Simon next cites to *United States v. Klein*, 80 U.S. 128 (1872) for the proposition that a waiver of an opt-out notice for solicited faxes would deprive the United States District Court for the Central District of California from finding a violation of the Regulation and thereby violate the separation of powers. In *Klein*, the Supreme Court struck down a statute passed by Congress directing courts to treat presidential pardons as conclusive evidence of guilt. *Klein* is inapposite because **the Commission is not determining in this instance whether a violation occurred but rather clarifying that its own Regulation was not meant to require an opt-out notice for**

⁶ 47 U.S.C. § 227(b)(2); *Northeast Cellular v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (“The FCC has authority to waive its rules if there is ‘good cause’ to do so”); *see also* 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.”).

⁷ *See NRDC*, 749 F.3d at 1064 (the “EPA cannot rely on its gap-filling authority to supplement the Clean Air Act’s provisions when Congress has not left the agency a gap to fill.”).

Solicited Faxes. Courts presiding over private actions, like the ones initiated by Simon and AHC against Medversant, are encouraged to “defer to [the] agency’s interpretations . . . unless [courts] find that a ‘regulation is contrary to unambiguous statutory language, that the agency’s interpretations of its own regulation is plainly erroneous or inconsistent with the regulation, or that application of the regulation [is] arbitrary or capricious.’” *Nack*, 715 F.3d at 684. Courts or juries presiding over private actions brought against Medversant pursuant to the TCPA and the Regulation must still decide whether the faxes at issue were solicited such that the waiver would apply.

Simon’s third cite is to *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 2014 U.S. Dist. LEXIS 175425 (W.D. Mich. Dec. 12, 2014). The language Simon quotes from *Stryker* is beside the point – as explained above, Medversant is not seeking a waiver of liability under the TCPA, just a retroactive waiver of the opt-out requirements for Solicited Faxes. Further, Circuit-level case law favors Medversant’s position that courts should defer to the Commission. *See Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 268 (3d Cir. 2013); *Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 466-67 (6th Cir. 2010).

As it did in the *Fax Order*, the Commission has authority to grant Medversant a waiver of the opt-out requirement for Solicited Faxes in this case.

III. Medversant Is Entitled To Retroactive Waiver Of The Opt-Out Requirements For Solicited Faxes Because It Is Similarly Situated To The Petitioners In The Fax Order.

Simon and AHC argue that Medversant is not entitled to retroactive waiver of the opt-out requirements for Solicited Faxes because Medversant is not similarly situated to the petitioners in the *Fax Order*. Simon’s reasoning, and the argument apparently adopted by AHC, is that, unlike the petitioners in the *Fax Order*, Medversant did not actually obtain prior express permission to transmit fax advertisements and, unlike the petitioners, Medversant’s alleged violations did not result from confusion or misplaced confidence in the Commission’s rules. In so arguing, Simon and AHC fundamentally misconstrue the standard applied by the Commission to the petitioners in the *Fax Order*.

In the *Fax Order*, the Commission did not engage in any case-by-case fact finding to determine whether the petitioners had prior express permission to send faxes or actual confusion of the Commission's rules. To the contrary, the Commission granted waiver based on the finding that nothing in the record demonstrated that the petitioners understood that they had to comply with the opt-out notice requirement for fax ads sent for prior express permission but nonetheless failed to do so. Medversant asserts the same argument and Simon and AHC present no evidence indicating otherwise.

In support of their contention that Medversant's alleged violation did not result from confusion or misplaced confidence in the Commission's rules, Simon and AHC claim that Medversant does not contend that the footnote cited by petitioners in the *Fax Order*⁸ led to its own confusion. This is simply not true; Medversant does rely on the same rationale as the petitioners in the *Fax Order*. As explained in the Medversant Petition: "Medversant certainly did not '[understand] that [it] did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so.'" (Pet. at 3-4.)

Simon's and AHC's claim that Medversant needs to show evidence of prior express permission as part of its petition for retroactive waiver of the opt-out requirements for Solicited Faxes is also wrong.⁹ Indeed, in the *Fax Order*, the Commission explicitly stated that "the granting of such waivers [shall not] be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of recipients to be sent the faxes at issue. . . ." *Fax Order* at ¶ 31. Medversant should not be held to a different standard and Simon and AHC present no argument to justify such a deviation from the analysis applied by the Commission in the *Fax Order*. Further, even assuming *arguendo* and contrary to fact that Medversant did not obtain prior express permission from any of the fax recipients, Simon and AHC would not be

⁸ Footnote 154 of *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, 3810 n.154 (2006) ("Footnote 154 of the Junk Fax Order").

⁹ It should not go unnoticed that, by asking the Commission to factor in evidence of prior express permission, Simon fully contradicts his first argument that the Commission should play no role in determining whether a violation has taken place.

prejudiced in any way by the Commission granting a retroactive waiver of the opt-out requirement because the waiver would not apply to faxes sent without prior express permission.

In any event, even if it was appropriate for the Commission to consider evidence of prior express permission in connection with Medversant's Petition, and assuming for argument's sake that Medversant sent advertising faxes (which Medversant strongly denies),¹⁰ Medversant can in fact produce such evidence. In addition to obtaining permission via the Healthways Participating Practitioner Agreements, as attached to the Declaration of Scott Z. Zimmerman,¹¹ Medversant obtained permission from certain of the fax recipients when those health care providers affirmatively agreed to the terms of Medversant's privacy policy for ProviderSource, where Medversant credentials health care providers. That privacy policy explicitly states that "Medversant uses the ProviderSource online provider application to collect provider data[, including fax numbers], for all provider data-driven processes including credentialing, enrollment, provider and member relations, marketing and sales, claims assessment, etc," and health care provider credentialing through ProviderSource were required to affirmatively agree to these terms when they submitted their ProviderSource online provider application. Declaration of Kathleen Policarpio ¶ 3 & Ex. A, filed concurrently herewith.

Finally, Simon and AHC contend that Medversant has not demonstrated its potential liability. Simon argues that, because Medversant has a \$3 million insurance policy, the Commission cannot find that Medversant's damages are substantial enough to warrant a waiver (Simon Comment at n. 96); AHC argues, without any factual basis, that Medversant is liable for a maximum of \$60,000 (AHC Comment at 5). This is unfounded. Based on the numbers set forth in Simon's Comment, Medversant transmitted 36,000 faxes (Simon Comment at 6). Based

¹⁰ AHC attempts to argue that Medversant cannot claim the benefit of a prior express permission defense because Medversant disputes that the faxes it transmitted were advertisements. (AHC Comment at 5.) This is silly. If the faxes were not advertisements, there would be no basis for AHC to be suing Medversant in the first place. Medversant argues both that the faxes were not advertisements and, in the event that a tribunal with authority finds otherwise, that it had prior express permission to transmit those faxes.

¹¹ See Declaration of Scott Z. Zimmerman ("Zimmerman Decl."), Ex. E, filed concurrently with the Simon Comment.

on that number, and the statutory damages available under the TCPA (Simon Comment at 8), Medversant's potential liability under the statute (which Medversant denies) could be as much as \$54 million.

Medversant is similarly situated to the Petitioners in the *Fax Order* and is entitled to a waiver of the opt-out requirements for Solicited Faxes.

IV. Public Interest Considerations Also Support The Granting Of A Waiver.

Simon claims it would be against public policy to grant Medversant a waiver of liability because Medversant fails to meet its burden to demonstrate it is similarly situated to the petitioners in the *Fax Order*. As discussed above, Medversant readily meets the burden of demonstrating that it is entitled to a retroactive waiver of the opt-out requirements for Solicited Faxes. Medversant should not be penalized tens of millions of dollars as a result of its confusion or misplaced confidence in the Commission's rules.

The Commission has "acknowledge[d] that there is an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads. On balance, however, we find it serves the public interest in this instance to grant a retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward Because we do not waive the rule indefinitely, consumers will not, as a result of our action, be deprived of the rule's value." *Fax Order* ¶¶ 27-28. This balancing test weighs strongly in favor of Medversant, as it did for the petitioners in the *Fax Order*.

V. Conclusion.

For the reasons stated above, and in the Medversant Petition, Medversant respectfully requests the Commission grant Medversant a retroactive waiver of Section 64.1200(a)(4)(iv) of Title 47 of the Code of Federal Regulations for any Solicited Faxes transmitted by Medversant (or on its behalf) prior to April 30, 2015.

Respectfully submitted,

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Dated: February 20, 2015

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**DECLARATION OF KATHLEEN POLICARPIO IN SUPPORT OF REPLY COMMENT
OF MEDVERSANT TECHNOLOGIES L.L.C.**

1. I am a product manager at Medversant Technologies, L.L.C. (“Medversant”).

The facts contained in this declaration are true and correct, and they are based upon my personal and firsthand knowledge. If called upon to do so, I could and would testify to the contents.

2. Medversant provides a healthcare credentialing service called ProviderSource, which is used by healthcare organizations and healthcare providers. Online applicants to the ProviderSource are required to agree to the terms of Medversant’s privacy policy (“Privacy Policy”) when signing-up for the service.

3. Attached hereto as Exhibit A is a true and correct copy of the Privacy Policy.

4. Attached hereto as Exhibit B is a true and correct copy of the website page requiring online applicants to affirmatively agree to the terms of the Privacy Policy.

5. Certain Healthways providers who received faxes transmitted by Medversant on July 22, August 13, and August 20, 2014 had previously affirmatively agreed to the terms of the Privacy Policy.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and was executed this 20th day of February, 2015, at Los Angeles, California.

A handwritten signature in cursive script, appearing to read "Scott M. King", is written over a horizontal line.

Exhibit A

Privacy Policy

Your privacy is very important to us. Accordingly, we have developed this Privacy Policy in order for you to understand how we collect, use, communicate, disclose and make use of personal information. In this Privacy Policy, “we,” “us,” “our,” and other similar references mean Medversant and its ProviderSource portal. “You,” “your” and other similar references mean a specific user of the ProviderSource site. By visiting the ProviderSource site, you accept the practices described in this Privacy Policy, outlined as follows:

1. ProviderSource Purpose

- a. Medversant acts as a data collection agent on behalf of certain health plans, hospitals and other healthcare organizations. The use of your personal information by such health plans, hospitals, or other healthcare organizations is subject to a separate agreement between you and the organization(s).
- b. Medversant uses the ProviderSource online provider application to collect provider data for all provider data-driven processes including credentialing, enrollment, provider and member relations, marketing and sales, claims assessment, etc.
- c. In addition to ProviderSource, Medversant may use its own employees and agents to collect necessary data, and such employees and agents are subject to confidentiality restrictions, consistent with this Privacy Policy.
- d. Using ProviderSource does not grant or guarantee you participation with any health plan, hospital, or other healthcare organization.

2. The Collection and Use of Information

- a. Medversant will collect and use personal information (defined as information that identifies you, would allow someone to contact you, or defines your relationship with ProviderSource) with the sole objective of providing the services you have requested and for other compatible purposes, unless we obtain the consent of the individual concerned or as required by law.
- b. Some information is collected from you automatically when you view ProviderSource pages and download information. This may include your Internet Protocol (IP) address as assigned by your Internet Service Provider, domain name, the type of browser and operating system you used, the date and time you accessed the ProviderSource site, the pages you requested and visited, and the site you linked from to reach ProviderSource. Medversant uses this type of information to statistically measure site traffic and to improve the website. The information is not reviewed on an individual basis but is aggregated with other users for comparison purposes. Please note: in order to prevent the introduction of viruses and hackers into the ProviderSource portal, we may collect information, such as IP addresses, into a log file to be used to identify potential hackers of the ProviderSource system.
- c. Medversant will collect personal information by lawful and fair means and, where appropriate, with the knowledge or consent of the individual concerned.

- d. Personal data collected should be relevant to the purposes for which it is to be used, and, to the extent necessary for those purposes, should be accurate, complete, and up-to-date. ProviderSource collects personal information throughout the online application process including: account registration, application completion, help question submission, document upload, electronic signature completion, etc.
- e. You are never required to submit any information to the ProviderSource portal. If you choose not to submit certain information, however, you may not be able to access or use some of the features and functions of ProviderSource and its corresponding services.
- f. ProviderSource does not direct any content toward or knowingly collect or use personal information from children (a child is defined as someone who is less than 18 years old). If it is learned that a user is a child, all personal information will be promptly deleted for that user. If you are under the age of 18, please do not submit any personal information to ProviderSource.
- g. Medversant Technologies, LLC may transfer personal or proprietary information to one of our other international offices, to contractors, or to a customer located outside the country in which it was originally collected, in accordance with international data protection laws.

3. Information Security

- a. Medversant utilizes physical, electronic and administrative security measures to prevent unauthorized access, maintain data integrity, and enforce correct usage of users' personal information.
- b. We will protect personal information by utilizing reasonable security safeguards against loss or theft, as well as unauthorized access, disclosure, copying, use or modification.
- c. Except as noted in this Privacy Policy, access to users' personal information is limited to the employees, agents and officers of Medversant Technologies, LLC who need to use the information in the performance of their jobs.

4. Information Sharing and Disclosure

ProviderSource will not trade, sell or rent your personal information to others except as specified below. ProviderSource will only send personal information about you to others when:

- a. we have your consent to share the information; or
- b. we need to share your information to provide the product or service you have requested; or
- c. we are required to do so by law; or
- d. we must protect and defend our rights or property or the rights or property of other users of ProviderSource; or
- e. in an emergency, when we must protect the personal safety of users of ProviderSource or the public.

5. External Website Links

Companies or organizations separate from Medversant Technologies, LLC may have links to their websites or materials on ProviderSource. Medversant is not responsible for how these other companies or organizations collect, use, disclose, or secure the information that you provide them. If you choose to access a third party website linked to ProviderSource, you do so at your own risk and are subject to any terms of service or privacy policy (if any) associated with such external, third party websites.

6. User Control - Editing and Deleting Your Account Information

You will be able to edit your ProviderSource account information and preferences at any time. You may delete your ProviderSource account at any time using the ProviderSource account control features.

7. Changes to this Privacy Policy

Medversant may amend this privacy policy at any time. Medversant will prominently display any substantial changes in the way we use your personal information on this website.

We are committed to conducting our business in accordance with these principles in order to ensure that the confidentiality of personal information is protected and maintained at all times.
Last Updated: August 21, 2013

Exhibit B

*Email

*Confirm email

*Security question

*Security answer

*Provider type

*Enter the letters into the textbox



I have read and agree to the ProviderSource™ [Terms of Service](#) and [Privacy Policy](#).

Register

* - required fields