

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

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

**REPLY IN SUPPORT OF
PETITION FOR RETROACTIVE WAIVER**

Pursuant to 47 C.F.R. § 1.3 and Paragraph 30 of the Commission’s *Order*, CG Docket Nos. 02-278, 05-338, FCC 14-164, 61 Communications Reg. (P&F) 671 (Oct. 30, 2014) (the “*Order*”), Petitioners Healthways, Inc. (“Healthways”) and Healthways WholeHealth Networks, Inc. (“WholeHealth Networks”) (together, “Petitioners”) respectfully submit the following reply in support of their petition (the “Petition”) for a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s rules, 47 C.F.R. § 64.1200(a)(4)(iv), with respect to any alleged advertising faxes sent with the recipients’ prior express invitation or permission, and in response to the comments in opposition filed by Edward Simon (“Simon”) and Affiliated Health Care Associates, P.C. (“Affiliated”).

In the *Order*, the Commission clarified that the opt-out notice requirement under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the “TCPA”), which is set forth in 47 U.S.C. § 227(b)(1)(C) and (2)(d) of the statute, and in the implementing regulation, 47 C.F.R. § 64.1200(a)(4)(iv), applies to solicited fax advertisements (*i.e.*, fax advertisements sent with the recipients’ prior express invitation or permission). The Commission also granted a retroactive waiver of Section 64.1200(a)(4)(iv) to several petitioners who were facing lawsuits alleging that the petitioners had violated Section 64.1200(a)(4)(iv) by failing

to include the “opt-out” language in advertising faxes. The Commission determined that, because of potential confusion regarding whether the opt-out language was required in solicited fax advertisements, good cause supported a retroactive waiver, and that a waiver was in the public interest. *See Order* ¶¶ 26-28. The Commission invited “similarly situated parties” to seek retroactive waivers of the opt-out requirement with respect to solicited advertising faxes. *See id.* ¶ 30.

As Petitioners demonstrated in the Petition, they are similarly situated to the petitioners who were granted retroactive waivers in the *Order*. Petitioners currently are facing two putative class action lawsuits in which plaintiffs contend that Petitioners violated the TCPA and the Commission’s regulations by not including opt-out notices on alleged advertising faxes sent by Medversant Technologies, L.L.C. and WholeHealth Networks. *See Complaint, Simon v. Healthways, Inc., Healthways WholeHealth Networks, Inc., Medversant Technologies, L.L.C., et al.*, No. 2:14-08022 BRO-JC (C.D. Cal.) (filed September 16, 2014); *Class Action Complaint, Affiliated Health Care Associates, P.C. v. Medversant Technologies, LLC, Healthways WholeHealth Networks, Inc., et al.*, No. 1:14-cv-10247 (N.D. Ill.) (filed December 22, 2014).¹ One of the Petitioners’ defenses to the claims in those actions is that the alleged recipients of the faxes at issue – who are members of the network managed by WholeHealth Networks – provided their prior express invitation or permission to receive such faxes.

¹ Medversant Technologies, L.L.C., also has filed a petition for retroactive waiver with the Commission. *See In the Matter of Petition of Medversant Technologies, LLC for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338, Petition for Waiver (filed Jan. 8, 2015).

Only two parties submitted comments in opposition to the Petition: the named plaintiffs in the putative class actions pending against Petitioners.² Simon and Affiliated each argue that the Commission should deny the Petition. For the reasons set forth below, the Commission should reject their arguments, and grant the retroactive waiver sought by Petitioners.

I. The Commission Has The Authority To Grant A Retroactive Waiver.

Simon first argues that the Commission lacks the authority to waive violations of its regulations. (*See* Simon Comments at 10-19.)³ According to Simon, the Commission has no authority to waive its regulations with respect to a private right of action, and a waiver would “violate the separation of powers.” (*See id.*) Those arguments are without merit.

First, the Commission already has considered and rejected these arguments in the *Order*. (*Id.* ¶ 21.) Simon is not permitted to appeal the *Order*, or to challenge the Commission’s determinations in the *Order*, in the guise of commenting on the Petition here. *See, e.g., Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir. 2013). Simon’s attempt to collaterally attack the Order is procedurally improper, and should be rejected.

Second, even if Simon properly could collaterally attack the *Order* here (which he cannot), his arguments for why the Commission supposedly lacks authority to waive its regulations all fail.

Simon acknowledges (as he must) that the TCPA expressly authorizes the Commission to promulgate regulations under the TCPA (*see* Simon Comment at 10, citing

² *See Edward Simon’s Comments on Petition for Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by Healthways, Inc. and Healthways WholeHealth Networks, Inc.*, CG Docket Nos. 05-338 and 02-278 (April 10, 2015) (the “Simon Comment”); *Comments of Affiliated Health Care Associates, P.C. to Petition of Healthways, Inc. and Healthways WholeHealth Networks, Inc.*, CG Docket Nos. 02-278, 05-338 (April 15, 2015) (the “Affiliated Comment”).

³ For its part, Affiliated does not argue that the Commission lacks authority to grant the retroactive waiver sought in the Petition. (*See* Affiliated Comment at 1-6.)

47 U.S.C. § 227(b)(2)), but argues that the TCPA “does not authorize the Commission to ‘waive’ its regulations in a private right of action.” (See Simon Comment at 10-11.)

Simon ignores that it is well-settled that the Commission may suspend, revoke, amend, or waive any of its rules at any time “for good cause shown.” 47 C.F.R. § 1.3; *accord Nat’l Ass’n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009) (stating that “[t]he Commission has authority under its rules, see 47 C.F.R. § 1.3, to waive requirements not mandated by statute where strict compliance would not be in the public interest.”); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990). Thus, as the Commission already determined in the Order, it has the authority to waive the opt-out notice requirement with respect to solicited faxes. See *Order* ¶ 23 & n.82 (citing 47 C.F.R. § 1.3 and *Northeast Cellular*, 897 F.2d 1164).

Simon next argues that granting a retroactive waiver would “violate the separation of powers, both with respect to the judiciary and Congress.” (See Simon Comment at 12-19.) In doing so, Simon relies upon three cases: *United States v. Klein*, 80 U.S. 128 (1872); *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12-cv-0729, 2014 WL 7109630 (W.D. Mich. Dec. 12, 2014); and *Natural Resources Defense Counsel v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) (“*NRDC*”). None of those cases support his argument.

In *Klein* (decided in 1872), the Supreme Court invalidated legislation that prohibited a presidential pardon from being admitted into evidence in support of a claim against the federal government (and directed that if the Supreme Court determined that a judgment had been founded upon such a pardon, it must dismiss the case for lack of jurisdiction), finding that Congress had encroached upon the executive’s exclusive power to grant pardons. 80 U.S. at 146-48. Simon argues that *Klein* stands for the broad proposition that “one branch of

government cannot ‘prescribe a rule for the decision of a cause in a particular way’ to the judicial branch.” (Simon Comment at 13.) But even if that was an accurate reading of *Klein* (which it is not), it would have no bearing here. Contrary to what Simon asserts (notably, without any citation to the Petition) (*see id.* at 13), Petitioners are *not* asking the Commission to determine whether a violation of the TCPA has occurred. Instead, Petitioners are asking the Commission to act within its well-established authority to construe statutes and to apply its own regulations.

Simon also relies upon *Physicians Healthsource*, 2014 WL 7109630, at *14. (*See* Simon Comments at 14-15.) That decision, of course, is not binding upon the Commission. Nor is it persuasive, given the district court’s apparent assumption that the opt-out notice requirement for solicited faxes is in the TCPA itself (it isn’t), and its perfunctory analysis of the separation of powers argument – which, among other things, failed to address the Commission’s well-established authority to waive its regulations. 2014 WL 7109630, at *14.

Simon next contends that the *NRDC* decision supports his argument. (*See* Simon Comments at 15-19.) In that case, the D.C. Circuit held that the EPA did not have the authority to create an affirmative defense to a particular statutory cause of action. 749 F.3d at 1063-64. *NRDC*, however, involved a different administrative agency and a fundamentally different regulatory scheme than those involved here. Moreover, the D.C. Circuit recently confirmed that the Commission has the authority to waive requirements not mandated by statute where strict compliance would not be in the public interest. *Nat’l Ass’n of Broadcasters*, 569 F.3d at 426.

For all these reasons, as it concluded in the *Order*, the Commission has the authority to grant retroactive waivers of the opt-out notice requirement with respect to advertising faxes sent with the prior express permission or invitation of the recipients.

II. Petitioners Are Similarly Situated To The Parties Granted Retroactive Waivers In The Order.

As Petitioners previously demonstrated, they are similarly situated to the parties who were granted retroactive waivers in the *Order*. (*See* Petition at 5-6.) Petitioners are facing two putative class action lawsuits in which plaintiffs contend that Petitioners violated the TCPA and the Commission’s regulations by not including opt-out notices on alleged advertising faxes. One of the Petitioners’ defenses to the claims in those actions is that the alleged recipients of the faxes at issue – who are members of the network managed by WholeHealth Networks – provided their prior express invitation or permission to receive such faxes.

Moreover, the alleged advertising faxes at issue in *Simon* and *Affiliated* were sent after the Commission issued the *Junk Fax Order* – which included the “inconsistent” footnote stating that the opt-out notice requirement applied only to *unsolicited* advertising faxes – and before the Commission issued its October 30, 2014 *Order* clarifying the opt-out notice requirement. As the Commission has recognized, that footnote caused “confusion” and “misplaced confidence” regarding the applicability of the opt-out notice requirement to solicited faxes. *Order* ¶ 24. The Commission concluded that such confusion and misplaced confidence, coupled with questions about whether the Commission had provided adequate notice about its intent to adopt the opt-out notice requirement for solicited faxes, “presumptively establishes good cause for retroactive waiver of the rule.” *Id.* ¶ 26.

Simon and Affiliated both argue that Petitioners are not entitled to a waiver because, according to Simon and Affiliated, in connection with seeking a waiver, Petitioners were required to demonstrate the existence of prior express permission or invitation, and have not done so. (*See* Simon Comment at 2-22; Affiliated Comment at 1-5.) Simon and Affiliated are wrong.

Contrary to what Simon and Affiliated suggest, in the *Order*, the Commission did not condition the granting of waivers upon a determination that the petitioners had demonstrated prior express permission. Instead, the Commission made clear in the *Order* 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” *Order* ¶ 31.

Petitioners have asserted, as affirmative defenses in the *Simon* and *Affiliated* actions, that any alleged advertising faxes were sent with the prior express permission or invitation of the recipients, and at the appropriate time, will present evidence to the district courts demonstrating that prior express permission or invitation. Simon and Affiliated – not surprisingly – dispute the existence of such prior express invitation or permission. But as the Commission made clear in the *Order*, the existence of a dispute over the existence of prior express invitation or permission is not a reason to deny a retroactive waiver of the opt-out notice requirement. *See* *Order* ¶ 31 & n.104.⁴

Simon also argues that the Petition should be denied because, according to Simon, the district court in the *Simon* action purportedly has ruled that Petitioners cannot show the existence of prior express invitation or permission. (*See* Simon Comment at ii, 22.) That argument is based

⁴ Simon and Affiliated both misleadingly contend that Petitioners are seeking the waiver in connection with an established business relationship defense to the TCPA claims. (*See* Simon Comment at 25; Affiliated Comment at 2.) As the Petition makes clear, Petitioners seek the requested waiver with respect to any advertising faxes that were sent with the recipients’ prior express permission or invitation. (*See* Petition at 1, 4 & 5-6.)

upon a mischaracterization of the district court’s order denying the motion to stay that action. As that order (a copy of which is attached as Exhibit F to the Declaration of Scott Z. Zimmermann in Support of the Simon Comment) makes clear, the district court did *not* make any conclusive ruling on the merits regarding whether Petitioners will be able to establish prior express permission. Instead, at most, the district court found that the evidence submitted in support of the motion to stay – which, contrary to what Simon suggests, is not the entirety of the evidence of prior express permission in this case – did not “conclusively” rebut plaintiff’s allegation that the faxes were sent without prior express permission. (*See* Zimmermann Decl. Ex. F at 9.) Discovery and investigation in the *Simon* and *Affiliated* actions are continuing, and, at the appropriate time, Petitioners will present evidence demonstrating the existence of prior express permission.

Simon and Affiliated also argue that the Petition should be denied because, according to them, Petitioners do not demonstrate that they were confused about the opt-out notice requirement. (*See* Simon Comment at 22-23; Affiliated Comment at 5.) In the *Order*, however, the Commission did not require proof that individual petitioners were confused by the conflicting language in the Commission’s rules and orders. Instead, the Commission noted the conflicting language, and found that it “presumptively establishes good cause for retroactive waiver of the [opt-out notice] rule.” *Order* ¶ 26. The only specific finding that the Commission made in the *Order* about the petitioners’ subjective understanding was the determination that “we find nothing in the record here demonstrating that the petitioners understood that they 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.” *Id.*

Petitioners are similarly situated to the petitioners granted waivers in the *Order*. Here, Simon and Affiliated do not point to anything – and there is not anything – in the record

demonstrating that Petitioners understood that they had to comply with the opt-out notice requirement with respect to solicited faxes, but failed to do so. (*See* Simon Comment at 1-26; Affiliated Comment at 1-6.) As a result, Petitioners are similarly situated to the parties granted waivers in the *Order*, and also are entitled to retroactive waivers of the opt-out notice requirement.

Finally, Simon and Affiliated argue, in passing, that a waiver would not be in the public interest because Petitioners purportedly cannot show that they are subject to “potentially substantial damages.” (*See* Simon Comment at 24; Affiliated Comment at 5.) That is a strange argument for a plaintiff in a putative TCPA class action to make. It also is wrong. Simon has asserted that there are 41,000 faxes at issue in the putative class action. (*See* Simon Comment at 7.) Assuming, *arguendo*, that Simon could establish liability under the TCPA with respect to all of those faxes (which he cannot), that represents potential liability of at least \$20.5 million, which readily qualifies as “potentially substantial damages.”

For all of the reasons set forth above and in the Petition, Petitioners Healthways, Inc. and Healthways WholeHealth Networks, Inc. respectfully request that the Commission grant them the same retroactive waiver of Section 64.1200(a)(4)(iv) that the Commission already has granted to other, similarly situated parties.

Dated: April 21, 2015

Respectfully submitted,

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