

**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
)	

**MEDVERSANT TECHNOLOGIES, L.L.C.’S OPPOSITION
TO EDWARD SIMON’S REQUEST TO FILE SUPPLEMENTAL COMMENT ON
MEDVERSANT’S PETITION FOR RETROACTIVE WAIVER**

Medversant Technologies, L.L.C. (“Medversant”) hereby opposes the request of Edward Simon (“Simon”) for leave to file a Supplemental Comment¹ on the Medversant Petition.²

Simon seeks leave on grounds that he purportedly has new evidence to the effect that Medversant cannot show that it received prior express invitation or permission from the recipients of the faxes at issue in litigation pending in the Central District of California, referenced in Medversant’s Petition. Simon argues that the Medversant Petition should be denied because, according to Simon, the district court in the *Simon*³ action purportedly issued an order⁴ finding that Medversant cannot show the existence of prior express permission.

The Commission should reject Simon’s request. Simon’s request is based upon a mischaracterization of the *Simon* court’s order denying a *motion to stay* that action. As that order (on a motion to stay, not a motion for summary judgment) makes clear, the district court did *not* make any conclusive ruling on the merits regarding whether Medversant will be able to establish prior express permission. Instead, at most, the district court found that the evidence

¹ *Edward Simon’s Request to File Supplemental Comment on Petition for Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by Medversant Technologies, LLC Based on Matters After Simon’s Original Complaint*, CG Docket Nos. 02-278 and 05-338 (Apr. 15, 2015) (the “Supplemental Comment”).

² *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”).

³ *Edward Simon, DC v. Healthways, Inc. et al.*, No. 2:14-cv-08022 BRO (JCx), filed September 16, 2014 (“*Simon*”).

⁴ *Simon v. Healthways Inc.*, No. CV 14-08022 BRO JCX, 2015 WL 1568230 (C.D. Cal. Apr. 7, 2015).

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.⁵ Discovery and investigation in the *Simon* action are continuing, and, at the appropriate time, Medversant will present evidence demonstrating the existence of prior express permission. Simon also fails to explain in his request that the *Simon* court explicitly stated that it was *not* ruling on whether the privacy policy introduced by Medversant in connection with the motion to stay was sufficient to constitute prior express permission.⁶

Further, as discussed at length in the Medversant Petition and Reply Comment⁷, this is not the time or place for Simon to attempt to litigate on the merits of the dispute. In the *Fax Order*,⁸ 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. . . .”⁹ Neither the Simon Comment¹⁰ nor the proposed Supplemental Comment offer any argument to justify such a deviation from the analysis applied by the Commission in the *Fax Order*. Moreover, even assuming *arguendo*, and contrary to fact, that Medversant did not obtain prior express permission from any of the fax recipients, Simon would not be prejudiced in any way by the Commission granting a retroactive

⁵ *Simon*, 2015 WL 1568230, at *9.

⁶ *Id.*

⁷ *Reply Comment of Medversant Technologies, L.L.C. to Comments of Edward Simon and Affiliated Healthcare Associates, P.C. on Medversant’s Petition for Waiver of the Opt-Out Requirements for Faxes Sent with Prior Express Permission*, CG Docket Nos. 02-278 and 05-338 (Feb. 20, 2015) (the “Reply Comment”).

⁸ *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 61 Communications Reg. (P&F) 671, ¶ 31 (F.C.C. Oct. 30, 2014) (the “*Fax Order*”).

⁹ *Id.* at ¶ 31.

¹⁰ *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”).

waiver of the opt-out requirement because the waiver would not apply to faxes sent without prior express permission.¹¹

For the reasons stated above, the Commission should deny Simon's request.

Respectfully submitted,

/s/ Tanya L. Forsheit
Baker & Hostetler LLP
11601 Wilshire Boulevard, Suite 1400
Los Angeles, CA 90025-0509
(310) 820.8800 (phone)
(310) 820.8859 (fax)
tforsheit@bakerlaw.com

Dated: April 24, 2015

¹¹ Simon further argues that Medversant improperly introduced new facts in its Reply Comment and that the Supplemental Comment will give Simon a fair opportunity to address those new facts. Simon omits to mention that Medversant included its privacy policy in its Reply Comment solely for the purpose of responding to Simon's argument in his original Comment that Medversant should be required to introduce facts of prior express permission (and not because Medversant thinks that such evidence is remotely relevant to its petition for a retroactive waiver of the opt-out requirement).