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## **I. Background**

Plaintiff class action attorney Brian Wanca and his law firm Anderson + Wanca (collectively, “Wanca”) are no stranger to the Federal Communications Commission (the “Commission”) or these proceedings. Anderson + Wanca is a boutique law firm in Illinois that primarily sustains itself through the filing of junk fax class action lawsuits around the country. Wanca is currently counsel in over 60 junk fax class actions pending throughout the United States, including a class action lawsuit filed against Allscripts-Misy’s Healthcare Solutions, Inc., Allscripts, LLC, Allscripts Healthcare Solutions, Inc., and Allscripts Healthcare, LLC (collectively, “Allscripts”) in the Northern District of Illinois.<sup>1</sup>

Wanca’s client, Physicians Healthsource, Inc. (“PHI”), is a “serial” class action plaintiff being represented by Wanca in no fewer than 18 junk fax class action lawsuits throughout the country.<sup>2</sup> PHI is also the named plaintiff in the junk fax class action lawsuit currently pending against Allscripts in the Northern District of Illinois.

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<sup>1</sup> See *Physicians Healthsource, Inc. et al. v. Allscripts-Misys’s Healthcare, et al.*, Case No. 12-cv-3233 (N.D. Ill.).

<sup>2</sup> See *Physicians’ HealthSource, Inc. v. Stryker Sales Corporation, et al.*, Case No. 12-cv-000729-RJJ (W.D. Mich. 2012); *Physicians Healthsource, Inc. v. Allscripts-Misys’s Healthcare, et al.*, Case No. 12-cv-3233 (N.D. Ill. 2012); *Physicians Healthsource, Inc. v. Alma Lasers, Inc.*, Case No. 12-cv-04978 (N.D. Ill. 2012); *Physicians Healthsource Inc. v. Greenway Health LLC*, Case No. 8:14cv2593 (M.D. Fla. 2014); *Physicians Healthsource Inc. v. Transcept Pharma, Inc., et al.*, Case No. 3:14cv599 (D. Conn. 2014); *Physicians Healthsource Inc. v. Endo Pharmaceuticals Inc., et al.*, Case No. 14-2289 (E.D. Pa. 2014); *Physicians Healthsource Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc., et al.*, Case No. 14cv405 (D. Conn. 2014); *Physicians Healthsource Inc. v. Masimo Corporation*, Case No. 8:14cv00001 (C.D. Cal. 2014); *Physicians Healthsource Inc. v. Transcept Pharma, Inc. et al.*, Case No. 13cv5490 (N.D. Cal. 2013); *Physicians Healthsource Inc. v. Purdue Pharma LP, et al.*, Case No. 12-1208 (D. Conn. 2012); *Physicians Healthsource Inc. v. Multiplan Services Corporation, et al.*, Case No. 1:12-11693 (D. Mass. 2012); *Physicians Healthsource Inc. v. Formedic Communications Ltd.*, Case No. 12cv5087 (D.N.J. 2012); *Physicians Healthsource Inc. v. Cephalon Inc., et al.*, Case No. 2:12cv3753 (E.D. Pa. 2012); *Physicians Healthsource Inc. v. A-S Medication Solutions LLC, et al.*, Case No. 12cv5105 (N.D. Ill. 2012); *Physicians Healthsource Inc. v. Doctor Diabetic Supply LLC*, Case No. 1:12cv22330 (S.D. Fla. 2012); *Physicians Healthsource Inc. v. Reliant Technologies, Inc. et al.*, Case No. 12cv2180 (N.D. Cal. 2012); *Physicians Healthsource Inc. v. Anda Inc.*, Case No. 12cv60798 (S.D. Fla. 2012); *Physicians Healthsource Inc. v. Janssen Pharmaceuticals Inc.*, Case No. 12cv2132 (D.N.J. 2012).

Given Wanca's stake in so many junk fax lawsuits across the nation, it is not surprising that Wanca was heavily involved in the proceedings that led to the Commission's October 30, 2014 Ruling ("Fax Ruling").<sup>3</sup> Wanca filed numerous comments objecting to the 24 petitions that served the basis of the Commission's Fax Ruling.<sup>4</sup> Many of the petitioners were defendants in cases filed by Wanca. Wanca also filed several notices of *ex parte* presentations made before the Commission on the fax petitions.<sup>5</sup>

Wanca had argued to the Commission that addressing the petitions while related litigation was pending "violate[d] the separation of powers vis-à-vis the judiciary."<sup>6</sup> The Commission flatly rejected this argument, and properly so.<sup>7</sup> Wanca then ironically attempted to argue before the Commission disputed factual issues regarding whether the 24 petitioners subject to the

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<sup>3</sup> *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Application for Review filed by Anda, Inc., Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278 & 05-338, Order dated October 30, 2014 (herein "Fax Ruling").

<sup>4</sup> *See, e.g., TCPA Plaintiffs' Comments on Unique Vacations, Inc.'s Petition Concerning the Commission's Rule Requiring Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 05-338, 02-278, September 12, 2014; *TCPA Plaintiffs' Comments on American CareSource's Petition Concerning the Commission's Rule Requiring Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 05-338, 02-278, August 8, 2014; *TCPA Plaintiffs' Comments on Stericycle Inc.'s Petition Concerning the Commission's Rule Requiring Opt-Out Notices on Fax Advertisements*; CG Docket Nos. 05-338, 02-278, July 11, 2014; *TCPA Plaintiffs' Reply Comments Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 05-338, 02-278, Feb. 21, 2014; *TCPA Plaintiffs' Comments on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*; CG Docket Nos. 05-338, 02-278, Feb. 14, 2014; Letter to Commission commenting on fax petitions filed by Purdue Pharma L.P., Purdue Pharma Inc., and Purdue Products L.P., CG Docket Nos. 05-338, 02-278, December 30, 2013.

<sup>5</sup> *See, e.g., Notification of Ex Parte Presentation*, CG Docket Nos. 05-338 and 02-278, Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements, Aug. 27, 2014; *Notification of Ex Parte Presentation*, CG Docket Nos. 05-338 and 02-278, Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements, June 23, 2014; *Notice of Ex Parte Presentation*, CG Docket Nos. 05-338 and 02-278, May 8, 2014.

<sup>6</sup> Fax Ruling at ¶ 21 & n.77 (referencing letter from Brian J. Wanca, Anderson & Wanca, to Marlene H. Dortch, FCC, dated May 5, 2014).

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

October 30, 2014 Fax Ruling had the “prior express invitation or permission” to send faxes.<sup>8</sup>

The Commission declined the invitation to be the arbiter of factual issues reserved for the federal district courts and the triers of fact.<sup>9</sup>

On November 10, 2014, Anderson + Wanca filed a Petition for Review of the Commission’s Fax Ruling on behalf of multiple parties, including PHI, in the United States Court of Appeals for the District of Columbia Circuit with respect to the granting of retroactive waivers.<sup>10</sup> This petition, along with two other petitions for review, will proceed before the District of Columbia Court of Appeals.

Wanca has filed comments (“PHI’s Comments”),<sup>11</sup> on behalf of PHI, in response to Allscripts’ Petition.<sup>12</sup> Wanca filed nearly identical comments on behalf of Beck Simmons LLC in response to Francotyp-Postalia, Inc.’s petition,<sup>13</sup> which was subject to the same Public Notice as Allscripts’ petition on November 4, 2014.<sup>14</sup>

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<sup>8</sup> *Id.* at ¶ 31 & n.104 (referencing letter from Brian J. Wanca, Counsel for Anderson & Wanca, to Marlene H. Dortch, FCC filed in CG Docket No. 05-338, dated June 23, 2014, in which Wanca argues that he allegedly “obtained evidence contradicting the implication that [Petitioner] Stericycle obtained permission before sending its faxes”).

<sup>9</sup> *Id.*

<sup>10</sup> *Sandusky Wellness Center, LLC v. Federal Communications Commission*, No. 14-1235 (D.C. Cir. Nov. 10, 2014).

<sup>11</sup> *Physicians Healthsource, Inc.’s Comments on Allscripts Petition Seeking “Retroactive Waiver” of the Commission’s Rule Requiring Opt-Out Notices on Fax Advertisements Sent With Permission*, CG Docket Nos. 05-338, 02-278, November 18, 2014 (“PHI’s Comments”) at pg. 2, n.6 (arguing “the Commission has no authority to interfere in private TCPA litigation and that such an order would violate the separation of powers and due process and constitute a taking without just compensation”).

<sup>12</sup> *Petition of Allscripts-Misy’s Healthcare Solutions, Inc., Allscripts, LLC, Allscripts Healthcare Solutions, Inc., and Allscripts Healthcare, LLC for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (September 30, 2014) (“Allscripts Petition”).

<sup>13</sup> *Beck Simmons LLC’s Comments on Francotyp-Postalia, Inc. Petition Seeking “Retroactive Waiver” of the Commission’s Rule Requiring Opt-Out Notices on Fax Advertisements Sent With Permission*, CG Docket Nos. 05-338, 02-278, November 18, 2014.

<sup>14</sup> *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (November 4, 2014) (“Public Notice”) (seeking comments on Allscripts’ Petition and

PHI's Comments fail to identify any legitimate reason – much less a persuasive one – as to why Allscripts is not similarly-situated to the first batch of 24 petitioners, or why Allscripts should be denied a retroactive waiver. Rather than address the relevant issues head-on, PHI raises arguments that are best presented to the Court of Appeals for the District of Columbia Circuit and/or the district court presiding over PHI's lawsuit against Allscripts.

*First*, PHI asks the Commission to “clarify” whether petitioners seeking retroactive waivers must show they were “actually confused” regarding the opt-out notice requirements for “solicited” faxes. The Commission, however, declined to find this to be a relevant distinction in its October 30, 2014 Fax Ruling, and in any event, Allscripts did its level best to comply with what the Commission rightly observed is a confusing requirement.

*Second*, PHI argues that no matter what the standard, Allscripts' Petition should be denied because Allscripts purportedly did not claim to be, nor allegedly was it, actually confused about the law and because (PHI claims) Allscripts does not “maintain a record of persons who provided express consent to receive advertisements by facsimile transmission.”<sup>15</sup> This statement, however, is not a “fact,” but rather PHI's litigation position. PHI apparently believes that unless Allscripts had a list called “prior express invitation or permission,” it could not possibly have complied with the TCPA and, further, that this necessarily “proves” that Allscripts could not possibly have been “actually confused.” Allscripts strongly disputes PHI's position, and PHI's mischaracterization of the facts does not make PHI's position true or accurate.

*Lastly*, PHI argues that Allscripts should not be permitted prospective immunity until April 30, 2015 because Wanca has sued Allscripts twice and because (according to PHI) a six-month grant of prospective immunity “would create an unacceptable risk to public safety.”<sup>16</sup> PHI's position, however, is beyond absurd, particularly where PHI was a customer of Allscripts

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Petition of Francotyp-Postalia). These two petitions are the first petitions subject to Public Notice and comment following the Commission's Fax Ruling on October 30, 2014.

<sup>15</sup> PHI's Comments at Executive Summary, pg. iv.

<sup>16</sup> *Id.*, pg. iii.

and sent one or more faxes to Allscripts' entities *specifically requesting information via facsimile*. Where, as here, Allscripts is a provider of important services to the healthcare industry, including (at one time) to PHI, the suggestion that "public safety" is somehow implicated by Allscripts having transmitted information via facsimile to one of its customers is in no sense credible.<sup>17</sup>

## **II. Discussion**

### **A. Allscripts is Entitled to a Retroactive Waiver Because It is Similarly-Situated to the Prior Petitioners**

In its Fax Ruling, the Commission found "good cause" existed to grant retroactive waivers to the 24 prior petitioners and encouraged "similarly situated entities" to "request retroactive waivers from the Commission, as well."<sup>18</sup> The Commission noted 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>19</sup> The Commission also noted confusion that may have resulted due to an inconsistency between a footnote in its Junk Fax Order<sup>20</sup> referring specifically to "unsolicited advertisements" and its rules.<sup>21</sup> The Commission "note[d] that all petitioners make reference to the confusing footnote language in the record."<sup>22</sup> Notably, the Commission did not engage in any fact-finding as to each of the 24 petitioners on

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<sup>17</sup> <http://www.allscripts.com/company/about-us> (last visited November 25, 2014).

<sup>18</sup> Fax Ruling, at ¶¶ 22, 26, 30 & n.93.

<sup>19</sup> *Id.* at 25 & n.91.

<sup>20</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>21</sup> Fax Ruling, at ¶ 24.

<sup>22</sup> *Id.* at ¶¶ 24, 26 & n.86, n.92.

the issue of “confusion,” nor did it request comments on that issue.<sup>23</sup> Rather, it was sufficient that the petitioners noted the confusion, which the Commission itself found to be “reasonable.”<sup>24</sup>

Allscripts stands in an identical position to the prior petitioners. Allscripts’ Petition referred to the same inconsistencies and attendant confusion regarding the Commission’s rules. It noted the “unnecessary litigation efforts stemming from confusion over the Commission’s regulations”<sup>25</sup> and the fact that “[t]he Commission’s [Junk Fax Ruling] itself is also confusing.”<sup>26</sup> The Commission acknowledged as much in its Public Notice seeking comments on the petition.<sup>27</sup> Therefore, Allscripts is entitled to the same retroactive waiver, including any prospective waiver,<sup>28</sup> that the prior petitioners received.

PHI/Wanca urge this Commission to hold Allscripts (and other subsequent petitioners) to a new, higher standard, that of “actual confusion,” than that applied to the prior petitioners. But that request must be swiftly rejected.<sup>29</sup> Requiring a higher (or even different) standard for later-

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<sup>23</sup> The Commission’s Public Notice requesting comments on Allscripts’ Petition stated that “the Commission granted retroactive waivers of this requirement to several individual petitioners because of the *claimed uncertainty* about whether the opt-out notice applied to ‘solicited’ faxes.” Public Notice, *supra* note 14 (emphasis added).

<sup>24</sup> Fax Ruling at ¶ 27 (noting that failure to comply with the rule “could be the result of reasonable confusion or misplaced confidence”).

<sup>25</sup> Allscripts Petition, at pgs. 2, 10.

<sup>26</sup> *Id.* at pg. 6. *See generally id.* at pgs. 5-7.

<sup>27</sup> Public Notice, *supra* note 14 (“The Petitioners also allege that confusion was created regarding the applicability of the rule by language contained in a footnote to the Commission’s 2006 order adopting the rule.”).

<sup>28</sup> PHI/Wanca argue that Allscripts is not entitled to a prospective waiver because it “would endanger public health and safety, given Allscripts’ history of targeting medical professionals[.]” PHI’s Comments, at pg. 15-17. The only “history” here is PHI/Wanca’s mere allegations of junk fax violations against Allscripts in two cases (one of which settled and the other which is being heavily litigated), and Wanca’s long history of filing a multitude of similar junk fax lawsuits across the country. *See supra* note 2. To the extent PHI/Wanca take issue with the Commission for granting prospective immunity in the first place, the appropriate venue for consideration of that issue is the D.C. Circuit. *See supra* note 10.

<sup>29</sup> In fact, PHI specifically disputes that any of the prior petitioners met this higher standard, despite having already received retroactive waivers. PHI’s Comments, pg. 10 n.54.

filed petitions would not only be patently unfair to those subsequent petitioners, it would be a violation of their due process and Constitutional rights. It also would be inconsistent with the Commission’s Public Notice issued on November 4, 2014. Similarly-situated entities must be afforded the same treatment in order to comport with due process considerations. Moreover, subsequent petitioners should not be disadvantaged merely based on the timing of their petitions. To do so would entirely nullify the purpose of the Commission’s six-month window allowing similarly-situated parties to come forth and receive the same retroactive relief.<sup>30</sup>

**B. Private Litigation Initiated By PHI and Wanca is Irrelevant**

The vast majority of PHI’s Comments is devoted to discussing a prior junk fax lawsuit filed by Wanca and Radha Geismann, M.D. against Allscripts in the Northern District of Illinois in 2009.<sup>31</sup> PHI suggests that because Allscripts was sued in the *Geismann* and *PHI* suits, Allscripts must have known that it was required to comply with the opt-out notice requirements for “solicited” faxes. The argument is deeply flawed, and nothing more than a red-herring.

The *Geismann* suit was settled before the parties had an opportunity to litigate the merits of the case, and Allscripts strongly disputed liability. No determinations on the merits were made, including whether the faxes at issue were “solicited” (*i.e.*, sent with “prior express invitation or permission”) or whether the faxes were required to comply with the technical opt-out notice requirements. Moreover, as part of that settlement, Allscripts specifically disclaimed any admission of liability whatsoever.<sup>32</sup> Further to the point, as PHI/Wanca admit, the settlement was “strictly limited” to the specific faxes sent during a very narrow period of time — February 11, 2008 to April 26, 2008 – a period fewer than three months. Allscripts had no incentive to “hide” other faxes as PHI intimates; to the contrary, it had *every* incentive to obtain

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<sup>30</sup> Fax Ruling, at ¶¶ 22, 26, 30 & n.93.

<sup>31</sup> PHI’s Comments, at pgs. 2-10; *see Geismann v. Allscripts Healthcare Solutions, Inc.*, Case No. 09-cv-5114 (N.D. Ill.).

<sup>32</sup> *See Geismann v. Allscripts Healthcare Solutions, Inc.*, Case No. 09-cv-5114 (N.D. Ill.), Dkt. No. 132-1, at pgs. 1, 13.

the greatest relief possible in the *Geismann* settlement, a settlement that cost Allscripts \$1.9 million and earned Wanca fees and costs in excess of \$585,000.

Tellingly, just a few months after final approval was granted in the *Geismann* case, Wanca filed his next case against Allscripts on behalf of PHI, alleging further violations of the junk fax rule for *different* faxes that were allegedly (and coincidentally) sent just outside the timeframe of the claims released in *Geismann* and during the pendency of the *Geismann* litigation.<sup>33</sup>

Similarly, the current lawsuit, filed by PHI, is hotly contested and no merit determinations have been made, including whether the faxes at issue were “solicited” or required opt-out notice. PHI’s attempt to impute “actual knowledge of the law”<sup>34</sup> to Allscripts with respect to “solicited faxes” based on a prior settlement and pending litigation, where there were no merit determinations or admissions of liability, must be flatly rejected. The applicability of the opt-out notice requirements to “solicited” faxes was, according to the Commission, “confusing” and did not become clear until the Commission clarified the rules in its Fax Ruling on October 30, 2014.

### **C. The Issue of “Prior Express Invitation or Permission” is Equally Irrelevant**

As the Commission has already made clear, the granting of the retroactive waivers should not “be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.”<sup>35</sup>

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<sup>33</sup> The inference is inescapable – Wanca settled the *Geismann* case knowing full well he had PHI waiting in the wings as a new plaintiff.

<sup>34</sup> PHI’s Comments, at pg. 13 (claiming, incorrectly, that Allscripts had actual knowledge of the law when it sent the faxes at issue and simply chose not to comply). Curiously, PHI also argues that “given how easy it is to comply with the notice requirements,” “the only reasonable conclusion” is that Allscripts knew it had to comply “but made a conscious decision not to.” *Id.*, pg. 13-14. This argument is nonsensical. If that were true, it must necessarily be the case that every entity that fails to comply with the very technical requirements of opt-out notice must be purposely and flagrantly violating the law. The more likely explanation is the “reasonable confusion” in the rules that the Commission has previously acknowledged. *See supra* note 24.

<sup>35</sup> Fax Ruling, at ¶ 31 & n.104.

Whether the petitioners had “prior express permission or invitation” “remains a source of dispute between the parties.”<sup>36</sup> Despite acknowledging that the Commission has left these factual issues for determination by the district courts,<sup>37</sup> Wanca nonetheless argues that Allscripts did not have, and could not have had, prior express permission to send the faxes to PHI. Wanca tried a similar maneuver with respect to Stericycle’s petition, and the Commission correctly declined to resolve the dispute, leaving it to be decided in the pending litigation.<sup>38</sup> The Commission should do the same here.

Notwithstanding the Commission’s correct decision to defer disputed factual issues to the trier of fact, PHI’s argument is unconvincing in any event. PHI’s argument rests on a single discovery response from Allscripts in the underlying *PHI* litigation. Specifically, PHI asked Allscripts to admit or deny that “someone on your behalf maintains a record of persons who provided express consent to receive advertisements by facsimile machine and the dates of their consent” – in other words, a “prior express invitation or permission” list.<sup>39</sup> Allscripts objected to this request as being vague, among other things, and denied that it “maintains a record of persons who provided express consent to receive advertisements by facsimile transmission.”<sup>40</sup>

Allscripts’ response in no sense confesses judgment on the permission issue as PHI suggests. Rather, the response means just what it says: Allscripts does not maintain a special database or depository for persons or entities from whom it has “prior express invitation or permission” (a legal term of art not defined by the statute or regulations) to send fax advertisements. Rather, Allscripts has a database that contains customers and entities from whom it reasonably believes it has express permission to send and receive communications by

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<sup>36</sup> *Id.* (citing letter from Wanca alleging contradictory evidence on the issue of permission, but refusing to decide factual issue for purposes of granting retroactive waivers).

<sup>37</sup> PHI’s Comments at pgs. iv, 9-10, 14.

<sup>38</sup> Fax Ruling, at ¶ 31 & n.104.

<sup>39</sup> PHI’s Comments, Ex. C at pg. 7.

<sup>40</sup> *Id.*

facsimile, including (as appropriate) facsimile advertisements.<sup>41</sup> Allscripts vigorously disputes PHI's contention that Allscripts' discovery response somehow means that it did not have the proper permission to send faxes to PHI and other fax recipients. Allscripts will present evidence of the permission it received to send PHI fax advertisements at the appropriate time and before the proper forum.<sup>42</sup>

### **III. Conclusion**

Allscripts' Petition makes clear that it stands in the same shoes as the prior petitioners and that it too is entitled to a retroactive waiver in accordance with the Commission's Fax Ruling. PHI/Wanca's objections are entirely irrelevant, and are offered in order to preserve their own self-interest in pursuing private litigation against Allscripts and many others. For all the reasons stated, Allscripts respectfully requests that the Commission grant it a retroactive waiver consistent with its Fax Ruling of October 30, 2014.

Dated: November 25, 2014

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<sup>41</sup> Allscripts disputes PHI's characterization of many of the facsimile transmissions as "advertisements."

<sup>42</sup> Evidence of "prior express invitation or permission" need not be in writing, contrary to what PHI/Wanca suggests. *See* Junk Fax Order, 21 FCC Rcd 3787, ¶ 45 (2006) ("Prior express invitation or permission may be given by oral or written means, including electronic methods."). *See generally* PHI's Comments, pg. 14 & n.68.

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