

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

In the Matter of)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

**TCPA Plaintiffs' Comments on Petitions for Waiver of the Commission's Rule on
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.**

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Table of Contents

	Page
Executive Summary	v
Procedural History	2
Factual Background.....	4
A. The <i>EatStreet</i> litigation.....	4
B. The <i>McKesson</i> litigation.....	4
C. The <i>PCH</i> litigation.....	9
D. The <i>St. Luke’s</i> litigation.....	11
E. The <i>Sunwing</i> litigation.....	13
F. The <i>ZocDoc</i> litigation.....	16
Argument.....	19
I. The Commission has no authority to “waive” violations of the regulations prescribed under the TCPA in a private right of action, and doing so would violate the separation of powers.....	19
II. McKesson, PCH, St. Luke’s, Sunwing, and ZocDoc are not “similarly situated” to the petitioners covered by the Opt-Out Order.....	22
A. McKesson is not “similarly situated.”.....	22
1. McKesson had actual knowledge of the regulation requiring opt-out notice on faxes sent with permission, provided by the Commission itself.....	22
2. McKesson does not claim it was actually “confused” about whether opt-out notice was required on faxes sent with permission.....	23
3. McKesson’s potential liability is not “significant” in comparison to its financial resources.....	24

B.	PCH is not “similarly situated.”.....	25
1.	PCH does not claim it was “confused” about the Commission’s rules.....	25
2.	Plaintiff has a due-process right to inquire into whether PCH had actual knowledge of the rules if that factor is dispositive of its private right of action	26
3.	PCH has failed to demonstrate its potential liability is “substantial” when compared to its financial resources	27
C.	St. Luke’s is not “similarly situated.”	28
1.	St. Luke’s claims it was “confused” about whether opt-out notice was required, but it does not claim its confusion resulted from footnote 154 or the notice of rulemaking.....	28
2.	Plaintiff has a due-process right to inquire into whether St. Luke’s had actual knowledge of the rules if that factor is dispositive of its private right of action	28
3.	St. Luke’s has provided no evidence it faces “crushing” potential liability in the private litigation.....	29
D.	Sunwing is not “similarly situated.”	30
1.	Sunwing claims it “did not understand” the regulations, not that it was “confused.”	30
2.	Plaintiff has a due-process right to inquire into whether Sunwing had actual knowledge of the rules if that factor is dispositive of its private right of action	30
3.	Sunwing has not demonstrated its potential liability is “massive” in comparison to its financial resources.....	31
E.	ZocDoc is not “similarly situated.”.....	31
1.	ZocDoc does not claim it was actually “confused” about the law when it sent its faxes	31

2.	Plaintiff has a due-process right to inquire into whether ZocDoc had actual knowledge of the rules if that factor is dispositive of its private right of action	32
3.	ZocDoc has not demonstrated its potential liability is “significant” in comparison to its financial resources.....	33
III.	The proceedings on reconsideration of the 2006 Junk Fax Order—which the Commission has not yet considered on a waiver petition—demonstrate interested parties immediately understood the opt-out rules and were not “confused” by footnote 154 or the notice of rulemaking	33
IV.	Allowing McKesson, PCH, St. Luke’s, Sunwing, and ZocDoc to send opt-out-free fax advertisements until April 30, 2015, would endanger public health and safety.....	38
	Conclusion.....	40

Executive Summary

On October 30, 2014, the Commission granted “retroactive waivers” of 47 C.F.R. § 64.1200(a)(4)(iv) to defendants in private TCPA litigation and allowed “similarly situated” persons to seek waivers. The Commission stated “all future waiver requests will be adjudicated on a case-by-case basis” and did not “prejudge the outcome of future waiver requests in the order.” The Commission should deny the current petitions for four reasons.

First, the Commission has no authority to “waive” violations of the regulations “prescribed under” the TCPA in a private right of action. Doing so would violate the separation of powers because the courts have exclusive authority to determine whether “a violation” of the regulations has taken place, and because Congress has determined that “each such violation” gives rise to \$500 in statutory damages.

Second, the current petitioners are not “similarly situated” to the prior petitioners. McKesson had actual knowledge of the opt-out regulations for at least two years before it sent its faxes, after the Commission’s Enforcement Bureau cited McKesson for TCPA violations and provided it with a copy of § 64.1200, advising it to comply. Also, McKesson’s potential damages are not “significant” when compared to its massive financial resources.

PCH does not claim it was “confused” about whether opt-out notice was required or even state whether it was aware of the Commission’s rules, making it just as likely PCH had actual knowledge of the rules when it sent its faxes. PCH also has not established it faces “significant” liability in the litigation.

St. Luke’s claims it was “confused” about whether opt-out notice was required when it sent its faxes, but it does not claim its confusion stemmed from the two sources of

“confusion” identified in the October 30 order (the 2005 notice of rulemaking and footnote 154). Plus, St. Luke’s has provided no evidence that its potential liability is “crushing,” “ruinous,” or “catastrophic,” as it claims.

Sunwing does not claim actual “confusion,” and it has failed to demonstrate it faces “significant” potential liability in the private litigation.

ZocDoc does not claim it was actually “confused” over whether opt-out notice was required, and it fails to demonstrate that it faces “significant” liability.

Third, the record on the petitions for reconsideration of the 2006 order demonstrates that regulated parties immediately understood the new rules required “all faxed advertisements” to include opt-out notice, and that the “plain language” extended to “solicited facsimile advertisements.” These parties were not “confused” by the notice of rulemaking or footnote 154. This record was not raised in the petitions addressed in the October 30 order or the comments on those petitions, and it rebuts any “presumption” of confusion on the part of the current petitioners.

Fourth, even if the Commission grants retroactive waivers, it should not grant prospective waivers to McKesson, PCH, St. Luke’s, Sunwing, and ZocDoc because it would endanger public health and safety. These petitioners have a history of targeting physicians and other medical-care providers with fax advertisements, and granting a prospective waiver of the opt-out requirements would allow them to “lock in” any permission they hold today simply by not including opt-out notice on their faxes until April 30, 2015.

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Commenters are plaintiffs in private TCPA actions against petitioners EatStreet, Inc. (“EatStreet”), McKesson Corp. (“McKesson”), Philadelphia Consolidated Holding Corp. (“PCH”), St. Luke’s Center for Diagnostic Imaging, LLC (“St. Luke’s”), Sunwing Airlines, Inc. (“Sunwing”), and ZocDoc, Inc. (“ZocDoc”). Petitioners seek “retroactive waivers” of the regulation requiring opt-out notice on fax advertisements sent with “prior express invitation or permission,” which they intend to present to the courts presiding over the private litigation, asking the courts to excuse any violations of the opt-out regulation.¹ The Consumer and Governmental Affairs Bureau sought comments on December 30, 2014.²

¹ See *Petition of EatStreet, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules*, CG Docket Nos. 02-278, 05-338 (Dec. 12, 2014) (EatStreet Petition); *Petition for Waiver of McKesson Corp.*, CG Docket Nos. 02-278, 05-338 (Nov. 25, 2014) (McKesson Petition); *Petition for Waiver of PCH*, CG Docket Nos. 02-278, 05-338 (Dec. 19, 2014) (PCH Petition); *Petition of St. Luke’s Center for Diagnostic Imaging, LLC for Retroactive Waiver*, CG Docket No. 05-338 (Dec. 8, 2014) (St. Luke’s Petition); *Petition for Retroactive Waiver of Sunwing*, CG Docket No. 05-338 (Nov. 26, 2014) (Sunwing Petition); *Petition for Waiver by ZocDoc, Inc.*, CG Docket Nos. 02-278, 05-338 (Dec. 4, 2014) (ZocDoc Petition).

² *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions For Waiver of the Commission’s Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Dec. 30, 2014).

Procedural History

On October 30, 2014, the Commission issued the Opt-Out Order,³ granting “retroactive waivers” intended to relieve the covered TCPA defendants of liability in private TCPA actions for past violations of § 64.1200(a)(4)(iv) as well as prospective waivers for any future violations through April 30, 2015.⁴ The Commission invited “similarly situated” parties to petition for similar waivers.⁵

Undersigned counsel filed comments on two post-order petitions on November 18, 2014,⁶ and another five petitions on December 12, 2014,⁷ asking the Commission to clarify whether the standard for a waiver is that the petitioner was *actually* confused about whether opt-out notice was required when it sent its faxes⁸ or whether the Commission created a

³ *In re Rules & 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, FCC 14-164 (rel. Oct. 30, 2014) ¶ 26.

⁴ Plaintiff’s counsel opposed these “waivers,” 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. On November 10, 2014, Plaintiffs appealed the waiver portion of the order to the D.C. Circuit Court of Appeals in *Sandusky Wellness Center, LLC v. FCC*, No. 14-1235 (D.C. Cir. Nov. 10, 2014).

⁵ Opt-Out Order ¶ 30.

⁶ *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Beck Simmons LLC’s Comments on Francotyp-Postalia Petition (Nov. 18, 2014); *id.*, Physicians Healthsource, Inc.’s Comments on Allscripts Petition (Nov. 18, 2014).

⁷ *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, TCPA Plaintiffs’ Comments on Petitions for Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by Alma Lasers, ASD Specialty Healthcare, Den-Mat Holdings, and Stryker Corp. (Dec. 12, 2014).

⁸ Opt-Out Order ¶ 26 (stating waiver was justified because footnote 154 of the 2006 Junk Fax Order “led to confusion or misplaced confidence on the part of petitioners”); *id.* ¶ 32 (stating Commission granted waivers “to parties that have been confused by the footnote”).

presumption that petitioners are confused in the absence of evidence they were “simpl[y] ignorant” or knowingly violated the law.⁹

Plaintiffs’ counsel explained they expect dozens of defendants in TCPA fax litigation to petition the Commission for waivers before April 30, 2015, and that the Commission should expect waiver requests from defendants in non-fax TCPA litigation, as well. Counsel noted a defendant in a text-message case had already sought a waiver and that a commenter on a separate petition had suggested the Commission create a “path for retroactive waiver” from the telemarketing rules in private TCPA litigation.¹⁰ Plaintiffs noted that, on December 5, 2014, Wells Fargo filed comments citing the Opt-Out Order as authority for a retroactive waiver absolving TCPA defendants of liability for cellular-phone calls where the “called party” is not the “intended recipient.”¹¹

By one estimate, there were 2,069 private TCPA lawsuits filed in 2014 (as of October 31).¹² If the standard for a waiver from TCPA liability is that the law is “confusing” and that the petitioner is subject to “substantial” damages, the Commission should expect a waiver

⁹ *Id.* (stating combination of footnote 154 and lack of notice “presumptively establishes good cause for retroactive waiver,” finding no evidence “that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement,” and “emphasiz[ing]” that “simple ignorance” of the law “is not grounds for a waiver”).

¹⁰ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling of the Consumer Bankers Assoc.*, CG Docket No. 02-278, Comments of ACA Int’l (Nov. 17, 2014) at 2 & 10.

¹¹ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling of the Consumer Bankers Assoc.*, CG Docket No. 02-278, Reply Comments of Wells Fargo (Dec. 5, 2014) at 9 & n.35 (citing Opt-Out Order ¶ 26).

¹² Debt Collection Litigation & CFPB Complaint Statistics, October 2014, WebRecon, Nov. 21, 2014, available at <http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-october-2014>.

petition to be filed in the majority of TCPA cases. Plaintiffs reiterate their request that the Commission clarify the standards it applied in the Opt-Out Order.

Factual Background

A. The *EatStreet* litigation.

The *EatStreet* litigation has been resolved by agreement.

B. The *McKesson* litigation.

On May 9, 2008, the Commission served McKesson with a Citation, attached hereto as Exhibit A, warning McKesson that it “apparently sent one or more unsolicited advertisements to telephone facsimile machines in violation of” the TCPA.¹³ The Citation advised McKesson that an “unsolicited” advertisement is one sent without the recipient’s “prior express invitation or permission” and that “[m]ere distribution or publication of a fax number does not establish consent to receive advertisements by fax.”¹⁴ The Citation informed McKesson that an advertiser may send faxes pursuant to an established business relationship (“EBR”), but only if the requirements of 47 U.S.C. § 227 and 47 C.F.R. § 64.1200 are met.¹⁵ The Citation attached “[a] copy of these provisions”¹⁶ and warned, “in the event of a complaint or dispute, the burden rests with the fax sender to demonstrate that it either obtained prior express invitation or permission to send the facsimile advertisement

¹³ Ex. A at 1.

¹⁴ *Id.*

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 1, n.1.

or satisfied all the criteria necessary to invoke the established business relationship exemption.”¹⁷

The copy of § 64.1200 the Commission provided McKesson in May 2008 stated, as it does today, that one of the criteria for the EBR exemption is that “the advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements.”¹⁸ The regulation also stated, as it does today, that “[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with” the same requirements as EBR faxes.¹⁹

On May 15, 2013, undersigned counsel filed a putative class action against McKesson in the United States District Court for the Northern District of California on behalf of True Health Chiropractic, Inc., a chiropractic practice in a suburb of Columbus, Ohio.²⁰ Plaintiffs later filed an amended complaint and a Second Amended Complaint (“SAC”) adding McLaughlin Chiropractic Associates, Inc., a chiropractic practice in Tennessee, as an additional Plaintiff.²¹ The SAC alleges McKesson sent “unsolicited” fax advertisements to Plaintiffs on April 20, 2010, February 3, 2010, February 22, 2010, and May 11, 2010.²²

In addition, the SAC alleges McKesson is precluded from raising an affirmative defense based on EBR or “prior express invitation or permission” because the faxes do not

¹⁷ *Id.* at 3.

¹⁸ 47 C.F.R. § 64.1200(a)(3)(iii) (2008) (since recodified as § 64.1200(a)(4)(iii)).

¹⁹ *Id.* § 64.1200(a)(3)(iv) (2008) (since recodified as § 64.1200(a)(4)(iv)).

²⁰ *True Health Chiropractic, Inc. v. McKesson Corp.*, No. 13-2219 (N.D. Cal.), Compl. (Doc. 1).

²¹ *McKesson*, Second Amended Compl. (Doc. 90).

²² *Id.* ¶¶ 12–13.

comply with the opt-out-notice requirements.²³ The SAC alleges McKesson sent fax advertisements to “at least forty” persons during the class period and that class certification is appropriate.²⁴ Plaintiffs also attached the Commission’s Citation letter from May 2008, alleging that “approximately two years prior to Plaintiffs’ receipt of Defendant’s unsolicited facsimiles, McKesson Corporation was served with a citation from the FCC informing it of violations of the TCPA and demanding it cease and desist the violations.”²⁵

The faxes attached to the SAC promote McKesson’s electronic-health records software, “Medisoft,” stating the product allows practitioners to “bill more accurately, resulting in higher levels of reimbursement” and offering, respectively, a “\$1,500 cash rebate” on purchases,²⁶ a “limited-time” offer to purchase the software with “0% financing” and “cash-back rebates,”²⁷ and a “40% discount on Medisoft version 16.”²⁸ The faxes contain no opt-out notice of any kind.²⁹

On August 22, 2014, McKesson answered the SAC, asserting as affirmative defenses that “Plaintiffs cannot recover damages under the TCPA because they gave their express prior consent” and that “Plaintiffs cannot recover damages under the TCPA because Plaintiffs have an established business relationship with McKesson.”³⁰

²³ *Id.* ¶¶ 33–34.

²⁴ *Id.* ¶ 22.

²⁵ *Id.* ¶ 20.

²⁶ *Id.*, Exs. A & B-3.

²⁷ *Id.*, Ex. B-1.

²⁸ *Id.*, Ex. B-2.

²⁹ *Id.*, Exs. A–B-3.

³⁰ *McKesson*, Answer (Doc. 103) at 6, Second & Fourth Aff. Defenses.

McKesson claims Plaintiffs gave “prior express invitation or permission” to receive McKesson fax advertisements because they purchased the Medisoft product and provided their fax numbers “in their registration of the software.”³¹ The registration forms, attached hereto as Exhibit B, provide spaces for name, address, email, phone, and fax number and boxes to select “Do not . . . Mail, e-Mail, Call, Fax.”³² The registration forms say nothing about receiving “advertisements” by fax or any other method.³³ McKesson claims that, by providing their fax numbers on the registration forms, Plaintiffs gave “prior express invitation or permission” to receive McKesson fax advertisements and that by not checking the “Do not . . . Fax” box, they failed to “opt out” of receiving fax advertisements.³⁴

On November 25, 2014, McKesson filed its petition for a waiver, arguing it “provides valuable information about discounted products and other offers via fax to commercial enterprises that specifically asked to receive such offers.”³⁵ McKesson does not identify any person who ever “specifically asked to receive” its fax advertisements or claim that Plaintiffs ever made such a request.³⁶ McKesson’s petition does not advance its theory that providing a fax number on a software-registration form constitutes “prior express invitation or permission” to receive fax advertisements.³⁷

³¹ *McKesson*, Defs.’ Mot. Stay (Doc. 84) at 3.

³² Ex. B, RS-TRUEHEALTH-000001, 000003, 000005, 000007, 0000227.

³³ *Id.*

³⁴ *McKesson*, Defs.’ Reply Supp. Mot. Stay (Doc. 92) at 9–10.

³⁵ *McKesson* Pet. at 2.

³⁶ *Id.* at 1–5.

³⁷ *Id.*

McKesson claims it “did not believe that these solicited facsimiles required opt-out notices.”³⁸ McKesson does not say why it had that mistaken belief or claim it ever read footnote 154 or the 2005 public notice.³⁹ McKesson does mention that the Commission cited it for sending unsolicited fax advertisements in May 2008 and that the Commission provided McKesson with copies of the TCPA and § 64.1200, advising it that “the burden rests with the fax sender” to demonstrate compliance with the requirements for EBR faxes and faxes sent with permission.⁴⁰

McKesson complains that Plaintiffs seek “millions of dollars in statutory damages,” which it claims is “substantial,” but it does not compare the potential damages to its financial resources. McKesson has refused to produce fax-transmission logs showing the number of faxes sent, in violation of the magistrate judge’s order that it do so by December 12, 2014.⁴¹ McKesson is “a Fortune 15 corporation”⁴² that reported net income of \$1.26 billion in fiscal year 2014 on revenues of \$137 billion.⁴³ McKesson holds \$3.8 billion in “cash and cash equivalents” on hand.⁴⁴ McKesson does not disclose Plaintiffs’ lawsuit as a “material” risk

³⁸ *Id.* at 2.

³⁹ *Id.*

⁴⁰ Ex. A at 3.

⁴¹ *McKesson*, Order (Doc. 143) at 3–5. The district court judge denied McKesson’s objections to the order on December 19, 2014, holding it was “well-reasoned, thorough, and correct in all respects.” *McKesson*, Order (Doc. 148) at 1.

⁴² *McKesson* Pet. at 2.

⁴³ *McKesson* Corp. 2014 Form 10-K at 28, available at http://www.sec.gov/Archives/edgar/data/927653/000144530514002132/mck_10kx3312014.htm#sFA56D5584A5B653F007415CB78C843E7.

⁴⁴ *McKesson* Form 10-Q for Period Ending Sept. 30, 2014, at 6, available at http://www.sec.gov/Archives/edgar/data/927653/000144530514004514/mck_10qx09302014.htm

factor to investors.⁴⁵ McKesson denies it sent unsolicited faxes to more than forty persons and denies the numerosity element for class certification is satisfied.⁴⁶

C. The *PCH* litigation.

On June 21, 2013, undersigned counsel filed suit against PCH on behalf of True Health Chiropractic, Inc. in the United States District Court for the Eastern District of Pennsylvania, alleging PCH sent an unsolicited fax advertisement to True Health on March 28, 2011.⁴⁷ In addition, Plaintiff alleges that, even if PCH claims it had “prior express invitation or permission” to send the fax, it violated the opt-out regulations.⁴⁸ The complaint alleges PCH sent the same or similar fax advertisements to “at least forty” persons, and that class certification is appropriate.⁴⁹

The fax attached to the complaint states that PCH “has a product designed specifically for Chiropractor’s Professional Liability” insurance and offers to provide “a competitive quote at your next insurance renewal.”⁵⁰ The fax contains no opt-out notice of any kind.⁵¹

On September 16, 2013, PCH filed its Answer, asserting as affirmative defenses that Plaintiff’s claims “are barred to the extent that Plaintiff provided Defendants with consent

⁴⁵ McKesson Corp. 2014 Form 10-K at 104–06.

⁴⁶ *McKesson*, Answer to Second Amended Compl. (Doc. 103) ¶¶ 17, 22.

⁴⁷ *True Health Chiropractic, Inc. v. Philadelphia Consol. Holding Corp.*, No. 13-3541 (E.D. Pa.), Compl. (Doc. 1) ¶ 12.

⁴⁸ *Id.* ¶ 32.

⁴⁹ *Id.* ¶ 20.

⁵⁰ *Id.*, Ex. A.

⁵¹ *Id.*

for the alleged fax.”⁵² PCH denies there are “at least forty” class members.⁵³ On September 18, 2014, the district court stayed the case pending the Commission’s ruling on the opt-out petitions.⁵⁴

On December 19, 2014, PCH filed its petition for a waiver, arguing that a PCH representative called Plaintiff by telephone prior to sending the fax and that one of Plaintiff’s employees gave PCH permission to send the fax.⁵⁵ PCH does not state whether it had actual knowledge of the opt-out-notice regulation when it sent its faxes.⁵⁶ PCH does not claim it was “confused” about whether opt-out notice was required or that it read footnote 154 or the 2005 public notice.⁵⁷

PCH argues it faces “substantial remedies” in the lawsuit but does not state how many faxes it sent or attempt to estimate its potential liability.⁵⁸ PCH does not discuss its financial resources.⁵⁹ In 2008, the last year in which PCH reported financial data before it went private, PCH reported net income over \$326 million with \$106 million in cash and cash equivalents on hand.⁶⁰

⁵² *PCH*, Answer (Doc. 19) at 8.

⁵³ *Id.* ¶ 20.

⁵⁴ *PCH*, Order (Doc. 52).

⁵⁵ *PCH* Pet. at 3–4.

⁵⁶ *Id.* at 1–8.

⁵⁷ *Id.*

⁵⁸ *Id.* at 6.

⁵⁹ *Id.*

⁶⁰ *PCH* 2007 Form 10-K at 65, available at <http://www.sec.gov/Archives/edgar/data/909109/000089322008000559/w50354e10vk.htm#110>

D. The *St. Luke's* litigation.

On April 30, 2014, undersigned counsel filed suit in Missouri state court against St. Luke's on behalf of Alan Presswood, D.C., P.C., a chiropractic practice in St. Charles, Missouri, alleging St. Luke's sent unsolicited fax advertisements to Plaintiff on February 28, 2012, and May 14, 2012.⁶¹ In addition, Plaintiff alleged that, even if St. Luke's claims it had "prior express invitation or permission," the faxes violated the opt-out regulations.⁶² The complaint alleges St. Luke's sent the same or similar fax advertisements to "more than forty" persons, and that class certification is appropriate.⁶³

The faxes attached to the complaint advertise "same day" MRI and CT scans at the "Center for Diagnostic Imaging" at St. Luke's locations in Missouri.⁶⁴ The faxes contain no opt-out notice of any kind.⁶⁵

On August 8, 2014, St. Luke's answered the complaint, asserting as affirmative defenses that "[o]n information and belief . . . Defendant had established business relationships with or the permission of one or more of the recipients who may have received the faxes"⁶⁶ and asserting "upon information and belief, that some or all of the alleged facsimile transmissions were sent with the permission of the recipient or his or her agents."⁶⁷

⁶¹ *Alan Presswood, D.C., P.C. v. St. Luke's Center for Diagnostic Imaging, LLC*, No. 14SL-CC01420 (Cir. Ct. St. Louis Cty., Mo.), Class Action Petition ¶ 9.

⁶² *Id.* ¶¶ 18–19.

⁶³ *Id.* ¶ 32.

⁶⁴ *Id.*, Exs. A & B.

⁶⁵ *Id.*

⁶⁶ *St. Luke's*, Answer at 9, Aff. Def. No. 2.

⁶⁷ *Id.* at 11, Aff. Def. No. 12.

In discovery, St. Luke's asserted Plaintiff gave "prior express invitation or permission" to send fax advertisements because "Plaintiff is a referring physician who continues to have a relationship with CDI" and "Plaintiff transmitted a facsimile to Defendant within months of receiving the Two Facsimiles, and the facsimile transmitted to Defendant bears Plaintiffs facsimile number."⁶⁸ St. Luke's denied it "maintains a record of persons who provided any form of consent, invitation, or permissions to receive advertisements by facsimile machine and the dates such consent, invitation, or permissions."⁶⁹ Regarding the number of faxes at issue, St. Luke's admitted "that the Two Facsimiles were transmitted to more than 1000 persons" but denied "that the Two Facsimiles were sent to more than 3000."⁷⁰

On December 8, 2014, St. Luke's filed its petition for a waiver, arguing that it "is currently facing a putative class action lawsuit seeking potentially multi-millions of dollars in damages because it allegedly sent faxes to its referring physicians who had consented to receive them."⁷¹ The petition does not cite any paragraph of the complaint alleging St. Luke's obtained permission from any recipient;⁷² the complaint alleges that "Defendant faxed the same and other facsimile advertisements to the members of the proposed classes

⁶⁸ *St. Luke's*, Def.'s Answers to Pl.'s First Interrogos., Resp. No. 10.

⁶⁹ *St. Luke's*, Def.'s Resp. to Pl.'s First Request for Admissions, Resp. No. 37.

⁷⁰ *Id.*, Resp. No. 14.

⁷¹ *St. Luke's* Pet. at 2.

⁷² *Id.* at 1-8.

in Missouri and throughout the United States *without* first obtaining the recipients' prior express permission or invitation."⁷³

St. Luke's claims it is "similarly situated" to the petitioners covered by the Opt-Out Order because St. Luke's was "confused as to whether Solicited Faxes must include an opt-out notice" when it sent the faxes at issue in the underlying litigation.⁷⁴ St. Luke's does not say why it was "confused" about the requirement or claim that it read footnote 154 or the 2005 public notice.⁷⁵ St. Luke's claims it had "express permission" to send fax advertisements because Plaintiff had "repeated communication with its assigned St. Luke's account executives over several years" and Plaintiff "never asked St. Luke's to refrain from sending it faxes."⁷⁶

St. Luke's claims it is subject to potentially "crushing," "ruinous," or "catastrophic" damages, but it does not state how many faxes are at issue.⁷⁷ St. Luke's does not give any indication of its financial resources.⁷⁸ St. Luke's is not a publicly traded corporation.

E. The *Sunwing* litigation.

On July 17, 2014, undersigned counsel filed suit against Sunwing, a Canadian airline, in the United States District Court for the Northern District of Ohio on behalf of Carradine Chiropractic Center, Inc., a chiropractic practice near Youngstown, Ohio, alleging Sunwing

⁷³ *St. Luke's*, Compl. ¶ 21 (emphasis added).

⁷⁴ *St. Luke's* Pet. at 7.

⁷⁵ *Id.* at 1–8.

⁷⁶ *Id.* at 6.

⁷⁷ *Id.* at 7–8.

⁷⁸ *Id.*

sent an unsolicited fax advertisement to Plaintiff on March 5, 2012.⁷⁹ In addition, the complaint alleges that, even if Sunwing claims it had “prior express invitation or permission” to send the fax, it violated the opt-out regulations.⁸⁰ The complaint alleges Sunwing sent the same or similar fax advertisements to “over forty” persons and that class certification is appropriate.⁸¹

The fax attached to the Complaint promotes an “exclusive offer” to “save \$100” on “NEW Non-Stop Champagne Flights on Sunwing Airlines” to locations in Mexico and Jamaica.⁸² The opt-out notice at the bottom of the fax states, “[t]o be unsubscribed from this list please call 1.866.996.6329 or 1.877.90NOFAX or 1.866.615.5568 or 1.905.366.1333 or 1.905.366.1357 or via email REMOVE@PROINFOTECH.CA or per fax at 1.905.361.0789 or mail PRO INFO TECH 141–2550 Matheson Blvd, Mississauga, ON CANADA L4W 4Z1.”⁸³ The notice does not (1) state the consumer has a legally enforceable right to opt out, (2) state a sender’s failure to comply within 30 days is unlawful, (3) state the consumer must follow the opt-out instructions in the fax to make an enforceable request, or (4) state the consumer must identify the fax number to which the request relates to make an enforceable request, as required by § 64.1200(a)(4)(iii).⁸⁴

⁷⁹ *Carradine Chiropractic Center, Inc. v. Sunwing Airlines, Inc.*, No. 14-1583 (N.D. Ohio), Compl. (Doc. 1) ¶ 12.

⁸⁰ *Id.* ¶ 31.

⁸¹ *Id.* ¶ 20.

⁸² *Id.*, Ex. A.

⁸³ *Id.*

⁸⁴ *Id.*

On September 5, 2014, Sunwing answered the Complaint, asserting as affirmative defenses that “[a]ny faxes sent to the Plaintiff or putative class members were solicited and therefore not subject to the provisions of the TCPA” and that “Plaintiff and purported class members had an established business relationship with Defendants that precludes liability under the TCPA.”⁸⁵ Sunwing denies it sent the same or similar faxes to “over forty” persons and asserts that numerosity is not satisfied.⁸⁶

On September 15, 2014, Sunwing served its initial disclosures identifying “Prominent Information Technologies Inc.,” a Canadian company, as “the company that, upon information and belief, may have sent the facsimile attached as Exhibit A to Plaintiff’s complaint.” Sunwing stated its “investigation for relevant documents is continuing” but produced no documents showing Plaintiff or any other person gave Sunwing express permission to send fax advertisements. On October 3, 2014, Sunwing supplemented its disclosures, identifying another fax broadcaster, “5 Star Fax,” with relevant information, but producing no evidence of permission.

On November 26, 2014, Sunwing filed its petition for a waiver, asserting it sent its faxes with “prior express invitation or permission,” but providing no details of how it obtained such permission or explaining why a chiropractic practice in Ohio would give such permission to a Canadian airline.⁸⁷ Sunwing asserts that it “did not understand the opt-out requirement to apply to solicited faxes” at the time it sent its faxes.⁸⁸ Sunwing does not

⁸⁵ *Sunwing*, Answer (Doc. 14) at 16.

⁸⁶ *Id.* ¶ 20.

⁸⁷ *Sunwing* Pet. at 5.

⁸⁸ *Id.*

explain why it “did not understand” the requirements or claim it read footnote 154 or the 2005 notice of rulemaking.⁸⁹

Sunwing complains it is “potentially subject to massive liability” in Plaintiff’s lawsuit, but it does not state how many faxes it sent or provide any evidence of its financial resources.⁹⁰ Sunwing claims on its website to have seen “a 179% increase in sales volume” in 2013, “with 1,776 employees and sales in excess of \$1 Billion.”⁹¹ Sunwing claims it “understand[s] the importance of compliance with the Commission’s rules, including the 2006 Order as clarified by Order FCC 1[4]-164, and [has] implemented procedures to ensure compliance.”⁹²

F. The *ZocDoc* litigation.

On January 10, 2014, undersigned counsel filed suit against ZocDoc in Missouri state court on behalf of Radha Geismann, M.D., P.C., a medical practice in St. Louis, Missouri. ZocDoc removed to the Eastern District of Missouri, which transferred the case to the Southern District of New York, where Plaintiff filed a First Amended Complaint (“FAC”).⁹³ The FAC alleges ZocDoc sent Plaintiff unsolicited fax advertisements on July 24, 2012, and October 2, 2012.⁹⁴ In addition, the FAC alleges that, even if ZocDoc claims it obtained “prior express invitation or permission” to send the faxes, the faxes violated the opt-out-

⁸⁹ *Id.* at 1–6.

⁹⁰ *Id.* at 5.

⁹¹ Press Release, *Sunwing Travel Group Makes Profit 500 List for 9th Consecutive Year*, at <http://www.sunwing.ca/newsstory.asp?id=398> (last visited Jan. 12, 2015).

⁹² *Id.* at 6.

⁹³ *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, No. 14-472 (S.D.N.Y.), First Amended Compl. (Doc. 39).

⁹⁴ *Id.* ¶ 11.

notice requirements.⁹⁵ The complaint alleges ZocDoc sent the same or similar fax advertisements to “more than 40 persons” and that class certification is appropriate.⁹⁶

The faxes attached to the FAC advertise ZocDoc’s “patient matching service,” providing a phone number and email address to “learn more about our service and how to participate” in the service.⁹⁷ The opt-out notice at the bottom of the faxes states, “[t]o stop receiving faxes, please call (866) 975-3308.”⁹⁸ The notice does not (1) state the recipient has a right to demand the sender not send future advertisements, (2) state a sender’s failure to comply within 30 days is unlawful, (3) set forth the information the consumer must include to make an opt-out request legally enforceable, or (4) provide both a fax number and domestic telephone number for requests, as required by § 64.1200(a)(4)(iii).⁹⁹

ZocDoc has never answered Plaintiff’s allegations or produced any discovery because the district court allowed it to “pick off” Plaintiff’s individual claim and avoid class certification with an offer for \$6,000 and dismissed the case as moot, a decision that is currently on appeal to the Second Circuit Court of Appeals.¹⁰⁰ In its motion to dismiss, ZocDoc did not claim it obtained “prior express invitation or permission” from Dr. Geismann or any other class member.¹⁰¹

⁹⁵ *Id.* ¶ 44.

⁹⁶ *Id.* ¶ 33.

⁹⁷ *Id.*, Exs. A & B.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Geismann v. ZocDoc, Inc.*, 2014 WL 6601024 (S.D.N.Y. Sept. 26, 2014).

¹⁰¹ *ZocDoc*, Def.’s Mem. Supp. Mot. Dismiss or Stay (Doc. 45) at 1–20.

On December 4, 2014, ZocDoc filed its petition for a waiver, arguing it “made efforts to ensure that its faxes were sent only to individuals who consented to their receipt.”¹⁰² ZocDoc does not explain what “efforts” it took or provide any evidence for this assertion.¹⁰³

ZocDoc does not claim it was “confused” about the law when it sent its faxes.¹⁰⁴ ZocDoc does not claim it “did not understand” the law when it sent its faxes.¹⁰⁵ ZocDoc does not deny that it had actual knowledge of the law when it sent its faxes.¹⁰⁶

ZocDoc claims it could be subject to a “significant damages award” in the underlying litigation, but it does not state how many faxes are issue or attempt to quantify its risk.¹⁰⁷ ZocDoc is not a publicly traded corporation, and there has been no discovery in the case into ZocDoc’s financial resources. ZocDoc filed a certificate with the State of Delaware on May 30, 2014, stating it had raised funding of \$152 million and valuing the company at \$1.6 billion.¹⁰⁸

¹⁰² ZocDoc Pet. at 1.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1–4.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 4.

¹⁰⁸ Fortune Magazine Online, *ZocDoc Raising \$152 Million at \$1.6 Billion Valuation*, at <http://fortune.com/tag/zocdoc/> (last visited Jan. 12, 2015).

Argument

I. The Commission has no authority to “waive” violations of the regulations prescribed under the TCPA in a private right of action, and doing so would violate the separation of powers.

The TCPA creates a private right of action for any person to sue “in an appropriate court” for “a violation of this subsection or the regulations prescribed under this subsection,”¹⁰⁹ and directs the Commission to “prescribe regulations” to be enforced in those lawsuits.¹¹⁰ The “appropriate court” then determines whether “a violation” has taken place.¹¹¹ If the court finds “a violation,” the TCPA automatically awards a minimum \$500 in damages for “each such violation” and allows the court “in its discretion” to increase the damages up to \$1,500 per violation if it finds they were “willful[] or knowing[].”¹¹²

The TCPA does not authorize the Commission to “waive” its regulations in a private right of action.¹¹³ It does not authorize the Commission to intervene in a private right of action.¹¹⁴ It does not require a private plaintiff to notify the Commission it has filed a private lawsuit.¹¹⁵ Nor does it limit a private plaintiff’s right to sue to cases where the Commission declines to prosecute.¹¹⁶ The Commission plays no role in determining whether “a violation” has taken place, whether a violation was “willful or knowing,” whether statutory damages

¹⁰⁹ 47 U.S.C. § 227(b)(3).

¹¹⁰ *Id.* § 227(b)(2).

¹¹¹ *Id.* § 227(b)(3)(A)–(B).

¹¹² *Id.* § 227(b)(3).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*; *C.f.*, Clean Air Act, 42 U.S.C. § 7604(b) (requiring 60 days prior notice to the EPA to maintain a citizen suit).

¹¹⁶ *C.f.*, *e.g.*, 42 U.S.C.A. § 2000e-5(f)(1) (requiring employment-discrimination plaintiffs to obtain “right-to-sue” letter from Equal Employment Opportunity Commission).

should be increased, or how much the damages should be increased. These duties belong to the “appropriate court” presiding over the lawsuit.¹¹⁷

The Communications Act does, however, grant the Commission authority to enforce the TCPA through administrative forfeiture actions.¹¹⁸ Private citizens have no role in that process, such as determining whether a violator acted “willfully or repeatedly.”¹¹⁹ Thus, the TCPA and the Communications Act create a dual-enforcement scheme in which the Commission promulgates regulations that both the Commission and private litigants may enforce but where the Commission plays no role in the private litigation and private citizens play no role in agency enforcement.¹²⁰ This scheme is similar to several other statutes, including the Clean Air Act, which empowers the EPA to issue regulations imposing emissions standards¹²¹ that are enforceable both in private “citizen suits”¹²² and in administrative actions.¹²³

The D.C. Circuit Court of Appeals recently held the EPA could not issue a regulation creating an affirmative defense for “unavoidable” violations in private litigation under the Clean Air Act in *Nat. Res. Def. Council v. EPA*,¹²⁴ holding it is “the Judiciary” that “determines ‘the scope’—*including the available remedies*” of “statutes establishing private rights

¹¹⁷ *Id.* § 227(b)(3).

¹¹⁸ *Id.* § 503(b).

¹¹⁹ *Id.*

¹²⁰ *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 688 (7th Cir. 2013) (holding TCPA “authorizes private litigation” and agency enforcement, so consumers “need not depend on the FCC”).

¹²¹ 42 U.S.C. § 7412(d).

¹²² 42 U.S.C. § 7604(a).

¹²³ 42 U.S.C. § 7413(d).

¹²⁴ 749 F.3d 1055, 1062 (D.C. Cir. 2014).

of action”¹²⁵ and that, consistent with that principle, the Clean Air Act “vests authority over private suits in the *courts*, not EPA.”¹²⁶ TCPA Plaintiffs discussed *NRDC* extensively in a letter to the Commission after it was issued April 18, 2014,¹²⁷ and in subsequent comments on waiver petitions.¹²⁸ The Opt-Out Order does not cite *NRDC*.

On December 12, 2014, the United States District Court for the Western District of Michigan became the first court in the country to rule on whether a Commission “waiver” from § 64.1200(a)(4)(iv) is enforceable in private TCPA litigation.¹²⁹ The district court held “[i]t would be a fundamental violation of the separation of powers for the administrative agency to ‘waive’ retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court.”¹³⁰ The district court held that “nothing in the waiver—even assuming the FCC ultimately grants it—invalidates the regulation itself” and that “[t]he regulation remains in effect just as it was originally promulgated” for purposes of determining whether a defendant violated the “regulations prescribed under” the TCPA, as directed by § 227(b)(3).¹³¹ The district court concluded, “the

¹²⁵ *Id.* (quoting *City of Arlington v. FCC*, --- U.S. ---, 133 S. Ct. 1863, 1871 n.3 (2013); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)).

¹²⁶ *Id.*

¹²⁷ Letter of Brian J. Wanca, CG Docket No. 05-338 (May 19, 2014).

¹²⁸ *See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Nos. 02-278, 05-338, TCPA Pls.’ Comments on Stericycle Pet. at 7 (July 11, 2014); *id.*, TCPA Pls.’ Comments on Unique Vacations, Inc. Pet. at 6–8 (Sept. 12, 2014).

¹²⁹ *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, --- F. Supp. 3d ---, 2014 WL 7109630 (W.D. Mich. Dec. 12, 2014).

¹³⁰ *Id.*, at *14.

¹³¹ *Id.*

FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action; at most, the FCC can choose not to exercise its own enforcement power.”¹³²

The Commission should deny any further waiver requests. Plaintiffs recognize the Commission issued waivers in the Opt-Out Order, but the fact that an improper action has been taken once is no justification for doing it again. Plaintiffs respect that some members of the Commission maintain the 2006 opt-out regulation was *ultra vires*. But the principled stance would be to state that position clearly (as these Commissioners did in their statements dissenting in part from the Opt-Out Order), while denying any additional waivers as beyond the Commission’s power. Two wrongs do not make a right, and taking unauthorized action to rectify another perceived unauthorized action does not reflect the rule of law.

II. McKesson, PCH, St. Luke’s, Sunwing, and ZocDoc are not “similarly situated” to the petitioners covered by the Opt-Out Order.

A. McKesson is not “similarly situated.”

1. McKesson had actual knowledge of the regulation requiring opt-out notice on faxes sent with permission, provided by the Commission itself.

If the standard for a “waiver” is that petitioners are “presumptively” considered confused in the absence of evidence they “understood that they did, in fact, have to comply with the opt-out notice requirement,”¹³³ then that presumption is rebutted with respect to McKesson. The Commission furnished McKesson with a copy of § 64.1200 on May 9, 2008, warning McKesson that it appeared to have violated the rules and that it must comply in the

¹³² *Id.*

¹³³ Opt-Out Order ¶ 26.

future.¹³⁴ The copy of § 64.1200 the Commission provided McKesson in May 2008 stated, as it does today, that “[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with” the same requirements as EBR faxes.¹³⁵ The language of the regulation is unambiguous.¹³⁶ The regulations themselves do not contain footnote 154 of the Junk Fax Order or the 2005 notice of rulemaking.¹³⁷

McKesson did not heed the Commission’s warning. Instead, in 2012, it sent faxes to Plaintiffs and an unknown number of other class members with no opt-out notice whatsoever. The Commission granted waivers in the Opt-Out Order on the basis that the combination of footnote 154 and the lack of notice in the 2005 notice of rulemaking “presumptively establishes good cause for retroactive waiver” and that there was no evidence “that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement.”¹³⁸ That presumption is rebutted with respect to McKesson. If the Commission is going to presume anything, it should be that when the Commission personally serves a fax advertiser with a copy of the Commission’s rules and advises the advertiser to comply, the advertiser “understands” the plain language of those rules.

¹³⁴ Ex. A at 3.

¹³⁵ *Id.* § 64.1200(a)(3)(iv) (2008) (since recodified as § 64.1200(a)(4)(iv)).

¹³⁶ *See Nack v. Walburg*, 715 F.3d 680, 683 (8th Cir. 2013) (holding “plain language” of the regulation “extends the opt-out notice requirement to solicited as well as unsolicited fax advertisements”).

¹³⁷ 47 C.F.R. § 64.1200.

¹³⁸ Opt-Out Order ¶ 26.

2. McKesson does not claim it was actually “confused” about whether opt-out notice was required on faxes sent with permission.

If the standard for a waiver is that the petitioner was actually confused about whether opt-out notice was required when it sent its faxes, then the McKesson petition must be denied. McKesson claims it “did not believe that . . . solicited facsimiles required opt-out notices” when it sent it faxes.¹³⁹ It does not claim it was “confused” or claim that its mistaken belief was based on footnote 154 or the 2005 notice of rulemaking.¹⁴⁰

3. McKesson’s potential liability is not “significant” in comparison to its financial resources.

The Opt-Out Order states the Commission granted waivers, in part, because the petitioners were “subject to significant damage awards under the TCPA’s private right of action,” ruling that “the risk of substantial liability,” although not dispositive, was “a factor” in its decision.¹⁴¹ McKesson’s petition does not state how many faxes it sent or estimate its potential liability,¹⁴² and McKesson has refused to produce the documents necessary to make that calculation, in violation of a court order to produce those documents by December 12, 2014.¹⁴³ In its answer, however, McKesson denies it sent unsolicited faxes to forty or more persons and denies the numerosity element for class certification is satisfied.¹⁴⁴ On this

¹³⁹ *Id.* at 2.

¹⁴⁰ *Id.*

¹⁴¹ Opt-Out Order ¶¶ 27–28.

¹⁴² McKesson Pet. at 1–5.

¹⁴³ *McKesson*, Order (Doc. 143) at 3–5; *id.* (Doc. 148) at 1 (upholding order as “well-reasoned, thorough, and correct in all respects”).

¹⁴⁴ *McKesson*, Answer to Second Amended Compl. (Doc. 103) ¶¶ 17, 22.

record, in the absence of any evidence from McKesson in its reply comments, McKesson is liable for a maximum of \$58,500 (39 faxes at \$1,500 per fax).

McKesson is “a Fortune 15 corporation,”¹⁴⁵ reporting net income of \$1.26 billion in fiscal year 2014 on revenues of \$137 billion.¹⁴⁶ McKesson holds \$3.8 billion in “cash and cash equivalents” on hand.¹⁴⁷ The potential damages of \$58,500 amount to 0.0046% of McKesson’s profits in 2014 and 0.0015% of its cash on hand. That is why McKesson does not disclose Plaintiffs’ lawsuit as a “material” risk factor that a reasonable investor would consider relevant in the overall mix of information in deciding whether to invest in the company.¹⁴⁸ McKesson’s exposure is negligible compared to its financial resources.

B. PCH is not “similarly situated.”

1. PCH does not claim it was “confused” about the Commission’s rules.

PCH does not state indicate one way or the other whether it was aware of the Commission’s rules when it sent the fax advertisements at issue.¹⁴⁹ PCH does not, for example, claim it was “confused” about whether opt-out notice was required on faxes it

¹⁴⁵ McKesson Pet. at 2.

¹⁴⁶ McKesson Corp. 2014 Form 10-K at 28, available at http://www.sec.gov/Archives/edgar/data/927653/000144530514002132/mck_10kx3312014.htm#sFA56D5584A5B653F007415CB78C843E7.

¹⁴⁷ McKesson Form 10-Q for Period Ending Sept. 30, 2014, at 6, available at http://www.sec.gov/Archives/edgar/data/927653/000144530514004514/mck_10qx09302014.htm

¹⁴⁸ McKesson Corp. 2014 Form 10-K at 104–06.

¹⁴⁹ PCH Pet. at 1–8.

believed were sent with “prior express invitation or permission” or claim that it read footnote 154 or the 2005 notice of rulemaking.¹⁵⁰

Based on the record before the Commission, it is just as likely that PCH had actual knowledge of the plain language of § 64.1200(a)(4)(iv) when it sent its faxes and chose not to comply. If the standard is actual “confusion” about the law resulting from footnote 154 and the notice of rulemaking, then the Commission should deny the PCH petition on this basis alone.

2. Plaintiff has a due-process right to inquire into whether PCH had actual knowledge of the rules if that factor is dispositive of its private right of action.

If the standard for a waiver is that petitioners are “presumptively” considered confused in the absence of evidence they “understood that they did, in fact, have to comply with the opt-out notice requirement,”¹⁵¹ then True Health has no evidence of actual knowledge at this time with which to rebut the presumption. PCH has been silent on that issue in the underlying litigation and before the Commission, and PCH did not respond to discovery before the district court stayed the case in September 2014.

True Health has a due-process right to investigate whether PCH was aware of the opt-out rules if that factor is dispositive of its private right of action under the TCPA.¹⁵² The Commission may hold such “proceedings as it may deem necessary” for such purposes and

¹⁵⁰ *Id.*

¹⁵¹ Opt-Out Order ¶ 26.

¹⁵² See, e.g., *Applications of Comcast Corp. and Time Warner Cable Inc. For Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57; *Applications of AT&T, Inc. and DIRECTV For Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Dissenting Statement of Commissioner Pai (arguing Commission violated petitioners’ “due process rights” by denying “serious arguments that merit the Commission’s thoughtful consideration”).

may “subpoena witnesses and require the production of evidence” as the Commission determines “will best serve the purposes of such proceedings.”¹⁵³ In the alternative, True Health requests the Commission stay a ruling on the PCH petition until Plaintiff has completed discovery regarding PCH’s actual knowledge (or lack thereof) of the law prior to sending its faxes before the United States District Court for the Eastern District of Pennsylvania.

3. PCH has failed to demonstrate its potential liability is “substantial” when compared to its financial resources.

PCH claims it is subject to “substantial remedies” in the private litigation, but it does not attempt to estimate its liability or demonstrate it would be “substantial” in comparison to its financial resources.¹⁵⁴ PCH denies there are “at least forty” class members.¹⁵⁵ On this record, in the absence of any evidence from PCH in its reply comments, PCH is liable for a maximum of \$58,500 (39 faxes at \$1,500 per fax).

Regarding whether \$58,500 would be “substantial” when compared with PCH’s financial resources, in 2008, the year it went private, PCH reported net income over \$326 million with \$106 million in cash and cash equivalents on hand.¹⁵⁶ On this record, in the absence of any contrary evidence, PCH’s potential liability is 0.018% of its 2007 profits and 0.055% of its cash on hand in 2007, which is not a “substantial” risk to the company.

¹⁵³ 47 C.F.R. § 1.1.

¹⁵⁴ PCH Pet. at 6.

¹⁵⁵ PCH, Answer ¶ 20.

¹⁵⁶ PCH 2007 Form 10-K at 65, available at <http://www.sec.gov/Archives/edgar/data/909109/000089322008000559/w50354e10vk.htm#110>

C. St. Luke's is not "similarly situated."

1. St. Luke's claims it was "confused" about whether opt-out notice was required, but it does not claim its confusion resulted from footnote 154 or the notice of rulemaking.

Unlike McKesson, PCH, Sunwing, and ZocDoc, St. Luke's claims it was actually "confused as to whether Solicited Faxes must include an opt-out notice" when it sent the faxes at issue in the underlying litigation.¹⁵⁷ But St. Luke's does not say why it was "confused" about the requirement or claim that it read footnote 154 or the 2005 public notice.¹⁵⁸ It is just as likely St. Luke's was "confused" because it obtained bad legal advice or ignored good legal advice. In the absence of additional evidence on this point, if the standard is actual "confusion" resulting from the "combination of factors" identified in the Opt-Out Order (footnote 154 and the notice of rulemaking), then the Commission should deny the St. Luke's petition on this ground alone.

2. Plaintiff has a due-process right to inquire into whether St. Luke's had actual knowledge of the rules if that factor is dispositive of its private right of action.

If the standard for a waiver is that petitioners are considered "presumptively" confused in the absence of evidence they "understood that they did, in fact, have to comply with the opt-out notice requirement,"¹⁵⁹ then Plaintiff has no evidence of actual knowledge at this time with which to rebut the presumption. St. Luke's has been silent on that issue in the underlying litigation and before the Commission.

¹⁵⁷ St. Luke's Pet. at 7.

¹⁵⁸ *Id.* at 1–8.

¹⁵⁹ Opt-Out Order ¶ 26.

Plaintiff has a due-process right to investigate whether St. Luke's had actual knowledge of the opt-out rules if that factor is dispositive of its private right of action under the TCPA, and the Commission should hold such "proceedings as it may deem necessary" for that purpose.¹⁶⁰ In the alternative, Plaintiff requests the Commission stay a ruling on the St. Luke's petition until Plaintiff has completed discovery regarding St. Luke's actual knowledge (or lack thereof) before the Missouri state court.

3. St. Luke's has provided no evidence it faces "crushing" potential liability in the private litigation.

St. Luke's claims it is subject to potentially "crushing," "ruinous," or "catastrophic" damages, but it does not state how many faxes are at issue.¹⁶¹ In discovery, St. Luke's admitted it sent faxes to "more than 1000 persons" but denied it sent them "to more than 3000."¹⁶² On this record, in the absence of any contrary evidence in St. Luke's reply comments, St. Luke's is potentially liable for a maximum of \$4.5 million (2,999 faxes at \$1,500 per fax).

St. Luke's does not give any indication of its financial resources.¹⁶³ Since St. Luke's is not a publicly traded corporation and it has produced no discovery on the subject, the Commission cannot meaningfully evaluate whether a \$4.5 million damage award would be "significant" to St. Luke's. Therefore, St. Luke's has failed to meet its burden on this issue.

¹⁶⁰ 47 C.F.R. § 1.1.

¹⁶¹ St. Luke's Pet. at 7–8.

¹⁶² *St. Luke's*, Def.'s Resp. to Pl.'s First Request for Admissions, Resp. No. 14.

¹⁶³ St. Luke's Pet. at 1–8.

D. Sunwing is not “similarly situated.”

1. Sunwing claims it “did not understand” the regulations, not that it was “confused.”

Sunwing asserts that it “did not understand the opt-out requirement to apply to solicited faxes,” but it does not explain why it had that misunderstanding.¹⁶⁴ Sunwing does not, for example, claim its misunderstanding resulted from reading footnote 154 or the 2005 notice of rulemaking.¹⁶⁵ If the standard for a waiver is actual “confusion” about the law, then the Commission should deny Sunwing’s petition on this ground alone.

2. Plaintiff has a due-process right to inquire into whether Sunwing had actual knowledge of the rules if that factor is dispositive of its private right of action.

If the standard for a waiver is that petitioners are considered “presumptively” confused in the absence of evidence they “understood that they did, in fact, have to comply with the opt-out notice requirement,”¹⁶⁶ then Plaintiff has no evidence of actual knowledge at this time with which to rebut the presumption. Sunwing has been silent on that issue in the underlying litigation and before the Commission.

Plaintiff has a due-process right to investigate whether Sunwing was aware of the opt-out rules if that factor is dispositive of its private right of action under the TCPA. The Commission should hold such “proceedings as it may deem necessary” for that purpose¹⁶⁷ or stay a ruling on the Sunwing petition until Plaintiff has completed discovery regarding

¹⁶⁴ Sunwing Pet. at 5.

¹⁶⁵ *Id.* at 1–6.

¹⁶⁶ Opt-Out Order ¶ 26.

¹⁶⁷ 47 C.F.R. § 1.1.

Sunwing's actual knowledge (or lack thereof) before the United States District Court for the Northern District of Ohio.

3. Sunwing has not demonstrated its potential liability is “massive” in comparison to its financial resources.

Sunwing complains it is “potentially subject to massive liability” in Plaintiff's lawsuit, but it does not state how many faxes it sent or estimate its potential liability.¹⁶⁸ In its Answer, Sunwing denied it sent the same or similar faxes to “over forty” persons and asserted that numerosity is not satisfied.¹⁶⁹ On this record, in the absence of any evidence from Sunwing in its reply, Sunwing is liable for a maximum of \$60,000 (40 faxes at \$1,500 per fax).

Sunwing does not discuss its financial resources, and it is not a publicly traded corporation. Sunwing claims on its website, however, to have “sales in excess of \$1 Billion” in 2013.¹⁷⁰ Plaintiff submits it is highly unlikely that Sunwing makes so little profit on \$1 billion in annual sales that \$58,500 would be a “massive” drain on its resources.

E. ZocDoc is not “similarly situated.”

1. ZocDoc does not claim it was actually “confused” about the law when it sent its faxes.

ZocDoc does not claim it was “confused” about whether opt-out notice was required on faxes sent with permission when it sent its faxes.¹⁷¹ ZocDoc does not claim it “did not

¹⁶⁸ Sunwing Pet. at 5.

¹⁶⁹ *Sunwing*, Answer ¶ 20.

¹⁷⁰ Press Release, *Sunwing Travel Group Makes Profit 500 List for 9th Consecutive Year*, at <http://www.sunwing.ca/newsstory.asp?id=398> (last visited Jan. 12, 2015).

¹⁷¹ *Id.* at 1–4.

understand” the law when it sent its faxes.¹⁷² ZocDoc does not claim it read footnote 154 or the 2005 notice of rulemaking.¹⁷³

Based on the record before the Commission, it is just as likely that ZocDoc had actual knowledge of the plain language of § 64.1200(a)(4)(iv) when it sent its faxes. If the standard is actual “confusion” about the law resulting from footnote 154 and the notice of rulemaking, then the Commission should deny the ZocDoc petition on this ground alone.

2. Plaintiff has a due-process right to inquire into whether ZocDoc had actual knowledge of the rules if that factor is dispositive of its private right of action.

If the standard for a waiver is that petitioners are considered “presumptively” confused in the absence of evidence they “understood that they did, in fact, have to comply with the opt-out notice requirement,”¹⁷⁴ then Plaintiff has no evidence of actual knowledge at this time with which to rebut the presumption. ZocDoc has been silent on that issue in the underlying litigation and before the Commission.

Plaintiff has a due-process right to investigate whether ZocDoc was aware of the opt-out rules if that factor is dispositive of its private right of action under the TCPA. The Commission should hold such “proceedings as it may deem necessary” for that purpose¹⁷⁵ or 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.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Opt-Out Order ¶ 26.

¹⁷⁵ 47 C.F.R. § 1.1.

3. ZocDoc has not demonstrated its potential liability is “significant” in comparison to its financial resources.

ZocDoc claims it could be subject to a “significant damages award” in the underlying litigation, but it does not state how many faxes are issue or attempt to quantify its risk.¹⁷⁶ ZocDoc has never answered Plaintiff’s allegations regarding the number of faxes it sent, leaving the operative allegation that ZocDoc sent the same or similar fax advertisements to “more than 40 persons.”¹⁷⁷ On this record, in the absence of any evidence from ZocDoc in its reply comments, the Commission should presume ZocDoc’s potential liability to be \$61,500 (41 faxes at \$1,500 per fax).

ZocDoc is not a publicly traded corporation, but ZocDoc claimed in a May 2014 filing with the State of Delaware that it had raised funding of \$152 million and that the value of the company was \$1.6 billion.¹⁷⁸ Plaintiff submits that a company with \$152 million in capital valued at \$1.6 billion would not find a damages award of \$61,500 “significant” in relation to its financial resources.

III. The proceedings on reconsideration of the 2006 Junk Fax Order—which the Commission has not yet considered on a waiver petition—demonstrate interested parties immediately understood the opt-out rules and were not “confused” by footnote 154 or the notice of rulemaking.

The proceedings following the 2006 Junk Fax Order were not discussed in any of the petitions covered by the Opt-Out Order or any of the comments on those petitions. The record of those proceedings demonstrates that regulated parties immediately understood that

¹⁷⁶ *Id.* at 4.

¹⁷⁷ *ZocDoc*, FAC (Doc. 39) ¶ 33.

¹⁷⁸ Fortune Magazine Online, *ZocDoc Raising \$152 Million at \$1.6 Billion Valuation*, at <http://fortune.com/tag/zocdoc/> (last visited Jan. 12, 2015).

the plain language of the 2006 rules required opt-out notice on faxes sent with permission and that no one was “confused” by footnote 154 or the notice of rulemaking. There were two petitions for reconsideration of the 2006 Junk Fax Order, one of which was filed by the law firm of Levanthal Senter & Lerman (“LSL”) on behalf of CBS and other broadcasting clients on June 2, 2006.¹⁷⁹

The LSL petition noted that the new rules required “that all faxed advertisements include an opt-out notice,” including those sent with permission.¹⁸⁰ The LSL petition did not seek reconsideration of the rule; it sought clarification that it could place the opt-out notice on a cover page, arguing consumers who previously gave permission would still be able to “exercise their right to opt-out of unwanted faxed advertisements.”¹⁸¹ Public notice of the LSL petition for reconsideration was published in the Federal Register pursuant to Rule 1.429(e) on June 28, 2006.¹⁸²

Three parties filed comments on the LSL petition, including the American Society of Association Executives (“ASAE”) and the Named State Broadcasters Associations (“NSBA”).¹⁸³ The ASAE acknowledged that the 2006 Junk Fax Order states, “entities that send facsimile advertisements to consumers from whom they obtained permission, must

¹⁷⁹ *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Nos. 02-278, 05-338, Petition for Reconsideration or Clarification of Levanthal Senter & Lerman PLLC (June 2, 2006) (“LSL Petition”) at 1.

¹⁸⁰ *Id.* at 2.

¹⁸¹ *Id.* at 7.

¹⁸² *Petitions for Reconsideration of Action in Rulemaking Proceeding*, 71 Fed. Reg. 36798, 36798 (June 28, 2006).

¹⁸³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Nos. 02-278, 05-338, Comments of American Society of Association Executives (July 12, 2006); National Association Broadcasters Comments (July 13, 2006); Joint Comments of the Named State Broadcasters Associations (July 13, 2006).

include on the advertisements their opt-out notice and contact information to allow consumers to stop unwanted faxes in the future.”¹⁸⁴

The ASAE argued the “plain language” of this rule inappropriately extended to “solicited facsimile advertisements” and asked the Commission to “vacate” it.¹⁸⁵ The relevant section of ASAE’s 2006 comments reads as follows in its entirety:

The plain language of this provision imposes the opt-out notice requirement on both unsolicited and *solicited* facsimile advertisements. The Fax Act requires advertisers to include such notices only on any *unsolicited* facsimile advertisement, but neither the Fax Act nor the Telephone Consumer Protection Act of 1991 (“TCPA”) authorizes the Commission to impose any notice requirement on *solicited* facsimile advertisements.

By applying the notice requirement to solicited facsimile advertisements, the Commission has exceeded its authority, especially with respect to nonprofit associations. In the Fax Act, Congress explicitly authorized the Commission to exempt nonprofit professional and trade associations from any notice requirement whatsoever. This provision demonstrates that Congress recognized the favored, unique position of nonprofit associations and did not intend for the Commission to impose additional requirements on such associations – especially requirements unauthorized by Congress through the Fax Act, the TCPA, or otherwise.

Accordingly, ASAE respectfully urges the Commission to vacate the portion of the Report and Order that imposes a notice requirement with respect to *solicited* facsimile advertisements.¹⁸⁶

The ASAE did not argue footnote 154 or the notice of rulemaking made the ruling “confusing.”¹⁸⁷ It argued the “plain language” was clear.¹⁸⁸

¹⁸⁴ ASAE Comments at 4.

¹⁸⁵ *Id.* at 2.

¹⁸⁶ *Id.* at 4–5.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

The NSBA raised the same arguments, asking the Commission to “vacate the notice requirement to the extent it applies to solicited facsimile advertisements” on the basis that the Commission “lack[ed] the authority” to issue it under the TCPA.¹⁸⁹ The NSBA argued the Commission should “on its own motion” correct this “critical flaw” in the 2006 Junk Fax Order.¹⁹⁰

Following the ASAE and NSBA comments, either of the two parties that filed timely petitions for reconsideration of the 2006 order (the Direct Marketing Association and LSL) could have sought to “supplement” their petitions to argue that the rules were “confusing” via a “separate pleading stating the grounds for acceptance of the supplement,” as allowed by Rule 1.429.¹⁹¹ Neither petitioner did so.

On October 14, 2008, the Commission decided the two petitions for reconsideration, which it granted in part and denied in part.¹⁹² The Commission denied LSL’s request to allow opt-out notice to appear on a cover page.¹⁹³ The order does not expressly address the challenges to the Commission’s statutory authority to require opt-out notice on faxes sent with permission raised in in the ASAE and NSBA comments.¹⁹⁴

¹⁸⁹ Named State Broadcasters Associations Comments at 3.

¹⁹⁰ *Id.* at 5–6.

¹⁹¹ 47 C.F.R. § 1.429]; *see also 21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199 (D.C. Cir. 2003) (refusing to consider constitutional challenge on appeal where party sought to supplement a timely petition for reconsideration but failed to explain why argument was omitted from petition).

¹⁹² *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Nos. 02-278, 05-338, Order on Reconsideration, 23 FCC Rcd 15059 (rel. Oct. 14, 2008) ¶ 23.

¹⁹³ *Id.* ¶ 15.

¹⁹⁴ *Id.* ¶¶ 1–24.

No party petitioned for reconsideration of the 2008 order pursuant to Rule 1.429 on the basis that the rules were “confusing.”¹⁹⁵ No party appealed the 2006 order or the 2008 order under the Communications Act and the Hobbs Act on the basis that the rules were “confusing” or violated the notice requirements of the Administrative Procedures Act. No party filed a petition to “clarify” the rule until more than two years later, when Anda filed its petition November 30, 2010. No party petitioned to repeal or amend the opt-out-notice rule until nearly five years later, when Staples filed its petition July 19, 2013.

In sum, the record of proceedings demonstrates that regulated parties immediately understood the plain language of the rules and were not confused by footnote 154 or the notice of rulemaking. Contemporaneous legal observers immediately understood the rule.¹⁹⁶ The courts understood the plain language of the rule.¹⁹⁷ There is no evidence in the record of anyone in particular ever actually being “confused” by footnote 154 or the notice of rulemaking. There is now affirmative evidence in the record that regulated parties were *not* confused. Based on this record, the Commission cannot reasonably find that McKesson, PCH, St. Luke’s, Sunwing, or ZocDoc were “presumptively” confused about the law.

¹⁹⁵ 47 C.F.R. § 1.429; *see N. Am. Telecommc’ns Ass’n v. FCC*, 772 F.2d 1282, 1286 (7th Cir. 1985) (telecommunications association could obtain review of FCC orders by appealing from FCC’s subsequent reconsideration decision within appropriate time, even though association’s prior appeal of substantive FCC order had been dismissed as untimely).

¹⁹⁶ *See, e.g., FCC Issues Regulations Implementing Junk Fax Prevention Act*, 60 Consumer Fin. L.Q. Rep. 401 (Fall 2006) (“The opt-out notice must be included in all facsimile advertisements, including those based on an established business relationship or in response to a recipient’s prior express invitation or permission.”).

¹⁹⁷ *See, e.g., In re Sandusky Wellness Ctr., LLC*, 570 F. App’x 437 (6th Cir. 2014) (ordering district court to apply the rule); *Nack v. Walburg*, 715 F.3d 680, 687 (8th Cir. 2013) (citing “plain language” of the rule); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 683 (7th Cir. 2013) (applying plain language of the rule in affirming class certification and summary judgment).

IV. Allowing McKesson, PCH, St. Luke’s, Sunwing, and ZocDoc to send opt-out-free fax advertisements until April 30, 2015, would endanger public health and safety.

Even if the Commission grants McKesson, PCH, St. Luke’s, Sunwing, and ZocDoc *retroactive* waivers for past conduct, it should not grant them *prospective* waivers immunizing them from future violations of § 64.1200(a)(4)(iv) through April 30, 2015. These petitioners have a history of targeting doctors and other medical professionals with their faxes.

Congress found in the TCPA that “when an emergency or medical assistance telephone line is seized,” unrestricted advertising can be “a risk to public safety.”¹⁹⁸ Two doctors commented in these proceedings that they use fax technology to transmit and receive time-sensitive patient information and that unwanted fax advertisements disrupt patient care.¹⁹⁹

The Opt-Out Order ruled that the “interplay” between the notice requirement and the requirement that an opt-out request is enforceable only if it uses the instructions on the fax did not counsel against a *retroactive* waiver under the “particular circumstances” at issue.²⁰⁰ But it did not expressly address the interplay of those rules with respect to a *prospective* waiver. Plaintiffs request the Commission do so with respect to the current petitions out of concern for public health and safety.

Unbound by § 64.1200(a)(4)(iv), McKesson, PCH, St. Luke’s, Sunwing, and ZocDoc would be free to send faxes with no opt-out mechanisms to their preferred targets until April

¹⁹⁸ Telephone Consumer Protection Act of 1991, Pub. L. 102–243, § 2(5) (Dec. 20, 1991).

¹⁹⁹ See Comments of Dr. John Lary, M.D., CG Docket No. 05-338 (Feb. 19, 2014) (stating Dr. Lary’s office “receives many unsolicited and unwanted faxes” and that it is “disruptive and potentially dangerous”); TCPA Pls.’ Ex Parte Notice, CG Docket No. 05-338 (Aug. 27, 2014) (summarizing Dr. Richard Maynard’s comments in meeting with Commission staff that his office is often *required* to send and receive patient information by fax and that fax advertisements disrupt his practice).

²⁰⁰ Opt-Out Order ¶ 25, n.91.

30, 2015. They could “effectively lock in” any permission they have today by making it impossible to revoke permission, which is precisely what the Commission sought to avoid in the Opt-Out Order.²⁰¹ If, for example, a doctor agreed to receive one fax advertisement for a particular product from one of the petitioners, the petitioner could then program its software (or instruct its fax broadcaster) to send fax advertisements to the doctor’s fax line *continuously* until 11:59 p.m. on April 30, 2015. The doctor’s fax machine would be useless for anything but printing advertisements for months, and there would be nothing the doctor could do to stop it. Not even filing a lawsuit under the TCPA’s private right of action would revoke permission, because that is not an authorized opt-out mechanism.²⁰²

TCPA defendants typically respond that all faxes must include header information, and fax advertisements usually include some kind of contact information to purchase a product, sign up for a “free seminar,” etc., so the recipient could use these avenues to communicate an opt-out request. The problem is that the Commission has already ruled that permission may be revoked only by “using the telephone number, facsimile number, website address or email address provided by the sender *in its opt-out notice*.”²⁰³ If there is no opt-out notice, there is no way to revoke permission. The Opt-Out Order recognized this problem and expressly declined to change the rule or grant a reciprocal “waiver” of the fax recipient’s obligations.²⁰⁴

²⁰¹ *Id.* ¶ 20.

²⁰² 47 C.F.R. § 64.1200(a)(4)(v).

²⁰³ 2006 Junk Fax Order ¶ 34.

²⁰⁴ Opt-Out Order ¶ 25, n.91.

Thus, if McKesson, PCH, St. Luke's, and ZocDoc choose not to include opt-out notice on fax advertisements they contend are sent with permission until April 30, 2015, then the recipients will have no way to revoke permission. The Opt-Out Order concluded this was an acceptable trade-off with respect to faxes sent in the *past*,²⁰⁵ but the parties who sent those faxes were ostensibly "confused" about whether their faxes were legal, which would have tempered the faxing activity of a reasonable person. Granting immunity for faxes sent in the *future* by McKesson, PCH, St. Luke's, Sunwing, and ZocDoc, in contrast, would give these parties free reign to send as many "locked in" fax advertisements as possible for the next several months, threatening public health and safety.

Conclusion

The Commission should deny the McKesson, PCH, St. Luke's, Sunwing, and ZocDoc petitions for waivers because the Commission has no authority to "waive" a regulation in a private right of action under the TCPA and doing so would violate the separation of powers. These petitioners are also not "similarly situated" to the petitioners covered by the Opt-Out Order, since (1) the Commission put McKesson on notice of the rules by serving McKesson with a copy and advising it to comply in 2008, (2) only St. Luke's claims it was "confused" about the rules, and it does not claim to have read footnote 154 or the 2005 notice of rulemaking, and (3) none of the petitioners have established that they face "significant" potential liability.

In addition, the Commission should consider the 2006 proceedings after the opt-out regulation was issued, which demonstrate that regulated parties immediately understood the

²⁰⁵ *Id.*

plain language of the opt-out rules and were not “confused” by footnote 154 or the notice of rulemaking, rebutting any presumption of “confusion” (if that is indeed the standard).

Finally, the Commission should not grant prospective waivers to McKesson, PCH, St. Luke’s, Sunwing, and ZocDoc because these petitioners target doctors and other medical-care providers with fax advertisements, and a prospective waiver would allow them to “effectively lock in” permission by sending opt-out-free fax advertisements until April 30, 2015, threatening public health and safety.

Respectfully submitted,

By: s/Brian J. Wanca
Brian J. Wanca
Glenn L. Hara
Anderson + Wanca
3701 Algonquin Road, Suite 760
Rolling Meadows, IL 60008
Telephone: (847) 368-1500
Facsimile: (847) 368-1501

Federal Communications Commission



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

May 9, 2008

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

McKesson Corporation
f/k/a Relay Health Corporation
Attn: Giovanni Colella, MD, CEO
1 Post Street, Floor 19
San Francisco, CA 94104

RE: EB-08-TC-2410

Dear Dr. Colella:

This is an official **CITATION**, issued pursuant to section 503(b)(5) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 503(b)(5), for violations of the Act and the Federal Communications Commission's rules that govern telephone solicitations and unsolicited advertisements.¹ As explained below, future violations of the Act or Commission's rules in this regard may subject you and your company to monetary forfeitures.

It has come to our attention that your company, acting under your direction, apparently sent one or more unsolicited advertisements to telephone facsimile machines in violation of Section 227(b)(1)(C) of the Communications Act, as described in the attached complaint(s).² Section 227(b)(1)(C) makes it "unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to use a telephone facsimile machine,

¹ 47 U.S.C. § 227; 47 C.F.R. § 64.1200. A copy of these provisions is enclosed for your convenience. Section 227 was added to the Communications Act by the Telephone Consumer Protection Act of 1991 and is most commonly known as the TCPA. The TCPA and the Commission's parallel rules restrict a variety of practices that are associated with telephone solicitation and use of the telephone network to deliver unsolicited advertisements, including fax advertising. 47 U.S.C. § 64.1200(a)(3); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 – Junk Fax Protection Act of 2005*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (2006 TCPA Report and Order).

² We have attached one complaint at issue in this citation. The complaint addresses a facsimile advertisement that contains the telephone number 516-491-1891, which your business utilized during the time period at issue.

Federal Communications Commission

computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.”³ As relevant here, an “unsolicited advertisement” is “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.”⁴ Mere distribution or publication of a fax number does not establish consent to receive advertisements by fax.⁵ Fax advertisements may be sent to recipients with whom the sender has an established business relationship, as long as the fax number was provided voluntarily by the recipient.⁶ An established business relationship is defined as a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, based on a purchase, inquiry, application or transaction by that subscriber regarding products or services offered by such person or entity. This relationship must not have been previously terminated by either party.⁷ A fax advertisement may be sent to a recipient with whom the sender has an established business relationship only if the sender also:⁸

- (i) obtains the fax number directly from the recipient;⁹ or

³ 47 U.S.C. § 227(b)(1)(C); *see also* 47 C.F.R. § 64.1200(a)(3) (providing that no person or entity may . . . use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine). Both the TCPA and the Commission’s rules define “telephone facsimile machine” as “equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.” 47 U.S.C. § 227(a)(3); 47 C.F.R. § 64.1200(f)(11). The Commission has stated that “[t]he TCPA’s definition of ‘telephone facsimile machine’ broadly applies to any equipment that has the capacity to send or receive text or images.” Thus, “faxes sent to personal computers equipped with, or attached to, modems and to computerized fax servers are subject to the TCPA’s prohibition on unsolicited faxes. . . [although] the prohibition does not extend to facsimile messages sent as email over the Internet.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14131-32 (2003) (*2003 TCPA Report and Order*).

⁴ 47 U.S.C. § 227(a)(5); 47 C.F.R. § 64.1200(f)(13) (defining “unsolicited advertisement” to specify that prior express invitation or permission may be “in writing or otherwise”).

⁵ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12408-09 (1995) (*1995 TCPA Reconsideration Order*); *see also 2003 TCPA Report and Order*, 18 FCC Rcd at 14128 (concluding that mere publication of a fax number in a trade publication or directory does not demonstrate consent to receive fax advertising).

⁶ 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. 64.1200(a)(3)(ii).

⁷ 47 U.S.C. § 227(a)(2); 47 C.F.R. 64.1200(f)(5); *see also 2006 TCPA Report and Order*, 21 FCC Rcd at 3797-3799. An inquiry about a store location or merely visiting a company website does not create an established business relationship; an inquiry must seek information about the products or services offered by the company. Once established, nonetheless, a business relationship will permit an entity to send facsimile advertisements until the recipient “terminates” the relationship by making a request not to receive future faxes. *2006 TCPA Report and Order*, 21 FCC Rcd at 3798.

⁸ If a valid EBR existed between the fax sender and recipient prior to July 9, 2005, and the sender also possessed the facsimile number prior to July 9, 2005, the sender may send the facsimile advertisements to that recipient without demonstrating how the number was obtained or verifying it was provided voluntarily by the recipient. 47 U.S.C. § 227(b)(1)(C)(iii); 47 C.F.R. § 64.1200 (a)(ii)(C); *see also 2006 TCPA Report and Order*, 21 FCC Rcd at 3796.

⁹ 47 U.S.C. § 227(b)(1)(C)(ii)(I); 47 C.F.R. § 64.1200 (a)(ii)(A).

Federal Communications Commission

- (ii) obtains the fax number from the recipient's own directory, advertisement, or site on the Internet, unless the recipient has noted on such materials that it does not accept unsolicited advertisements at the fax number in question;¹⁰ or
- (iii) has taken reasonable steps to verify that the recipient agreed to make the number available for public distribution, if obtained from a directory or other source of information compiled by a third party.¹¹

Finally, in the event of a complaint or dispute, the burden rests with the fax sender to demonstrate that it either obtained prior express permission to send the facsimile advertisement or satisfied all the criteria necessary to invoke the established business relationship exemption.¹²

If, after receipt of this citation, you or your company violate the Communications Act or the Commission's rules in any manner described herein, the Commission may impose monetary forfeitures not to exceed \$11,000 for each such violation or each day of a continuing violation.

You may respond to this citation within thirty (30) days from the date of this letter either through (1) a personal interview at the Commission's Field Office nearest to your place of business, (2) a written statement, or (3) a teleconference interview with the Commission's Telecommunications Consumers Division in Washington, DC. Your response should specify the actions that you are taking to ensure that you do not violate the Commission's rules governing telephone solicitation and unsolicited advertisements, as described above.

Please contact Delores Browder at (202) 418-2861 to arrange for an interview at the closest field office, if you wish to schedule a personal interview. You should schedule any interview to take place within thirty (30) days of the date of this letter. You should send any written statement within thirty (30) days of the date of this letter to:

Kurt A. Schroeder
Deputy Chief
Telecommunications Consumers Division
Enforcement Bureau
Federal Communications Commission
445-12th Street, S.W., Rm. 4-C222
Washington, D.C. 20554

Reference EB-08-TC-2410 when corresponding with the Commission.

Reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation you will need including as much detail as you can.

¹⁰ 47 U.S.C. § 227(b)(1)(C)(ii)(II); 47 C.F.R. § 64.1200 (a)(ii)(B).

¹¹ 47 U.S.C. § 227(b)(1)(C)(ii)(II); 47 C.F.R. § 64.1200 (a)(ii)(B); *see also 2006 TCPA Report and Order*, 21 FCC Rcd at 3795 (“[I]f the sender obtains the number from sources of information compiled by third parties—*e.g.*, membership directories, commercial databases, or internet listings—the sender must take reasonable steps to verify that the recipient consented to have the number listed, such as calling or emailing the recipient.”).

¹² *2006 TCPA Report and Order*, 21 FCC Rcd at 3793-9, 3795, 3812.

Federal Communications Commission

Also include a way we can contact you if we need more information. Please allow at least 5 days advance notice; last minute requests will be accepted, but may be impossible to fill. Send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau:

For sign language interpreters, CART, and other reasonable accommodations:
202-418-0530 (voice), 202-418-0432 (tty);

For accessible format materials (braille, large print, electronic files, and audio format): 202-418-0531 (voice), 202-418-7365 (tty).

Under the Privacy Act of 1974, 5 U.S.C. § 552(a)(e)(3), we are informing you that the Commission's staff will use all relevant material information before it, including information that you disclose in your interview or written statement, to determine what, if any, enforcement action is required to ensure your compliance with the Communications Act and the Commission's rules.

The knowing and willful making of any false statement, or the concealment of any material fact, in reply to this citation is punishable by fine or imprisonment under 18 U.S.C. § 1001.

Thank you in advance for your anticipated cooperation.

Sincerely,

Kurt A. Schroeder
Deputy Chief, Telecommunications Consumers Division
Enforcement Bureau
Federal Communications Commission

Enclosures

Version 12 – Product Registration

Registered User: (new) MediSoft

Register | Hardware | Providers | USPS Address | Order Info | Password

Lytec ID: Serial Number: 18180121483725

Registration Version: 5 Product Version: [KS] Do not

Product Name: NDCMedisoft Network Professional Mail

Registration Name: TRUE HEALTH CHIROPRACTIC e-Mail

Contact: Jeffrey R. Shope, D.C. Call

Street: 2511 W. Schrock Rd Fax

City: Westerville State: OH

Zip Code: 43081 Check Address Address status: Valid

Practice Specialty: Chiropractor

e-mail: truehealth@midohio.twcbc.com

Phone: (614)794-1379 Fax: (614)794-1625

Registration Date: 08/16/07

Number of Users: 3

Upgraded from: Upgraded to:

Registration Number: FACAD9EAF05

Save

Cancel

EXHIBIT B

Version 16 – Product Registration

Registered Users (new) MediSoft

Register | Hardware | Providers | USPS Address | Order Info | Password

Lytec ID: Serial Number: 20000121388267

Registration Version: 5 Product Version: 10 Do not:

Product Name: Office Hours Professional for Networks (NT) Mail

Registration Name: TRUE HEALTH CHIROPRACTIC e-Mail

Contact: Jeffrey R. Shope, D.C. Call

Street: 2511 W. Schrock Rd Fax

City: Westerville State: OH

Zip Code: 43081 Check Address Address status: Valid

Practice Specialty: Chiropractor

e-mail: truehealth@midohio.twcbc.com

Phone: (614)794-1379 Fax:

Registration Date: 11/10/10

Number of Users: 3

Upgraded from: Upgraded to:

Registration Number: 016791A77C24

Save Cancel

Version 17 – Product Registration

Registered User: (new) MediSoft

Register	Hardware	Providers	USPS Address	Order Info	Password
-----------------	----------	-----------	--------------	------------	----------

Lytec ID: [] Serial Number: 18180121420865

Registration Version: 5 Product Version: 17

Product Name: NDCMedisoft Network Professional

Registration Name: TRUE HEALTH CHIROPRACTIC

Contact: Jeffrey R. Shope, D.C.

Street: 2511 W. Schrock Rd

City: Westerville State: OH

Zip Code: 43081

Check Address Address status: Valid

Practice Specialty: Chiropractor

e-mail: truehealth@midohio.twebc.com

Phone: (614)794-1379 Fax: []

Registration Date: 08/29/11

Number of Users: 3

Upgraded from: 18180121420865 Upgraded to: []

Registration Number: 189862719175

Do not

- Mail
- e-Mail
- Call
- Fax

Save

Cancel

Version 18 – Product Registration

Registered User: (new) MediSoft

Register | Hardware | Providers | USPS Address | Order Info | Password

Lytec ID: Serial Number: 18180121433812

Registration Version: 5 Product Version: Do not

Product Name: NDCMedisoft Network Professional

Registration Name: TRUE HEALTH CHIROPRACTIC

Contact: Shope, Jeffrey

Street: 2511 W. Schrock Rd

City: Westerville State: OH

Zip Code: 43081 Check Address Address status: Not Validated

Practice Specialty: Chiropractor

e-mail: truehealth@midohio.twebc.com

Phone: (614)794-1379 Fax:

Registration Date: 10/31/13

Number of Users: 3

Upgraded from: Upgraded to:

Registration Number: 18180121433812

Save

Cancel

Mail

e-Mail

Call

Fax

Registered User: (new)MediSoft

Register | Hardware | Providers | USPS Address | Order Info | Password

Lytec ID: Serial Number: **10100121391257**

Registration Version: Product Version:

Product Name: NDCMedisoft

Registration Name: MCLAUGHLIN CHIROPRACTIC CENTER

Contact: Franya M. Peterson, D.C.

Street: 2330 Merchants Drive

City: Knoxville State: TN

Zip Code: 37912

Check Address Address status: Valid

Practice Specialty:

e-mail: FPeterson06@comcast.net

Phone: (865)405-0655 Fax: (865)687-0279

Registration Date:

Number of Users: 1

Upgraded from: Upgraded to:

Registration Number: **595361689530**

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