

**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)	

**Edward Simon's Comments on Petition for Waiver of the Commission's Rule on
Opt-Out Notices on Fax Advertisements Filed by
Medversant Technologies, LLC**

Scott Z. Zimmermann
Law Offices of Scott Z. Zimmermann
601 S. Figueroa St., Suite 2610
Los Angeles, CA 90017
Telephone: (213) 452-6509
Facsimile: (213) 622-2171
Email: szimm@zkcf.com

C. Darryl Cordero
Payne & Fears LLP
801 S. Figueroa St., Suite 1150
Los Angeles, CA 90017
Telephone: (213) 439-9911
Facsimile: (213) 439-9922
Email: cdc@paynefears.com

February 13, 2015

TABLE OF CONTENTS

	<u>Page</u>
Executive Summary	ii
Edward Simon’s Comments on Petition for Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by Medversant Technologies, LLC	1
The Commission’s October 30 “Opt-Out Order”	2
The Simon Litigation	5
I. Simon’s Complaint	5
II. “Established Business Relationship” and “Prior Express Permission” Claimed by Defendants	6
III. Medversant’s Petition for Waiver	7
Argument	8
I. The Commission does not have the 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.	8
A. The Commission has no authority to “waive” its regulations in a private right of action.	8
B. A waiver would violate the separation of powers, both with respect to the judiciary and Congress.	10
II. Medversant is not “similarly situated” to the petitioners covered by the Opt-Out Order.	17
A. Medversant did not obtain prior express permission from Simon or any other class member.	17
B. Medversant claims that it “did not believe” or “did not understand,” but it does not claim that its “belief” or “understanding” resulted from footnote 154 or the notice of rulemaking.	20
III. It would be contrary to public interest to grant Medversant a waiver.	23
Conclusion	24

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 (“Opt-Out Order”). The Commission ruled that “all future waiver requests will be adjudicated on a case-by-case basis” and did not “prejudge the outcome of future waiver requests.” The Commission specifically refused to grant blanket future waivers and indicated that only “some” parties will qualify for waivers.

The Commission should deny the petition for waiver brought by Medversant Technologies, LLC (“Medversant”) for each of the following reasons:

First, the Commission has no authority to “waive” violations of any regulations “prescribed under” the TCPA in a private right of action.¹ Doing so would violate the separation of powers by dictating a “rule of decision” to the courts, which have exclusive power to determine whether a violation of the regulations has taken place, and by abrogating Congress’s determination that “each such violation” automatically gives rise to \$500 in minimum statutory damages.²

Second, Medversant is not “similarly situated” to the petitioners to whom waivers were granted in the Opt-Out Order, in at least the following respects: (1) Medversant cannot maintain, consistent with the TCPA and Commission rules, that it sent fax ads to

¹ *Natural Res. Def. Council v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014) (holding federal agency lacked authority to create affirmative defense to its own regulations in statutory private right of action).

² *United States v. Klein*, 80 U.S. 128, 147–48 (1872); *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12-cv-0729, 2014 WL 7109630 at *14 (W.D. Mich. Dec. 12, 2014).

Edward Simon (“Simon”)³ or any other recipient with their prior express permission; and (2) while Medversant asserts that did it not “believe” or “understand” that it needed to comply with § 64.1200(a)(4)(iv), it does not claim that its “belief” or “understanding” stemmed from the two sources of “confusion” or “misplaced confidence” identified in the Opt-Out Order (*i.e.*, the notice of rulemaking for, and footnote 154 of, the 2006 Junk Fax Order). Indeed, Medversant does not claim that it even was aware of the requirements of the regulation and, under the Opt-Out Order, simple ignorance of the law such as this is an insufficient basis to obtain a waiver.

Third, Medversant asserts that “many of the putative class” in the litigation brought by Simon “had an existing business relationship with one or both Defendants.” Accordingly, Medversant was obligated to provide opt-out notices on its faxes regardless of any purported prior express permission— but there are no opt-out notices on its faxes. As recognized by the Commission in the Opt-Out Order, no waiver is to be granted in connection with “fax ads sent pursuant to an established business relationship.” It would be against public interest to waive Medversant’s liability under § 64.1200(a)(4)(iv) in connection with its failure to provide opt-out notices because opt-out notices were required on all its faxes in all events.

³ Simon is the named plaintiff and proposed class representative in class action litigation brought against Medversant and others pending in the United States District Court for the Central District of California. (*Edward Simon, DC v. Healthways, Inc. et al.*, No. 2:14-cv-08022 BRO (JCx) (filed September 16, 2014)).

**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)	

**Edward Simon’s Comments on Petition for Waiver of the Commission’s Rule on
Opt-Out Notices on Fax Advertisements Filed by Medversant Technologies, LLC**

Edward Simon (“Simon”) is the named plaintiff and proposed class representative in a private TCPA action pending in the United States District Court for the Central District of California brought against petitioner Medversant Technologies, LLC (“Medversant”),⁴ as well as others. Medversant seeks a “retroactive waiver” of § 64.1200(a)(4)(iv), which requires opt-out notices on fax advertisements sent with “prior express invitation or permission.” If successful, Medversant intends to present the waiver to the District Court, asking it to bar any claims based on violations of the regulation.⁵ On January 30, 2015, the Consumer and Governmental Affairs Bureau sought comments on Medversant’s petition by February 13, 2015.⁶

⁴ Case No. 2:14-cv-08022 BRO (JCx).

⁵ See *Petition for Waiver*, CG Docket Nos. 02-278 and 05-338 (filed January 7, 2015).

⁶ *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 (Jan. 30, 2015).

The Commission's October 30 "Opt-Out Order"

On October 30, 2014, the Commission issued the "Opt-Out Order,"⁷ 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), which requires opt-out notices on fax ads sent to recipients who provided prior expression permission. The Opt-Out Order does not grant any waiver for or otherwise affect fax ads sent *without* prior express permission. The Commission "emphasize[d] that this waiver does not affect the prohibition against sending unsolicited fax ads, which has remained in effect since its original effective date."⁸

The Opt-Out Order also allows "similarly situated" parties to petition for similar waivers.⁹ The Commission ruled that "all future waiver requests will be adjudicated on a case-by-case basis" and did not "prejudge the outcome of future waiver requests."¹⁰ The Commission specifically refused to grant blanket future waivers¹¹ and indicated that only "some" parties would be granted waivers.¹²

⁷ *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).

⁸ Opt-Out Order ¶ 31.

⁹ *E.g.*, Opt-Out Order ¶ 5.

¹⁰ *Id.* ¶ 30, n. 102.

¹¹ *Id.* ¶ 13.

¹² *Id.* ¶ 1.

Before it addressed waivers in the Opt-Out Order, the Commission ruled that its adoption of § 64.1200(a)(4)(iv) was a valid exercise of Congressional authority granted under 47 U.S.C. § 227(b).¹³ Further, the Commission found that requiring opt-out notices on fax ads sent to recipients who give prior express permission serves highly useful and important purposes: “absent [such] a requirement...recipients could be confronted with a practical inability to make senders aware that their consent is revoked. At best, this could require such consumers to take, potentially, considerable time and effort to determine how to properly opt out...At worse, it would effectively lock in their consent. Moreover...giving consumers a cost-free, simple way to withdraw previous consent is good policy.”¹⁴

The Commission also ruled that the “similar requirement to include an opt-out notice on fax ads sent pursuant to an established business relationship” was completely unaffected by the Opt-Out Order and continues to be mandatory under the TCPA and Commission rules and regulations.¹⁵

After making these rulings, the Commission found that “good cause exists to grant a retroactive waiver” to the petitioners covered by the Opt-Out Order, observing that “good cause” is shown if “(1) special circumstances warrant a deviation from the general

¹³ Opt-Out Order ¶ 14. Unless as expressly noted, all statutory references herein to ‘§ 227’ are to 47 U.S.C. § 227 and all Commission references herein to “§ 64.1200” are to 47 C.F.R. § 64.1200.

¹⁴ *Id.* ¶ 20.

¹⁵ Opt-Out Order ¶ 2, n.2, ¶ 28, n.99.

rule and (2) the waiver would better serve the public interest than would application of the rule.”¹⁶ With respect to the petitioners covered by the Opt-Out Order, the Commission found that “special circumstances” existed because of the “confusion” caused by footnote 154 in the Commission’s 2006 Junk Fax Order, 21 FCC Rcd. at 3810.¹⁷ In that regard, the Commission specifically noted that “all petitioners make reference to the confusing footnote language in the record.”¹⁸ The Commission also found that covered petitioners could have had “misplaced confidence,” because of the manner of rulemaking, that § 64.1200(a)(4)(iv) did not potentially apply to recipients who had given prior express permission.¹⁹ But the Commission emphasized that “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.”²⁰

The Commission also found that “granting a retroactive waiver would serve the public interest, citing the showings made by covered petitioners that they were subject to “potentially substantial damages” for having violated § 64.1200(a)(4)(iv).²¹

¹⁶ Opt-Out Order ¶¶ 22-23.

¹⁷ *Id.* ¶ 24.

¹⁸ *Id.*

¹⁹ Opt-Out Order ¶¶ 26-27.

²⁰ *Id.* ¶ 26.

²¹ Opt-Out Order ¶ 27, citing, among others, the Best Buy petition at 5 stating that “Best Buy is now facing a putative class action lawsuit, alleging millions of damages, a claim for which it has no insurance coverage and no ability to pay.” *See id.*, ¶ 28, n.98.

The Simon Litigation

I. Simon's Complaint

On September 16, 2014, Simon commenced an action in Los Angeles Superior Court against Medversant and Healthways WholeHealth Networks, Inc. (“HWHN”) and Healthways, Inc. for sending fax ads in direct violation of the TCPA and the Commission’s regulations.²² Simon avers that Defendants violated the TCPA in two independent ways: (1) by failing to obtain prior express permission from targeted recipients to send its fax ads; and (2) by failing to include an opt-out notice, required by the Act and the Commission’s regulations,²³ advising recipients of their right to stop future Defendants’ fax ads and informing them how to make a valid opt-out request.²⁴ Simon specifically avers that he did not give prior express permission to Defendants to send fax ads to him.²⁵

Simon seeks to represent a class of all persons to whom Defendants sent junk faxes commencing within the four years preceding the filing, *i.e.*, since September 16,

²² The action was later removed to the United States District Court for the Central District of California.

²³ § 227(b)(1)(C)(iii), (b)(2)(D), (b)(2)(E), (d)(2); 47 C.F.R. § 64.1200(a)(4)(iii)-(vi). In other words, Defendants’ alleged violations of the opt-out notice requirements are not limited to violations of § 64.1200(a)(4)(iv); they also include violations of § 64.1200(a)(4)(iii) with respect to faxes sent with established business relationships.

²⁴ See Declaration of Scott Z. Zimmermann (“Zimmermann Decl.”), Ex. A (Simon Complaint) ¶¶ 15, 24.

²⁵ *Id.* ¶ 15.

2010.²⁶ Simon requests, on behalf of himself and the putative class, statutory damages and an injunction to enjoin future junk faxes by Defendants.²⁷

Simon attaches, as Exhibit 1 to his complaint, a copy of a fax ad sent via facsimile transmission to him on August 13, 2014.²⁸ HWHN and Medversant have acknowledged successfully transmitting via facsimile approximately 5,000 and 36,000 transmissions, respectively, of the type received by Simon on August 13, advertising, among other things, a fee-based email service “ProMailSource.”²⁹ There is no opt-out notice whatsoever contained on the August 13 faxes or on the other “ProMailSource” faxes.³⁰

II. “Established Business Relationship” and “Prior Express Permission”

Claimed by Defendants

HWHN asserts that it had “an established business relationship with every person the ProMailSource faxes were sent to.”³¹ Medversant asserts that “many members of the putative class had an existing business relationship with one or both Defendants.”³²

Both Medversant and HWHN claim that “prior express permission” was given through HWHN’s “Participating Practitioner Agreement” because the Participating

²⁶ *Id.* at ¶ 17.

²⁷ *Id.* ¶ 26 and Prayer for Relief.

²⁸ Zimmermann Decl., Ex. A (Ex. 1 thereto).

²⁹ *See* Zimmermann Decl., Ex. B (Parties’ Initial Rule 26(f) Report), 2:13-16, 3:8-16, 3:25-4:7.

³⁰ Zimmermann Decl., Ex. B, 8:10-12.

³¹ *See* Zimmermann Decl., Ex. C (HWHN Interrogatory Responses), 10:3-4.

³² Zimmermann Decl., Ex. B, 11:3-4.

Practitioner Agreement “requests contact information, including fax number” and the ProMailSource faxes were “sent to the members of HWHN’s network of practitioners at the fax numbers that each member voluntarily provided in their Participating Practitioner Agreement.”³³

III. Medversant’s Petition for Waiver

Medversant claims that it “did not believe” that faxes sent with prior express permission “required opt-out notices”³⁴ Medversant also claims that it “did not [understand] that [it] did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission.”³⁵ This passage merely cribs the Commission’s language from the Opt-Out Order ¶ 26.

But Medversant does not explain these claims, nor does it state that its “belief” or “understanding” stemmed from the two sources of “confusion” and “misplaced confidence” identified in the Opt-Out Order (*i.e.*, the notice of ruling making for, and footnote 154 of, the 2006 Junk Fax Order.)³⁶ Indeed, Medversant does not claim that it was even aware of the requirements of § 64.1200(a)(4)(iv), let alone of the rulemaking for the 2006 Junk Fax Order or footnote 154 from that order.

³³ Zimmermann Decl. C, 7:4-8; *see* Zimmermann Decl. Ex. D (Medversant’s Interrogatory Responses), 8:26-9:2 and 13:10-13.

³⁴ Petition 2.

³⁵ Petition 4.

³⁶ Opt-Out Order ¶ 24.

Medversant does not state whether it intends to comply with § 64.1200(a)(4)(iv) or any other opt-out notice requirement in the future, or whether it has implemented any procedures to ensure compliance going forward.

Argument

I. The Commission does not have the 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.

A. The Commission has no authority to “waive” its regulations in a private right of action.

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,”³⁷ and directs the Commission to “prescribe regulations” to be enforced in those lawsuits.³⁸ The “appropriate court” then determines whether “a violation” has taken place.³⁹ If the court finds “a violation,” the TCPA automatically awards a minimum \$500 in statutory 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 the violations were “willful[] or knowing[].”⁴⁰

³⁷ § 227(b)(3).

³⁸ § 227(b)(2).

³⁹ § 227(b)(3)(A)–(B).

⁴⁰ § 227(b)(3).

The Commission plays no role in determining whether “a violation” has taken place, whether a violation was “willful or knowing,” whether statutory damages should be increased, or how much the damages should be increased. These duties belong to the “appropriate court” presiding over the lawsuit.⁴¹

The TCPA does not authorize the Commission to “waive” its regulations in a private right of action.⁴² It does not authorize the Commission to intervene in a private right of action.⁴³ It does not require a private plaintiff to notify the Commission that it has filed a private lawsuit.⁴⁴ Nor does it limit a private plaintiff’s right to sue for violations in situations where the Commission declines to prosecute.⁴⁵

The Communications Act does, however, grant the Commission authority to enforce the TCPA through administrative forfeiture actions.⁴⁶ Private citizens have no role in that process.⁴⁷ 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

⁴¹ § 227(b)(3).

⁴² *Id.* 47 C.F.R. § 1.3 does not provide this authority at all, and certainly not on a retroactive basis.

⁴³ *Id.*

⁴⁴ *Id.*; *Cf.*, Clean Air Act, 42 U.S.C. § 7604(b) (requiring 60 days prior notice to the EPA to maintain a citizen suit).

⁴⁵ *Cf.*, *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).

⁴⁶ *Id.* § 503(b).

⁴⁷ *Id.*

in the private litigation and private citizens play no role in agency enforcement actions.⁴⁸ This is not an unusual scheme. The TCPA is similar to several statutes, including the Clean Air Act, which empowers the EPA to issue regulations imposing emissions standards⁴⁹ that are enforceable both in private “citizen suits”⁵⁰ and in administrative actions.⁵¹

B. A waiver would violate the separation of powers, both with respect to the judiciary and Congress.

The seminal separation-of-powers case is *United States v. Klein*,⁵² involving a statute passed by Congress intended to undermine a series of presidential pardons issued during and after the Civil War to former members of the Confederacy. The statute directed the courts to treat the pardons as conclusive evidence of guilt in proceedings brought by such persons seeking compensation for the confiscation of private property by the government during the war, thereby justifying the seizure of their property.⁵³

The Supreme Court held the statute violated the separation of powers by forcing a “rule of decision” on the judiciary that impermissibly directed findings and results in

⁴⁸ *Ira Holtzman, C.P.A. & Assocs., Ltd v. Turza*, 728 F.3d 682, 688 (7th Cir. 2013) (holding TCPA “authorizes private litigation” so consumers “need not depend on the FCC”).

⁴⁹ 42 U.S.C. § 7412(d).

⁵⁰ 42 U.S.C. § 7604(a).

⁵¹ 42 U.S.C. § 7413(d).

⁵² 80 U.S. 128, 147–48, 13 Wall. 128, 20 L.Ed. 519 (1872).

⁵³ *Id.*

particular cases.⁵⁴ The Court held one branch of government cannot “prescribe a rule for the decision of a cause in a particular way” to the judicial branch and struck down the law.⁵⁵

But dictating a “rule of decision” is precisely what the “waiver” requested by Medversant seeks to accomplish. The goal, as Medversant does not hesitate to admit, is to prevent the Central District Court from finding “a violation” of § 64.1200(a)(4)(iv). If the waiver is granted, the statute will remain the same. This regulation will remain the same. But the federal district court will be told it cannot find “a violation” of the regulation. That the Commission cannot do.

Medversant might argue that the court could still find a violation of the regulation after a waiver; it simply cannot award damages. That does not save its argument because then the “waiver” would abrogate Congress’s directive that when the “appropriate court” finds “a violation,” the private plaintiff is automatically entitled to a minimum of \$500 in statutory damages.⁵⁶ The Commission has no power to “waive” a statute.⁵⁷ From any angle, the Commission cannot encroach on the judiciary or Congress in the manner contemplated by Medversant, and it should deny Medversant’s requested waiver.

⁵⁴ *Id.* at 146.

⁵⁵ *Id.*

⁵⁶ § 227(b)(3).

⁵⁷ *In re Maricopa Community College Dist. Request for Experimental Authority to Relax Standards for Public Radio Underwriting Announcements on KJZZ(FM) and KBAQ(FM), Phoenix, Arizona*, FID Nos. 40095 & 40096, Mem. Op. & Order (rel. Nov. 24, 2014) (“The Commission’s power to waive its own Rules cannot confer upon it any authority to ignore a statute. While some portions of the Act contain specific language authorizing the Commission to waive provisions thereof, the Act grants no such authority with respect to Section 399B.23.”).

Indeed, the United States District Court for the Western District of Michigan, in a private TCPA action wherein the defendant sought a waiver, just last December held “[i]t would be a fundamental violation of the separation of powers for [the Commission] to ‘waive’ retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court.”⁵⁸ The 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 the defendant violated the “regulation prescribed under” the TCPA.⁵⁹ The court concluded that “the 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.”⁶⁰

Accordingly, the Commission should decline to issue a “waiver” to shield Medversant from private TCPA liability (as opposed to Commission enforcement). If the Commission decides to grant Medversant a “waiver,” it should expressly state that its effect is limited to Commission enforcement proceedings.

The decision in *Stryker* is fully supported by the D.C. Circuit Court of Appeals’ decision in *Natural Resources Defense Council v. EPA* (“*NRDC*”).⁶¹ There the D.C.

⁵⁸ *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12-cv-0729, 2014 WL 7109630, at *14 (W.D. Mich. Dec. 12, 2014).

⁵⁹ *Id.*

⁶⁰ *Id.*

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

Circuit considered whether the EPA had authority to issue a regulation creating an affirmative defense to a private right of action for violations of emissions standards it issued pursuant to the Clean Air Act, in situations where such violations are caused by “unavoidable” malfunctions.⁶² The court held the agency did not have such authority and struck the regulation down for three main reasons.

First, the court noted the statute grants “any person” the right to “commence a civil action” against any person for a “violation of” the EPA standards.⁶³ The statute states a federal district court presiding over such a lawsuit has jurisdiction “to enforce such an emission standard” and “to apply any appropriate civil penalties.”⁶⁴ To determine whether civil penalties are appropriate, the statute directs the courts to “take into consideration (in addition to such other factors as justice may require)” a number of factors, including “the size of the business, the economic impact of the penalty on the business, the violator’s full compliance history and good faith efforts to comply,” etc.⁶⁵

Thus, the D.C. Circuit held, although the statute directs the EPA to issue regulations and “creates a private right of action” for their violation, “the Judiciary” “determines ‘the scope’—*including the available remedies*” of “statutes establishing

⁶² *NRDC*, 749 F.3d at 1062.

⁶³ *Id.* at 1062–63.

⁶⁴ *Id.* at 1063.

⁶⁵ *Id.*

private rights of action.”⁶⁶ The Clean Air Act was consistent with that principle, the court held, because it “clearly vests authority over private suits in the *courts*, not EPA.”⁶⁷ The court held that, by creating an affirmative defense to the statutory private right of action—as opposed to issuing the regulations to be enforced in those actions as directed by the statute—the EPA impermissibly attempted to dictate to the courts the circumstances under which penalties are “appropriate.”⁶⁸ Therefore, the court struck down the regulation.⁶⁹

Second, the D.C. Circuit noted that the EPA has dual enforcement authority over the Clean Air Act, which authorizes both private actions and agency actions to enforce the regulations.⁷⁰ It also noted the EPA has the power to “compromise, modify, or remit, with or without conditions, any administrative penalty” for a violation in those proceedings.⁷¹ Under this dual-enforcement structure, the court held, “EPA’s ability to determine whether penalties should be assessed for Clean Air Act violations extends only

⁶⁶ *Id.*, emphasis in original (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 n.3 (2013); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)).

⁶⁷ *Id.*, emphasis added.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

to administrative penalties, not to civil penalties imposed by a court.”⁷² The regulation creating an affirmative defense for “unavoidable” violations ran afoul of that principle.⁷³

Third, the court noted that the Clean Air Act authorizes the EPA to intervene in private litigation.⁷⁴ Thus, the court held that “[t]o the extent that the Clean Air Act contemplates a role for EPA in private civil suits, it is only as an intervenor” or “as an amicus curiae.”⁷⁵ An intervenor or amicus curiae has no power to create an affirmative defense in the actions in which it intervenes or submits its views, the court held.⁷⁶

The reasoning of *NRDC* directly applies here. First, like the Clean Air Act, the TCPA creates a private right of action for “any person” to sue for violations of the regulations prescribed under the statute and directs the Commission to issue those regulations, but it vests the “appropriate court” with the power to determine whether “a violation” has occurred.⁷⁷ If the court finds a violation, the TCPA imposes automatic minimum statutory damages of \$500, but allows the court “in its discretion” to increase the damages.⁷⁸ The TCPA creates *no role* for the Commission in determining whether a

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* The statute also requires the private plaintiff to give notice to the EPA so the agency can decide whether to intervene. 42 U.S.C. § 7604(c)(3).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ § 227(b)(3).

⁷⁸ *Id.*

violation has occurred, whether it was willful, or whether damages should be increased (and if so, in what amount). Instead, the TCPA “clearly vests authority over private suits in the *courts*,” not the Commission.⁷⁹ Issuing a “waiver” to prevent the Central District of California from determining that “a violation” occurred is no different than the EPA issuing an affirmative defense to prevent courts from determining that civil penalties are “appropriate” because a defendant’s violations were “unavoidable.”

Second, just as the Clean Air Act grants the EPA authority to enforce the regulations through administrative penalties, the Communications Act grants the Commission authority to determine whether penalties should be assessed for TCPA violations in forfeiture actions brought pursuant to 47 U.S.C. § 503(b). Like the EPA’s attempt to dictate “whether penalties should be assessed” in private litigation, granting a “waiver” for the purpose of extinguishing Medversant’s liability in private litigation would run afoul of the bifurcated dual-enforcement structure Congress has created. The Commission is free to choose not to enforce its regulations against Medversant, but it cannot make that choice for Simon or the putative class.

Third, the Commission has even *less* authority to grant a waiver than the EPA did to create an affirmative defense because the Clean Air Act at least allows the EPA to intervene in private actions. The TCPA allows the Commission to intervene only in actions brought by state governments to seek civil penalties for violations of the caller-

⁷⁹ *NRDC*, 749 F.3d at 1063, emphasis added.

identification requirements.⁸⁰ It creates no role for the Commission in private TCPA actions. If an agency with express authority to intervene in a private action enforcing its regulations lacks power to create an affirmative defense in that action, then an agency with no authority to intervene cannot grant an outright “waiver” of a defendant’s liability. The Commission is limited to participating in private TCPA actions “as amicus curiae,” as it often does.⁸¹

In sum, in accordance with *NRDC*, the Commission could not create an affirmative defense of “confusion” or “misplaced confidence” that petitioners could then attempt to establish in court.⁸² If the Commission cannot do that, it cannot take the more radical step of simply “waiving” the violation.

II. Medversant is not “similarly situated” to the petitioners covered by the Opt-Out Order.

A. Medversant did not obtain prior express permission from Simon or any other class member.

Medversant is not entitled to a waiver because it is not “similarly situated” to the petitioners covered by the Opt-Out Order. The Opt-Out Order states that only similarly situated parties may seek waivers and provides that waivers will apply, if at all, only to

⁸⁰ § 227(e)(6)(C).

⁸¹ See, e.g., *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 771 F.3d 1274, 1284 (11th Cir. 2014) (relying on FCC interpretation of TCPA fax rules in amicus letter submitted at court’s request).

⁸² As stated *infra*, Medversant does not even claim that it was “confused” or had “misplaced confidence” in the Junk Fax Order or its rulemaking. Indeed, it does not claim that it was aware of any of this or of the requirements of § 64.1200(a)(4)(iv).

parties who sent fax ads *with prior express permission*. Unlike the covered petitioners, Medversant cannot maintain, consistent with the TCPA and Commission rules, that it obtained prior express permission to send its junk faxes.

In its Petition, Medversant ambiguously requests a waiver with respect to “any faxes” it sent with prior express permission “prior to April 30, 2015.”⁸³ But Medversant never claims that it actually obtained prior express permission at all, let alone explains how or in what manner it did so.⁸⁴ To the contrary, discovery in the Simon litigation reveals that Medversant did not obtain any prior express permission.

Medversant claims in the Simon litigation that it obtained prior express permission when medical practitioners, like Simon, provided their facsimile numbers via “Participating Practitioner Agreements” with HWHN. Medversant is mistaken. The mere act of providing a fax number to another does not constitute prior express permission under the TCPA. The Commission stresses that prior express permission “requires that the consumer understand that by providing a fax number, he or she is agreeing to receive faxed advertisements.”⁸⁵ Similarly, the Commission has ruled that

⁸³ Petition 1. Simon contends that under no circumstance should the Commission grant any waiver to Medversant for fax ads sent after October 30, 2014, *i.e.*, the date of the issuance of the Opt-Out Order.

⁸⁴ Simon objects on due process grounds to any attempt by Medversant to present any additional or different facts in any reply to these Comments. Simon requests that the Commission disregard any additional or different facts that Medversant may offer in its reply. At a minimum, the Commission should grant Simon the ability to respond to any such additional or different facts.

⁸⁵ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 F.C.C.R. 14014, 14129, ¶ 193 (“FCC 2003 Order”); *see also Jemiola v. XYZ Corp.*, 802 N.E.2d 745, 748 (Ohio C.P. 2003) (“the recipient must be expressly told that the materials to

Footnote continued on next page

providing a fax number on an application form gives prior express permission only if the form “include[s] a clear statement indicating that, by providing such fax number, the individual agrees to receive facsimile advertisements from that company or organization.”⁸⁶

Here, the Participating Practitioner Agreements do not give prior express permission to *anyone*, not even HWHN. HWHN’s Agreements do not state that medical practitioners, by providing their fax numbers, thereby consent to receive fax ads. Indeed, the Agreements do not even mention what use, if any, will be made of fax numbers provided.⁸⁷ And if HWHN cannot claim prior express permission through the Agreements, then certainly Medversant—a nonparty to those Agreements—cannot claim prior express permission. This is true as a matter of Commission rule and established law.⁸⁸

Accordingly, because Medversant cannot even make a facial showing that it obtained any prior express permission, it is not entitled to a waiver of § 64.1200(a)(4)(iv).

Footnote continued from previous page

be sent are advertising materials, and will be sent by fax.”)

⁸⁶ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 21 F.C.C.R. 3781, 3807, ¶ 45 (“2006 Junk Fax Order”).

⁸⁷ See Simon’s Participating Practitioner Agreement with HWHN attached as Exhibit E to the Zimmermann Declaration. Certain information on the Agreement has been redacted to protect Simon’s privacy.

⁸⁸ 2006 Junk Fax Order ¶45 (limiting prior express permission to “receiv[ing] facsimile advertisements from that company or organization” that requested the fax number) and *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (defendant cannot take advantage of express consent extended to unaffiliated party).

Indeed, granting a waiver under such circumstances would provide an unfair and unwarranted advantage to Medversant in the Simon litigation.⁸⁹ This alone precludes Medversant from contending that it is “similarly situated” and from obtaining any waiver.

B. Medversant claims that it “did not believe” or “did not understand,” but it does not claim that its “belief” or “understanding” resulted from footnote 154 or the notice of rulemaking.

Medversant is also dissimilar to the petitioners covered by the Opt-Out Order because its violations of § 64.1200(a)(4) (iv) did not result from confusion or misplaced confidence about the opt-out notice requirement. The Commission granted waivers because it determined that two specific grounds led to “confusion” or “misplaced confidence” by the petitioners about whether the opt-out requirement applied: the rulemaking for, and footnote 154 in, the 2006 Junk Fax Order.⁹⁰ The Commission found that these factors taken *together* justified a waiver.⁹¹ The Commission cautioned, however, that “simple ignorance of the TCPA or the Commission’s attendant regulations

⁸⁹ It is one thing for the Commission to state in the Opt-Out Order, in the context of petitioners who could claim that they obtained prior express permission, that “[n]or should the granting of such waivers be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of recipients to be sent the faxes at issue...” Opt-Out Order ¶ 31. But it is an entirely different matter here, where Medversant cannot maintain that it obtained any prior express permission based on its own admissions.

⁹⁰ For example, the petitioners covered by the Opt-Out Order all made reference to the “confusing footnote language in the record.” Opt-Out Order ¶ 24.

⁹¹ Opt-Out Order ¶ 28 (“Taken together, the inconsistent footnote in the *Junk Fax Order* and the lack of explicit notice in the *Junk Fax NPRM* militates in favor of a limited waiver in this instance.”).

is not grounds for waiver.”⁹² Thus, a party will only be similarly situated to the covered petitioners if it was confused about the opt-out requirement based on *both* of these grounds.

Here, Medversant never claims it was confused on *either* of these two grounds. Instead, Medversant states without any explanation that it “did not believe” that § 64.1200(a)(4) (iv) “required opt-out notices” and that it “did not understand” that it needed to comply with the regulation.⁹³ But Medversant does not claim that its “belief” or “understanding” stemmed from the two sources of “confusion” or “misplaced confidence” identified in the Opt-Out Order (*i.e.*, the rulemaking for, and footnote 154 in, the 2006 Junk Fax Order).⁹⁴ Indeed, Medversant does not even claim that it knew about

⁹² *Id.* at ¶ 26.

⁹³ Without any explanation, these statements are mere conclusions that the Commission must disregard in any event.

⁹⁴ 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 the plain language of the 2006 rules required an opt-out notice on faxes sent with permission and that no one was “confused” by footnote 154 or the notice of rulemaking. *See, e.g., 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) and public comments to this Petition for Reconsideration, including those by the American Society of Association Executives and the Named State Broadcasters Associations; *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).

Likewise, contemporaneous legal observers immediately understood the rule. *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

Footnote continued on next page

§ 64.1200(a)(4)(iv), or the requirement that faxes sent with prior express permission must contain opt-out notices. At most, it appears that Medversant was simply ignorant of the law, which the Commission ruled in the Opt-Out Order is insufficient for a waiver from § 64.1200(a)(4)(iv).⁹⁵ This separately bars Medversant's waiver request.⁹⁶

Footnote continued from previous page

invitation or permission.”). The courts also understood the plain language of the rule. *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); *Turza*, 728 F.3d at 683 (applying plain language of the rule in affirming class certification and summary judgment).

In sum, there is no evidence in the record of anyone in particular ever actually being “confused” by footnote 154 or the notice of rulemaking.

⁹⁵ *See* Opt-Out Order ¶ 26. If for any reason the Commission finds Medversant was “confused” or had “misplaced confidence,” Simon has a due process right to investigate the same. It has been denied discovery on this issue to date. *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”). The Commission may hold such “proceedings as it may deem necessary” for such purposes and may “subpoena witnesses and require the production of evidence” as the Commission determines “will best serve the purpose of such proceedings.” *See* 47 C.F.R. § 1.1. In the alternative, Simon requests the Commission postpone ruling on Medversant’s Petition until Simon has completed discovery regarding Medversant’s knowledge (or lack thereof) of the statute and the Commission’s regulations at the time it sent its fax ads.

⁹⁶ Also separately requiring denial of Medversant’s Petition is the fact that it failed to offer any proof of its exposure overall, or specifically its exposure for failing to provide out-out notices on faxes sent with purported prior express permission. Given that it makes no showing in the Petition that it obtained any prior express permission, the exposure Medversant faces is for sending *unsolicited* fax ads (including fax ads unprotected by the established business relationship exemption because of the omission of opt-out notices). Moreover, Medversant has a \$3 million insurance policy which it believes provides coverage. *See* Zimmermann Decl., Ex. B, 17:14-18. Because of Medversant’s failures proof, the Commission cannot find that Medversant’s damages are “substantial” enough to warrant a waiver. *See* Opt-Out Order ¶ 27.

Moreover, Medversant does not claim its “belief” or “understanding” caused it omit opt-out notices in its faxes. This is another reason Medversant is not similarly situated to the petitioners covered by the Opt-Out Order.

III. It would be contrary to public interest to grant Medversant a waiver.

Although unnecessary to deny Medversant a waiver because Medversant failed to carry its burden to demonstrate that it is “similarly situated,” it would be against the public interest to grant Medversant the waiver it seeks. In the Opt-Out Order, the Commission recognized two competing public interests—on one hand, an interest in protecting parties from substantial damages if they violated the opt-out requirement due to confusion or misplaced confidence, and on the other hand “an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads.”⁹⁷ The former does not apply here (including because, as discussed above, Medversant’s failure to provide opt-out notices did not result from confusion or misplaced confidence about the rulemaking of, or footnote 154 in, the Opt-Out Order), but the latter does.

In addition, Medversant relies on the “established business relationship” exemption to justify its junk faxes in the Simon litigation. This means, however, Medversant was required to provide opt-out notices on the faxes in the Simon litigation in any event. In the Opt-Out Order, the Commission reiterated that a “waiver does not

⁹⁷ Opt-Out Order ¶ 27.

extend to the similar requirement to include an opt-out notice on fax ads sent pursuant to an established business relationship, as there is no confusion regarding the applicability of this requirement to such faxes.”⁹⁸

It would be against public policy (especially in light of the highly useful purposes served by opt-out notices as found by the Commission) to give Medversant a waiver of liability for sending faxes with no opt-out notices whatsoever when it was required to provide opt-out notices in all events because the faxes were sent to persons having established business relationships. Medversant cannot claim any confusion or misplaced confidence about the need to provide opt-out notices on its faxes in the first place.

Conclusion

The Commission should deny Medversant’s petition for waiver because the Commission has no authority to “waive” a regulation in a private right of action under the TCPA. Doing so would encroach on the judiciary’s power to determine whether “a violation” of a regulation has taken place and Congress’s power to impose statutory damages for “each such violation.” Medversant also is not “similarly situated” to the petitioners covered by the Opt-Out Order including because (1) Medversant cannot maintain, as a matter of Commission orders and law, that it sent faxes with prior express permission; and (2) Medversant claims no “confusion” or “mistaken confidence” about the rulemaking or footnote 154 of the 2006 Junk Fax Order. Indeed, it does not even claim that it was aware of the requirement for placing opt-out notices on its faxes. At

⁹⁸ *Id.* at ¶ 2, n. 2; *see also* ¶ 29.

most, it appears that Medversant was simply ignorant of the law, which the Commission ruled is insufficient for a waiver.

Moreover, it would be against public policy to waive Medversant's liability for violating § 64.1200(a)(4)(iv) because it was required to provide opt-out notices on its faxes in all events.

Dated: February 13, 2015.

Respectfully submitted,

By: s/Scott Z. Zimmermann
Scott Z. Zimmermann

One of the Attorneys for
Edward Simon
601 S. Figueroa St., Suite 2610
Los Angeles, CA 90017
Telephone: (213) 452-6509
Facsimile: (213) 622-2171
Email: szimm@zkcf.com