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 Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	

Physicians Healthsource, Inc.'s Comments on A-S Medication Solutions LLC's Petition for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules and/or Declaratory Relief

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February 13, 2015

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Executive Summary

The Commission's order of October 30, 2014, stated all future requests for "retroactive waivers" of 47 C.F.R. § 64.1200(a)(4)(iv) would be "adjudicated on a case-by-case basis" and that the Commission did not "prejudge the outcome of future waiver requests in the order." The Commission should deny the current petition for three 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, A-S Medication is not "similarly situated" to the petitioners covered by the Opt-Out Order. There is no genuine "dispute" A-S Medication did not obtain "prior express invitation or permission" to send fax advertisements by purchasing a list from a third party. A-S Medication does not claim it was "confused" by footnote 154 or the 2005 notice of rulemaking. And it has not produced any evidence allowing the Commission to determine whether it faces "significant" liability in the underlying private TCPA action.

Finally, the Commission should not grant a prospective waiver to A-S Medication, since it targets doctors and other medical-care providers with fax advertisements, and a prospective waiver would allow it to "effectively lock in" permission by sending opt-out-free fax advertisements until April 30, 2015, threatening public health and safety.

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Commenter Physicians Healthsource, Inc., is the plaintiff in a private TCPA action pending in the United States District Court for the Northern District of Illinois against petitioner A-S Medication Solutions LLC ("A-S Medication").[1] A-S Medication filed a petition on January 4, 2015, seeking a "retroactive waiver" of 47 C.F.R. § 64.1200(a)(4)(iv), the regulation requiring opt-out notice on fax advertisements sent with "prior express invitation or permission."[2] The petition also seeks a declaratory ruling (1) that the regulation does not apply to faxes sent with "prior express invitation or permission" or (2) that there is no private right of action for violations of the regulation.[3]

The Commission issued an order on 24 similar petitions on October 30, 2014 ("Opt-Out Order").[4] That order rejected the challenges to the validity of the opt-out regulation

[1] *Physicians Healthsource, Inc. v. A-S Medication Solutions LLC*, No. 12-cv-5105 (N.D. Ill.).

[2] *Petition for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules and/or Declaratory Relief*, CG Docket Nos. 02-278, 05-338 (Jan. 4, 2015).

[3] *Id.* at 9–12.

[4] *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*

raised in the A-S Medication petition,[5] but granted retroactive "waivers" purporting to relieve the 24 petitioners of liability in private TCPA litigation.[6] The Consumer and Governmental Affairs Bureau sought comments on A-S Medication's petition January 30, 2015.[7] As instructed by the Public Notice, Physicians Healthsource will address A-S Medication's request for a "waiver" and will not address its request for declaratory ruling.[8]

Procedural History

On October 30, 2014, the Commission issued the Opt-Out Order, granting "retroactive waivers" intended to relieve the covered TCPA defendants of liability in private TCPA actions for violations of § 64.1200(a)(4)(iv) from its effective date, August 1, 2006, to October 30, 2014, as well as prospective waivers for any future violations through April 30, 2015.[9] As one petitioner recently argued, the Commission effectively "modifie[d] the operative date of an existing FCC regulation" with respect to the covered petitioners.[10] The Commission invited "similarly situated" parties to petition for similar waivers.[11]

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).

[5] *Id.* ¶¶ 19–20, 32 & n.70 (ruling that Commission issued regulation under its statutory authority to "implement" the TCPA by empowering consumers to "halt unwanted faxes" and regulation is enforceable through the TCPA's private right of action).

[6] *Id.* ¶¶ 22–31.

[7] *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning Commission's Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Jan. 30, 2015) ("Public Notice").

[8] Public Notice at 2, n.3 (stating "we find it unnecessary to seek additional comment on the Petitioners' request for declaratory ruling" and seeking comment only on the request for waiver).

[9] Opt-Out Order ¶ 29.

[10] *Physicians Healthsource, Inc. v. Stryker Corp.*, No. 12-cv-729 (W.D. Mich.), Defs.' Mem. Supp. Mot. Reconsideration & Renewed Mot. Stay (Doc. 199) at 6 (Feb. 6, 2015).

[11] Opt-Out Order ¶ 30.

Plaintiff's counsel filed comments on two post-order petitions filed by TCPA Defendants on November 18, 2014,[12] five petitions on December 12, 2104,[13] and six petitions on January 13, 2015.[14] Each petition asked 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 faxes[15] or whether the Commission created a *presumption* that petitioners are confused in the absence of evidence they were "simpl[y] ignorant" or knowingly violated the law.[16]

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

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[12] *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).

[13] *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).

[14] *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 EatStreet Inc., McKesson Corp., Philadelphia Consolidated Holding Corp., St. Luke's Center for Diagnostic Imaging, LLC, Sunwing Vacations, Inc, and ZocDoc, Inc. (Jan. 13, 2015).

[15] 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").

[16] *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").

on a separate petition had suggested the Commission create a "path for retroactive waiver" from the telemarketing rules in private TCPA litigation.[17] Plaintiffs noted that, on December 5, 2014, Wells Fargo cited 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."[18] Plaintiffs reiterate their request that the Commission clarify the standards it applied in the Opt-Out Order.

Factual Background

On May 22, 2012, Physicians Healthsource, a chiropractic practice near Columbus, Ohio, filed a TCPA action in Illinois state court, alleging A-S Medication sent it an unsolicited fax advertisement on February 10, 2010. A-S Medication removed to the Northern District of Illinois.[19] The fax, attached hereto as Exhibit A, stated A-S Medication offered "Quality Service Guaranteed," including an offer to provide physicians "the most comprehensive web-based dispensing and 3rd party payer management system in the industry, PedigreeRx Easy Scripts."[20] The fax claimed PedigreeRx Easy Scripts has "[n]o up front costs for software, implementation or training" and provides the "[f]astest return on investment in the industry."[21] The fax contains no opt-out notice of any kind.[22]

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[17] *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.

[18] *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).

[19] *Physicians Healthsource, Inc. v. A-S Medication Solutions LLC*, No. 12-cv-5105 (N.D. Ill.), Notice of Removal (Doc. 1) (June 26, 2012).

[20] *Id.* (Doc. 1-1).

[21] *Id.*

The Complaint alleged A-S Medication sent "the same and similar" faxes to "Plaintiff and more than 39 other recipients" and that class certification was appropriate.[23] The Complaint alleged A-S Medication was precluded from raising an affirmative defense based on an established business relationship ("EBR") or "prior express invitation or permission" because the faxes do not comply with the opt-out-notice requirements.[24]

On January 4, 2013, A-S Medication answered the Complaint, asserting Physicians Healthsource lacked standing because it failed to allege it "received" the fax, even though a copy was attached to the Complaint.[25] A-S Medication did not assert it had an EBR with Plaintiff or obtained Plaintiff's "prior express invitation or permission" to send the fax.[26]

On April 2, 2013, Physicians Healthsource filed a First Amended Complaint ("FAC").[27] On May 10, 2013, A-S Medication answered the FAC, asserting as affirmative defenses that Plaintiff "had an existing business relationship with Defendants" and that Plaintiff "provided, upon information and belief, express consent, invitation, and/or permission to receive information from Defendants."[28]

During discovery, A-S Medication admitted it sent the fax from its location in Libertyville, Illinois, "using a software program known as ZetaFax that was hosted on A-S

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[22] *Id.*

[23] *Id.* ¶ 18.

[24] *Id.* ¶¶ 20, 32.

[25] *Id.*, Defs.' Answer & Affirmative Defenses (Doc. 28) at 16 (Jan. 4, 2013).

[26] *Id.*

[27] *Id.*, FAC (Doc. 38).

[28] *Id.*, Defs.' Answer to FAC (Doc. 42) at 22–23 (May 10, 2013).

Medication Solutions server."[29] Asked where it obtained its list of target fax numbers, A-S Medication stated it "obtained contact data regarding facsimile transmission recipients from Allscripts"[30] when it purchased Allscripts's "prepackaged medications business" as part of an Asset Purchase Agreement for $8 million on March 16, 2009.[31] Allscripts is a defendant in a separate TCPA suit filed by undersigned counsel, and it has also filed a petition with the Commission, on which Plaintiffs' counsel previously filed comments.[32] A-S Medication admitted it sent the fax to "more than 1,000 telephone numbers," but denied it sent it to "more than 5,000 telephone numbers."[33]

Asked for evidence it obtained "prior express invitation or permission" from Plaintiff or the class members, A-S Medication stated it was "unaware of any specific document responsive to this request" and that A-S Medication "believes prior consent may have been provided to AS's predecessor Allscripts, which would be in possession of such documents to the extent they exist."[34] A-S Medication stated it "believes that consent to receive such alleged facsimiles may have also been derived via a prior existing business relationship with recipients of such alleged facsimiles either through AS, or its predecessor entity, Allscripts."[35] A-S Medication later updated its response to state, "see the Asset Purchase Agreement by and Among Allscripts, LLC, A-S Medication Solutions, LLC, and SAV-RX,

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[29] Defs.' Supp. Answers to Pl.'s First Set of Interrogs. Nos. 4 & 8, Resp. No. 8 (Oct. 1, 2013).

[30] Def.'s Supp. Answers to Pl.'s First Set of Interrogs., Resp. No. 11 (Oct. 31, 2013).

[31] Allscripts Healthcare Solutions, Inc. 2009 Form 10-K at 41, *available at* http://www.sec.gov/Archives/edgar/data/1124804/000119312509159671/d10k.htm

[32] *See* Physicians Healthsource, Inc.'s Comments on Allscripts Petition (Nov. 18, 2014).

[33] A-S Medication Answers to Pl.'s First Set of Requests for Admissions, Nos. 8 & 9 (Jan 4, 2012).

[34] Defs.' Resp. Pl.'s First Request for Production of Documents, Resp. No. 2 (July 3, 2013).

[35] *Id.*

LLC, dated March 2, 2009 (the 'APA'), which refers to an assignment of existing customers of Allscripts to AS by way of the terms of the APA."[36]

On January 4, 2015, A-S Medication filed its petition, asserting Physicians Healthsource "specifically requested, or agreed, to receive" A-S Medication's fax advertisements.[37] The petition cites no evidence for this assertion.[38] A-S Medication asserts it sent its fax advertisements to "customers who have provided their prior express consent to receive such facsimiles."[39] The petition cites the title of the case for this assertion.[40] A-S Medication asserts the class members "explicitly agreed to receive" its fax advertisements and "had the means and ability to revoke their consent at any time, and never expressed any interest or desire to do so."[41] It cites nothing in support.[42]

A-S Medication asserts it "was reasonably confused as to whether faxes sent with permission must include an opt-out notice," when it sent its fax advertisements in 2010.[43] It does not say why it was "confused" about the requirement or claim that it read footnote 154 or the 2005 public notice.[44]

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[36] *Id.*, Defs.' Supp. Resp. to Pl.'s First Request for Production of Documents, No. 2 (Oct. 31, 2013).

[37] A-S Medication Pet. at 2.

[38] *Id.*

[39] *Id.* at 3.

[40] *Id.*

[41] *Id.* at 7.

[42] *Id.* at 1–12.

[43] *Id.* at 8.

[44] *Id.*

A-S Medication asserts it faces a risk of "annihilating," "crushing," "ruinous," "catastrophic" damages in the lawsuit.[45] It does not state how many faxes are at issue or give any indication of its financial resources.[46] A-S Medication is not a publicly traded corporation, so its financial statements are not publicly available.

A-S Medication's petition requests that "[t]o the extent that the Commission makes a declaratory ruling, waiver or 'other relief' is appropriate for unsolicited facsimile advertisements sent within the context of an established business relationship, A-S Medication prays that it, similarly, receives that relief."[47]

On January 29, 2015, A-S Medication updated its discovery responses to claim it obtained "prior express invitation or permission" to send fax advertisements to Physicians Healthsource based on documents produced in the Allscripts case showing that Physicians Healthsource was an Allscripts customer until it canceled its service on November 11, 2009.[48] A-S Medication also updated its responses to state it obtained "prior express invitation or permission" to send fax advertisements to the other class members, pointing to approximately 13,600 pages of customer information, without specifying any documents in particular.[49] A-S Medication does not, for example, single out any particular document

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[45] A-S Pet. at 3, 7, 8,

[46] *Id.*

[47] *Id.* at 2.

[48] *A-S Medication*, Defs.' Third Supp. Answers to Pl.'s First Request for Production of Documents, No. 7 (Jan. 29, 2015).

[49] *Id.*, No. 2.

containing "a clear statement indicating that, by providing such fax number, the individual or business agrees to receive facsimile advertisements from that company or organization."[50]

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,"[51] and directs the Commission to "prescribe regulations" to be enforced in those lawsuits.[52] The "appropriate court" then determines whether "a violation" has taken place.[53] 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[]."[54]

The TCPA does not authorize the Commission to "waive" its regulations in a private right of action.[55] It does not authorize the Commission to intervene in a private right of action.[56] It does not require a private plaintiff to notify the Commission it has filed a private

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[50] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG No.s 02-278, 05-338, Report & Order & Third Order on Reconsideration, 21 FCC Rcd 3787, 3812 ¶ 45 & n.168 (rel. Apr. 6, 2006).

[51] 47 U.S.C. § 227(b)(3).

[52] *Id.* § 227(b)(2).

[53] *Id.* § 227(b)(3)(A)–(B).

[54] *Id.* § 227(b)(3).

[55] *Id.*

[56] *Id.*

lawsuit.[57] Nor does it limit a private plaintiff's right to sue to cases where the Commission declines to prosecute.[58] 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.[59]

The Communications Act does, however, grant the Commission authority to enforce the TCPA through administrative forfeiture actions.[60] Private citizens have no role in that process, such as determining whether a violator acted "willfully or repeatedly."[61] 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.[62] This scheme is similar to several other statutes, including the Clean Air Act, which empowers the EPA to issue regulations imposing

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[57] *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).

[58] *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).

[59] *Id.* § 227(b)(3).

[60] *Id.* § 503(b).

[61] *Id.*

[62] *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").

emissions standards[63] that are enforceable both in private "citizen suits"[64] and in administrative actions.[65]

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*,[66] holding it is "the Judiciary" that "determines 'the scope'—*including the available remedies*" of "statutes establishing private rights of action"[67] and that, consistent with that principle, the Clean Air Act "vests authority over private suits in the *courts*, not EPA."[68] TCPA Plaintiffs discussed *NRDC* extensively in a letter to the Commission after it was issued April 18, 2014,[69] and in subsequent comments on waiver petitions.[70] 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.[71] The district court held "[i]t would be a fundamental violation of the separation of powers for the administrative

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[63] 42 U.S.C. § 7412(d).

[64] 42 U.S.C. § 7604(a).

[65] 42 U.S.C. § 7413(d).

[66] 749 F.3d 1055, 1062 (D.C. Cir. 2014).

[67] *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)).

[68] *Id.*

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

[70] *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).

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

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."[72] 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).[73] The district court concluded, "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."[74]

The Commission has no power to do what A-S Medication is asking it to do. The Commission may waive administrative enforcement against A-S Medication, but it cannot make that choice for Physicians Healthsource or the United States District Court for the Northern District of Illinois. 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, while denying the A-S Medication petition as beyond the Commission's power. Taking unlawful action to rectify another perceived unlawful action does not reflect the rule of law.

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[72] *Id.*, at *14.

[73] *Id.*

[74] *Id.*

II. A-S Medication is not "similarly situated" to the petitioners covered by the Opt-Out Order.

A. There is no genuine "dispute" over "prior express invitation or permission" because A-S Medication claims it obtained permission by purchasing a list of fax numbers from a third party, which is insufficient under the Commission's rules.

The Opt-Out Order noted, "[t]he record indicates that whether some of the petitioners had acquired prior express permission of the recipient remains a source of dispute between the parties."[75] In this case, there is no reasonable "dispute." A-S claims it obtained "prior express invitation or permission" to send fax advertisements to Physicians Healthsource and thousands of others by purchasing a list of customer contact information from Allscripts in March 2009, referring to the "assignment of existing customers of Allscripts to AS by way of the terms of" an Asset Purchase Agreement.[76]

The Commission's 2006 Junk Fax Order ruled that for permission to be "express," a recipient must state that "the individual or business agrees to receive facsimile advertisements *from that company or organization*" sending the faxes.[77] That is one of the things that makes it *express* permission, rather than *implied* permission.[78] By definition, a sender cannot purchase "express" permission from a third party. *See Physicians Healthsource, Inc. v. Stryker Sales Corp.*, --- F. Supp. 3d ---, 2014 WL 7109630, at *13 (W.D. Mich. Dec. 12, 2014) (holding sender could not "purchase" physicians' express permission from American Medical Association).

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[75] *Id.* n.104.

[76] Defs.' Supp. Resp. to Pl.'s First Request for Production of Documents, No. 2 (Oct. 31, 2013).

[77] 2006 Junk Fax Order ¶ 45 (emphasis added)).

[78] *Id.*

Moreover, Allscripts did not have express permission to sell in the first place. At best, it had an EBR. The Commission has squarely ruled that a fax advertiser may not transfer an EBR to its "affiliates," let alone sell it to third parties.[79] And even if A-S Medication could have "purchased" an EBR from Allscripts, the Commission ruled in the Opt-Out Order that its "waivers" do "*not* 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."[80]

B. A-S Medication 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.

A-S Medication claims it was actually "confused as to whether faxes sent with permission must include an opt-out notice," when it sent its fax advertisements in 2010.[81] But it does not explain why it was "confused" about the requirement or claim that it read footnote 154 or the 2005 public notice.[82] There is nothing "confusing" about the regulation itself; the plain language is crystal clear.

It is just as likely A-S Medication 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

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[79] *Id.* ¶ 20 ("The Commission believes that to permit companies to transfer their EBRs to affiliates would place an enormous burden on consumers to prevent faxes from companies with which they have no direct business relationship.")

[80] Opt-Out Order ¶ 27, n.99.

[81] *Id.* at 8.

[82] *Id.*

Opt-Out Order (footnote 154 and the notice of rulemaking), then the Commission should deny the A-S Medication petition on this ground alone.

C. Plaintiff has a due-process right to inquire into whether A-S Medication 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 a petitioner is considered "presumptively" confused in the absence of evidence it "understood that [it] did, in fact, have to comply with the opt-out notice requirement,"[83] then Plaintiff has no evidence of actual knowledge at this time with which to rebut the presumption with respect to A-S Medication. Only A-S Medication has that information, and it has been silent on the issue in the underlying litigation and before the Commission.

Plaintiff has a due-process right to investigate whether A-S Medication 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.[84] In the alternative, Plaintiff requests the Commission stay a ruling on A-S Medication's petition until Plaintiff has completed discovery regarding its actual knowledge (or lack thereof) before the United States District Court for the Northern District of Illinois.

D. A-S Medication has provided no evidence it faces "significant" liability in the private litigation.

The Opt-Out Order stated 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"

[83] Opt-Out Order ¶ 26.

[84] 47 C.F.R. § 1.1.

in its decision.[85] A-S Medication claims it faces "annihilating," "crushing," "ruinous," or "catastrophic" damages in the lawsuit.[86] But it does not state how many faxes are at issue or give any indication of its financial resources.[87] Unlike some petitioners, A-S Medication is not a publicly traded corporation, so its financial statements are not publicly available. Neither Plaintiff's counsel nor the Commission is in a position to say whether A-S Medication's potential liability is "significant" in relation to its financial resources.

III. Allowing A-S Medication to send opt-out-free fax advertisements until April 30, 2015, would endanger public health and safety.

Even if the Commission grants A-S Medication a *retroactive* waiver for past conduct, it should not grant it a *prospective* waiver for future violations of § 64.1200(a)(4)(iv) through April 30, 2015. A-S Medication targets doctors and other medical professionals with its 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."[88] Two doctors commented in these proceedings that they use fax technology to transmit and receive time-sensitive patent information and that unwanted fax advertisements disrupt patient care.[89]

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[85] Opt-Out Order ¶¶ 27–28.

[86] A-S Pet. at 3, 7, 8,

[87] *Id.*

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

[89] *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).

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.[90] But it did not expressly address the interplay of those rules with respect to a *prospective* waiver. Plaintiff requests the Commission do so with respect to the A-S Medication petition out of concern for public health and safety.

Unbound by § 64.1200(a)(4)(iv), A-S Medication would be free to send faxes with no opt-out mechanisms to its preferred targets until April 30, 2015. It 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.[91] If, for example, a doctor agreed to receive one fax advertisement for a particular product from A-S Medication, it could then program its software to send fax advertisements to that 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.[92]

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 already ruled that

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[90] Opt-Out Order ¶ 25, n.91.

[91] *Id.* ¶ 20.

[92] 47 C.F.R. § 64.1200(a)(4)(v).

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*."[93] 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.[94]

The Opt-Out Order concluded this was an acceptable trade-off with respect to faxes sent in the *past*,[95] 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 A-S Medication, in contrast, would give it 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 A-S Medication petition for waiver because the Commission has no authority to "waive" a regulation in a private right of action under the TCPA. Also, A-S Medication is not "similarly situated" to the petitioners covered by the Opt-Out Order, since (1) there is no genuine "dispute" that A-S Medication did not obtain "prior express invitation or permission" by purchasing a customer list from a third party, (2) A-S Medication claims it was "confused" about the rules, but does not claim to have read footnote 154 or the 2005 notice of rulemaking, (3) there is no evidence regarding whether A-

[93] 2006 Junk Fax Order ¶ 34.

[94] Opt-Out Order ¶ 25, n.91.

[95] *Id.*

S Medication had actual knowledge of the opt-out regulation, and (4) A-S Medication has failed to establish it faces "significant" potential liability.

Finally, the Commission should not grant a prospective waiver to A-S Medication, since it targets doctors and other medical-care providers with fax advertisements, and a prospective waiver would allow it to "effectively lock in" permission by sending opt-out-free fax advertisements until April 30, 2015, threatening public health and safety.

Respectfully submitted,

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EXHIBIT A