

**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

**Declaration of Scott Z. Zimmermann in Support of Edward Simon’s Comments on
the Petition for Waiver of the Commission’s Rule on Opt-Out Notices on Fax
Advertisements Filed by Healthways, Inc. and Healthways WholeHealth Networks,
Inc.**

1. I am an attorney of law duly licensed by the State Bar of California. I am co-counsel with Payne & Fears LLP representing Edward Simon (“Simon”). I have personal knowledge of the facts set forth herein, except as to those stated on information and belief and, as to those, I am informed and believe them to be true. If called as a witness, I could and would competently testify to the matters stated herein. I make this declaration in support of Simon’s Comments on the Petition for Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by Healthways, Inc. and Healthways WholeHealth Networks, Inc. (collectively, “Healthways”).

2. Attached hereto as Exhibit A is a true and correct copy of Simon’s Complaint filed on September 16, 2014, in the Los Angeles Superior Court. Subsequently Defendants removed the action to the United States District Court for the Central District of California. The action was assigned to Judge Beverly Reid O’Connell and given Case No. 2:14-cv-8022 BRO (JCx). Exhibit A is the operative complaint in the action.

3. Attached hereto as Exhibit B is a true and correct copy of the Parties’ Initial Rule 26(f) Report filed in the Simon litigation on January 26, 2015, as Docket Entry. 25.

4. Attached hereto as Exhibit C is a true and correct copy of Defendant Healthways WholeHealth Networks Inc.'s responses to Simon's Interrogatories served in the Simon litigation.

5. Attached hereto as Exhibit D is a true and correct copy of Healthways's Amended Answer filed in the Simon litigation on November 26, 2014, as Docket Entry 17.

6. Attached hereto as Exhibit E is a true and correct copy of the District Court's order in the Simon litigation denying Defendants' motion to stay, filed on April 7, 2015, as Docket Entry 46.

7. Attached hereto as Exhibit F is a true and correct copy of a form of Healthways WholeHealth Networks Inc.'s Participating Practitioner Agreement that I received from Simon.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed April 10, 2015, at Santa Monica, California.



Scott Z. Zimmermann

EXHIBIT "A"

1 Law Offices of Scott Z. Zimmermann
2 Scott Z. Zimmermann, SBN 78694
3 szimm@zkef.com
4 601 S. Figueroa Street, Suite 2610
5 Los Angeles, California 90017
6 Telephone: (213) 452-6509
7 Facsimile: (213) 622-2171

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Superior Court of California
County of Los Angeles

SEP 16 2014

Sherri R. Carter, Executive Officer/Clerk
By Myrna Beltran, Deputy

5 Payne & Fears LLP
6 C. Darryl Cordero, SBN 126689
7 edc@paynefears.com
8 Eric M. Kennedy, SBN 228393
9 emk@paynefears.com
10 801 S. Figueroa Street, Suite 1150
11 Los Angeles, California 90017
12 Telephone: (213) 439-9911
13 Facsimile: (213) 439-9922

14 Attorneys for Plaintiff
15 Edward Simon, DC,
16 and for all others similarly situated

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

BC 5 5 7 7 7 2

16 EDWARD SIMON, DC, individually
17 and on behalf of all others similarly
18 situated,

Case No.

CLASS ACTION

18 Plaintiff,

**Complaint for Violations of the Junk
Fax Prevention Act (47 U.S.C. § 227)
and 47 C.F.R. § 64.1200); Demand for
Jury Trial; Exhibit**

19 v.

**[CAL. CIV. PROC. CODE §§ 382, 410;
CAL. R. CT. 3.760]**

20 HEALTHWAYS, INC., a Delaware
21 corporation; HEALTHWAYS
22 WHOLEHEALTH NETWORKS, INC.,
23 a Delaware corporation;
24 MEDVERSANT TECHNOLOGIES,
25 L.L.C., a California limited liability
26 company; and DOES 1 through 1,000,
27 inclusive,

28 Defendants.

27 Plaintiff Edward Simon, DC ("Plaintiff"), brings this action on behalf of
28 himself and all others similarly situated, and alleges:

LAW OFFICES OF SCOTT Z. ZIMMERMANN

Introduction

1
2
3 1. More than two decades ago the Telephone Consumer Protection Act of
4 1991, 47 U.S.C. § 227 (“TCPA”) was enacted into law. The law responded to
5 widespread complaints by American consumers and businesses about the cost,
6 disruption and nuisance imposed by junk faxes. The law prohibited the transmission
7 of facsimile advertising without first obtaining the express invitation or permission
8 of the recipient. Despite its passage, consumers and businesses continued to be
9 besieged with junk faxes. In 2005 Congress responded by strengthening the law by
10 amending the TCPA through the Junk Fax Prevention Act of 2005 (collectively
11 “JFPA” or the “Act”).¹ As amended, the law requires a sender to include on its fax
12 advertisements a clear and conspicuous notice that discloses to recipients their right
13 to stop future faxes and explains how to exercise that right.

14
15 2. Plaintiff brings this class action to recover damages for and to enjoin
16 junk faxing by Defendants in violation of the JFPA and the regulations of the
17 Federal Communications Commission (“FCC”) promulgated under the Act.
18 Plaintiff is informed and believes, and upon such information and belief alleges, that
19 Defendants have, commencing within four years preceding the filing of this action,
20 transmitted fax advertisements in violation of the JFPA and FCC regulations.
21 Defendants’ violations include, but are not limited to, the facsimile transmission of
22 an advertisement on August 13, 2014, sent to Plaintiff’s telephone facsimile
23 machine via Plaintiff’s facsimile telephone number, a true and correct copy of which
24 advertisement is attached as Exhibit 1 hereto.

25
26
27 ¹ Unless otherwise noted, all statutory references are to this statute in
28 effect since 2005.

1 7. **Defendant Healthways WholeHealth Networks, Inc.** Plaintiff is
2 informed and believes, and upon such information and belief alleges, that Defendant
3 Healthways WholeHealth Networks, Inc. ("Healthways") is, and at all times
4 relevant hereto was, a corporation organized and existing under the laws of the state
5 of Delaware and a wholly-owned subsidiary of Healthways Parent.

6
7 8. **Defendant Medversant Technologies, L.L.C.** Plaintiff is informed
8 and believes, and upon such information and belief alleges, that Defendant
9 Medversant Technologies, L.L.C. ("Medversant") is, and at all times relevant hereto
10 was, a limited liability company organized and existing under the laws of the state
11 of California, with its principal offices located within this County.

12
13 9. **Defendant Does 1 Through 1,000.** Plaintiff is unaware of the true
14 names and capacities of Does 1 through 1,000, inclusive, and therefore sues such
15 defendants by their fictitious names. Plaintiff will amend this Complaint to show
16 the true names and capacities of the fictitiously named defendants when they are
17 ascertained.

18
19 10. As used herein, the term "Defendants" refers, jointly and severally, to
20 Defendants Healthways Parent, Healthways, Medversant and Does 1 through 1,000,
21 inclusive, and the term "Defendant" refers singularly to any of the Defendants.

22 23 **The JFPA's Prohibition Against Junk Faxing**

24
25 11. By the early 1990s, advertisers had exploited facsimile telephone
26 technology to blanket the country with junk fax advertisements. This practice
27 imposed tremendous disruption, annoyance, and cost on American consumers and
28 businesses. Among other things, junk faxes tie up recipients' telephone lines and

1 facsimile machines, misappropriate and convert recipients' fax paper and toner, and
2 require recipients to sort through faxes to separate legitimate faxes from junk faxes,
3 and to discard the latter. Congress responded to the problem by passing the TCPA.
4 The law was enacted to eradicate "the explosive growth in unsolicited facsimile
5 advertising, or 'junk fax.'" H.R. Rep. No. 102-317 (1991).

6
7 12. The original law did not achieve its objectives, however. In the decade
8 following the law's enactment, however, American consumers and businesses
9 continued to be "besieged" by junk faxes because senders refused to honor requests
10 by recipients to stop.² Congress responded by strengthening the law by amending it
11 through the JFPA. The JFPA, for the first time, required senders to disclose on their
12 fax advertisements that recipients have the right to stop future faxes and to explain
13 how they can exercise that right (hereinafter collectively the "Opt-Out Notice
14 Requirements").³

15 16 **Defendants' Illegal Junk Fax Program**

17
18 13. Plaintiff is informed and believes, and upon such information and belief
19 alleges, that Exhibit 1 and the fax advertisements that are the subject of this
20 Complaint were designed as, intended as, and constituted advertisements under the
21 JFPA within their four corners and as part of Defendants' overall marketing
22 activities promoting their property, goods and services. For example, with respect
23 to Exhibit 1, Plaintiff is informed and believes, and upon such information and

24
25 ² Federal Communications Commission, Report and Order on
Reconsideration of Rules and Regulations Implementing the TCPA of 1991, 29
Comm. Reg. 830 ¶ 186 (2003).

26
27 ³ The Opt-Out Notice Requirements are contained in § 227 (b)(1)(C)(iii),
(b)(2)(D) and (b)(E), the FCC's regulations found at 47 C.F.R. § 64.1200(a)(4)(iii)-
28 (vi) and the FCC's 2006 order. See Federal Communications Commission, Report
and Order and Third Order on Reconsideration, 21 FCC Red. 3787 ¶ 26 (2006).

1 belief alleges, that Exhibit 1 is an advertisement within the ambit of the JFPA and
2 FCC regulations because, *inter alia*, it promotes and advertises the following: (1)
3 the trademark "Healthways" owned by Healthways Parent; (2) the national
4 discounted-fee physician network and wellness program operated by Healthways;
5 (3) the commercial availability and qualities of a product/service known as
6 "ProMailSource" on a subscription-fee basis for use within and without the
7 Healthways network and wellness program; (4) the website, promailsource.com (a
8 service, which itself is an advertisement within the ambit of the JFPA and FCC
9 regulations) and invites recipients to visit that website; (5) the trademark
10 "ProMailSource" owned by Medversant; and (6) the "partnership" between
11 Healthways and Medversant with respect to "ProMailSource."

12
13 14. Plaintiff is informed and believes, and upon such information and belief
14 alleges, that each Defendant is directly and/or vicariously liable for the violations of
15 the JFPA and/or FCC regulations alleged herein because, *inter alia*, it: (i) was a
16 sender of the fax advertisements that are the subject of this Complaint because these
17 advertisements were sent on its behalf and/or its property, goods or services were
18 advertised or promoted in such advertisements; (ii) had involvement in the content,
19 preparation and/or transmission of the fax advertisements; (iii) received and retained
20 the benefits from the fax advertisements in the form of revenue and name and
21 trademark recognition and promotion; and (iv) had actual notice of the unlawful
22 activity constituting the violations alleged herein and failed to take steps to prevent
23 the same.

24
25 15. Plaintiff did not give Defendants prior express invitation or permission
26 as defined in the JFPA (§ (a)(5)) to send to him Exhibit 1 to this Complaint or any
27 other fax advertisements. Plaintiff is informed and believes, and upon such
28 information and belief alleges, that Defendants sent or caused Exhibit 1 and other fax

1 advertisements to be sent without obtaining prior express invitation or permission
2 from other recipients. In sending these faxes, or causing them to be sent,
3 Defendants also failed to include the disclosures required by the Opt-Out Notice
4 Requirements, in further violation of the JFPA and FCC regulations. Indeed,
5 Exhibit 1 has no opt-out notice whatsoever.

6 7 **Class Action Allegations**

8
9 16. **Class Action.** This action is properly maintainable as a class action
10 because (a) there is an ascertainable class; and (b) there is a well-defined community
11 of interest in the questions of fact and law involved.

12
13 17. **Class Definition.** The Plaintiff Class consists of all persons and
14 entities that were at the time subscribers of telephone numbers to which material
15 that discusses, describes, or promotes any of Defendants' respective property, goods
16 or services (whether separately or in combination with the property, goods or
17 services of any other Defendant) was sent via facsimile transmission, commencing
18 within four years preceding the filing of this action, including, without limitation,
19 Exhibit 1 to this Complaint ("Plaintiff Class"). Plaintiff reserves the right to amend
20 the class definition following completion of class certification discovery.

21
22 18. **Class Size/Ascertainability.** Plaintiff is informed and believes, and
23 upon such information and belief alleges, that the number of persons and entities of
24 the Plaintiff Class is sufficiently numerous such that joinder of all members is
25 impracticable due to the class's size and due to the relatively small potential
26 monetary recovery for each Plaintiff Class member, in comparison to the time and
27 costs associated with joinder in the litigation on an individual basis. Plaintiff is
28 further informed and believes, and upon such information and belief alleges, that the

1 identity of all class members is readily ascertainable from records and other
2 documents maintained by Defendants and/or third parties.

3
4 **19. Community of Interest.** There is a community of interest in the
5 questions of fact and law involved because there are predominant questions of fact
6 and law (as more particularly alleged in paragraph 21) and because Plaintiff's claims
7 are typical of claims held by members of the Plaintiff Class, and Plaintiff and its
8 counsel can adequately represent the Plaintiff Class (as more particularly alleged in
9 paragraph 20).

10
11 **20. Typicality and Adequacy of Representation.** The claims of Plaintiff
12 are typical of the Plaintiff Class because they were sent fax advertisements by
13 Defendants, have claims under the same statute and FCC regulations and are entitled
14 to the same damages and injunctive relief. The Plaintiff Class will be well
15 represented by Plaintiff and Plaintiff's counsel. Plaintiff appreciates the
16 responsibilities of a class representative and understands the nature and significance
17 of the claims made in this case. Plaintiff can fairly and adequately represent and
18 protect the interests of the Plaintiff Class because there is no conflict between his
19 interests and the interests of other class members as it regards this action. Proposed
20 class counsel have the necessary resources, experience (including extensive
21 experience in litigating claims under the TCPA/JFPA) and ability to prosecute this
22 case on a class action basis.

23
24 **21. Common Questions of Law and Fact Are Predominant.** Questions
25 of law and fact common to the class predominate over questions affecting only
26 individual class members.

27
28 **A. Common Questions of Fact.** This case presents numerous

1 questions of fact that are common to all class members claims. Plaintiff is informed
2 and believes, and upon such information and belief alleges, that the case arises out
3 of a common nucleus of facts and that Defendants have engaged in the same general
4 course of conduct vis-à-vis class members, and all class members' damages arise
5 out of that conduct.

6

7 **B. Common Questions of Law.** The case presents numerous
8 common questions of law, including, but not limited to:

9

10 (1) whether the faxes are advertisements within the ambit of the
11 JFPA and FCC regulations;

12

13 (2) who were the senders of the faxes that are the subject of this
14 Complaint;

15

16 (3) whether and to what extent Defendants are vicariously liable for
17 each other's acts or omissions that violate the JFPA and FCC regulations;

18

19 (4) Defendants' mode and method of obtaining the telephone
20 numbers to which the faxes that are the subject of this Complaint were sent and
21 whether that mode and method complied with the requirements of § (b)(1)(C)(ii)
22 and FCC regulations;

23

24 (5) whether Defendants complied with the Opt-Out Notice
25 Requirements of the JFPA and FCC regulations, and the legal consequences of the
26 failure to comply with those requirements;

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(6) what constitutes a knowing or willful violation of the JFPA within the meaning of § (b)(3);

(7) whether Defendants committed knowing and/or willful violations of the JFPA and/or FCC regulations;

(8) whether damages should be increased on account of Defendants' knowing and/or willful violations of the Act and/or FCC regulations and, if so, by what amount; and

(9) whether injunctive relief as prayed for in the Complaint should be entered.

22. Appropriateness and Manageability of Class Adjudication. A class action is an appropriate method for the fair and efficient adjudication of this matter for several reasons:

A. Prosecuting separate actions by individual class members would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for Defendants.

B. Because Defendants have acted on grounds that apply generally to the Plaintiff Class, injunctive relief is appropriate respecting the class as a whole.

C. Common questions of law and fact, including those identified in paragraph 21, predominate over questions affecting only individual members.

1 D. Absent class certification there is a possibility of numerous
2 individual cases and, therefore, class adjudication will conserve judicial resources.

3
4 E. Most members of the Plaintiff Class are not likely to join or
5 bring an individual action due to, among other reasons, the small amount to be
6 recovered relative to the time, effort and expense necessary to join or bring an
7 individual action. Because the statutory minimum damage is \$500 per violation and
8 the JFPA does not authorize an award of attorneys' fees to a successful plaintiff,
9 individual action to remedy Defendants' violations would be uneconomical. As a
10 practical matter, the claims of the vast majority of the Plaintiff Class are not likely to
11 be redressed absent class certification.

12
13 F. Equity dictates that all persons who stand to benefit from the
14 relief sought herein should be subject to the lawsuit and, hence, subject to an order
15 spreading the costs of litigation among the class members in relationship to the
16 benefits received.

17
18 G. Class adjudication will serve to educate class members about
19 their rights under the Act and FCC regulations to stop unwanted junk faxes, a
20 particularly important public purpose given Defendants' failure to disclose to
21 recipients their right to stop future fax advertisements and how to exercise that right,
22 in violation of the JFPA and FCC regulations.

23
24 H. This case is manageable as a class action because, among other
25 things:

26
27 (i) Defendants and/or third parties maintain records that will
28 enable Plaintiff to readily ascertain class members and the number of facsimile

1 transmissions at issue and establish liability and damages.

2

3 (ii) liability and damages can be established for Plaintiff and
4 the Plaintiff Class with the same common proofs.

5

6 (iii) statutory damages are provided for in the Act and are the
7 same for all members of the Plaintiff Class and can be calculated with mathematical
8 certainty.

9

10 (iv) a class action will result in an orderly and expeditious
11 administration of claims, and it will foster economies of time, effort and expense.

12

13 (v) a class action will contribute to uniformity of decisions
14 concerning Defendants' faxing policies and practices.

15

16 (vi) as a practical matter, the claims of the Plaintiff Class are
17 likely to go unredressed absent class certification.

18

19 **Cause of Action for Violations of the JFPA and FCC Regulations**
20 **(Against All Defendants)**

21

22 23. **Incorporation.** Plaintiff and the Plaintiff Class reassert and reallege
23 the allegations set forth in paragraphs 1 through 22, above.

24

25 24. **Defendants' Violations of the Act and FCC Regulations.**

26 Commencing within four years preceding the filing of this action, including, without
27 limitation, on August 13, 2014, Defendants violated the JFPA and FCC regulations
28 by, among other things, sending unsolicited advertisements and/or advertisements

1 that violate the Opt-Out Notice Requirements from telephone facsimile machines,
2 computers, or other devices to telephone facsimile machines of Plaintiff and
3 members of the Plaintiff Class, within the United States.
4

5 **25. Private Right of Action.** Under § (b)(3), Plaintiff has a private right of
6 action to bring this claim for damages and injunctive relief on behalf of himself and
7 on behalf of the Plaintiff Class to redress Defendants' violations of the Act and FCC
8 regulations.
9

10 **26. Injunctive Relief.** Plaintiff is entitled have preliminary and permanent
11 injunctions issue to: (1) prohibit Defendants, their respective employees, agents,
12 representatives, contractors, affiliates and all persons and entities acting in concert
13 with them, from committing further violations of the Act and FCC regulations,
14 including, without limitation, the transmission of any unsolicited advertisements, or
15 of any advertisements that do not comply with the Opt-Out Notice Requirements;
16 (2) require Defendants to deliver to Plaintiff all records of fax advertisements sent
17 commencing within four years of the filing of this action, including all content sent
18 via facsimile, fax lists, and transmission records; (3) require Defendants to adopt
19 ongoing educational, training and monitoring programs to ensure compliance with
20 the JFPA and FCC regulations, and limiting facsimile advertising activity to
21 personnel who have undergone such training; (4) require Defendants to provide
22 written notice to all persons to whom Defendants sent, via facsimile transmission,
23 advertisements in violation the Act and/or FCC regulations, warning such persons
24 that the faxing of unsolicited advertisements or advertisements that do not comply
25 with the Opt-Out Notice Requirements violates the JFPA and that they should not be
26 led or encouraged in any way by Defendant's violations of the Act and/or FCC
27 regulations to send advertisements of their own that violate the Act and/or FCC
28 regulations; and (5) require Defendants to conspicuously place on the homepage of

LAW OFFICES OF SCOTT Z. ZIMMERMANN

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5. Entering preliminary and permanent injunctions requested in paragraph 26 of the Complaint;

6. Ordering payment of Plaintiff's costs of litigation, including, without limitation, costs of suit and attorneys' fees, spread among the members of the Plaintiff Class in relation to the benefits received by the Plaintiff Class;

7. For pre-judgment interest;

8. For such other and further relief as the Court shall deem just and proper.

Jury Demand

Plaintiff demands trial by jury on all issues triable by jury.

DATED: September 15, 2014 LAW OFFICES OF SCOTT Z. ZIMMERMANN
and
PAYNE & FEARS LLP

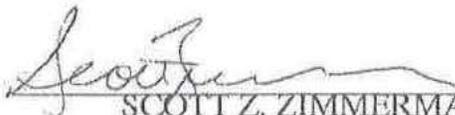
By: 
SCOTT Z. ZIMMERMANN
Attorneys for Plaintiff Edward Simon, DC, and for
all others similarly situated

Exhibit 1



August 13, 2014

RE: Healthways HIPAA Compliance Announcement

Healthways is excited to announce our partnership with a HIPAA compliant email solution. *ProMailSource™* is an email service, but unlike common email services, it is *secure* (cannot be hacked and protects the privacy of our mutual offices and patients). *ProMailSource™* complies with HIPAA Privacy Rules (now being diligently enforced) that apply to all practitioners who treat patients.

This solution allows you to communicate PHI (Protected Health Information) via email. You will be able to communicate with Healthways, your patients, health plans, attorneys, and anyone you currently share PHI with.

How will ProMailSource™ benefit you?

- You can use *ProMailSource™* to communicate securely with all your patients and other healthcare organizations. Your patients will appreciate your concern for their privacy.
- Reduce risk of fines for HIPAA violations of up to \$1,500,000.

Healthways will be utilizing *ProMailSource™* to communicate with our practitioners for Educational Materials, Claims Management Questions, Changes to network policies, Practitioner credentialing updates, Practitioner enrollment questions and more.

Healthways will continue to offer all of our existing communication options. We do find a HIPAA compliant email solution to be the most effective method to share and trade information with our practitioners.

How to subscribe to ProMailSource™

To subscribe, visit <https://promailsources.com/healthways> or call 1-855-252-4314.

As *ProMailSource™* is a solution that is applicable beyond Healthways there is a cost to subscribe. *ProMailSource™* is only \$12.95 per month or an annual subscription of only \$120 per year per mailbox.

As a valued Healthways partner, *ProMailSource™* has agreed to waive its \$100 implementation fee if you subscribe prior to September 5, 2014.

Sincerely,

Martie Stabelfeldt
Healthways WholeHealth Networks, Inc.
Vice President, Physical Medicine Operations

EXHIBIT "B"

1 [COUNSEL LISTED ON SIGNATURE PAGE]

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

8

9 EDWARD SIMON, DC, individually
10 and on behalf of all others similarly
situated,

11 Plaintiff,

12 v.

13 HEALTHWAYS, INC., a Delaware
14 corporation; HEALTHWAYS
WHOLEHEALTH NETWORKS, INC.,
15 a Delaware corporation;
MEDVERSANT TECHNOLOGIES,
16 L.L.C., a California limited liability
company; and DOES 1 through 1,000,
17 inclusive,

18 Defendants

Case No. 2:14-CV-08022-BRO-JC

Honorable Beverly Reid O'Connell

CLASS ACTION

Parties' Initial Rule 26(f) Report

[Fed. R. Civ. P. 26(f)]

Scheduling Conf.: February 2, 2015

Time: 1:30 p.m.

Courtroom: 14 – Spring Street

19

20

21 Plaintiff Edward Simon, DC ("Plaintiff"), Defendants Healthways, Inc.
22 ("HWAYS") and Healthways WholeHealth Networks, Inc. ("HWHN") (collectively
23 "Healthways"), and Defendant Medversant Technologies, L.L.C. ("Medversant")
24 (Medversant and Healthways are collectively, "Defendants") submit this Initial Rule
25 26(f) Report.

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1. Statement of the Case

Plaintiff's Statement: This is a putative class action alleging that Defendants violated the Telephone Consumer Protection Act, as amended by the Junk Fax Prevention Act of 2005, 47 U.S.C. § 227, and regulations promulgated thereunder by the Federal Communications Commission ("FCC") (collectively "TCPA"), by sending, via facsimile transmission, unsolicited advertisements and advertisements that did not comply with the TCPA's opt-out notice requirements. The class period commenced on September 16, 2010 (four years prior to the filing of the action, consistent with the applicable statute of limitations contained in 28 U.S.C. § 1658).

HWHN and Medversant have acknowledged in connection with Rule 26(f) conferences successfully transmitting via facsimile approximately 5,000 and 36,000 transmissions, respectively, of the type received by Plaintiff on August 13, 2014, regarding, among other things, "ProMailSource" (discussed in more detail in Plaintiff's Statement on Legal Issues). Plaintiff alleges that the ProMailSource fax he received violated the TCPA because (1) it was unsolicited, including that he did not give any "prior express permission" via his HWHN "Participating Practitioner Agreement;" and (2) the fax failed to contain any opt-out notice.

Healthways' Statement: HWHN is a wholly owned subsidiary of HWAYS. HWAYS is a health and well-being improvement company. HWHN is a subsidiary of HWAYS that offers physical medicine benefit management to health plans and employer groups.

In order to join HWHN's network of practitioners, a medical care provider

1 has to fill out and submit to HWHN an application referred to as "Participating
2 Practitioner Agreement" and upon HWHN's approval of the Participating
3 Practitioner Agreement, the applicant becomes a member of HWHN's network of
4 practitioners. The Participating Practitioner Agreement requests contact
5 information, including fax number. Plaintiff completed and signed a Participating
6 Practitioner Agreement and was a member of HWHN's network at the time the
7 relevant faxes were sent.

8 Sometime before June 2014, Medversant contacted HWHN to inform it of a
9 product/service known as "ProMailSource", which is a HIPAA compliant e-mail
10 communication program. Medversant informed HWHN that the product could be
11 beneficial to the providers in its network. Medversant drafted the initial version of
12 the ProMailSource fax that was eventually sent to Plaintiff. In or around June
13 2014, HWHN starting sending out the ProMailSource faxes. Thereafter, on July
14 22, August 13 and August 20, 2014, Medversant transmitted faxes to HWHN's
15 network. Plaintiff alleges that he received one of Medversant's faxes on August
16 13, 2014.

17 Healthways deny all material allegations in the complaint and deny that they
18 violated the TCPA. Healthways also deny that Plaintiff or the putative class is
19 entitled to any of the relief requested.

20
21 *Medversant' Statement:* Medversant provides credentialing services and
22 offers communication compliance services to help its customers, like Healthways,
23 and the healthcare providers working within such networks, meet their information
24 security obligations.

25 In or around June 2014, Healthways began sending announcements to its
26 providers via fax that it would be using ProMailSource, Medversant's new
27

1 communication compliance service, and making it available to its providers to use
2 in their own practices. In July, Healthways asked Medversant to transmit such
3 announcements via facsimile to some of its providers. Therefore, on July 22,
4 August 13 and August 20, 2014, Medversant transmitted faxes to providers in the
5 Healthways network, the content of which Medversant was not allowed to alter
6 without permission of Healthways, informing the providers of the new service that
7 Healthways would be using and its availability for use in the providers' practices.

8 Plaintiff, a chiropractor and a provider in the Healthways network who
9 alleges that he received a fax on August 13, 2014, filed this class action. He
10 alleges the fax was an unsolicited advertisement that violated the TCPA because
11 Defendants did not provide information that would allow him to opt out of certain
12 kinds of faxes.

13 Medversant denies all material allegations in the complaint, that it has
14 violated the TCPA, that Plaintiff or the putative class is entitled to any of the
15 requested relief, and that Plaintiff has been damaged in any sum or sustained any
16 injury or loss by reason of any act or omission of Medversant. Medversant has
17 petitioned the Federal Communications Commission for retroactive waiver of the
18 opt-out requirements of 47 C.F.R. § 64.1200(a)(4)(iv). *In the Matter of Rules &*
19 *Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 61
20 Communications Reg. (P&F) 671 (F.C.C. Oct. 30, 2014).

21 Please see Medversant's Statements under "Legal Issues" and "Motions" for
22 further information on Medversant's position in the action.

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2. Subject Matter Jurisdiction

Plaintiff's Statement: Plaintiff filed this action on September 16, 2014, in Los Angeles County Superior Court. Healthways, joined by Medversant, removed the action to this Court on October 16, 2014. This Court has subject matter jurisdiction of this case pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). *See Mims v. Arrow Fin. Svcs., LLC*, 132 S. Ct. 740, 742 (2012).

Spokeo, Inc. v. Robins, referenced by Defendants below, is not a TCPA case. It is a FCRA case in which the plaintiff could not show any actual harm; here, Plaintiff suffered identifiable concrete harm when he was sent the August 13 fax, including wasted paper and toner and interference with his telephone line. In any event, the whole notion that *Spokeo* might affect this case is pure speculation.

Healthways' Statement: Healthways incorporates Medversant's position set forth below.

Medversant's Statement: A third party petition for a writ of certiorari currently pending before the United States Supreme Court may have bearing on the question of whether Plaintiff has standing, and therefore whether the Court has subject matter jurisdiction, in this matter. Plaintiff does not allege any injury in fact. Pending before the Supreme Court of the United States is the Petition for a Writ of Certiorari of *Spokeo, Inc.*, on the question of whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute. *See Spokeo, Inc. v Robins* (Petition for Writ of Certiorari filed May 1, 2014). On

1 October 6, 2014 the Supreme Court asked the United States Solicitor General to
2 weigh in on Spokeo's petition. That petition specifically references the TCPA as
3 one of the statutes that would be impacted if the Court grants the petition and finds
4 that there is no subject matter jurisdiction. Medversant therefore reserves the right
5 to argue that the Court does not have subject matter jurisdiction, pending resolution
6 of the Spokeo petition (and, if the Court grants certiorari, of the Spokeo matter).

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8 **3. Legal Issues**

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10 *Plaintiff's Statement:*

11 Below are the major legal issues from Plaintiff's perspective:

12 ***Advertisement Issue:*** On August 13, 2014, Plaintiff received a fax, a copy
13 of which is attached as Exhibit 1 to the Complaint. Among other things, the
14 August 13 fax promotes the commercial qualities and availability of an email
15 service "ProMailSource" (e.g., "it is secure (cannot be hacked and protects the
16 privacy of our mutual offices and patients)") and seeks to have recipients subscribe
17 to "ProMailSource" for "only" \$12.95 per month or for "only" \$120 per year. The
18 fax announces a "partnership" between HWHN and the distributor of
19 "ProMailSource" (Medversant) and promotes HWHN's physician network and
20 wellness program. The fax is signed by a HWHN Vice President. Plaintiff
21 contends that the August 13 fax is an advertisement within the scope of the TCPA.
22 Defendants dispute this contention.

23 ***Statutory Defenses:*** HWHN claims that Plaintiff provided it with his
24 facsimile number via Plaintiff's "Participating Practitioner Agreement" with
25 HWHN. But this does not provide HWHN with a defense. There are only two
26 defenses under the TCPA: (1) "prior express invitation or permission" ("PEP" for
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1 short) and (2) “existing business relationship” (“EBR” for short). § 227(a)(5),
2 (b)(1)(C)(i)-(iii).

3 The mere act of providing a fax number to another does not constitute PEP
4 under the JFPA. In order to obtain PEP “the recipient must be expressly told that
5 the materials to be sent are advertising materials, and will be sent by fax.” *Jemiola*
6 *v. XYZ Corp.*, 802 N.E.2d 745, 748 (Ohio C.P. 2003). The FCC stresses that PEP
7 “requires that the consumer understand that by providing a fax number, he or she is
8 agreeing to receive faxed advertisements.” In the Matter of Rules and Regulations
9 Implementing the Telephone Consumer Protection Act of 1991, 18 F.C.C.R.
10 14014, 14129, ¶ 193 (“FCC 2003 Order”). Similarly, the FCC has ruled that
11 requesting a fax number on an application form provides PEP only if it “include[s]
12 a clear statement indicating that, by providing such fax number, the individual
13 agrees to receive facsimile advertisements from that company of organization.” In
14 the Matter of Rules and Regulations Implementing the Telephone Consumer
15 Protection Act of 1991, 21 F.C.C.R. 3781, 3807, ¶ 45 (“FCC 2006 Order”).

16 Moreover, the burden on a fax sender to prove PEP is extremely high:
17 “Senders that claim their facsimile advertisements are delivered based on the
18 recipient’s prior express permission must be prepared to provide *clear and*
19 *convincing evidence* of the existence of such permission.” FCC 2006 Order ¶ 36,
20 emphasis added; *see also* FCC 2003 Order ¶ 46.

21 Accordingly, Simon contends that HWHN will not be able to establish that
22 Simon gave PEP to it. Nor can the other defendants assert a PEP defense because
23 they (1) claim no contact with Simon, and (2) cannot “piggyback” on any PEP
24 given to HWHN. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th
25 Cir. 2009) (defendant cannot take advantage of express consent extended to
26 unaffiliated party) and FCC 2006 Order at ¶ 45.

1 HWHN cannot assert an EBR defense either. The existence of an
2 “established business relationship” alone is not a defense under the TCPA. A
3 defendant’s fax must contain a “clear and conspicuous” opt-out notice setting forth
4 a number of mandatory disclosures. § 227(b)(2)(C)(iii), (b)(2)(D) and (b)(E), and
5 the FCC’s regulations found at 47 C.F.R. § 64.1200(a)(iii). The October 30, 2014,
6 FCC order relied upon by Defendants in connection with their contemplated
7 motion to stay (see Medversant’s discussion of Motions *infra*) reaffirmed the opt-
8 out notice requirements for EBR-based faxes and is not the subject of Defendants’
9 FCC petitions on which their motion to stay is based.

10 There is no opt-out notice whatsoever contained on the August 13 fax (and
11 based on discussions with defense counsel, there are no opt-out notices on any of
12 the ProMailSource faxes). Accordingly, regardless of whether Plaintiff had a
13 business relationship with HWHN, it cannot assert an EBR defense.

14 Because there are no opt-out notices on any of the faxes at issue, neither of
15 the other defendants can assert an EBR. Separately, these defendants did not have
16 a business relationship with Plaintiff and cannot “piggyback” on any EBR between
17 Plaintiff and HWHN. An EBR is not “fungible” according to the FCC: “the EBR
18 exemption applies only to the entity with which the business or residential
19 subscriber has had a ‘voluntary two-way communication.’ It would not extend to
20 affiliates of that entity.” FCC 2006 Order ¶ 20.

21 ***Plaintiff’s Standing:*** Defendants deny that Plaintiff has standing. The
22 TCPA confers standing to private persons to sue for violations. § 227(b)(3). Just
23 recently, the Eleventh Circuit re-confirmed that standing for Article III purposes is
24 conferred to a TCPA plaintiff simply by being sent a fax; nothing else is
25 required. *Palm Beach Golf Ctr.-Boca, Inc v. Sarris*, 771 F.3d 1274 (11th Cir.
26 2014); *see also, Holtzman v. Turza*, 728 F.3d 682 (7th Cir. 2013); *Chapman v.*

1 *Wagener Equities, Inc.*, 747 F.3d 489 (7th Cir. 2014). There is no issue that Simon
2 was sent the August 13 fax and he therefore has standing.

3 ***Class Certification:*** The Seventh Circuit recently observed that “[c]lass
4 certification is normal in litigation under §227, because the main questions, such as
5 whether a given fax is an advertisement, are common to all recipients.” *Ira*
6 *Holtzman, C.P.A., Ltd. v. Turza*, 728 F.3d at 684; *see also CE Design Ltd. v. King*
7 *Architectural Metals, Inc.*, 271 F.R.D. 595, 600 (N.D. Ill. 2010) vacated and
8 remanded on other grounds, 637 F.3d 721 (7th Cir. 2011) (class certification
9 granted, observing that “the weight of authority, particularly in this District
10 [Northern District of Illinois],” supports certification of junk fax class actions).
11 Indeed, within the last six years, courts in the Northern District of Illinois alone
12 have certified classes in no fewer than nineteen contested junk fax cases’ A legion
13 of courts, including within the Central District—too numerous to cite—agree. *See,*
14 *e.g., Vandervort v. Balboa Cap. Corp.*, 287 F.R.D. 554, 563 (C.D. Cal. 2012)
15 (Staton Tucker, J.); *Critchfield Phys. Therapy v. Taranto Group, Inc.*, 263 P.3d
16 767, 778-79 (Kan. 2011); *Reliable Money Order, Inc. v. McKnight Sales Co.*, 281
17 F.R.D. 327, 339 (E.D. Wis. 2012), *aff’d*, 704 F.3d 489 (7th Cir. 2013); *Kavu, Inc.*
18 *v. Omnipak Corp.*, 246 F.R.D. 642, 650 (W.D. Wash. 2007); *Karen S. Little, L.L.C.*
19 *v. Drury Inns, Inc.*, 306 S.W.3d 577, 584 (Mo. Ct. App. 2010).

20 Plaintiff contends that the case is well suited for class treatment because the
21 factual and legal issues are common to all putative class members and
22 predominate, and resolving the claims of the putative class via a class action is far
23 superior to individual actions.

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25 **Healthways’ Statement:** Healthways dispute Plaintiff’s contentions.
26 Healthways contend that the faxes do not constitute advertisement. Even if the
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1 faxes are held to constitute advertisement, Plaintiff and the putative class had an
2 established business relationship with HWHN and gave HWHN prior express
3 invitation or permission to send the faxes. Moreover, Plaintiff's proposed class
4 action formation is improper for several reasons, including: a) the issue of whether
5 Plaintiff (or the putative class members, respectively) consented to HWHN's
6 alleged communication precludes certification; b) whether each member of the
7 class received the fax; and c) whether each recipient of the fax owned the fax
8 machine and therefore has standing to sue.

9 The key legal issues include, but are not limited to: (1) whether Plaintiff has
10 standing to bring this lawsuit under the TCPA; (2) whether this case should be
11 stayed pending the petitions for a waiver to the FCC; (3) whether the faxes were
12 unsolicited advertisements under the TCPA; (4) whether Plaintiff and/or members
13 of the putative class gave Medversant and/or Healthways express invitation or
14 permission to send faxes; (5) whether Plaintiff and/or members of the putative
15 class had an established business relationship with Medversant and/or Healthways;
16 (6) if there was a violation of the TCPA, which Healthways denies, whether that
17 violation was willful or knowing; (7) whether Plaintiff has stated a class capable of
18 certification; (8) whether Plaintiff will fairly and adequately protect the interests of
19 the putative class; (9) whether the facts alleged support class certification; (10)
20 whether Plaintiff fails to show the existence of a class; (11) whether a class action
21 is the appropriate method for fair and efficient adjudication of this matter; (12)
22 whether the faxes constitute advertisement; and (13) did HWAYS violate the
23 TCPA despite not sending any faxes.

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25 *Medversant's Statement:* Medversant disputes Plaintiff's positions.
26 Medversant contends that the faxes at issue did not violate the TCPA because they
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1 did not require an opt out notice since: they were not advertisements but rather
2 informational announcements by Healthways; Plaintiff had an existing business
3 relationship with Healthways and many members of the putative class had an
4 existing business relationship with one or both Defendants; and Plaintiff and the
5 putative class gave prior express invitation or permission to Healthways and/or
6 Medversant to receive faxes. Medversant also maintains that, assuming *arguendo*
7 that it violated the TCPA (and Medversant denies any such violation), such
8 violation was not willful or knowing. The case *Jemiola v. XYZ Corp.*, 802 N.E.2d
9 745, 748 (Ohio C.P. 2003), cited by Plaintiff regarding PEP, has no precedential
10 value in the Central District of California.

11 Medversant further disputes that a class action is the appropriate vehicle for
12 adjudication of this dispute because, among other things, there are unique factual
13 issues to be addressed with respect to each individual member of the putative class,
14 including without limitation (1) which version of the fax was transmitted to each
15 member of the putative class, (2) whether each member of the putative class
16 received a fax, and (3) whether each member of the putative class gave prior
17 express permission or invitation for either or both of the Defendants to transmit the
18 faxes and/or had an existing business relationship with either or both of the
19 Defendants.

20 The key legal issues include, *inter alia*: (1) whether Plaintiff has standing to
21 bring this lawsuit under the TCPA; (2) whether this case should be stayed pending
22 the FCC's resolution of issues relating to whether an opt out notice was required
23 on the faxes at issue in this case since Plaintiff and member of the putative class
24 gave prior express permission or invitation to Healthways and/or Medversant to
25 transmit the faxes; (3) whether Medversant had a high degree of involvement in the
26 creation and/or sending of the faxes at issue; (4) whether Medversant can or should
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1 be held liable for faxes that it transmitted at the direction of Healthways; (5)
2 whether the faxes at issue were unsolicited advertisements under the TCPA; (6)
3 whether Plaintiff and/or members of the putative class gave Medversant and/or
4 Healthways express invitation or permission to send him faxes; (7) whether
5 Plaintiff and/or members of the putative class had an established business
6 relationship with Medversant and/or Healthways; (8) if there was a violation of the
7 TCPA, which is denied, whether that violation was willful or knowing; (9) whether
8 Plaintiff has stated a class of litigants capable of certification for a class under the
9 Federal Rules of Civil Procedure or under California law; (10) whether Plaintiff
10 will fairly and adequately protect the interests of the putative class; (11) whether
11 the facts alleged support class certification; (12) whether Plaintiff fails to show the
12 existence of a class; (13) whether a class action is the appropriate method for fair
13 and efficient adjudication of this matter; (14) whether Medversant violated any of
14 Plaintiff's or the putative classes' privacy rights; and (15) whether Plaintiff is
15 entitled to injunctive relief.

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4. Parties, Evidence, Etc.

Plaintiff's Statement: Plaintiff is an individual. He is a doctor of
chiropractic medicine practicing in North Hollywood. He will testify regarding (1)
the facts and circumstances surrounding his receipt of the August 13 fax and any
other fax advertisements sent or caused to be sent by Defendants which are the
subject of this action (the "Faxes"); (2) his subscription, during all relevant times,
of the facsimile telephone number (818) 761-8705 to which the August 13 fax was
sent; (3) whether an established business relationship existed between Plaintiff and
Defendants at the time the Faxes were sent to Plaintiff; (4) the absence of any prior

1 express permission given by Plaintiff to be sent the Faxes; and (5) the adequacy of
2 Plaintiff to act as class representative for the putative class in this case.

3 The "core" set of documents to be produced by Defendants in this case
4 consists of: (1) fax advertisements sent by Defendants; (2) fax lists used for the fax
5 broadcasts; and (3) reports and other documents recording the transmission of the
6 fax advertisements. Based on discussions at the Rule 26(f) conference, Plaintiff
7 understands that Defendants have these documents.

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9 *Healthways' Statement:* HWAYS is a health and well-being improvement
10 company. HWHN is a subsidiary of HWAYS that offers physical medicine
11 benefit management to health plans and employer groups.

12 Healthways identifies the following parties: Plaintiff, Medversant and
13 Healthways.

14 Healthways identifies the following Witnesses: Plaintiff; Megan Walker
15 (Senior Manager of Physical Medicine Operation for Healthways WholeHealth
16 Networks, Inc.); Denise Ferrari (Director of Provider Network Services & Claims
17 for Healthways WholeHealth Networks, Inc.); Pamela DeWeese (Manager,
18 Compliance for Healthways WholeHealth Networks, Inc.); Dayna Carney
19 (Business Analyst for Healthways WholeHealth Networks, Inc.); Winnie Grim
20 (Analyst, Service Operations for Healthways WholeHealth Networks, Inc.); Lori
21 Davis (Account Management Consultant for Healthways WholeHealth Networks,
22 Inc.); Desiree Wood (Coordinator, Operations for Healthways WholeHealth
23 Networks, Inc.); Martie Stabelfeldt, (Vice President Physical Medicine Operations
24 for Healthways WholeHealth Networks, Inc.); Kathleen Policarpio (IT Operations
25 Analyst for Medversant Technologies, LLC.); Joe Beckerman (Vice President of
26 National Accounts for Medversant Technologies, LLC.); Noor Alikan (Vice

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1 President of Technology Operations for Medversant Technologies, LLC.) ; Matt
2 Haddad (Chief Executive Officer at Medversant); other employees of Healthways
3 and Medversant; putative class members.

4 Healthways identify the following documents:

5 Agreement between Healthways WholeHealth Networks, Inc., and
6 Medversant Technologies, LLC; ProMailSource faxes; Drafts of the
7 ProMailSource faxes; Communications between Healthways WholeHealth
8 Networks, Inc., and Medversant Technologies, LLC. relating to the ProMailSource
9 faxes; Documents related to the transmission of the ProMailSource faxes;
10 Documents reflecting prior relationship and/or permission from members of
11 Healthways WholeHealth Networks, Inc.'s network of practitioners to receive
12 faxes from the Healthways Defendants; Copies of documents and other tangible
13 items produced by Plaintiff to the extent relevant to Defendant's defenses; Copies
14 of documents and other tangible items produced by Medversant Technologies,
15 LLC to the extent relevant to Defendant's defenses.

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17 *Medversant's Statement:*

18 Medversant provides credentialing services to healthcare organizations such
19 as Healthways. The credentialing process involves gathering, verifying and
20 updating information from healthcare providers within the Healthways network. In
21 addition, Medversant offers communication compliance solutions to help its
22 customers, like Healthways, and the healthcare providers working within such
23 networks, meet their information security obligations under the Health Information
24 Portability and Accountability Act ("HIPAA"). As part of its credentialing
25 business, Medversant communicates with, follows up on requests from, and
26 exchanges valuable information directly with customers (healthcare organizations

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1 customers and the healthcare providers in their networks), including by fax.

2 Medversant is not in the advertising business.

3 Medversant identifies the following parties: Plaintiff; Healthways; and
4 Medversant.

5 Medversant identifies the following percipient witnesses: Plaintiff; Noor
6 Alikhan (Vice President of Technology Operations at Medversant); Joe Beckerman
7 (Vice President of National Accounts at Medversant); Matt Haddad (Chief
8 Executive Officer at Medversant); Kathleen Policarpio (IT Operations Analyst at
9 Medversant); Martie Stabelfeldt (Vice President of Physical Operations at
10 Healthways); Megan Walker (Senior Manager of Physical Medicine Operations at
11 Healthways); Denise Ferrari (Director of Provider Network Services & Claims at
12 Healthways); Kelley Moore (Senior buyer of Supplier Contracts Group at
13 Healthways); other employees of Healthways and Medversant; putative class
14 members.

15 Medversant identifies the following categories of documents: Faxes
16 transmitted from Medversant and/or Healthways to health care providers regarding
17 ProMailSource; drafts of faxes from Medversant and/or Healthways to health care
18 providers regarding ProMailSource; documents regarding the relationship between
19 Medversant and Healthways, including, but not limited to, contracts; documents
20 regarding the implementation of ProMailSource, including, but not limited to, test
21 plans, launch schedules, and statements of work; documents reflecting prior
22 relationships and/or permission from health care providers to receive faxes from
23 Medversant or Healthways; documents reflecting existing business relationships
24 with health care providers and/or relating to Medversant's credentialing services;
25 and communications between Medversant and Healthways regarding faxes and/or
26 ProMailSource.

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5. Damages

Plaintiff's Position: The TCPA provides for minimum statutory damages of \$500 per fax transmission (without showing any actual damages) that the Court may, in its discretion, increase no more than threefold if a defendant's violations are either knowing or willful. § 227(b)(3). The threshold to qualify for trebling is low. In last year's *Bridgeview* decision, the court adopted what it called a "more common interpretation" of the willfully or knowingly threshold under the Act, holding that it "simply requires that the Act be intentional or volitional, as opposed to inadvertent, and not that defendant must have known that the conduct would violate the statute." *Bridgeview Health Care Ctr. Ltd. v. Clark*, No. 09 C 5601, 2013 WL 1154206, at *7 (N.D. Ill. Mar. 19, 2013). Indeed, "a plaintiff does not need to prove that defendant had knowledge of the TCPA's provisions..." *Id.*

Using the 41,000 fax transmissions acknowledged by Defendants, minimum statutory damages are \$20.5 million without consideration of trebling.

Healthways' Position: Not applicable to Healthways as defendants. However, Healthways deny that Plaintiff has suffered any damages whatsoever.

Medversant's Position: Not applicable to Medversant as a defendant. To the extent it is applicable, Medversant asserts that neither Plaintiff nor any putative class member has suffered damages and that Medversant is not liable for any damages. Using a single sheet of paper and black toner to print a fax (assuming the fax is even printed given that many fax lines use electronic delivery) is not concrete harm. Further, while the TCPA provides for minimum statutory damages

1 of \$500 per fax transmission (which Medversant asserts is unconscionable),
2 Plaintiff's calculated number of \$20.5 million relies on a faulty assumption that the
3 41,000 fax transmissions (which differ amongst each other) comprise a single
4 class.

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6 **6. Insurance**

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8 *Plaintiff's Position:* This is inapplicable to Plaintiff.

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10 *Healthways' Position:* Healthways has an E&O policy with ACE USA
11 (Illinois Union Insurance Company). The policy has a \$15 million limit (including
12 defense expenses.)

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14 *Medversant's Position:* Medversant has an insurance policy with Travelers
15 Insurance, under which Travelers Insurance may be liable to satisfy all or part of a
16 possible judgment in this action. The limits of coverage are \$3 million per
17 wrongful act with a \$3 million aggregate limit. The policy limits are reduced by
18 any fees, costs or settlement. The carrier has issued a reservation of rights.

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20 **7. Motions**

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22 *Plaintiff's Position:* Based on the information provided by Defendants at
23 the Rule 26(f) conference, Plaintiff does not anticipate filing a motion to add other
24 parties. Plaintiff anticipates that after conducting class-related discovery, Plaintiff
25 will file an amended complaint to reflect such discovery and to conform the
26 pleading to Rule 23 requirements (as Plaintiff's current complaint is a California
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1 state court based pleading). Plaintiff anticipates filing a motion for class
2 certification, and as appropriate, a motion for partial/complete summary judgment.
3 Plaintiff anticipates the need to file discovery motions, although Plaintiff is hopeful
4 that discovery disputes can be resolved. Plaintiff will file Motions in Limine, as
5 necessary.

6 Plaintiff will oppose any motion by Defendants to stay the action. As
7 Plaintiff understands it, Defendants will seek to stay the case until after the FCC
8 rules on their petitions to the FCC for retroactive waivers of past violations of the
9 FCC's regulation requiring opt-out notices for PEP-based fax transmissions.
10 (Medversant has already filed its petition, and Healthways indicated that it intends
11 to file a petition shortly.) Defendants' requests for retroactive waivers do not merit
12 a stay because, among other things, any applications for waiver would not change
13 discovery in the case—the retroactive waivers would only apply to transmissions
14 sent to persons who gave PEP, meaning Defendants would need to establish PEP
15 in the first instance. Plaintiff is entitled to conduct discovery regarding any alleged
16 PEP, and therefore the scope of discovery would remain unchanged.

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18 **Healthways' Position:** Healthways intend to file the following motions: (1)
19 Motion to Stay; (2) Motion for Summary Judgment; (3) Motions in Limine, if
20 necessary. The motion to stay will be filed jointly with Medversant for the reasons
21 identified by Medversant below.

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23 **Medversant's Position:** Medversant intends to file the following motions
24 during the course of the litigation: (1) Motion to Stay; (2) Motion for Summary
25 Judgment; (3) Motions in Limine, if necessary; and (4) Motions to Compel, if
26 necessary.

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1 On October 30, 2014, the FCC acknowledged in an order that, prior to the
2 issuance of the order, organizations reasonably may have believed that an opt out
3 notice was not required for faxes sent to recipients who had provided prior express
4 invitation or permission for the transmission of faxes, and invited organizations to
5 apply for retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv). *In the Matter of*
6 *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 61
7 Communications Reg. (P&F) 671 (F.C.C. Oct. 30, 2014). Accordingly,
8 Medversant submitted a petition for retroactive waiver on January 8, 2015.
9 Because the FCC has yet to grant or deny Medversant's petition for waiver, and
10 Medversant's defenses, including PEP, are in part dependent upon the granting of
11 such waiver, it would be prejudicial to Medversant for this case to go forward and
12 for Medversant to have to defend itself without it knowing whether it has a PEP
13 defense. *Physicians Healthsource, Inc. v. Endo Pharmaceuticals, et al.*, No. 2:14-
14 cv-02289 (E.D. Pa. Jan 16, 2015). Further, the scope of discovery and potential
15 settlement discussions drastically change based on whether the FCC grants or
16 denies the waiver. There is no prejudice to Plaintiff by a stay and the Court would
17 benefit from waiting for the FCC to resolve the ambiguity. For these reasons,
18 Medversant will seek a stay of this lawsuit until the FCC grants or denies its
19 petition for retroactive waiver.

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22 **8. Manual for Complex Litigation**

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25 The parties do not believe that this case needs to be governed by the Manual
26 of Complex Litigation.

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9. Status of Discovery

On November 19, 2014 (same day as counsel’s Rule 26(f) conference), Plaintiff served Rule 34 requests, interrogatories and Rule 36 requests on each Defendant. Medversant responded on December 22, 2014, and Heathways Defendants responded (after extension granted) on January 12, 2015. Plaintiff asserts there are a number of discovery issues outstanding regarding Defendants’ responses. Medversant contests Plaintiff’s assertion. The parties hope to resolve their issues without court intervention.

10. Discovery Plan

The following Discovery Plan is subject to the Court’s ruling on Defendants’ Motion to Stay based on Medversant’s pending petition to the FCC described above.

a. Phasing of Discovery, Depositions, Written Discovery and Completion Dates

i. Whether to Conduct Discovery in Phases

The parties agree that class certification-related discovery and merits-related discovery may be pursued concurrently and not phased. The parties also agree merits-related discovery may be pursued after the Court’s ruling on Plaintiff’s motion for class certification (in the event that the Court grants certification of a class).

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ii. Anticipated Deponents and Completion

Plaintiff's Position: It is currently premature to identify anticipated deponents. Defendants identified 16 witnesses in their Initial Disclosures. Accordingly, Plaintiff may need to depose up to 16 witnesses, not including experts. Also, Plaintiff may need to depose two third-party fax broadcasters.

Healthways' Position: It is presently premature to identify anticipated deponents. However, Healthways will depose Plaintiff and other individuals that Plaintiff may identify in responses to written discovery. Healthways may also depose witnesses identified by Medversant and putative class members.

Medversant's' Position:

It is presently premature to identify anticipated deponents. However, Medversant will depose Plaintiff and other individuals that Plaintiff may identify in responses to written discovery. Medversant may also depose witnesses identified by Healthways, putative class members, and other witnesses as necessary.

iii. Anticipated Written Discovery and Schedule of Completion

Plaintiff's Position: Plaintiff intends to serve follow-up written discovery to both Defendants.

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b. Rule 26(f)(2) —Evidence Preservation

Concurrently with the service of the Complaint upon Defendants, Plaintiff served letters identifying evidence to be preserved by Defendants and asking Defendants to notify any pertinent third parties to also preserve such evidence. At the Rule 26(f) conference Defendants' counsel stated that their respective clients have complied with their obligations to preserve evidence under law.

c. Rule 26(f)(3)(C)—Electronically Stored Information

Based on discussions between the parties, it does not appear that ESI will be an issue, although each party reserves its rights related to ESI. Defendants indicate that they will produce fax transmission reports in Excel format.

d. Rule 26(f)(3)(D)—Claims of Privilege

The parties agree that the following communications do not need to be logged on a privilege log as long as the communication has not been shared in any part or manner with anyone to whom the privilege does not apply:

- (1) Attorney-client privileged communications between Plaintiff and its counsel of record regarding the litigation created after the litigation was filed;
- (2) Attorney-client privileged communications between Defendants and their respective counsel of record, respectively, regarding the litigation created after the litigation was filed;
- (3) Communications between or among counsel for Plaintiff, between or among counsel for Healthways (including Healthways' in-house counsel), and

1 between or among counsel for Medversant (including Medversant's in-house
2 counsel) created after the litigation was filed.

3
4 **e. Rule 26(f)(3)(E)—Changes to Limitations of Discovery**

5
6 The parties agree to abide by the limits set forth in the Federal Rules of Civil
7 Procedure regarding discovery, without prejudice to any party's right to seek relief
8 for good cause shown.

9
10 **f. Protective Order**

11
12 The parties anticipate agreeing on the terms of a protective order in the near
13 future.

14
15 **11. Dispositive Motions**

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17 **Plaintiff's Position:** Plaintiff anticipates filing a motion for partial/complete
18 summary judgment on Defendants' statutory defenses, other liability issues, and
19 minimum statutory damages.

20
21 **Healthways' Position:** Healthways intend to file a motion for summary
22 judgment on its defenses to Plaintiff's claim.

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24 **Medversant's' Position:** Medversant intends to make a motion for summary
25 judgment on its defenses to Plaintiff's claim.

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12. Motion for Class Certification

The parties agreed that Plaintiff can file its motion for class certification by August 1, 2015, with a projected hearing date in late September or early October, depending on the Court's calendar. These dates are subject to the Court's ruling on the Motion to Stay.

13. Settlement/Alternative Dispute Resolution

The parties agree that at this point settlement discussions are premature. The parties have selected private mediation as their ADR method, but have not yet selected any mediator.

14. Preliminary Estimate of Trial Length and Proposed Trial Date

The parties' proposed trial dates are set forth in the Timetable attached at the end of this Report. These dates are subject to the Court's ruling on the Motion to Stay. As the case is currently pled by Plaintiff, the trial is to be tried by jury. Without waiver to seek modification, the parties currently estimate a trial between four to seven days.

15. Names of Trial Counsel

For Plaintiff:

Scott Z. Zimmermann (Law Offices of Scott Z. Zimmermann) and Darryl Cordero (Payne & Fears LLP).

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For Healthways:

Stephen H. Turner (Lewis Brisbois Bisgaard & Smith LLP), Patrik Johansson (Lewis Brisbois Bisgaard & Smith LLP) and Larissa Nefulda (Lewis Brisbois Bisgaard & Smith LLP).

For Medversant

Tanya L. Forsheit (Baker & Hostetler LLP) and Daniel M. Goldberg (Baker & Hostetler LLP).

16. Independent Expert or Master

The parties currently do not believe that there is a need for an independent expert or master.

17. Timetable

The parties' proposed dates for pre-trial matters and trial are contained in the Timetable attached at the end of this Report. These proposed dates are subject to the Court's ruling on the Motion to Stay.

18. Other Matters

The parties have no other matters to bring before the Court at this time.

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DATED: January 26, 2015

Law Offices of Scott Z. Zimmermann
and
Payne & Fears LLP

By: s/ Scott Z. Zimmermann

Scott Z. Zimmermann
Attorneys for Plaintiff Edward Simon, DC,
and for all others similarly situated

DATED: Janaury 26, 2015

Lewis Brisbois Bisgarrd & Smith LLP

By: s/ Stephen H. Turner

Stephen H. Turner
Attorneys for Defendants Healthways, Inc.
and Healthways WholeHealth Networks,
Inc.

DATED: January 26, 2015

Baker & Hostetler LLP

By: s/ Tanya L. Forsheit

Tanya L. Forsheit
Attorneys for Defendant Medversant
Technologies, L.L.C.

**JUDGE BEVERLY REID O'CONNELL SCHEDULE OF TRIAL AND
PRETRIAL DATES**

Matter	Time	Weeks before trial	Plaintiff(s) (Request)	Defendant(s) (Request)	Court Order
Trial: jury. Estimated length: four days	8:30 am		2/23/16		
[Jury trial] Hearing on Motions in Limine		-1	2/15/16		
[Court trial] File Findings of Fact and Conclusions of Law; Hearing on Motions in Limine		-1	2/15/16		
Hearing on Disputed Jury Instructions	1:30 pm	-2	2/8/16		
Pretrial Conference; Proposed Voir Dire Qs Lodged and Agreed-to Statement of Case	3:00 pm	-4	1/25/16		
Motions in Limine to be filed;		-5	1/12/16		
Lodge Pretrial Conf. Order; File Memo of Contentions of Fact and Law; Exhibit & Witness Lists; File Status Report re Settlement; File Agreed Upon Set of Jury Instructions and Verdict Forms; File Joint Statement re Disputed Instructions, Verdicts, etc.		-6	1/5/16		
Last date to conduct Settlement Conference		-8	12/22/15		
Last day for hearing motions	1:30 pm	-9	12/21/15		
Discovery cut-off [Note: Expert disclosure no later than 70 days prior to this date.]		-10	11/30/15		
Last day to Amend Pleadings or Add Parties			5/31/15		

EXHIBIT "C"

1 **LEWIS BRISBOIS BISGAARD & SMITH LLP**
STEPHEN H. TURNER, SB# 89627
2 E-Mail: Stephen.Turner@lewisbrisbois.com
PATRIK JOHANSSON, SB# 231769
3 E-Mail: Patrik.Johansson@lewisbrisbois.com
LARISSA G. NFULDA, SB# 201903
4 E-Mail: Larissa.Nefulda@lewisbrisbois.com
633 W. 5th St., Ste. 4000
5 Los Angeles, CA 90071
Telephone: 213.250.1800
6 Facsimile: 213.250.7900

7 Attorneys for Defendants
HEALTHWAYS, INC.
8 and HEALTHWAYS WHOLEHEALTH
NETWORKS, INC.
9

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION
12

13 EDWARD SIMON, DC, individually
and on behalf of all others similarly
14 situated,

15 Plaintiffs,

16 vs.

17 HEALTHWAYS, INC., a Delaware
corporation; HEALTHWAYS
18 WHOLEHEALTH NETWORKS, INC.,
a Delaware corporation;
19 MEDVERSANT TECHNOLOGIES,
L.L.C., a California limited liability
20 company; and DOES 1 through 1,000,
inclusive,
21

22 Defendants.
23

CASE NO. 2:14-cv-08022-BRO-JC

**DEFENDANT HEALTHWAYS
WHOLEHEALTH NETWORKS,
INC.'S RESPONSES TO
PLAINTIFF EDWARD
SIMON'S FIRST SET OF
INTERROGATORIES**

[Hon. Beverly Reid O'Connell]

State Action Filed: September 16, 2014
Removed: October 16, 2014
Trial: None

24 PROPOUNDING PARTY: Plaintiff, EDWARD SIMON

25 RESPONDING PARTY: Defendant, HEALTHWAYS WHOLEHEALTH
26 NETWORKS, INC.

27 SET NO.: ONE (1)

28 Pursuant to Federal Rules of Civil Procedure 33, Defendant HEALTHWAYS

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DEFENDANT HEALTHWAYS WHOLEHEALTH NETWORKS, INC.'S RESPONSES
TO PLAINTIFF EDWARD SIMON'S FIRST SET OF INTERROGATORIES

1 WHOLEHEALTH NETWORKS, INC. ("Defendant" or "HWHN") hereby provides
2 its Responses and Objections to Plaintiff EDWARD SIMON's ("Plaintiff") First Set
3 of Interrogatories, as follows:

4 **PRELIMINARY STATEMENT**

5 It should be noted that Defendant has not fully completed its investigation of
6 the facts relating to the case, has not fully completed its discovery in this action, and
7 has not completed its preparation for trial. All of the answers contained herein are
8 based only upon such information and documents that are presently available to and
9 specifically known to Defendant and disclose only those contentions which
10 presently occur to Defendant. It is anticipated that further discovery, independent
11 investigation, legal research, and analysis will supply additional facts, add meaning
12 to known facts, as well as establish entirely new factual conclusions and legal
13 contentions, all of which may lead to substantial additions to, changes in, and
14 variations from the contentions herein set forth. The following responses are given
15 without prejudice to Defendant's right to produce evidence of any subsequently
16 discovered fact or facts which Defendant may later develop. The answers contained
17 herein are made in a good faith effort to supply as much factual information and as
18 much specification of legal contentions as is presently known, but should in no way
19 be to the prejudice of Defendant in relation to further discovery, research or
20 analysis.

21 **GENERAL OBJECTIONS AND RESERVATIONS**

22 As to each and every Interrogatory in Plaintiff's First Set of Interrogatories,
23 Defendant states the following:

24 A. Defendant objects to Plaintiff's definition of "FAXES" on the grounds
25 that it is overly broad, unduly burdensome, harassing and calls for information that
26 is not relevant and not reasonably calculated to lead to the discovery of admissible
27 evidence regarding Plaintiff's claims and Defendants' defenses in this action.

28 Defendant's responses are solely limited to the allegations in the Complaint,

1 Exhibit 1, similar ProMailSource faxes, and the facts and circumstances surrounding
2 Exhibit 1 and similar ProMailSource faxes.

3 B. Defendant has not yet completed its discovery and investigation of the
4 facts giving rise to this action, but has made a diligent, good faith effort to obtain all
5 information responsive to these requests within Defendant's possession, custody, or
6 control. Accordingly, these responses are made without prejudice to Defendant's
7 right to introduce prior to or at the time of trial or otherwise use any additional
8 information it may obtain as a result of Defendant's continuing discovery and
9 investigation, but Defendant assumes no obligation, beyond that imposed by the
10 California Federal Rules of Civil Procedure to supplement and amend these
11 responses to reflect witnesses, facts, or other information discovered following the
12 date of these responses.

13 C. Defendant has based these responses on the assumption that Plaintiff
14 did not intend to seek information protected against discovery by the attorney-client
15 privilege or the attorney work-product doctrine, the right of privacy laws, the
16 protection afforded trade secrets or any other applicable privilege or protection from
17 disclosure. To the extent that these requests are intended to elicit such privileged or
18 protected information, Defendant objects thereto as to each request and assert the
19 applicable privilege or protection to the fullest extent permitted by law.

20 D. To the extent that Defendant responds to the requests, Defendant does
21 not concede the relevancy of those responses to this action, nor do they concede that
22 such responses may be used for any purpose in this action or any other action or
23 proceeding. Defendant expressly reserves the right to object to further discovery
24 into the subject matter of any request or any portion thereof.

25 E. Defendant objects to each request to the extent that it seeks information
26 equally available to Plaintiff or information that is not within Defendant's
27 possession, custody, or control.

28 F. Defendant objects to the requests to the extent that they are intended to

1 be and are overly broad, unduly burdensome and oppressive.

2 G. Defendant objects to each request to the extent they seek information
3 that is not relevant to the subject matter of this action, and is not reasonably
4 calculated to lead to the discovery of admissible evidence.

5 Without waiving any of the foregoing General Objections, each of which
6 applies to each and every one of the individual responses set forth below and is
7 incorporated by this reference therein (whether or not specifically stated in the
8 response), Defendant responds to the individual requests as follows:

9 **RESPONSES TO FIRST SET OF INTERROGATORIES**

10 **INTERROGATORY NO. 1:**

11 Separately for each FAX (identified by bate number or other identification
12 used in connection with their production), state the dates and times (or approximate
13 dates and times) they were sent or attempted to be sent, and the number of
14 successful transmissions of the FAX.

15 **RESPONSE TO INTERROGATORY NO. 1:**

16 Objection. The interrogatory is overly broad, unduly burdensome and
17 harassing. The interrogatory calls for information that is not relevant and not
18 reasonably calculated to lead to the discovery of admissible evidence regarding
19 Plaintiff's claims and Defendant's defenses. The interrogatory invades the privacy
20 of third parties and calls for confidential and private information. Subject to and
21 without waiving said objections, Defendant responds as follows: Defendant's
22 response to this interrogatory is solely limited to the allegations in the Complaint,
23 Exhibit 1, similar ProMailSource faxes, and the facts and circumstances surrounding
24 Exhibit 1 and similar ProMailSource faxes. HWHN refers Plaintiff to documents
25 which will be produced in connection with HWHN's responses to Plaintiff's First
26 Set of Requests for Production of Documents, after the entry by the Court of a
27 Stipulated Protective Order executed by the parties to this action.

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1 **INTERROGATORY NO. 2:**

2 State how, when and through what means MEDVERSANT,
3 HEALTHWAYS, or any other PERSON obtained the facsimile telephone numbers
4 on the LISTS.

5 **RESPONSE TO INTERROGATORY NO. 2:**

6 Objection. The interrogatory is overly broad, unduly burdensome and
7 harassing. The interrogatory calls for information that is not relevant and not
8 reasonably calculated to lead to the discovery of admissible evidence regarding
9 Plaintiff's claims and Defendant's defenses. The interrogatory invades the privacy
10 of third parties and calls for confidential and private information. Subject to and
11 without waiving said objections, Defendant responds as follows: Defendant's
12 response to this interrogatory is solely limited to the allegations in the Complaint,
13 Exhibit 1, similar ProMailSource faxes, and the facts and circumstances surrounding
14 Exhibit 1 and similar ProMailSource faxes. The ProMailSource fax was sent to
15 HWHN's network of practitioners, including Plaintiff. In order to join HWHN's
16 network of practitioners, a medical care provider has to fill out and submit to
17 HWHN an application referred to as "Participating Practitioner Agreement" and
18 upon HWHN's approval of the Participating Practitioner Agreement, the applicant
19 becomes a member of HWHN's network of practitioners. The Participating
20 Practitioner Agreement requests contact information, including fax number. The
21 ProMailSource fax was sent to the members of HWHN's network of practitioners at
22 the fax numbers that each member voluntarily provided in their Participating
23 Practitioner Agreement. HWHN refers Plaintiff to documents which will be
24 produced in connection with HWHN's responses to Plaintiff's First Set of Requests
25 for Production of Documents, after the entry by the Court of a Stipulated Protective
26 Order executed by the parties to this action.

27 **INTERROGATORY NO. 3:**

28 Separately for each FAX, IDENTIFY each SENDER of the FAX.

1 **RESPONSE TO INTERROGATORY NO. 3:**

2 Objection. The interrogatory is overly broad, unduly burdensome and
3 harassing. The interrogatory calls for information that is not relevant and not
4 reasonably calculated to lead to the discovery of admissible evidence regarding
5 Plaintiff's claims and Defendant's defenses. The interrogatory invades the privacy
6 of third parties and calls for confidential and private information. Subject to and
7 without waiving said objections, Defendant responds as follows: Defendant's
8 response to this interrogatory is solely limited to the allegations in the Complaint,
9 Exhibit 1, similar ProMailSource faxes, and the facts and circumstances surrounding
10 Exhibit 1 and similar ProMailSource faxes. HWHN and Medversant Technologies,
11 LLC were the senders of the ProMailSource faxes. HWHN refers Plaintiff to
12 documents which will be produced in connection with HWHN's responses to
13 Plaintiff's First Set of Requests for Production of Documents, after the entry by the
14 Court of a Stipulated Protective Order executed by the parties to this action.

15 **INTERROGATORY NO. 4:**

16 IDENTIFY each PERSON who you contend gave PRIOR EXPRESS
17 INVITATION OR PERMISSION to be sent the FAXES.

18 **RESPONSE TO INTERROGATORY NO. 4:**

19 Objection. The interrogatory is overly broad, unduly burdensome and
20 harassing. The interrogatory calls for information that is not relevant and not
21 reasonably calculated to lead to the discovery of admissible evidence regarding
22 Plaintiff's claims and Defendant's defenses. The interrogatory invades the privacy
23 of third parties and calls for confidential and private information. Subject to and
24 without waiving said objections, Defendant responds as follows: Defendant's
25 response to this interrogatory is solely limited to the allegations in the Complaint,
26 Exhibit 1, similar ProMailSource faxes, and the facts and circumstances surrounding
27 Exhibit 1 and similar ProMailSource faxes. The ProMailSource fax was sent to
28 HWHN's network of practitioners, including Plaintiff. In order to join HWHN's

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DEFENDANT HEALTHWAYS WHOLEHEALTH NETWORKS, INC.'S RESPONSES
TO PLAINTIFF EDWARD SIMON'S FIRST SET OF INTERROGATORIES

1 network of practitioners, a medical care provider has to fill out and submit to
2 HWHN an application referred to as "Participating Practitioner Agreement" and
3 upon HWHN's approval of the Participating Practitioner Agreement, the applicant
4 becomes a member of HWHN's network of practitioners. The Participating
5 Practitioner Agreement requests contact information, including fax number. The
6 ProMailSource fax was sent to the members of HWHN's network of practitioners at
7 the fax numbers that each member voluntarily provided in their Participating
8 Practitioner Agreement. HWHN refers Plaintiff to documents which will be
9 produced in connection with HWHN's responses to Plaintiff's First Set of Requests
10 for Production of Documents, after the entry by the Court of a Stipulated Protective
11 Order executed by the parties to this action.

12 **INTERROGATORY NO. 5:**

13 For each PERSON identified or mentioned in response to Interrogatory No. 4,
14 describe the COMMUNICATIONS (including date, nature, content and parties
15 thereto) by which such PERSON gave PRIOR EXPRESS INVITATION OR
16 PERMISSION.

17 **RESPONSE TO INTERROGATORY NO. 5:**

18 Objection. The interrogatory is overly broad, unduly burdensome and
19 harassing. The interrogatory calls for information that is not relevant and not
20 reasonably calculated to lead to the discovery of admissible evidence regarding
21 Plaintiff's claims and Defendant's defenses. The interrogatory invades the privacy
22 of third parties and calls for confidential and private information. Subject to and
23 without waiving said objections, Defendant responds as follows: Defendant's
24 response to this interrogatory is solely limited to the allegations in the Complaint,
25 Exhibit 1, similar ProMailSource faxes, and the facts and circumstances surrounding
26 Exhibit 1 and similar ProMailSource faxes. The ProMailSource fax was sent to
27 HWHN's network of practitioners, including Plaintiff. In order to join HWHN's
28 network of practitioners, a medical care provider has to fill out and submit to

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DEFENDANT HEALTHWAYS WHOLEHEALTH NETWORKS, INC.'S RESPONSES
TO PLAINTIFF EDWARD SIMON'S FIRST SET OF INTERROGATORIES

1 HWHN an application referred to as "Participating Practitioner Agreement" and
2 upon HWHN's approval of the Participating Practitioner Agreement, the applicant
3 becomes a member of HWHN's network of practitioners. The Participating
4 Practitioner Agreement requests contact information, including fax number. The
5 ProMailSource fax was sent to the members of HWHN's network of practitioners at
6 the fax numbers that each member voluntarily provided in their Participating
7 Practitioner Agreement. HWHN refers Plaintiff to documents which will be
8 produced in connection with HWHN's responses to Plaintiff's First Set of Requests
9 for Production of Documents, after the entry by the Court of a Stipulated Protective
10 Order executed by the parties to this action.

11 **INTERROGATORY NO. 6:**

12 IDENTIFY each PERSON who you contend had an ESTABLISHED
13 BUSINESS RELATIONSHIP with MEDVERSANT at the time the FAXES were
14 sent or attempted to be sent to such PERSON.

15 **RESPONSE TO INTERROGATORY NO. 6:**

16 Objection. The interrogatory is overly broad, unduly burdensome and
17 harassing. The interrogatory calls for information that is not relevant and not
18 reasonably calculated to lead to the discovery of admissible evidence regarding
19 Plaintiff's claims and Defendant's defenses. The interrogatory invades the privacy
20 of third parties and calls for confidential and private information. Subject to and
21 without waiving said objections, Defendant responds as follows: Defendant's
22 response to this interrogatory is solely limited to the allegations in the Complaint,
23 Exhibit 1, similar ProMailSource faxes, and the facts and circumstances surrounding
24 Exhibit 1 and similar ProMailSource faxes. HWHN had an established business
25 relationship with each recipient and attempted recipient of the ProMailSource faxes,
26 and Medversant is a vendor to HWHN. Medversant sent the ProMailSource faxes at
27 HWHN's request.

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1 **INTERROGATORY NO. 7:**

2 For each PERSON identified or mentioned in response to Interrogatory No. 6,
3 state the circumstances of how, when and with whom the ESTABLISHED
4 BUSINESS RELATIONSHIP was started or otherwise was formed.

5 **RESPONSE TO INTERROGATORY NO. 7:**

6 Objection. The interrogatory is overly broad, unduly burdensome and
7 harassing. The interrogatory calls for information that is not relevant and not
8 reasonably calculated to lead to the discovery of admissible evidence regarding
9 Plaintiff's claims and Defendant's defenses. The interrogatory invades the privacy
10 of third parties and calls for confidential and private information. Subject to and
11 without waiving said objections, Defendant responds as follows: Defendant's
12 response to this interrogatory is solely limited to the allegations in the Complaint,
13 Exhibit 1, similar ProMailSource faxes, and the facts and circumstances surrounding
14 Exhibit 1 and similar ProMailSource faxes. Not applicable.

15 **INTERROGATORY NO. 8:**

16 IDENTIFY each PERSON who you contend had an ESTABLISHED
17 BUSINESS RELATIONSHIP with HEALTHWAYS at the time the FAXES were
18 sent or attempted to be sent to such PERSON.

19 **RESPONSE TO INTERROGATORY NO. 8:**

20 Objection. The interrogatory is overly broad, unduly burdensome and
21 harassing. The interrogatory calls for information that is not relevant and not
22 reasonably calculated to lead to the discovery of admissible evidence regarding
23 Plaintiff's claims and Defendant's defenses. The interrogatory invades the privacy
24 of third parties and calls for confidential and private information. Subject to and
25 without waiving said objections, Defendant responds as follows: Defendant's
26 response to this interrogatory is solely limited to the allegations in the Complaint,
27 Exhibit 1, similar ProMailSource faxes, and the facts and circumstances surrounding
28 Exhibit 1 and similar ProMailSource faxes. The ProMailSource faxes were only

1 sent to members of HWHN. In order to become a member of HWHN, a medical
2 care provider has to fill out and submit a Participating Practitioner Agreement to
3 HWHN. HWHN has an established business relationship with every person that the
4 ProMailSource faxes were sent to. HWHN refers Plaintiff to documents which will
5 be produced in connection with HWHN's responses to Plaintiff's First Set of
6 Requests for Production of Documents, after the entry by the Court of a Stipulated
7 Protective Order executed by the parties to this action.

8 **INTERROGATORY NO. 9:**

9 For each PERSON identified or mentioned in response to Interrogatory No. 8,
10 state the circumstances of how, when and with whom the ESTABLISHED
11 BUSINESS RELATIONSHIP was started or otherwise was formed.

12 **RESPONSE TO INTERROGATORY NO. 9:**

13 Objection. The interrogatory is overly broad, unduly burdensome and
14 harassing. The interrogatory calls for information that is not relevant and not
15 reasonably calculated to lead to the discovery of admissible evidence regarding
16 Plaintiff's claims and Defendant's defenses. The interrogatory invades the privacy
17 of third parties and calls for confidential and private information. Subject to and
18 without waiving said objections, Defendant responds as follows: Defendant's
19 response to this interrogatory is solely limited to the allegations in the Complaint,
20 Exhibit 1, similar ProMailSource faxes, and the facts and circumstances surrounding
21 Exhibit 1 and similar ProMailSource faxes. The ProMailSource fax was only sent to
22 HWHN's network of practitioners, including Plaintiff. In order to join HWHN's
23 network of practitioners, a medical care provider has to fill out and submit to
24 HWHN an application referred to as "Participating Practitioner Agreement" and
25 upon HWHN's approval of the Participating Practitioner Agreement, the applicant
26 becomes a member of HWHN's network of practitioners. The Participating
27 Practitioner Agreement requests contact information, including fax number. The
28 ProMailSource fax was sent to the members of HWHN's network of practitioners at

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1 the fax numbers that each member voluntarily provided in their Participating
2 Practitioner Agreement. HWHN refers Plaintiff to documents which will be
3 produced in connection with HWHN's responses to Plaintiff's First Set of Requests
4 for Production of Documents, after the entry by the Court of a Stipulated Protective
5 Order executed by the parties to this action.

6 **INTERROGATORY NO. 10:**

7 If your response to any Request for Admission concurrently propounded by
8 PLAINTIFF is anything other than an unqualified admission, state all facts you
9 contend support your response.

10 **RESPONSE TO INTERROGATORY NO. 10:**

11 Defendant's response to this interrogatory is solely limited to the allegations
12 in the Complaint, Exhibit 1, similar ProMailSource faxes, and the facts and
13 circumstances surrounding Exhibit 1 and similar ProMailSource faxes.

14 **Request For Admission No. 11:**

15 Admit that YOU did not have an ESTABLISHED BUSINESS
16 RELATIONSHIP with PLAINTIFF at the time the EXHIBIT 1 was sent via
17 facsimile transmission to (818) 761-8705.

18 **Response To Request For Admission No. 11:**

19 Objection. The request calls for a legal conclusion. Subject to and without
20 waiving said objections, Defendant responds as follows: Deny.

21 **Facts to Support Response to Request for Admission No. 1:**

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1 Defendant's response to this request is solely limited to the allegations in the
2 Complaint, Exhibit 1, similar ProMailSource faxes, and the facts and circumstances
3 surrounding Exhibit 1 and similar ProMailSource faxes. The ProMailSource faxes
4 were only sent to members of HWHN's network of practitioners. Plaintiff has been
5 a member of HWHN's network of practitioners since April 2008. In order to
6 become a member of HWHN, a medical care provider has to fill out and submit a
7 Participating Practitioner Agreement to HWHN. HWHN has an established
8 business relationship with every person that the ProMailSource faxes were sent to.

9 **Request For Admission No. 12:**

10 Admit that PLAINTIFF did not give PRIOR EXPRESS INVITATION OR
11 PERMISSION to be sent EXHIBIT 1 via facsimile transmission to (818) 761-8705.

12 **Response To Request For Admission No. 12:**

13 Objection. The request calls for a legal conclusion. Subject to and without
14 waiving said objections, Defendant responds as follows: Deny.

15 **Facts to Support Response to Request for Admission No. 2:**

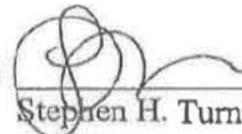
16 Defendant's response to this request is solely limited to the allegations in the
17 Complaint, Exhibit 1, similar ProMailSource faxes, and the facts and circumstances
18 surrounding Exhibit 1 and similar ProMailSource faxes. HWHN had prior express
19 written consent to send the ProMailSource faxes from every member of HWHN.
20 Plaintiff has been a member of HWHN since April 2008. In order to become a
21 member of HWHN, a medical care provider has to fill out and submit a Participating
22 Practitioner Agreement to join HWHN. Plaintiff filled out and submitted a
23 Participating Practitioner Agreement to join HWHN on April 21, 2008. The
24 Participating Practitioner Agreement requests contact information, including fax
25 number. The ProMailSource fax was sent to Plaintiff at (818) 761-8705, which is
26 the fax number voluntarily provided by Plaintiff in his Participating Practitioner
27 Agreement.

1 Participating Practitioner Agreement requests contact information, including fax
2 number. The ProMailSource fax was sent to Plaintiff at (818) 761-8705, which is
3 the fax number voluntarily provided by Plaintiff in his Participating Practitioner
4 Agreement. HWHN had Plaintiff's prior express written consent and had an
5 established business relationship with Plaintiff at the time the ProMailSource fax
6 was sent.

7
8 DATED: January 12 2015

LEWIS BRISBOIS BISGAARD & SMITH LLP

9
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11 By:



Stephen H. Turner

Patrik Johansson

Larissa G. Nefulda

Attorneys for Defendants

HEALTHWAYS, INC. and

HEALTHWAYS WHOLEHEALTH

NETWORKS, INC.

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VERIFICATION

I have read the foregoing **DEFENDANT HEALTHWAYS WHOLEHEALTH NETWORKS, INC.'S RESPONSES TO PLAINTIFF EDWARD SIMON'S FIRST SET OF INTERROGATORIES** and know its contents.

I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am the Vice President of Physical Medicine Operations for Healthways WholeHealth Networks, Inc., a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason.

I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am one of the attorneys for Healthways WholeHealth Networks, Inc., a party to this action. Such party is absent from the county where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on January 9, 2015, at Sterling, Virginia.

I declare under penalty of perjury under the laws of the States of California and Virginia, and the United States of American that the foregoing is true and correct.

Martie Stabelfeldt MHSA
Print Name of Signatory

M Stabelfeldt
Signature

EXHIBIT "D"

1 **LEWIS BRISBOIS BISGAARD & SMITH LLP**
STEPHEN H. TURNER, SB# 89627
2 E-Mail: Stephen.Turner@lewisbrisbois.com
LARISSA G. NEFULDA, SB# 201903
3 E-Mail: Larissa.Nefulda@lewisbrisbois.com
221 North Figueroa Street, Suite 1200
4 Los Angeles, California 90012
Telephone: 213.250.1800
5 Facsimile: 213.250.7900

6 Attorneys for Defendants
HEALTHWAYS, INC.
7 and HEALTHWAYS WHOLEHEALTH
NETWORKS, INC.
8

9
10 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION
11

12 EDWARD SIMON, DC, individually
13 and on behalf of all others similarly
situated,

14 Plaintiffs,

15 vs.

16 HEALTHWAYS, INC., a Delaware
17 corporation; HEALTHWAYS
WHOLEHEALTH NETWORKS, INC.,
18 a Delaware corporation;
MEDVERSANT TECHNOLOGIES,
19 L.L.C., a California limited liability
company; and DOES 1 through 1,000,
20 inclusive,

21 Defendants.
22

CASE NO. 2:14-cv-08022-BRO-JC

**DEFENDANTS HEALTHWAYS,
INC. AND HEALTHWAYS
WHOLEHEALTH NETWORKS,
INC.'S FIRST AMENDED ANSWER**

[Hon. Beverly Reid O'Connell]

State Action Filed: September 16, 2014
Removed: October 16, 2014
Trial: None

23
24 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

25 COMES NOW, Defendants, HEALTHWAYS, INC. and HEALTHWAYS
26 WHOLEHEALTH NETWORKS, INC. (hereinafter collectively "Defendants"), for themselves
27 and on behalf of no other defendant, answer EDWARD SIMON, DC's (hereinafter "Plaintiff")

28 Complaint as follows:

FILE COPY

**LEWIS
BRISBOIS
BISGAARD
& SMITH LLP**
ATTORNEYS AT LAW

1 1. This paragraph states legal conclusions to which no response is
2 required, however, to the extent any such allegations are deemed factual and alleged
3 against Defendants, they are denied.

4 2. Defendants admit that Plaintiff has brought this action to recover
5 alleged damages for violations of the Telephone Consumer Protection Act
6 (“TCPA”), 47 USC § 227 and the Junk Fax Prevention Act of 2005 (“JFPA”).
7 Defendants admit that a communication was transmitted by facsimile on August 13,
8 2014; however, Defendants have insufficient information sufficient to form a belief
9 as to the truth of whether Plaintiff received the communication by facsimile .
10 Defendants deny that the communication and the facsimile transmission of the
11 communication violated any laws, including the TCPA or the JFPA, and/or FCC
12 regulations.

13 3. Defendants admit that this action is a civil action of which the United
14 States District Court has original jurisdiction under 28 U.S.C. § 1331, and is one
15 which may be removed to this Court pursuant to the provisions of 28 U.S.C. §
16 1441(a) in that it arises under the Telephone Consumer Protection Act (“TCPA”),
17 47 U.S.C. § 227. As noted by the United States Supreme Court, federal and state
18 courts have concurrent jurisdiction over private suits arising under the TCPA.
19 Section 227(b)(3) does not vest jurisdiction exclusively in state courts over private
20 TCPA actions and does not divest federal district courts of federal question
21 jurisdiction under 28 U.S.C.S. § 1331. *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct.
22 740 (U.S. 2012). Defendants admit that venue is proper. Defendants deny that their
23 communications and facsimile transmissions violated any laws, including the TCPA
24 or the JFPA, and/or FCC regulations.

25 4. Defendants admit that the United States District Court for the Central
26 District of California has personal jurisdiction over Defendants. Defendants deny
27 that their communications and facsimile transmissions violated any laws, including
28 the TCPA or the JFPA, and/or FCC regulations.

1 5. Defendants admit that Plaintiff did business in North Hollywood and is
2 the subscriber of the facsimile telephone number, (818) 761-8705. Defendants deny
3 that their communications and facsimile transmissions violated any laws, including
4 the TCPA or the JFPA, and/or FCC regulations.

5 6. Defendants admit the allegations contained therein.

6 7. Defendants admit the allegations contained therein.

7 8. Defendants deny having knowledge or information sufficient to form a
8 belief as to the truth of the allegations stated in this paragraph.

9 9. Defendants deny having knowledge or information sufficient to form a
10 belief as to the truth of the allegations stated in this paragraph.

11 10. This paragraph requires no response, however, to the extent any such
12 allegations are deemed factual and alleged against Defendants, they are denied.

13 11. This paragraph states legal conclusions to which no response is
14 required, however, to the extent any such allegations are deemed factual and alleged
15 against Defendants, they are denied.

16 12. This paragraph states legal conclusions to which no response is
17 required, however, to the extent any such allegations are deemed factual and alleged
18 against Defendants, they are denied.

19 13. This paragraph states legal conclusions to which no response is
20 required. Defendants admit that Defendant Medversant owns the trademark
21 ProMailSource. Defendants admit that the trademark "Healthways" is owned by
22 Healthways, Inc. Defendants further admit that Healthways Wholehealth Networks,
23 Inc. operates a discounted-fee physician network and wellness program. Defendants
24 deny the remaining allegations contained therein.

25 14. This paragraph states legal conclusions to which no response is
26 required. Defendants admit that a communication was transmitted by facsimile on
27 August 13, 2014. Defendants admit that they had involvement in the content,
28 preparation and/or transmission of the communication. Defendants deny the

1 remaining allegations contained in the paragraph including that they are directly
2 and/or vicariously liable for any violations of the TCPA or the JFPA, and/or FCC
3 regulations, that they were senders of any fax advertisements, that they had
4 involvement in the content, preparation and/or transmission of any fax
5 advertisements, that they received and retained any benefits from any fax
6 advertisements, and that they had actual notice of any unlawful activity.

7 15. This paragraph states legal conclusions to which no response is
8 required. Defendants admit that a communication was transmitted by facsimile on
9 August 13, 2014 and that the communication did not contain any opt-out notice.
10 Defendants deny that Plaintiff did not give Defendants prior express invitation or
11 permission to send him the fax communication at issue. Defendants further deny
12 that they sent Plaintiff fax advertisements without obtaining prior express invitation
13 or permission from recipients, or that the communication failed to include any
14 disclosures required by the TCPA or the JFPA, and/or FCC regulations.

15 16. Defendants deny the allegations contained therein.

16 17. Defendants deny the allegations contained therein.

17 18. Defendants deny the allegations contained therein.

18 19. Defendants deny the allegations contained therein.

19 20. Defendants deny the allegations contained therein.

20 21. Defendants deny the allegations contained therein.

21 22. Defendants deny the allegations contained therein.

22 23. Defendants repeat each and every allegation in paragraphs 1 through 22
23 as if set forth herein.

24 24. Defendants deny the allegations contained therein.

25 25. Defendants deny the allegations contained therein.

26 26. Defendants deny the allegations contained therein.

27 27. Defendants deny the allegations contained therein.

28

1 **PRAYER FOR RELIEF**

2 Defendants deny that Plaintiff is entitled to the relief requested or any other
3 relief.

4 **FIRST AFFIRMATIVE DEFENSE**

5 **(Failure to State a Claim)**

6 1. As a first defense, Defendants allege that Plaintiff's Complaint, and
7 each and every cause of action therein, fails to state a claim upon which relief can be
8 granted.

9 **SECOND AFFIRMATIVE DEFENSE**

10 **(Consent/Consent/Express Permission or Invitation)**

11 2. As a second defense, Defendants allege that Plaintiff's Complaint is
12 barred on the grounds of consent or express permission or invitation. Plaintiff gave
13 express permission or invitation to Defendants to send him the communication at
14 issue at the fax number he provided to Defendants.

15 **THIRD AFFIRMATIVE DEFENSE**

16 **(Due Diligence)**

17 3. As a third defense, Defendants state that they have exercised due
18 diligence and relied in good faith on the representations of others, and is not aware
19 of and had no way of becoming aware of any alleged wrongdoing or omissions.

20
21 **FOURTH AFFIRMATIVE DEFENSE**

22 **(Excessive Fines)**

23 4. As an fourth defense, Defendants allege that the award of statutory
24 penalties against Defendants would violate the prohibition against excessive fines of
25 the United States Constitution.

26 **FIFTH AFFIRMATIVE DEFENSE**

27 **(Statutory and Regulatory Compliance)**

28 5. As a fifth defense, Defendants state that, at all times, they have

1 complied with all requirements under relevant statutes and regulations.

2 **SIXTH AFFIRMATIVE DEFENSE**

3 **(Legitimate Business Purpose)**

4 6. As a sixth defense, Defendants allege that at all times mentioned in the
5 Complaint, Defendants acted lawfully and within their legal rights, with a good faith
6 belief in the exercise of those rights, and in the furtherance of a legitimate business
7 purpose. Further, Defendants acted in good faith in the honest belief that the acts,
8 conduct and communications, if any, of the Defendants were justified under the
9 circumstances based on information reasonably available to Defendants.

10 **SEVENTH AFFIRMATIVE DEFENSE**

11 **(No Intent or Willful Conduct)**

12 7. As a seventh defense, Defendants allege that they did not knowingly or
13 willfully violation to the TCPA or the JFPA, and/or FCC regulations.

14 **EIGHTH AFFIRMATIVE DEFENSE**

15 **(Established Business Relationship)**

16 8. As an eighth defense, Defendants allege that the Complaint is barred on
17 the grounds of an established business relationship between Defendants and
18 Plaintiff.

19 **NINTH AFFIRMATIVE DEFENSE**

20 **(No Violation of Privacy Rights)**

21 9. As a ninth defense, Defendants allege the facsimile(s) at issue did not
22 adversely affect the privacy rights of Plaintiff or the purported class.

23 **TENTH AFFIRMATIVE DEFENSE**

24 **(Abatement of Damages)**

25 10. As a tenth defense, should Defendants be found liable to Plaintiff,
26 which liability is expressly denied, Defendants are entitled to have the amount of
27 damages abated, reduced or eliminated to the extent the negligence, carelessness, or
28 fault of other persons, corporations, or business entities, including but not limited to

1 Defendant Medversant Technologies, LLC, caused or contributed to Plaintiff's
2 damages, if any.

3 **ELEVENTH AFFIRMATIVE DEFENSE**

4 **(Act of Other Parties or Third Parties)**

5 11. As an eleventh defense, the complaint and each purported claim
6 contained therein, is barred because the sole and/or proximate cause of the damages
7 claimed by Plaintiff was and is due to the willful and intentional acts of persons
8 and/or entities other than Defendants, including without limitation Defendant
9 Medversant Technologies, LLC.

10 **TWELFTH AFFIRMATIVE DEFENSE**

11 **(Excessive Fines)**

12 12. As a twelfth defense, Defendants state that the TCPA violates the
13 Excessive Fines Clause of the Eighth Amendment of the United States Constitution
14 and of the Article 1, Section 17, of the California Constitution.

15 **THIRTEENTH AFFIRMATIVE DEFENSE**

16 **(No Class Capable of Certification)**

17 13. As a thirteenth defense, Defendants state that Plaintiff has not validly
18 stated a class of litigants capable of certification for a class under the Federal Rules
19 of Civil Procedure of under California law.

20 **FOURTEENTH AFFIRMATIVE DEFENSE**

21 **(Reservation of Rights)**

22 14. As a fourteenth defense, Defendants state that they currently have
23 insufficient information upon which to form a belief as to whether they have
24 additional defenses available. Defendants reserve their right to assert additional
25 defenses in the event investigation and discovery indicate such additional defenses
26 would be appropriate.

27 WHEREFORE, Defendants HEALTHWAYS, INC. and HEALTHWAYS
28 WHOLEHEALTH NETWORKS, INC. respectfully request:

1 1. A judgment in favor of Defendants, and against Plaintiff and the class
2 he purports to represent, and that Plaintiff and the class he purports to represent take
3 nothing by reason of this Complaint; and

4 2. That the Court award Defendants their cost of suit herein and such
5 other further relief as the Court deems just.

6

7 Dated: November 26, 2014

LEWIS BRISBOIS BISGAARD & SMITH LLP

8

9

/s/ Larissa G. Nefulda

10

Stephen H. Turner

11

Larissa G. Nefulda

12

Attorneys for Defendants

13

HEALTHWAYS, INC. and

14

HEALTHWAYS WHOLEHEALTH

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NETWORKS, INC.

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Plascencia, Mirna L.

From: cacd_ecfmail@cacd.uscourts.gov
Sent: Wednesday, November 26, 2014 10:57 AM
To: ecfnef@cacd.uscourts.gov
Subject: Activity in Case 2:14-cv-08022-BRO-JC Edward Simon v. Healthways, Inc. et al Amended Answer to Complaint

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UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered by Turner, Stephen on 11/26/2014 at 10:57 AM PST and filed on 11/26/2014

Case Name: Edward Simon v. Healthways, Inc. et al
Case Number: 2:14-cv-08022-BRO-JC
Filer: Healthways Wholehealth Networks, Inc.
Healthways, Inc.
Medversant Technologies LLC

Document Number: 17

Docket Text:

AMENDED ANSWER FIRST AMENDED ANSWER filed by Defendants Healthways Wholehealth Networks, Inc., Healthways, Inc., Medversant Technologies LLC. (Turner, Stephen)

2:14-cv-08022-BRO-JC Notice has been electronically mailed to:

Charles Darryl Cordero cdc@paynefears.com, LA.Courtnotices@paynefears.com,
mplascencia@paynefears.com, tschubert@paynefears.com

Eric M Kennedy emk@paynefears.com, bgoff@paynefears.com, kjackson@paynefears.com

Larissa G Nefulda Larissa.Nefulda@lewisbrisbois.com, feldman@lbbslaw.com, sue.vigil@lewisbrisbois.com

Rosario C Doriott Dominguez rdoriottdominguez@bakerlaw.com, squinn@bakerlaw.com

Scott Z Zimmermann szimm@zkc.com, cdoubroff@cfglp.com

Stephen H Turner turner@lbbslaw.com, christopher.habashy@lewisbrisbois.com,
evy.lopez@lewisbrisbois.com, johansson@lbbslaw.com, larissa.nefulda@lewisbrisbois.com,
sue.vigil@lewisbrisbois.com

Tanya L Forsheit tforsheit@bakerlaw.com, bmigdal@bakerlaw.com, dgoldberg@bakerlaw.com

2:14-cv-08022-BRO-JC Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :

The following document(s) are associated with this transaction:

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[STAMP cacdStamp_ID=1020290914 [Date=11/26/2014] [FileNumber=18553200-0] [8f8d2f14d0798b1f4edaf0051b04eb04084b4c58d5ac8153cfae87a5458b195a398d4e338796aeec2f67cbdc148af00df1708d57fdc2012a354e33f48b2049]]

EXHIBIT "E"



21251 Ridgetop Circle, Ste 150
Sterling VA 20166

Ed Simon Chiropractic
Attn: Edward Simon DC
6344 Laurel Canyon Blvd
North Hollywood CA 91606

Dr. Simon,

Per your request please find your signed Healthways Participating Practitioner Agreement.
If you have any questions, please contact Healthways customer service at (800) 274-7526.

Thanks,

Del Bryant
Coordinator, Provider Services
Healthways WholeHealth Networks Inc

AFF_A Updates



HEALTHWAYS
 46040 Center Oak Plaza
 Suite 130, Sterling, VA 20166
 Fax: 703-430-9227
 Phone: 1-800-274-7526

**PARTICIPATING PRACTITIONER AGREEMENT
 CERTIFICATE OF PARTICIPATION FOR AFFINITY PROGRAMS**

INSTRUCTIONS

This form must be typed or printed legibly in blue or black ink. Below is a list of the items that must be submitted along with this application:

- Copy of license(s) if applicable
- Copy of insurance face sheet for professional and business liability policy
- Completed Published Fee Schedule form
- Signed release and attestation statement, with professional liability form if applicable.

Please return this application along with the necessary documentation to the address listed at the top of the page to the attention of the Credentialing Department.

SIGNATURE LINE

I, _____, ("PRACTITIONER"), hereby tender this Certificate of Participation in Healthways WholeHealth Networks, Inc ("HWHN") upon the terms and conditions set forth in this HWHN Participating Practitioner Agreement. With this Certificate, Practitioner agrees to serve as a Participating Practitioner member of HWHN for Affinity Programs, and hereby specifically authorizes and appoints HWHN to act on its behalf to contract for the provision of discounted cash services by Practitioner under HWHN Affinity Programs. I hereby attest to my meeting the network standards for my professional specialty and for my business operations as outlined in the Terms and Conditions, Participation Requirements, and Practitioner Credentials sections of this document, with respect to the following practice specialties:

PRACTITIONER SPECIALTIES

Please check all specialties for which you are applying for network participation. You must include all of the credentials for a specialty in order for it to be added to your profile. You must meet credentialing criteria for each specialty (please refer to THE Practitioner Specialty Specific Credentials Requirements section).

- | | | |
|--|---|---|
| <input type="checkbox"/> Acupuncture | <input type="checkbox"/> Health and Wellness Coach | <input type="checkbox"/> Occupational Therapist |
| <input type="checkbox"/> Acupuncture, MD/DO | <input type="checkbox"/> Hellerwork | <input type="checkbox"/> Oriental Bodywork Therapist |
| <input type="checkbox"/> Acupuncture, DC/ND | <input type="checkbox"/> Herbal Consultant | <input type="checkbox"/> Pain Practitioner |
| <input type="checkbox"/> Alexander Technique | <input type="checkbox"/> Holistic Nurse Practitioner | <input type="checkbox"/> Personal Trainer/Exercise Specialist |
| <input type="checkbox"/> Ayurvedic Medicine | <input type="checkbox"/> Integrative Holistic Physician (MD/DO) | <input type="checkbox"/> Pilates Instructor |
| <input type="checkbox"/> Behavioral Health | <input type="checkbox"/> Homeopathy | <input type="checkbox"/> Physical Therapy |
| <input type="checkbox"/> Biofeedback | <input type="checkbox"/> Hypnotist, non-clinical | <input type="checkbox"/> Post Birthing & Lactation Counselor |
| <input type="checkbox"/> Chinese Herbal Medicine | <input type="checkbox"/> Massage Therapy | <input type="checkbox"/> Qi Gong Instructor |
| <input checked="" type="checkbox"/> Chiropractic Physician | <input type="checkbox"/> Mind-Body Skills Instructor | <input type="checkbox"/> Reflexologist |
| <input type="checkbox"/> Dietician - Registered/Licensed | <input type="checkbox"/> Mindfulness-Based Stress Reduction Teacher | <input type="checkbox"/> Rolfer & Structural Integration Practitioner |
| <input type="checkbox"/> Doula | <input type="checkbox"/> Music Therapy | <input type="checkbox"/> Tai Chi Instructor |
| <input type="checkbox"/> Childbirth Educators | <input type="checkbox"/> Naprapathy | <input type="checkbox"/> Trager Practitioner |
| <input type="checkbox"/> Energy Healing Practitioner | <input type="checkbox"/> Naturopathic Physician | <input type="checkbox"/> WholeHealth Advocate |
| <input type="checkbox"/> Feldenkrais | <input type="checkbox"/> Nutritional Counselor | <input type="checkbox"/> Yoga Instructor |
| <input type="checkbox"/> Guided Imagery/Hypnotherapy | | |

HEALTHWAYS

APR 21 2008

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DISCOUNT AGREEMENT

I hereby agree to extend a 20 % (minimum of 10%-30%) discount from my usual service charges to all HWHN Affinity Program participants referred to me. If this left blank, Practitioner agrees to a 20% discount. I understand that, by agreeing to participate, HWHN will identify my practice in Group-specific online and offline directories to members seeking services under HWHN Affinity Group client contracts. I understand that certain HWHN Group clients may only accept affiliates who offer 20% or more discount levels to their beneficiaries. Practitioners listings in the online directories will be prioritized by discount level and include my name, specialty(s), discount level.

EDWARD SIMON
Practitioner's Printed Name

[Signature]
Practitioner's Signature

4/8/08
Date

Primary Location:

Clinic Name: ED SIMON CHIROPRACTIC

Address: 6344 LAUREL CANYON BLVD

City, State, Zip: NORTH HOLLYWOOD, CA 91606-3213

Phone: 8187611355

Office Fax: 8187618705

Office Contact: _____

Title: _____

Secondary Location:

Clinic Name: _____

Address: _____

City, State, Zip: _____

Phone: _____

Office Fax: _____

Office Contact: _____

Title: _____

Website Address: _____

E-Mail: _____

Do you wish to have your Website listed on your profile? Yes

www.edsimonchiropractic.com

What is your first year of practice? 1981

What non-English languages do you or your office staff speak fluently? Please list Spanish

Practice Focus:

Gentle, effective and affordable treatment of headache, neck and back pain, stress and sports injury.

Payment Methods Accepted:

- Visa
- MasterCard
- American Express

- Discover
- Cash
- Personal Check

Average Fee Range: \$ - \$

Special Offers:

No obligation examination and consultation

HEALTHWAYS

PRIMARY LOCATION OFFICE HOURS					
Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
8 AM	8 AM	8 AM	8 AM	8 AM	AM
6 PM	6 PM	6 PM	6 PM	6 PM	PM

SECONDARY LOCATION OFFICE HOURS					
Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
AM	AM	AM	AM	AM	AM
PM	PM	PM	PM	PM	PM

DEFINITIONS

- Affinity Program** means a discount cash payment arrangement where the Practitioner agrees to provide Participants in HWHN-contracted Affinity programs access to practitioner's services at a specific discount % off the practice's Published Fee Schedule. Practitioner has specified a discount within the range of 10% to 30+%, on services not covered by any health insurance or governmental program. Discount does not apply to co-payments or deductibles for covered services. This discount is to be offered to all Participants in all HWHN contracted Group Affinity programs, for which HWHN provides notice to Practitioner. Participants simply show the Practitioner their Group ID card or HWHN discount card to receive the discount. Payment for services, after the discount, is the complete responsibility of the Participant. (Discount must be applied to personal health services and therapies delivered by Practitioner's office, and may extend, at the Practitioner's discretion, to dispense health related supplies and durable medical goods).
- Published Fee Schedule** means the current retail or non-discounted fee schedule that applies to the Practitioner's services to the general public and to the fees for service charged to patients when Practitioner is a non-participating provider in the patient's insurance plan.
- Unrestricted License** means that the practitioner's healthcare license, registration, or certification is valid for full practice within the jurisdiction's regulated scope of practice for that health care professional specialty, and is not subject to stipulations, practice limitations, probationary periods, temporary supervision requirements, or other limitations. Limitations include peer review actions and malpractice claims settled or pending.

TERMS AND CONDITIONS OF PARTICIPATION

- Practitioner agrees to cooperate with HWHN's Quality Management programs. The Quality/Utilization Management (QUM) committee is responsible for evaluating a practitioner's professional performance record while participating in the network. It may review fees, quality of care, and administrative complaints and/or audit the services of Practitioners under this Agreement. It may impose sanctions and determine if the applicant's practice meets network standards for ongoing membership and participation in HWHN programs. HWHN, in accordance with health care industry guidelines, maintains a grievance and appeal process for decisions adversely affecting Practitioners eligibility for participation in Group plans.
- Practitioner represents and warrants that the information provided to HWHN, including, but not limited to the information attested to in each Practitioner's application, practice profile updates, and credentials updates, is true, complete, and current.
- Failure to honor the contracted discounts, or inconsistent application of the Published Fee Schedules, or failure to inform HWHN of changes in practice status will be considered a material breach of this agreement. HWHN will accept changes in the Published Fee Schedules every six months. Failure to comply with Quality Management investigations, and/or submission of false information, is grounds for termination.
- HWHN agrees to indemnify, defend, and hold the Practitioner harmless from and against any and all claims, losses, costs, damages, expenses of every kind and character and liabilities, including attorney's fees and costs, (hereinafter "claims" or "claim") incurred in connection with such claims, including any action or proceeding brought thereon, arising from or as a result of any accident, injury, loss or damage whatsoever caused to any person or to the property of any person arising out of or in connection with this Agreement caused by the negligence or misconduct of HWHN or its agents, contractors, servants or employees of HWHN excepting; however, in each case, claims caused by the negligence or misconduct of Practitioner or its agents, contractors, servants or employees of Practitioner. Practitioner agrees to defend, indemnify and hold HWHN and contracting Groups harmless from and against any and all claims, losses, costs, damages, expenses of every kind and character and liabilities, including attorney's fees and cost, hereinafter "claims" or "claim") incurred in connection with such claims, including any action or proceeding brought thereon, arising from or as a result of any accident, injury, loss or damage whatsoever caused to any person or to the property of any person arising out of or in connection with this Agreement caused by the negligence or misconduct of Practitioner or its agents, contractors, servants or employees of Practitioner excepting; however, in each case, claims caused by the negligence or misconduct of Group/HWHN or its agents, contractors, servants, or employees of Group/HWHN.

HEALTHWAYS

APR 21 2008

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PARTICIPATION REQUIREMENTS

Liability/Insurance: All Practitioners with health care licenses and Practitioners with specified unlicensed hands-on specialties (see specialty list) agree to maintain professional liability insurance. Per the current HWHN policy for CAM practitioners, a minimum of \$200,000 per occurrence and \$500,000 aggregate is required while limits of 1M/3M are required for all MD's and DO's, as well as ND's and DC's who also are credentialed for acupuncture. (Members who participate in certain regional contracts involving both covered benefits and affinity programs may be required to have higher limits.) Practitioner agrees to maintain required premisses and comprehensive general liability insurance in amounts of \$100,000 per claim and \$100,000 per year, or the minimum required by state law, whichever is greater. Furthermore, the Practitioner agrees to obtain extended liability insurance (sometimes called "nose" or "tail" policies), to insure retroactive coverage for professional acts performed during the term of this agreement, should the Practitioner terminate this agreement and change or terminate professional malpractice coverage.

Practice Experience: All practitioners are required to have 12 months experience in the credentialed practice specialty.

Patient Services: Practitioners must speak fluent English or have access to an interpreter.

Health Information Privacy Regulatory Compliance and Business Associate Agreement:

Practitioner agrees that practitioner's practice will remain compliant with applicable state and federal regulations regarding privacy and confidentiality of individually identifiable health information.

HWHN agrees to adhere to applicable state and federal privacy regulations with respect to Protected Health Information, as defined under the Health Insurance Portability and Accountability Act of 1996, received from Practitioner's practice.

Premises Standards: Health care office locations must follow OSHA safety standards, and home offices must have separate treatment room or studio and professional signage as allowed by local zoning.

Practitioner Licensure Requirements:

- Practitioners must give evidence of current unrestricted license in the specialty(ies). With some practitioner types, HWHN has established additional criteria, such as dual credentialing in both a licensed field as well as by meeting certification standards for the unlicensed practice specialty.
- Acceptance of practitioner types who meet HWHN credentialing criteria for training and certification is also subject to state-by-state application of network business criteria established by HWHN and their network clients.

NETWORK CERTIFICATION AND RELEASE OF INFORMATION

QUERIES TO THE NATIONAL PRACTITIONER DATA BANK OR STATE LICENSING BOARD

State and federal licensing and regulatory boards will be queried if you apply. If your application is rejected for reasons relating to professional conduct or professional competence, which reasons include misrepresenting, misstating or omitting a relevant fact in connection with your application, the rejection may be reported to the National Practitioner Data Bank.

RIGHT TO CORRECT ERRONEOUS INFORMATION

Practitioner has the right to review information submitted in support of your Network Application and contract to the extent permitted by law and HWHN will notify you of any information obtained during the review that differs substantially from the information you provide. You will then have the right to correct any erroneous information from HWHN.

CERTIFICATION OF APPLICATION HEALTH CARE LICENSE AND MALPRACTICE CLAIM STATUS

- I certify all statements in this application are correct and I agree with the terms of this agreement with HWHN.
- I certify that I have and will maintain during the course of my contractual relationship with HWHN the unrestricted healthcare license(s) required for my specialties as a HWHN network practitioner. Unrestricted license means that the practitioner's healthcare license is valid for full practice within the jurisdiction's regulated scope of practice for that health care professional specialty, and not subject to stipulations, practice limitations, probationary periods, temporary supervision requirements, or other limitations. I will notify HWHN if my license status changes.
- If there are national standards and/or state licensure standards for a practitioner type that is not licensed, registered, or certified by the applicable state jurisdiction, HWHN has recognized certain national standards applicable for its network. I certify that I meet these standards for training, experience, and examination, as summarized in this application, in the absence of local licensure, or in addition to any existing lesser local requirements. I recognize that HWHN standards do not substitute for my meeting such state licensure requirements for health care practice as may periodically be instituted or updated by state jurisdictions.
- I have ___ , have not ___ find any malpractice claims or award involvement. If you have past or current claims, please fill out the attached professional liability explanation form.

AUTHORIZATION FOR RELEASE OF INFORMATION

I authorize HWHN to consult with past employers, administrators and members of institutions with which I have been or am currently associated, and with others who may have information bearing on my qualifications as a Practitioner, including past and present malpractice carriers to obtain and verify my credentials and professional competence. I further consent to the inspection by representatives of HWHN of all documents that may be material to an evaluation of my professional competence, character and ethical qualifications including information relating to any disciplinary action, suspension, or curtailment of medical-surgical privileges. I consent to the release and exchange of information relating to any disciplinary action, suspension, or curtailment of medical-surgical privileges to HWHN. I authorize the medical and/or professional associations of which I am a member to turn over to the representatives of HWHN a copy of my application for membership and related documents.

I release from liability all representatives of HWHN for their acts performed in good faith and without malice in connection with evaluating my application and my credentials and qualifications, and I release from any liability any and all individuals and organizations that provide information to HWHN in good faith and without malice concerning my professional competence, character and ethics.

Signature: [Signature] Date: 4/8/08

Practitioner Name: Ed Simon, DC Title or Designation (DC, LAc, GCFP, etc): DC

A photocopy of this document shall be as effective as the original when so presented. (Signature stamps are not acceptable).

PROFESSIONAL LIABILITY INFORMATION FORM

Please complete this form explaining any professional liability claims or lawsuits brought against you, settled, or dismissed. The information provided should include pending and closed cases, as well as dismissed or dropped claims or suits. Please obtain information from your insurer if necessary. Copy this form if you have more than one claim to report.

Practitioner Name: NA Case Number: _____

Current status of legal action:

- Pending
- Dismissed or Dropped
- Closed

Court Date (if available):
Date: _____
Date: _____

Resolution:

- No Payments
- Out of Court Settlement
- Judgment or Award

Amount: \$ _____
Amount: \$ _____

Date of Filing: _____

Date of Incident: _____

Professional Liability Insurer: _____

Allegation: _____

Details of incident including your role, relating events, and patient outcome:

Have you made any changes in your practice as a result of this incident?
Attach separate sheet if required.

I certify to the best of my knowledge that all information provided above is correct and complete. I understand that any significant misstatement or omissions on this application may constitute cause for denial or revocation of my contract.

Signature: [Signature] Date: 4/8/08

Updated: 01/09/08

HEALTHWAYS

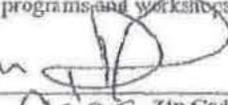
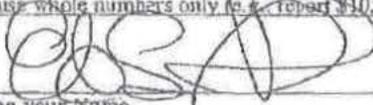
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Published Fee Schedule Reporting Form

Published Fee Schedule means the non-discounted fee schedule that applies to the Practitioner's services to the general public. Typical fees include initial contact session, revisit session, common treatment procedures, and group or individual educational class fees. Please indicate your current Published (prevailing or usual, customary and reasonable) Fees charged for your 5-10 most frequent services. Healthcare practitioners should consult the AMA reference materials for proper use of CPT codes. If one or more of your most frequently charged items is not listed, indicate them in the blank spaces provided. Circle the code or item number on the left of the columns for items that apply to your practice and report those fees. Non-licensed educators, trainers and counselors should indicate their fees for individual and group sessions and for group classes, programs and workshops. Please use whole numbers only (e.g. report \$30.00 as \$30; report \$10.25 as \$10; report \$10.75 as \$11).

Ed Simon   4/18/08
 Print your Name Zip Code Sign your Name Date

Check here if you are submitting a copy of your office Fee slip with the 5-10 most frequently used charges highlighted; sign above and attach your form to this one.

No.	CPT	Description	Fee
New Patient Services			
1	99201	Problem focused, (typically 10 min.)	\$
2	99202	Expanded problem, (typically 20 min.)	\$
3	99203	Detailed Hx & PE (typically 30 min.)	\$
4	99204	Comprehensive, Mod Complex (45min)	\$
5	99205	Comprehensive, High Complexity	\$
Established Patient Services			
6	99211	Minimal, (typically 5 minutes)	\$
7	99212	Problem focused, (typically 10 min.)	\$
8	99213	Expanded problem, (typically 15 min.)	\$
9	99214	Detailed, (typically 25 min.)	\$
10	99215	Comprehensive, (typically 40 min.)	\$
Office Management Services			
11	99273	Confirmatory Consult, Detailed Hx & PE, low complexity (typical 40 min.)	\$
12	99274	Confirmatory Consult, Comprehensive mod. complexity, (typically 60min.)	\$
13	99386	Preventive Med. Eval, Comp. Review and counseling, New Pt. Age 40-64	\$
14	90806	Office Psychotherapy, 45-50 min.	\$
15	90876	Office psychotherapy w/ Biofeedback	\$
16	90901	Biofeedback training, any modality	\$
Traditional Chinese Medicine Evaluation			
17	No code	Trad. Chinese Medicine Evaluation	\$
18	No code	Homeopathic Medicine Evaluation	\$
19	No code	Ayurvedic Medicine Evaluation	\$
Physical Medicine Evaluations			
20	97001	Physical therapy initial evaluation	\$
21	97002	Physical therapy re-evaluation	\$
22	97003	Occupational therapy initial eval.	\$
23	97005	Athletic Training initial evaluation	\$
24	97799a	Acupuncture initial evaluation	\$
25	97799b	Acupuncture reevaluation	\$
Other Evaluation Services			
			\$
			\$
			\$
			\$
Add-On Procedures			

No.	CPT	Description	Fee
Chiropractic Manipulative Treatment			
26	98940	CMT, spinal, 1 to 2 regions	\$
27	98941	CMT, spinal, 3 to 4 regions	\$
28	98942	CMT, spinal, 5 regions	\$
29	98943	CMT, extra spinal, 1 or more regions	\$
Therapeutic Procedures, one or more areas, each 15 minutes			
<i>Note your typical session length: _____ min.</i>			
30	97110	Therapeutic exercises	\$
31	97112	Neuromuscular reeducation	\$
32	97116	Gait training	\$
33	97124	Massage	\$
34	97139	Unlisted procedure, ea. 15 min.	\$
35	97140	Manual therapy, one or more regions	\$
36	97530	Therapeutic activities to improve performance, each 15 minutes	\$
37	97532	Training to Develop cognitive skills	\$
38	97533	Sensory integrative techniques	\$
39	97535	A.D.L. / Self care/home management	\$
Other Therapeutic Procedures			
40	97810	Acupuncture, one or more needles, initial 15 min, without electrical stimulation	\$
41	97811	Acupuncture, one or more needles, ea. add'l. 15 min without electrical stimulation	\$
42	97813	Acupuncture, one or more needles, initial 15 min, with electrical stimulation	\$
43	97814	Acupuncture, one or more needles, ea. add'l. 15 min with electrical stimulation	\$
44	97802	Nutrition Therapy, initial, ea. 15min	\$
45	20552	Trigger point injection, 1-2 muscle grps.	\$
Osteopathic Manipulative Treatment			
46	98925	OMT, 1 to 2 body regions involved	\$
47	98926	OMT, 3 to 4 body regions involved	\$
48	98927	OMT, 5 to 6 body regions involved	\$
49	98928	OMT, 7 to 8 body regions involved	\$
50	98929	OMT, 9 to 10 body regions involved	\$
Educational, Workshops, Seminars, Conferences			
51		Individual Training /Counseling Session	\$
52		Series/Package of Individual Sessions	\$
53		Group Class, Single Session	\$
54		Group Class, Multi part Workshop	\$
55		Group Class Series or Package of Group Sessions	\$

PRACTITIONER SPECIALTY SPECIFIC CREDENTIALS REQUIREMENTS

Please check the information that applies to your specialty(ies). You will be listed in the directories by these categories.

Acupuncture:	<input type="checkbox"/> Graduation from a formal full-time acupuncture program meeting NCCAOM requirements. <input type="checkbox"/> Held a valid unrestricted state license and/or National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM) certification. OR <input type="checkbox"/> Physician Acupuncturists (MD/DO) must hold a valid unrestricted license to practice medicine including acupuncture, and either be a practicing member of the Am. Academy of Medical Acupuncture (AAMA), or be certified by the Am. Board of Medical Acupuncture. <input type="checkbox"/> NDs and DCs need to have 200 hours of acupuncture training and meet ND or DC state scope of practice criteria. <input type="checkbox"/> Professional liability insurance limits of (M/JM) are required for all MD's and DO's as well as ND's and DC's who practice acupuncture. OR liability insurance limits of at least \$200,000 / \$500,000 for licensed acupuncturists only.
Alexander Technique:	<input type="checkbox"/> Certified by the American Society of Alexander Technique (AmSAT) or by Alexander Technique International (ATI). <input type="checkbox"/> Professional liability insurance limits of at least \$200,000 / \$500,000.
Ayurvedic:	<input type="checkbox"/> Credentialed with Healthways WholeHealth Networks, Inc. in another licensed specialty. <input type="checkbox"/> Written documentation of 260 hours of training. <input type="checkbox"/> Three letters of reference, preferably one from the program instructor.
Behavioral Health:	<input type="checkbox"/> Masters degree or higher in a behavior health discipline, i.e. Psychologists, Social Worker etc. <input type="checkbox"/> Hold a valid unrestricted state license. <input type="checkbox"/> Professional liability insurance limits of at least \$200,000 / \$500,000.
Biofeedback:	<input type="checkbox"/> Certification from the Biofeedback Certification Institute of America (BCIA). <input type="checkbox"/> Professional liability insurance limits of at least \$200,000 / \$500,000.
Childbirth Educator:	Applicants may qualify as a Childbirth Educator, with documented training and certification under the auspices of <input type="checkbox"/> International Childbirth Education Association (ICEA) OR <input type="checkbox"/> Childbirth and Postpartum Professional Association (CAPPA) OR <input type="checkbox"/> American Academy of Husband Coached Childbirth (AAHCC - Bradley @ Method) OR <input type="checkbox"/> ASPO/Lamaze - Lamaze Certified Childbirth Educator OR <input type="checkbox"/> Association of Labor Assistants and Childbirth Educators (ALACE)
Chinese Herbal Medicine:	<input type="checkbox"/> National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM) Herbal Practitioner certification, or state license exam for TCM herbs. <input type="checkbox"/> Credentialed as a licensed acupuncturist or other licensed profession. <input type="checkbox"/> Professional liability insurance limits of at least \$200,000 / \$500,000
Chiropractic:	<input checked="" type="checkbox"/> Graduation from an accredited college or formal training program. <input checked="" type="checkbox"/> Hold a valid unrestricted state license. <input checked="" type="checkbox"/> Professional liability insurance limits of at least \$200,000 / \$500,000.
Dietitian Registered/Licensed:	<input type="checkbox"/> Hold a valid unrestricted state license and/or American Dietetic Association/Commission on Dietetic Registration (ADA/CDR) accreditation. <input type="checkbox"/> Professional liability insurance limits of at least \$200,000 / \$500,000
Doula:	Applicants may qualify as a Doula, with documented training and certification as a prenatal, labor/birth, or postpartum doula under the auspices of <input type="checkbox"/> Doulas of North America (DONA) OR <input type="checkbox"/> Childbirth and Postpartum Professional Association (CAPPA) OR <input type="checkbox"/> National Association of Postpartum Care Services OR <input type="checkbox"/> Association of Labor Assistants and Childbirth Educators (ALACE) PLUS <input type="checkbox"/> Current professional liability insurance policy of 200,000 / 500,000 minimum.
Energy Healing Practitioners:	<input type="checkbox"/> Reiki: Credentialed with IHWIH in another licensed specialty AND <input type="checkbox"/> Professional liability insurance limits of at least \$200,000 / \$500,000. <input type="checkbox"/> Reiki: Certified as a Third Degree Reiki (Reiki Master) or as a Reiki Master Teacher, with three letters of reference OR <input type="checkbox"/> Healing Touch: Certified as a practitioner or teacher by Healing Touch International.
Feldenkrais:	<input type="checkbox"/> Guild Certified Feldenkrais Practitioner or Teacher certificate from the Feldenkrais Guild of North America. <input type="checkbox"/> Professional liability insurance limits of at least \$200,000 / \$500,000
Guided Imagery:	<input type="checkbox"/> Meet IHWIH credentialing criteria in Behavioral Health. <input type="checkbox"/> Documented training in clinical Guided Imagery or Hypnotherapy. <input type="checkbox"/> Professional liability insurance limits of at least \$200,000 / \$500,000.
Health and Wellness Coach:	<input type="checkbox"/> Certification by a professional certifying or trade organization with standards of practice, and a code of ethics acceptable to the Credentialing Committee OR <input type="checkbox"/> Graduation from an accredited post-secondary education program with a degree in coaching/lifestyle education field OR <input type="checkbox"/> Completion of a post-professional continuing education program in health education and coaching acceptable to the Credentialing Committee PLUS <input type="checkbox"/> Current, valid, unrestricted license/registration for coaching services if required by the state in which he/she will participate.
Hellerwork Practitioner:	<input type="checkbox"/> Certified by Hellerwork International as a Certified Hellerwork Practitioner. <input type="checkbox"/> Professional liability insurance of at least \$200,000 / \$500,000.

Herbal Consultant:	<input type="checkbox"/> Full member of the American Herbalists Guild and a minimum of 200 hours education in herbal medicine. <input type="checkbox"/> Three letters of reference, preferably one from the program instructor.
Holistic Nurse Practitioner:	<input type="checkbox"/> Hold a valid unrestricted state license as an advanced nurse or nurse practitioner. <input type="checkbox"/> 200 or more hours course work in alternative medicine or another credentialed CAM specialty. <input type="checkbox"/> Professional liability insurance of at least \$200,000/\$500,000.
Homeopath:	<input type="checkbox"/> Certified in Classical Homeopathy by the Council for Homeopathic Certification OR <input type="checkbox"/> A licensed independent prescribing health practitioner (DC, ND, MD, DO, NP, etc) otherwise credentialed by examination with a recognized state, national or international certificate of primary care or specialty care homeopathic expertise. <input type="checkbox"/> Business or professional liability insurance of at least \$200,000 / \$500,000 or \$1M/ \$3M based on license level.
Hypnotist (non clinical):	<input type="checkbox"/> Active Certified members of the National Guild of Hypnotists, Inc. <input type="checkbox"/> Professional liability insurance limits of at least \$200,000 / \$500,000.
Integrative Holistic Physician:	<input type="checkbox"/> A minimum of 200 hours of documented course work in integrative medicine or osteopathic principles, or be certified by the American Board of Holistic Medicine. <input type="checkbox"/> Hold a valid unrestricted state license to practice medicine. <input type="checkbox"/> Professional liability insurance of \$1,000,000 / \$3,000,000.
Massage Therapy:	<input checked="" type="checkbox"/> Hold a valid unrestricted state massage license. <input checked="" type="checkbox"/> Current jurisdictional (city/county, etc.) license PLUS either of the following: <input checked="" type="checkbox"/> Certificate of NCBTMB exam passage (National Certification Board of Therapeutic Massage & Bodywork OR <input checked="" type="checkbox"/> Certificate of active professional AMTA or ABMP membership (requires 500 hrs training) OR <input checked="" type="checkbox"/> Meet: WHN qualifications for alternative bodywork training and certification (Rolling, Myotherapy, Reiki, Hellerwork, Oriental Body Work, etc.). <input checked="" type="checkbox"/> Professional liability insurance of at least \$200,000 / \$500,000.
Mind-Body Skills Instructor:	<input type="checkbox"/> Certification by Peggy Huchinson of satisfactory completion of training in administering the "Prepare for Surgery, Heal Faster" workshop program OR <input type="checkbox"/> Written Documentation of completion of training as a meditation instructor in a formal or apprenticeship training program PLUS <input type="checkbox"/> Attestation of a minimum of 200 hours of training and/or practice teaching PLUS <input type="checkbox"/> Three letters of reference, one of which is from the program instructor OR <input type="checkbox"/> Written documentation of completion of training in the MindBodySpirh Professional Training Program, offered by the Center for Mind-Body Medicine in Washington D.C. OR <input type="checkbox"/> Documentation of status as a Certified Middendorf Practitioner by completion of the three year (three block) professional training offered by Middendorf Brecht Institute in Berkeley California.
Mindfulness Based Stress Reduction Teachers:	<input type="checkbox"/> MBSR Teacher Certification evidenced by a Certification by the Center for Mindfulness at the University of Massachusetts OR <input type="checkbox"/> Copy of Attestation to 200 hours of experience teaching Mindfulness-Based Stress Reduction (MBSR) PLUS <input type="checkbox"/> Written Documentation of completion of Mindfulness-Based Stress Reduction in Mind/Body Medicine: A 5- or 7-Day Residential Training Retreat offered by the Center for Mindfulness at University of Massachusetts Medical School OR <input type="checkbox"/> Written Documentation of completion of Practicum in MBSR (formerly the Internship Program) and/or Teacher Development Intensive in MBSR and/or Supervision in MBSR conducted by CFM or a CFM affiliated training program PLUS <input type="checkbox"/> Letter of Reference from an MBSR instructor/trainer approved by the Center for Mindfulness (contact CFM or HWHM for list of approved professionals) AND <input type="checkbox"/> Two Additional Professional or Client Letters of Reference (if holding a professional health care license, meet HWHM criteria for the licensed specialty)
Music Therapy:	<input type="checkbox"/> A listing of current certification as MT-BC by the Certification Board for Music Therapists (CBMT) OR <input type="checkbox"/> A listing as a Registered Music Therapist (RMT), Certified Music Therapist (CMT) or Advanced Certified Music Therapist (ACMT), as listed with the National Music Therapy Registry PLUS <input type="checkbox"/> Current membership in the American Music Therapy Association (AMTA) OR A listing of current certification as MT-BC by the Certification Board for Music Therapists (CBMT) OR <input type="checkbox"/> A listing of current certification as MT-BC by the Certification Board For Music Therapists. <input type="checkbox"/> Licensed by the State of practice where required.
Naprapathy:	<input type="checkbox"/> Graduate of the Chicago National College of Naprapathy or the Swedish College of Naprapathy. Professional liability insurance of at least \$200,000 / \$500,000. <input type="checkbox"/> Hold a valid unrestricted state license for naprapathy or manual therapy in your state. <input type="checkbox"/> Professional liability insurance of at least \$200,000 / \$500,000.
Naturopathic Physician:	<input type="checkbox"/> Graduation from a naturopathic medical college with a four-year graduate degree. <input type="checkbox"/> Hold a valid unrestricted state license. If licensure is not available by the state, the practitioner must pass the Naturopathic Physicians License Exam (NPLEX) and have a valid out-of-state ND license. <input type="checkbox"/> Professional liability insurance of at least \$200,000 / \$500,000.
Nutritional Counselor:	<input type="checkbox"/> Hold a valid unrestricted state license as a nutritionist OR (if non-licensed state) <input type="checkbox"/> Certified as a Certified Clinical Nutritionist (CCN) by the Clinical Nutrition Certification Board OR <input type="checkbox"/> Certified as a Certified Nutritionist (CN) by the National Institute of Nutritional Education. <input type="checkbox"/> Professional liability insurance limits of at least \$200,000 / \$500,000.
Occupational Therapist:	<input type="checkbox"/> Graduation from an accredited college or formal training program. <input type="checkbox"/> Business or Professional liability insurance limits of at least \$200,000 / \$500,000. <input type="checkbox"/> Hold a valid unrestricted state license. <input type="checkbox"/> Professional liability insurance limits of at least \$200,000 / \$500,000. Graduation from an accredited college or formal training program.

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Oriental Bodywork:	<input type="checkbox"/> Hold a valid unrestricted state or local license PLUS <input type="checkbox"/> Written documentation of Massage training program, including Oriental body work, of 500 class hours and a National Certification Board for Therapeutic Massage and Bodywork (NCBTMB) certification OR <input type="checkbox"/> Certification in Asian Bodywork Therapy by the Nat. Certification Commission for: Acupuncture and Oriental Med. (NCCAOM). <input type="checkbox"/> Professional liability insurance of at least \$200,000 / \$500,000
Pain Practitioner:	<input type="checkbox"/> Hold a current, valid, unrestricted license/registration as a health care practitioner (MD, DO, DC, PT, and ND, LAc, Nurse practitioner or behavioral health) in the state in which he/she will participate. <input type="checkbox"/> Graduation from an accredited college or formal training program for the primary license recognized by the state licensing agency. <input type="checkbox"/> Current professional liability insurance policy meeting primary specialty requirements, or at least \$200,000 / \$500,000. <input type="checkbox"/> Certification as a Diplomat, Fellow or Clinical Associate in Pain Mgmt by credentialing exam of American Academy of Pain Mgmt OR <input type="checkbox"/> Certified by the American Board of Pain Medicine OR <input type="checkbox"/> Certified by the subspecialty examination in Pain Medicine by the boards for Anesthesiology, Physical Medicine and Rehabilitation, or Psychiatry and Neurology.
Personal Trainer / Exercise Specialist:	<input type="checkbox"/> Certification from the American College of Sports Medicine (ACSM), the American Council on Exercise (ACE), the National Strength and Conditioning Association (NSCA), National Academy of Sports Medicine (NASM), International Sports Sciences Association (ISSA), or the International Weightlifting Association (IWA), the Aerobics and Fitness Association of America (AFAA) or an equivalent program sponsored by an accredited institution of post secondary education OR <input type="checkbox"/> Hold a Master's Degree in Exercise Physiology from a recognized US or Canadian institution OR <input type="checkbox"/> Hold an Undergraduate Degree in physical education, exercise science, health science or nutrition, with additional training in physical therapy and kinesiology, and a certification from one of the following: <input type="checkbox"/> The Center for Exercise Physiology (CEP) OR Registered Clinical Exercise Physiologist by the American College of Sports Medicine <input type="checkbox"/> Health Fitness Director or Program Director certification by the American College of Sports Medicine <input type="checkbox"/> Certified by the Health & Fitness Program of certification by the Canadian Society for Exercise Physiology (CSEP) PLUS <input type="checkbox"/> Evidence of at least 15 CEU's of continuing education in exercise and fitness specialties every two years
Physical Therapist:	<input type="checkbox"/> Graduation from an accredited college or formal training program. <input type="checkbox"/> Business or Professional liability insurance limits of at least \$200,000 / \$500,000. <input type="checkbox"/> Hold a valid unrestricted state license. <input type="checkbox"/> Professional liability insurance limits of at least \$200,000 / \$500,000. Graduation from an accredited college or formal training program
Pilates Instructor:	<input type="checkbox"/> Registered Pilates Instructor member of the Pilates Method Alliance (PMA) OR <input type="checkbox"/> Letter stating current employment at Studio or Educational Organization that is registered with PMA OR <input type="checkbox"/> Evidence of training through or by a Pilates Instructor program recognized by the Pilates Method Alliance OR <input type="checkbox"/> Certificate of completion in a comprehensive Pilate's teacher training course with a 400 hour minimum requirement. <input type="checkbox"/> Business or Professional liability insurance limits of at least \$200,000 / \$500,000
Post Birthing Lactation Counselor:	<input type="checkbox"/> Documented training and certification under the auspices of the International Childbirth Education Association (ICEA) OR <input type="checkbox"/> Childbirth and Postpartum Professional Association (CAPPA) OR <input type="checkbox"/> La Leche League International accredited Leader program OR <input type="checkbox"/> International Board of Lactation Consultant Examiners (IBLCE)
Qi Gong:	<input type="checkbox"/> Certification from the individual training program. <input type="checkbox"/> A minimum of 200 hours of training and/or practice teaching. <input type="checkbox"/> One year teaching experience.
Reflexologist:	<input type="checkbox"/> Credentialed with HWIN as a massage therapist. <input type="checkbox"/> Certification from the American Reflexology Certification Board. <input type="checkbox"/> Professional liability insurance limits of at least \$200,000 / \$500,000.
Roller/Structural Integration:	<input type="checkbox"/> Documented training and certification under the auspices of either certification from the Rolf Institute as a Certified Rolfar or Advanced Certified Rolfar, and an additional 400 class hours after certification OR <input type="checkbox"/> Meeting the current membership and certification standards of the International Association of Structural Integrators AND <input type="checkbox"/> Professional liability insurance in the amounts determined by the Operational Quality Committee
Tai Chi:	<input type="checkbox"/> Certification from the individual training program. <input type="checkbox"/> A minimum of 200 hours of training and/or practice teaching. <input type="checkbox"/> One year teaching experience.
Trager Practitioner:	<input type="checkbox"/> Credentialed with HWIN as a licensed health care practitioner. <input type="checkbox"/> Certified with the Trager Institute as a Trager Practitioner. <input type="checkbox"/> Professional liability insurance of at least \$200,000 / \$500,000.
WholeHealth Advocate:	<input type="checkbox"/> Certification by a National Institute of WholeHealth as a WholeHealth Educator OR <input type="checkbox"/> Completion of the WholeHealth Advocate Training Program of 186 CEU's offered to HWIN network members by the National Institute of WholeHealth OR <input type="checkbox"/> Evidence of completion of other comparable post professional or post degree continuing education programs acceptable to the Operational Quality Committee PLUS <input type="checkbox"/> Two years of experience as a professional health care practitioner or a health and wellness coach <input type="checkbox"/> Current, valid, unrestricted license/registration in the related health care profession, if applicable, and any coaching or lifestyle counseling registrations or certifications required by the state in which he/she will participate.
Yoga:	<input type="checkbox"/> A Registered Yoga Teacher, registered with Yoga Alliance (YA) OR <input type="checkbox"/> Evidence of training through or by a Yoga Alliance Registered School OR <input type="checkbox"/> Certificate of completion of an unregistered comprehensive Yoga Teacher course that meets the Yoga Alliance standards PLUS <input type="checkbox"/> One year in practice experience since completion of training or currently working under supervision of a Registered Yoga Teacher with Yoga Alliance.

Updated: 01/09/08

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Therapies and Techniques: Please check all that apply
 These Therapies and Techniques will be listed on your profile.

<input checked="" type="checkbox"/> Acupressure <input type="checkbox"/> Acupuncture <input type="checkbox"/> Acupuncture-Ear/Auricular <input checked="" type="checkbox"/> Acute injuries-auto/work <input type="checkbox"/> Addiction/Substance Abuse Treatment <input type="checkbox"/> Alexander Technique <input checked="" type="checkbox"/> Anti-Aging/Longevity Therapies <input checked="" type="checkbox"/> Applied kinesiology <input type="checkbox"/> Aquatic Therapy <input type="checkbox"/> Aromatherapy <input type="checkbox"/> Art therapy <input type="checkbox"/> Asian/Oriental Body Work <input type="checkbox"/> Ayurvedic Medicine <input type="checkbox"/> Biofeedback <input type="checkbox"/> Body Composition Testing <input type="checkbox"/> Breath work <input type="checkbox"/> Chelation therapy <input type="checkbox"/> Children's Health Programs <input type="checkbox"/> Children-Special Needs Care <input type="checkbox"/> Chinese Herbal Medicine <input type="checkbox"/> Chiropractic-Activator method <input checked="" type="checkbox"/> Chiropractic-Cranial therapy <input checked="" type="checkbox"/> Chiropractic-Diversified <input checked="" type="checkbox"/> Chiropractic-Gonstead <input checked="" type="checkbox"/> Chiropractic-Logan <input type="checkbox"/> Chiropractic-Network <input checked="" type="checkbox"/> Chiropractic-Neuromuscular Technique <input checked="" type="checkbox"/> Chiropractic-Nonforce <input type="checkbox"/> Chiropractic-Pettibon <input checked="" type="checkbox"/> Chiropractic-Sacro occipital <input checked="" type="checkbox"/> Chiropractic-Thompson <input type="checkbox"/> Chiropractic-Touch for Health <input checked="" type="checkbox"/> Chiropractic-Upper Cervical <input type="checkbox"/> Chronic Illness Management <input type="checkbox"/> Colon Hydrotherapy <input type="checkbox"/> Color Therapist <input type="checkbox"/> Counseling -Spiritual <input type="checkbox"/> Counseling-Marriage & Family <input type="checkbox"/> Counseling-Mental Health <input type="checkbox"/> Counseling-Sexual Problems <input type="checkbox"/> Cranial Osteopathic Manipulation <input checked="" type="checkbox"/> Craniocacral therapy <input type="checkbox"/> Dance therapy <input type="checkbox"/> Detoxification programs <input type="checkbox"/> Diet/Supplement Advice <input type="checkbox"/> Disability Evaluations <input type="checkbox"/> Dry Hydrotherapy <input type="checkbox"/> Electrodermal screening <input type="checkbox"/> EMDR-Counseling & Therapy	<input type="checkbox"/> Energy Healing <input type="checkbox"/> Energy Healing-Healing Touch <input type="checkbox"/> Energy Healing-Reiki <input type="checkbox"/> Environmental Medicine <input checked="" type="checkbox"/> Exercise-Clinical <input checked="" type="checkbox"/> Exercise-Fitness <input type="checkbox"/> Exercise-Performance training <input type="checkbox"/> Face Pain Therapy <input type="checkbox"/> Feldenkrais for groups <input type="checkbox"/> Feldenkrais for individuals <input type="checkbox"/> Flower essences <input type="checkbox"/> Food Allergy Management <input type="checkbox"/> Foot Care-Podiatry <input type="checkbox"/> Guided Imagery <input type="checkbox"/> Hellerwork therapy <input type="checkbox"/> Herbal consulting/Treatments <input type="checkbox"/> Homeopathy-complex <input type="checkbox"/> Homeopathy-Constitutional/classical <input type="checkbox"/> Homeopathy-personal care <input type="checkbox"/> Huddleston Prep for Surgery Workshop <input type="checkbox"/> Hypnotherapy-clinical <input type="checkbox"/> Hypnotism-nonclinical <input type="checkbox"/> Impairment Ratings <input type="checkbox"/> Integrative/Holistic Medicine <input type="checkbox"/> Jin Shin Jytsu/Jin Shi Do <input type="checkbox"/> Learning Disability Treatment <input type="checkbox"/> Lifestyle Healthy Coaching <input type="checkbox"/> Magnetic therapy <input type="checkbox"/> Male Health Programs <input checked="" type="checkbox"/> Manipulation-Chiropractic <input checked="" type="checkbox"/> Manipulation-Extremity <input type="checkbox"/> Manipulation-Naprapathic <input checked="" type="checkbox"/> Manipulation-Osteopathic <input checked="" type="checkbox"/> Manipulation-Spinal <input type="checkbox"/> Manipulation-Visceral <input checked="" type="checkbox"/> Manual Physical Therapy <input checked="" type="checkbox"/> Massage-Deep Tissue/Myofascial <input type="checkbox"/> Massage-Infant <input type="checkbox"/> Massage-Lymphatic/Lymphology <input type="checkbox"/> Massage-Neuro Muscular <input type="checkbox"/> Massage-Pregnancy <input type="checkbox"/> Massage-Relaxation <input type="checkbox"/> Massage-Sports <input type="checkbox"/> Massage-Swedish <input checked="" type="checkbox"/> Massage-Therapeutic/Medical <input type="checkbox"/> Meditation <input type="checkbox"/> Mind/Body Group Classes <input type="checkbox"/> Mindfulness-Based Stress Reduction Classes <input type="checkbox"/> Movement therapy	<input type="checkbox"/> Moxabustion <input type="checkbox"/> Music therapy <input type="checkbox"/> Myotherapy <input type="checkbox"/> NAET <input type="checkbox"/> Naturopathic Medicine <input type="checkbox"/> Nutrient Injection Therapy <input type="checkbox"/> Nutrition-Clinical <input type="checkbox"/> Nutrition-Preventive <input type="checkbox"/> Nutrition-Sports <input type="checkbox"/> Occupational Therapy <input type="checkbox"/> Orthomolecular medicine <input type="checkbox"/> Orthotics <input type="checkbox"/> Oxygen Therapy, Hyperbaric <input type="checkbox"/> Pain management <input type="checkbox"/> Physical Medicine Procedures <input type="checkbox"/> Physical Therapy/Physiotherapy <input type="checkbox"/> Pilates <input type="checkbox"/> Polarity therapy <input type="checkbox"/> Preventive medicine <input type="checkbox"/> Prolotherapy/Sclerotherapy <input type="checkbox"/> Psychotherapy <input type="checkbox"/> Qi Gong <input type="checkbox"/> Reflexology <input type="checkbox"/> Rehabilitation-Cardiac <input checked="" type="checkbox"/> Rehabilitation-Orthopedic <input checked="" type="checkbox"/> Rehabilitation-Sports <input type="checkbox"/> Rehabilitation-Stroke & Neurologic <input type="checkbox"/> Rolling <input type="checkbox"/> Senior Health Programs <input type="checkbox"/> Sensory Integration <input type="checkbox"/> Shiatsu <input type="checkbox"/> Sleep Disorder Assess & Treatment <input type="checkbox"/> Somatic Education <input type="checkbox"/> Somaemotional release <input type="checkbox"/> Sports medicine <input type="checkbox"/> Stop Smoking Program <input type="checkbox"/> Stress management <input type="checkbox"/> Structural Integration <input type="checkbox"/> Surgical Preparation <input type="checkbox"/> Tai Chi <input type="checkbox"/> Thought Field Counseling & Therapy <input type="checkbox"/> TMJ/TMD- Care of Jaw Joint <input type="checkbox"/> Triggerwork therapy <input type="checkbox"/> Trigger point therapy <input type="checkbox"/> Weight management <input type="checkbox"/> Woman's Health Programs <input type="checkbox"/> Yoga <input type="checkbox"/> Zero Balancing
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EXHIBIT "F"

LINK:

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CIVIL MINUTES – GENERAL

Case No. **CV 14-08022 BRO (JCx)** Date **April 7, 2015**

Title **EDWARD SIMON, DC V. HEALTHWAYS INC., ET AL.**

Present: The Honorable **BEVERLY REID O'CONNELL, United States District Judge**

Renee A. Fisher

Not Present

N/A

Deputy Clerk

Court Reporter

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS)

ORDER RE: MOTION TO STAY PROCEEDINGS [35]

Pending before the Court is Defendants Healthways, Inc. (“Healthways”), Healthways WholeHealth Networks, Inc. (“WholeHealth”), and Medversant Technologies L.L.C.’s (“Medversant”) motion to stay proceedings in this matter pending review by the Federal Communications Commission (“FCC”). (Dkt. No. 35.) After consideration of the papers filed in support of and in opposition to the instant motion, the Court deems this matter appropriate for decision without oral argument of counsel. *See* Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15. For the following reasons, the Court **DENIES** the Defendants’ motion.

I. BACKGROUND

A. The Parties

Plaintiff Edward Simon, DC is a chiropractor who practices in Los Angeles County. (Compl. ¶ 5.) As part of his business, Plaintiff submitted an application to Defendant WholeHealth in which he provided his fax number. (Simon Decl. ¶¶ 3–4.) WholeHealth, a subsidiary of Healthways, serves as a healthcare intermediary that connects patients to the discounted service providers within its network. (Kent Decl. ¶¶ 2–3.) WholeHealth communicates with its members via email, telephone, and fax. (Kent Decl. ¶ 6.) Plaintiff is part of this network, and he submitted an application to WholeHealth in order to receive patient referrals. (Simon Decl. ¶¶ 3–4.)

Defendant Medversant is another healthcare company that specializes in healthcare data management. (Beckerman Decl. ¶ 2.) Medversant offers “communications

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compliance solutions” to help healthcare providers meet their information security obligations under the Health Information Portability and Accountability Act (“HIPAA”). Healthways and WholeHealth are both clients of Medversant. (Beckerman Decl. ¶ 2)

Plaintiff brings this action on behalf of a class of similarly situated individuals, defined as “all persons and entities that were at the time subscribers of telephone numbers to which material that discusses, describes or promotes any of Defendants’ respective property, goods, or services (whether separately or in combination with the property, goods, or services of any other Defendant) was sent via facsimile transmission, commencing within four years preceding the filing of this action.” (Compl. ¶ 17.)

B. The Underlying Dispute

In the summer of 2014, Defendants sent out thousands of faxes to healthcare providers advertising ProMailSource, an encrypted email program provided by Medversant. (Beckerman Decl. ¶ 3.) WholeHealth sent these faxes based on information healthcare providers provided in order to become part of the WholeHealth network. (Kent Decl. ¶¶ 4–6.) Medversant also faxed some of these numbers at Healthways and WholeHealth’s request. (Beckerman Decl. ¶ 3.) According to Medversant, at least some of these providers had already expressly consented to receive this information when they applied for credentials through Medversant’s online program. (Policarpio Decl. ¶ 2.) These applicants were required to consent to the terms of Medversant’s privacy policy, which allows the company to use an applicant’s information for a variety of purposes, including member relations, marketing, and sales. (Policarpio Decl. Ex. A.)

On August 13, 2014, Plaintiff received a fax advertising ProMailSource. (Compl. Ex. 1.) Plaintiff alleges that this fax violated the Telephone Consumer Protection Act of 1991 (“TCPA”) and Junk Fax Prevention Act of 2005 (“JFPA”) for two reasons: (1) Defendants failed to obtain his prior express permission as defined in 47 U.S.C. § 227(a)(5); and (2) Defendants failed to include the “Opt-Out Notice” required by the TCPA and JFPA. (Compl. ¶¶ 1, 13–15.)

On behalf of a putative class of similarly situated individuals, Plaintiff filed this action in the Superior Court of California, County of Los Angeles, on September 16, 2014. (Dkt. No. 1 at 9.) Defendants then removed the case to this Court on the basis of

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federal question jurisdiction on October 16, 2014. (Dkt. No. 1.) In his Complaint, Plaintiff seeks statutory damages in the amount \$500 for each violation of the JFPA and requests that the Court triple these damages for what Plaintiff alleges was willful and knowing conduct. (See Compl. ¶¶ 26–27; Prayer for Relief ¶¶ 4–6.)

C. The FCC Decision

When Plaintiff filed this lawsuit, the law was unclear on whether opt-out notice was required for *solicited* faxes. On October 30, 2014, however, the FCC issued an order clarifying that even solicited faxes—those sent with a party’s prior express permission—require “opt-out” notice. (Dkt. No. 36 at 5–29.) The FCC recognized “that some parties who have sent fax ads with the recipient’s prior express permission may have reasonably been uncertain about whether [the FCC’s] requirement for opt-out notices applied to them.” (Dkt. No. 36 at 5.) Due to this uncertainty, the FCC granted parties a retroactive waiver from the opt-out requirement and invited similarly situated parties—those who sent fax ads without opt-out notice *but with* the parties’ prior express permission—a six-month window to seek a similar waiver. (Dkt. No. 36 at 5.) The waiver does not affect the prohibition against sending unsolicited fax ads. (Dkt. No. 36 at 19.)

On January 8, 2015, a little more than two months after the FCC’s order was issued, Medversant filed a petition with the FCC for a retroactive waiver from the opt-out requirement. (Dkt. No. 36 at 31–36.) On March 2, 2015, approximately four months after the FCC decision, Healthways and WholeHealth also filed a petition for waiver. (Lee Decl. ¶ 2.) Defendants now contend that they are eligible for such an exemption and that this litigation should be stayed until the FCC reaches a decision. Accordingly, Defendants filed the instant motion to stay these proceedings on March 3, 2015. (Dkt. No. 35.) Plaintiff opposed this motion on March 25, 2015, (Dkt. No. 41), and Defendants replied on March 30, 2015, (Dkt. No. 43).

II. REQUESTS FOR JUDICIAL NOTICE

A court may properly take judicial notice of (1) material which is included as part of the complaint or relied upon by the complaint, and (2) matters in the public record. See *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *Lee v. City of L.A.*, 250 F.3d 668, 688–89 (9th Cir. 2001). Under Federal Rule of Evidence 201(b), a judicially noticed

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fact must be one “not subject to reasonable dispute because it (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Further, a court “must take judicial notice if a party requests it and the court is supplied with the necessary information.” *See* Fed. R. Evid. 201(c)(2); *In re Icenhower*, 755 F.3d 1130, 1142 (9th Cir. 2014).

A. Defendants’ Request for Judicial Notice

Defendants have filed a Request for Judicial notice of two documents from other proceedings: (1) the “Fax Order” issued by the FCC, and (2) Medversant’s petition for a retroactive waiver. (Dkt. No. 36.) These documents have either been issued by or filed with a public agency and are therefore matters of public record. Accordingly, the existence and authenticity of these public records is beyond dispute and therefore properly the subject of judicial notice, although the Court cannot take judicial notice of the facts alleged therein. *See Lee*, 250 F.3d at 688–89; *see also Icenhower*, 755 F.3d at 1142 (“We ‘may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned,’ including ‘court filings and other matters of public record.’” (quoting *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006))). Accordingly, the Court **GRANTS** Defendants’ request for judicial notice.

B. Plaintiff’s Requests for Judicial Notice

Plaintiff requests that the Court take judicial notice of five documents:

- (1) Plaintiff’s comments that he provided to Medservant’s petition for waiver to the FCC;
- (2) Plaintiff’s reply comments to this petition;
- (3) the complaint from a related case in the Northern District of Illinois, *Affiliated Health Care Associates, P.C., v. Medversant Technologies, LLC & Healthways WholeHealth Networks, Inc.*, Case No. 1:14-cv-10247 (N.D. Ill. Dec. 22, 2014);
- (4) a motion to stay in the related case in the Northern District of Illinois; and
- (5) an order denying a motion to stay in a case from the Northern District of California, *Melita Meyer v. Bebe Stores, Inc.*, Case No. 14-cv-00267-YGR (N.D. Cal. Mar. 17, 2015).

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Although Plaintiff requests that Court take judicial notice of the comments and reply comments that he provided to Medservant’s petition, however, Plaintiff has not lodged the appropriate documents with the Court. Exhibits A and B, which Plaintiff asserts constitute his comments, appear instead to be faxes sent by WholeHealth, and not documents connected to Medservant’s pending petition before the FCC. (See Pl.’s Req. for Judicial Notice Exs. A–B). Nevertheless, it is not necessary to take notice of these documents before reaching its decision. Even if Plaintiff had provided them, the Court could only take notice of the existence of these documents—not the disputed facts or arguments for which Plaintiff may have sought to introduce them. See *Lee*, 250 F.3d at 688–89. Plaintiff’s remaining exhibits are publicly filed judicial documents and are therefore properly the subject of judicial notice. See *Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011) (“In particular, we ‘may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.’” (quoting *United States ex rel. Robinson Rancheria Citizens Council v. Boreno, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992))).

III. DISCUSSION

Defendants request that the Court stay these proceedings either under the doctrine of primary jurisdiction or for reasons within the Court’s discretion, including judicial economy and the potential prejudice to Defendants. For the following reasons, the Court finds a stay to be unnecessary and therefore **DENIES** Defendants’ motion.

A. The Doctrine of Primary Jurisdiction

To begin, Defendants argue that the Court should stay these proceedings in accordance with the primary jurisdiction doctrine due to the FCC’s recent clarification that solicited faxes must provide opt-out notice. The primary jurisdiction doctrine allows courts to stay proceedings when the court determines that a claim implicates technical and policy questions that should first be addressed by the appropriate regulatory authority. *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). The doctrine is not intended to enable courts to “secure expert advice,” but should only be used if a claim “requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency, and if protection

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of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.” *Id.* (internal citations and quotation marks omitted).

While there is no fixed formula for determining whether the primary jurisdiction doctrine applies, the Ninth Circuit has applied the doctrine where there is “(1) [a] need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration.” *Id.* at 1115 (modification in original). Applying these factors to the case at hand, it is clear that the primary jurisdiction doctrine does not apply.

In its recent decision, the FCC invited certain entities to apply for a retroactive waiver from the opt-out requirement. Whether Defendants qualify to seek a waiver from the FCC, however, depends on whether Defendants obtained prior express permission before sending the faxes in question. The FCC’s October 30, 2014 ruling only permits entities that sent faxes with prior express permission—but without opt-out notice—to seek a waiver for these faxes. The ruling does *not* affect the FCC’s prohibition against sending *unsolicited* faxes, nor does the decision affect the requirements for faxes based on an existing business relationship. (*See* Dkt. No. 36 at 5 n.2 (“The waiver does not extend to the similar requirement to include 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. We also note that the waiver does not affect the prohibition against sending unsolicited fax ads, which has remained in effect since its original effective date.”).) In requesting that the Court stay this action pursuant to the doctrine of primary jurisdiction, Defendants are in essence asking the Court to allow the FCC to resolve the question of prior express permission—without which Defendants would not qualify for a waiver. For the following reasons, that question does not warrant application of the primary jurisdiction doctrine.

First, although the FCC has the authority to define “prior express permission” or “prior express invitation,” this is not an issue of first impression. In fact, the FCC has previously examined this term:

[P]rior express invitation or permission must be express, must be given prior to the sending of any facsimile advertisements, and must include the facsimile number to which such advertisements may be sent. It cannot be in

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the form of a “negative option.” However, a company that requests a fax number on an application form could include a clear statement indicating that, by providing such fax number, the individual or business agrees to receive facsimile advertisements from that company or organization.

Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 21 FCC Rcd. 3787, 3811 (2006).

Second, this is not an issue that requires technical expertise beyond the Court’s conventional experience. Indeed, following the FCC’s recent decision, multiple courts have concluded that disputes over prior express permission are appropriate for judicial resolution. *See, e.g., Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC*, No. 12-22330-CIV, 2014 WL 7366255, at *2-3 (S.D. Fla. Dec. 24, 2014) (certifying class despite indication that defendant would seek a waiver because defendant had presented no evidence of prior express permission); *True Health Chiropractic Inc. v. McKesson Corp.*, No. 13-cv-02219-JST, 2014 WL 6707594, at *2 (N.D. Cal. Nov. 25, 2014) (holding that resolution of whether the named plaintiffs provided consent to receive faxes from the defendants is a factual issue that requires litigation, not a stay); *Around the World Travel, Inc. v. Unique Vacations, Inc.*, No. 14-cv-12589, 2014 WL 6606953, at *3 (E.D. Mich. Nov. 19, 2014) (considering the primary jurisdiction doctrine and finding that continuing with the litigation and discovery were more appropriate even though the parties disputed the issue of prior express permission).

Finally, this is not the type of claim that requires uniformity of administration or the need to establish a national rule. To the contrary, the FCC recognized in its decision that waiver requests must be determined on a case-by-case basis. (*See* Dkt. No. 36 at 19 n.102 (“[W]e note that all future waiver requests will be adjudicated on a case-by-case basis and do not prejudice the outcome of future waiver requests in this Order.”)). While the Court acknowledges the potential for inconsistent rulings between the FCC and this Court, this action is in its infancy; there is no basis to believe that after discovery on this issue there will remain a substantial risk of inconsistent rulings. Accordingly, the Court finds application of the doctrine of primary jurisdiction to be inappropriate in this case.

B. Defendants’ Motion Is Not Warranted on Other Grounds

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Alternatively, Defendants ask that the Court stay these proceedings in the interest of judicial economy and because they would suffer prejudice absent such a stay. “[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Although no precise rule governs the determination of when to grant a motion to stay when similar actions are pending in two different federal district courts, “the general principle is to avoid duplicative litigation.” *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976). The Ninth Circuit has held that a stay is proper if the conclusions of another tribunal “may be of valuable assistance to the court in resolving the [claims] presented in [the complaint], even under the assumption that the court is not bound and controlled by the [other tribunal’s] conclusions.” *Leyva v. Certified Growers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). Nevertheless, a “stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims presented to the court.” *Id.* at 864.

The Court declines to stay these proceedings pursuant to its inherent authority. In similar circumstances involving a dispute over prior express permission, courts have permitted the litigation to continue absent admissible evidence that disproves the plaintiff’s allegations. *See, e.g., Doctor Diabetic Supply*, 2014 WL 7366255, at *3 (“DDS has not yet presented any evidence of express invitation or permission from any recipient.”); *True Health Chiropractic*, 2014 WL 6707594, at *2 (“McKesson also seeks to resolve the factual question of whether the named Plaintiffs provided consent to receive faxes from McKesson. But resolution of that factual issue requires litigation, not a stay.” (internal citations omitted)); *Around the World Travel*, 2014 WL 6606953, at *4 (“Plaintiff is entitled to discovery to determine whether defendant can support its position that it sent faxes with the permission of the recipients.”). Despite the distinguishable procedural postures of these cases,¹ their reasoning remains applicable; the Court will not blindly grant a stay, over the objection of Plaintiff, absent *any* evidence that Defendants obtained the prior express permission necessary to qualify for a waiver.

¹ *Around the World Travel* involved a motion for reconsideration of an oral stay or, alternatively, a renewed motion to stay; *True Health Chiropractic* involved a motion for reconsideration of the district court’s denial of a motion to stay; and *Doctor Diabetic Supply* involved certification of a class despite an ongoing petition.

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Defendants rely on *Physicians Healthsource, Inc. v. Endo Pharmaceuticals*, No. 14-cv-002289-CMR (E.D. Pa. Jan. 5, 2015) (Dkt. No. 27), to support their contention that a stay is equitable while the FCC reviews a party's request for a retroactive waiver.² Unlike Plaintiff here, however, the plaintiff in *Endo Pharmaceuticals* asserted his claims without regard to whether the facsimile advertisements were solicited or unsolicited. *Id.* (Dkt. No. 27 at 1). This case is therefore more analogous to *Around the World Travel*, in which the class definition potentially included both solicited and unsolicited faxes, but the complaint clearly alleged that the actionable faxes were unsolicited. 2014 WL 6606953, at *2-4. Similarly here, Plaintiff's Complaint (if not his proposed class) specifically alleges that *all* faxes sent by Defendants were without prior express permission. (Compl. ¶ 15 ("Plaintiff did not give Defendants prior express invitation or permission Plaintiff is informed and believes . . . that Defendants sent or caused Exhibit 1 and other fax advertisements to be sent without obtaining prior express invitation or permission. In sending these faxes . . . Defendants *also* failed to include the disclosures required by the Opt-Out Notice Requirements" (emphasis added)).)

Defendants have presented no evidence that rebuts Plaintiff's allegation that the faxes were sent without prior express permission. Defendant WholeHealth has submitted an affidavit in which it claims to have had an existing business relationship with Plaintiff, (Kent Decl. ¶¶ 4-5), but the FCC waiver would not apply in these circumstance, (*see* Dkt. No. 36 at 5 n.2 ("This waiver does not extend to a similar requirement to include an opt-out notice on fax ads sent pursuant to an established business relationship")). Moreover, that WholeHealth obtained Plaintiff's fax number from an application he submitted does not conclusively demonstrate that the application contains a clear statement of consent to receive facsimile advertisements. No other evidence has been offered to disprove Plaintiff's claim.³ Accordingly, because as it would be inappropriate to stay the case without permitting Plaintiff the benefit of discovery to support his allegations, the Court declines to exercise its inherent power to stay these proceedings.

² The Court takes judicial notice of this unpublished order. *See Trigueros*, 658 F.3d at 987.

³ Medversant has also submitted a copy of its privacy policy to support its claim that certain Healthways providers credentialed through Medversant affirmatively agreed to the terms of this policy. (Policarpio Decl. Ex. A.) Regardless of whether this privacy policy is sufficient to constitute prior express permission, however, Medversant does not claim that this agreement covers all members of the class, nor that it even covers Plaintiff.

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See True Health Chiropractic, 2014 WL 6707594, at *2. If discovery reveals that the contested faxes were in fact sent with Plaintiff's or other class members' permission, a stay may become appropriate or may be relevant in limiting the size of the class. At this time, however, such a request remains premature.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion to stay is **DENIED**. The hearing set for April 13, 2015 is **VACATED**.

IT IS SO ORDERED.

Initials of Preparer

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