Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	
	)	
Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission's Opt-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission	)	Re: Waiver Request by Medversant Technologies L.L.C.

To: Office of the Secretary

Attention: The Commission
Consumer and Governmental Affairs Bureau

APPLICATION FOR REVIEW

Aaron P. Shainis
Shainis & Peltzman, Chartered

Scott Z. Zimmerman
Law Offices of Scott Z. Zimmerman

TABLE OF CONTENTS

Page

Summary.....i

Litigation Matters.....2

Medversant's Petition for Waiver.....4

The August 28 Order.....4

Argument.....6

A. Retroactive Waiver.....6

B. Violation of Separation of Powers.....8

C. Medversant Not Similarly Situated.....15

D. Due process violation and arbitrary and capricious.....18

E. Public Policy.....20

F. Conclusion.....21

Summary

The granting of a retroactive waiver by the Consumer and Governmental Affairs Bureau in its August 28, 2015 Order, DA 15-976, to Medversant Technologies L.L.C. is arbitrary and capricious. The Bureau's case support is misplaced. Its action violates the separation of powers. It is also against public policy.

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	
	)	
Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission's Opt-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission	)	Re: Waiver Request by Medversant Technologies L.L.C.

To: Office of the Secretary

Attention: The Commission
Consumer and Governmental Affairs Bureau

APPLICATION FOR REVIEW

Edward Simon, DC ("Simon") and Affiliated Health Care Associates, P.C. ("Affiliated"), by their attorneys, and pursuant to Section 1.115 of the Commission's rules, seek review of the August 28, 2015, Order, DA 15-976 ("August 28 Order"), of the Acting Chief, Consumer and Governmental Affairs Bureau ("Bureau"). The order grants a retroactive waiver to Medversant Technologies L.L.C. ("Medversant") of the Commission's regulation requiring an opt-out disclosure on fax advertisements sent with the prior express permission of recipients. As will be demonstrated, the August 28 Order is arbitrary and capricious. The Bureau's case support for granting the waiver is misplaced. The Commission's actions violate the separation of powers. Furthermore, the August 28 Order sets a precedent that is against public policy. In support, Simon and Affiliated submit the following:

Litigation Matters

A. Lawsuit Against Medversant for Sending Junk Faxes

Simon is a chiropractor practicing in North Hollywood, California. Simon commenced an action on September 16, 2014, against Medversant and Healthways WholeHealth Networks, Inc. ("HWHN"), and Healthways, Inc., for sending fax ads in direct violation of the TCPA and the Commission's regulations.[1] Simon commenced the action to stop junk faxes that regularly interfere with his practice and to obtain damages to compensate him and other junk fax victims and deter future violations. Simon was later joined in the case by Affiliated, a Chicago professional corporation, also engaged in chiropractic care. Simon and Affiliated allege that Medversant and the other defendants violated the TCPA in two independent ways: (1) by failing to obtain prior express permission from targeted recipients to send its fax ads; and (2) by failing to include an opt-out notice, required by the Act and the Commission's regulations, advising recipients of their right to stop future defendants' fax ads and informing them how to make a valid opt-out request.[2]

Medversant and its partners conducted seven fax broadcasts on June 16, June 24, July 7, July 22, August 13 and August 20, 2014. These faxes advertise, among other things, an email service/product called "ProMailSource" and Healthways' wellness network. All told, Medversant blasted about 42,000 junk fax transmissions to over 10,000 health care providers nationwide. Plaintiffs each received the same junk faxes from Defendants (on August 13 and August 20). Neither Simon nor Affiliated gave Medversant permission to send these faxes. There is no opt-out notice whatsoever contained on any of Medversant's faxes.

On July 23, 2015, Simon's counsel deposed Medversant's designated representative, Joseph Beckerman, under Federal Rule of Civil Procedure 30(b)(6) in the litigation.[3] Mr. Beckerman is Medversant's vice president of national accounts and was designated as

---

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

[2] § 227(b)(1)(C)(iii), (b)(2)(D), (b)(2)(E), (d)(2); 47 C.F.R. § 64.1200(a)(4)(iii)-(vi). Medversant violations of the opt-out notice requirements are not limited to violations of § 64.1200(a)(4)(iv); they also include violations of § 64.1200(a)(4)(iii) with respect to faxes sent on the basis of established business relationships.

[3] The portions of the deposition referenced herein are attached to this Application as Exhibit A.

Medversant's Rule 30(b)(6) designee[4] Mr. Beckerman claimed in his testimony that prior to the filing of the Simon lawsuit (1) Medversant did not know about any laws regulating the sending of faxes[5]; (2) Medversant did not know of any requirement that certain faxes needed to contain an opt-out notice[6]; (3) nobody from Medversant had read any FCC orders or reports regarding the sending of faxes[7]; (4) Medversant had never discussed either internally or with other defendants any law regulating the sending of faxes[8]; and (5) Medversant had never discussed either internally or with other defendants any requirement that certain faxes needed to contain an opt-out notice.[9]

B. "Established Business Relationship" and "Prior Express Permission" Claim

Both Medversant (and HWHN) contend that "prior express permission" was given through HWHN's "Participating Practitioner Agreement" because the Participating Practitioner Agreement "requests contact information, including fax number" and the ProMailSource faxes were "sent to the members of HWHN's network of practitioners at the fax numbers that each member voluntarily provided in their Participating Practitioner Agreement."

Dr. Simon applied to become a HWHN provider in April 2008. He does not recall treating any HWHN related patients. Because of this and the fact that he filed his lawsuit, he does not consider himself presently to be a HWHN provider. Affiliated was never a HWHN provider. HWHN asserts that one of Affiliated's doctors (Jaroslaw Slusarenko) was one of its providers, but HWHN cannot produce any provider agreement and cannot say when or how Dr. Slusarenko supposedly became a HWHN provider.

Neither Simon nor Affiliated had any established business relationship with Medversant at the time they each received the August 13 and 20 faxes.

---

[4] *Id.* at 9:21-25; 35:24-36:1.

[5] *Id.* at 88:1-5; 90:2-7.

[6] *Id.* at 90:8-15.

[7] *Id.* at 90:16-22.

[8] *Id.* at 91:3-11.

[9] *Id.* at 91:12-21.

Medversant's Petition for Waiver

In its Petition, Medversant ambiguously requests a waiver with respect to "any faxes" it sent with prior express permission "prior to April 30, 2015."[10] But Medversant never asserts that it actually *obtained* prior express permission, let alone explains how or in what manner it did so.

Medversant alleged in its Petition that it "did not believe" that faxes sent with prior express permission "required opt-out notices." Medversant also contended that it "did not '[understand] that [it] did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission.'"[11] This passage merely copies the Commission's language from its 2014 fax opt-out notice order,[12] ¶ 26 (the "*Anda Commission Order*").

But Medversant did not explain its contentions, nor state that its "belief" or "understanding" stemmed from the two sources of "confusion" and "misplaced confidence" identified in the *Anda Commission Order* (*i.e.*, the notice of ruling making for, and footnote 154 of, the 2006 Junk Fax Order.)[13] Indeed, Medversant did not contend that it was even *aware* of the requirements of § 64.1200(a)(4)(iv), let alone of the rulemaking for the 2006 Junk Fax Order or footnote 154 from that order. (In fact, Medversant's testimony in the Simon litigation confirms that Medversant was unaware of these requirements.)

Simon and Affiliated opposed Medversant's Petition in initial and supplemental comments.

The August 28 Order

In its August 28 Order, the Bureau summarized the history of fax regulations under the TCPA and recounted the lead-up to the *Anda Commission Order*, namely, "that a footnote contained in the Junk Fax Order caused confusion regarding the applicability of the opt-out notice requirement to faxes sent to recipients who provided prior express permission."[14] The

---

[10] Petition 1.

[11] Petition 4.

[12] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 14–164, 2014 WL 5493425 (F.C.C. Oct.30, 2014).

[13] *Anda Commission Order* ¶ 24.

[14] August 28 Order ¶ 7.

Commission stated in the *Anda Commission Order* that "[t]he use of the word 'unsolicited' in this one instance may have caused some parties to misconstrue the Commission's intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient." [15] The FCC had also noted a "lack of explicit notice" of the Commission's intent to impose an opt-out requirement on solicited fax advertisements.[16]

Conspicuously absent from the August 28 Order, however, was the Commission's admonition in the *Anda Commission Order* that "simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for waiver."[17] In its place, the Bureau found that petitioners, like Medversant, "are entitled to a presumption of confusion or misplaced confidence."[18] There was no such "presumption" contained in the *Anda Commission Order*. Indeed, this newly-minted presumption is directly contrary to the explicit requirement set forth by the Commission in the *Anda Commission Order* that a petitioner must show more than "simple ignorance" in order to obtain a waiver.

The Bureau granted waivers to petitioners, like Medversant, who merely asserted without explanation that they had sent faxes with prior express permission and/or cannot show that it obtained prior express permission. The Bureau took the position that it was sufficient for a waiver recipient to prove prior express permission, if any, later in their pending court cases.[19]

The Bureau rejected arguments that, by granting waivers while litigation is pending, the Commission violated the separation of powers.[20]

The Bureau failed to address Simon's argument that it would be against public interest to waive Medversant's liability under § 64.1200(a)(4)(iv) in connection with Medversant's failure to provide opt-out notices because those notices were required on all its faxes independent of § 64.1200(a)(4)(iv).

---

[15] *Anda Commission Order* ¶ 24.

[16] *Anda Commission Order* ¶ 25; August 28 Order ¶¶ 8, 15.

[17] *Anda Commission Order* ¶ 26.

[18] August 28 Order ¶ 15.

[19] August 28 Order ¶ 17.

[20] August 28 Order ¶ 13.

Argument

As will be demonstrated, the August 28 Order is arbitrary and capricious. The Bureau's case support for granting the waiver is misplaced. The Commission's actions violate the separation of powers. Furthermore, the August 28 Order sets a precedent that is against public policy.

A. The Commission Cannot Retroactively Waive § 64.1200(a)(4)

In its August 28 Order, the Bureau asserts that it has the authority under 47 C.F.R. § 1.3 to waive section 64.1200(a)(4).[21] But the Bureau does not even try to justify granting a waiver on a retroactive basis.[22] Indeed, the Bureau's retroactive waiver of section 64.1200(a)(4) is impermissible. Retroactive waiver is highly disfavored and agency regulations cannot be applied retroactively unless expressly authorized by Congress. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468 (1988). Congress did not authorize retroactive rulemaking in either the TCPA or in its 2005 amendment. *See* 47 U.S.C. § 227(b)(2). This alone precludes the retroactive application of any waiver.

Further, in *Retail, Wholesale, and Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972), the court noted the following:

> Among the considerations that enter into a resolution of the problem [of retroactivity] are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4)

---

[21] August 28 Order n. 55 and 56, citing *Northern Cellular v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) and *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir.), *cert. denied,* 409 U.S. 1027 (1972).

[22] *WAIT Radio* provides no support that the Commission can waive section 64.1200(a)(4) retroactively. *WAIT Radio* merely stands for the proposition that the Commission can waive its rules. It does not address a retroactive waiver, let alone of a regulation already at issue in active litigation. In the *Northern Cellular* case, the Commission granted a waiver, but it was not retroactive. Moreover, the case does not support any waiver by the Commission – whether retroactive or otherwise – because the District of Columbia Circuit overturned the Commission's action as arbitrary and capricious. Accordingly, *Northern Cellular* supports those like Simon and Affiliated in challenging the August 28 Order.

> the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[23]

A retroactive waiver is particularly unfair to those, like Simon, who commenced litigation in reliance of the clear and unambiguous language of section 64.1200(a)(4) before the issuance of the *Anda Commission Order*.[24] He commenced litigation on September 16, 2014. It is against public policy to apply a waiver retroactively to someone who in good faith relies on the Commission's regulations. In *Greene v. United States*, the Supreme Court held that, because the petitioner's rights "matured" under the 1955 rule, his claim must be evaluated that provision and disallowed retrospective operation of any new rule. The Court applied the 1960 DOD rule only prospectively—despite the construction by the agency that adopted the regulation. Thus, the Court departed from its usual practice of giving deference to an agency's interpretation of its own regulations.[25]

Simon's right to rely on section 64.1200(a)(4) matured when he commenced this litigation on September 16 and cannot be abrogated retroactively by the Commission. Simon read the Commission's regulation correctly and sued for its violation. In enacting the TCPA, Congress determined that giving junk fax victims the right to sue for violations, in addition to Commission enforcement, was the best way to achieve the statute's objectives. It would undermine the statutory objectives if junk fax victims, after reading and correctly comprehending the Commission's plain and unambiguous regulations, commenced litigation and invested

---

[23] In *Retail, Wholesale*, Judge McGowan also noted that "[u]nless the burden of imposing the new standards is de minimis, or the newly discovered statutory design compels its retroactive application, the principles which underlie the very notion of ordered society, in which authoritatively established rules of conduct may fairly be relied upon, must preclude its retroactive effect..." *Id.* at 392.

[24] Indeed, the Commission ruled in the *Anda Commission Order* that its adoption of section 64.1200(a)(4)(iv) was a valid exercise of Congressional authority granted under 47 U.S.C. § 227(b). *Id.* ¶ 14. Further, the Commission found that requiring opt-out notices on fax ads sent to recipients who give prior express permission serves highly useful and important purposes: "absent [such] a requirement...recipients could be confronted with a practical inability to make senders aware that their consent is revoked. At best, this could require such consumers to take, potentially, considerable time and effort to determine how to properly opt out...At worse, it would effectively lock in their consent. Moreover...giving consumers a cost-free, simple way to withdraw previous consent is good policy." *Id.* at ¶ 20.

[25] 376 U.S. 149,160(1964).

substantial resources to enforce those regulations, only to have the violation evaporate by agency action. This would seriously weaken the incentive to bring such actions in the first place and incentivize junk fax advertisers to run to the Commission whenever a victim seeks to hold them liable for their illegal conduct. "Pulling rug from underneath" Simon is arbitrary and capricious and violates public policy.

B. The Commission does not have the authority to "waive" violations of the regulations prescribed under the TCPA in a private right of action, and doing so would violate the separation of powers

1. The Commission has no authority to "waive" its regulations in a private right of action

The TCPA creates a private right of action for any person to sue "in an appropriate court" for "a violation of this subsection or the regulations prescribed under this subsection,"[26] and directs the Commission to "prescribe regulations" to be enforced in those lawsuits.[27] The "appropriate court" then determines whether "a violation" has taken place.[28] If the court finds "a violation," the TCPA automatically awards a minimum $500 in statutory damages for "each such violation" and allows the court "in its discretion" to increase the damages up to $1,500 per violation if it finds the violations were "willful[] or knowing[]."[29]

The Commission plays no role in determining whether "a violation" has taken place, whether a violation was "willful or knowing," whether statutory damages should be increased, or how much the damages should be increased. These duties belong to the "appropriate court" presiding over the lawsuit.[30]

The TCPA does not authorize the Commission to "waive" its regulations in a private right of action. It does not authorize the Commission to intervene in a private right of action.[31]

---

[26] § 227(b)(3).

[27] § 227(b)(2).

[28] § 227(b)(3)(A)–(B).

[29] § 227(b)(3).

[30] § 227(b)(3).

[31] *Id.*

It does not even require a private plaintiff to notify the Commission that it has filed a private lawsuit.[32] Nor does it limit a private plaintiff's right to sue for violations in situations where the Commission declines to prosecute.[33]

The Communications Act does, however, grant the Commission authority to enforce the TCPA through administrative forfeiture actions.[34] Private citizens have no role in that process.[35] Thus, the TCPA and the Communications Act create a dual-enforcement scheme in which the Commission promulgates regulations that both the Commission and private litigants may enforce, but where the Commission plays no role in the private litigation and private citizens play no role in agency enforcement actions.[36] This is not an unusual scheme. The TCPA is similar to several statutes, including the Clean Air Act, which empowers the EPA to issue regulations imposing emissions standards[37] that are enforceable both in private "citizen suits"[38] and in administrative actions.[39]

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

The seminal separation-of-powers case is *United States v. Klein,*[40] involving a statute passed by Congress intended to undermine a series of presidential pardons issued during and after the Civil War to former members of the Confederacy. The statute directed the courts to treat the pardons as conclusive evidence of guilt in proceedings brought by such persons seeking

---

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

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

[34] *Id.* § 503(b).

[35] *Id.*

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

[37] 42 U.S.C. § 7412(d).

[38] 42 U.S.C. § 7604(a).

[39] 42 U.S.C. § 7413(d).

[40] 80 U.S. 128, 147–48, 13 Wall. 128, 20 L.Ed. 519 (1872).

compensation for the confiscation of private property by the government during the war, thereby justifying the seizure of their property.[41]

The Supreme Court held the statute violated the separation of powers by forcing a "rule of decision" on the judiciary that impermissibly directed findings and results in particular cases.[42] The Court held one branch of government cannot "prescribe a rule for the decision of a cause in a particular way" to the judicial branch and struck down the law.[43]

But dictating a "rule of decision" is precisely what the "waiver" requested by Medversant seeks to accomplish. The goal, as Medversant does not hesitate to admit, is to prevent the District Court from finding "a violation" of § 64.1200(a)(4)(iv). If the waiver is granted, the statute will remain the same. This regulation will remain the same. But the federal district court will be told it cannot find "a violation" of the regulation. Such a result would be inappropriate and result in manifest injustice.

Medversant might argue that the court could still find a violation of the regulation after a waiver; it simply cannot award damages. That does not save its argument because then the "waiver" would abrogate Congressional intent. Specifically, that when the "appropriate court" finds "a violation," the private plaintiff is automatically entitled to a minimum of $500 in statutory damages.[44] The Commission has no power to "waive" a statute, to take any action inconsistent with statutory mandate, or to take any action inconsistent with statutory mandate.[45] From any angle, the Commission cannot encroach on the judiciary or Congress in the manner contemplated by Medversant. Thus, the waiver should have been denied.

Indeed, the United States District Court for the Western District of Michigan, in a private TCPA action involving a defendant that requested a waiver from the FCC, held "[i]t would be a

---

[41] *Id.*

[42] *Id.* at 146.

[43] *Id.*

[44] § 227(b)(3).

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

fundamental violation of the separation of powers for [the Commission] to 'waive' retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court."[46] The court held that "nothing in the waiver—even assuming the FCC ultimately grants it—invalidates the regulation itself" and that "[t]he regulation remains in effect just as it was originally promulgated" for purposes of determining whether the defendant violated the "regulation prescribed under" the TCPA.[47] The court concluded that "the FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action; at most, the FCC can choose not to exercise its own enforcement power."[48]

The decision in *Stryker* is fully supported by the District of Columbia Circuit decision in *Natural Resources Defense Council v. EPA* ("*NRDC*").[49] There the circuit court considered whether the EPA had authority to issue a regulation creating an affirmative defense to a private right of action for violations of emissions standards it issued pursuant to the Clean Air Act, in situations where such violations are caused by "unavoidable" malfunctions.[50] The court held the agency did not have such authority and struck the regulation down for three main reasons.

First, the court noted the statute grants "any person" the right to "commence a civil action" against any person for a "violation of" the EPA standards.[51] The statute states a federal district court presiding over such a lawsuit has jurisdiction "to enforce such an emission standard" and "to apply any appropriate civil penalties."[52] To determine whether civil penalties are appropriate, the statute directs the courts to "take into consideration (in addition to such other factors as justice may require)" a number of factors, including "the size of the business, the

---

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

[47] *Id.*

[48] *Id.*

[49] 749 F.3d 1055, 1062 (D.C. Cir. 2014).

[50] *NRDC*, 749 F.3d at 1062.

[51] *Id.* at 1062–63.

[52] *Id.* at 1063.

economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply," etc.[53]

Thus, the court held, although the statute directs the EPA to issue regulations and "creates a private right of action" for their violation, "the Judiciary" "determines 'the scope'—*including the available remedies*" of "statutes establishing private rights of action."[54] The Clean Air Act was consistent with that principle, the court held, because it "clearly vests authority over private suits in the *courts*, not EPA."[55] The court held that, by creating an affirmative defense to the statutory private right of action—as opposed to issuing the regulations to be enforced in those actions as directed by the statute—the EPA impermissibly attempted to dictate to the courts the circumstances under which penalties are "appropriate."[56] Therefore, the court struck down the regulation.[57]

Second, the court noted that the EPA has dual enforcement authority over the Clean Air Act, which authorizes both private actions and agency actions to enforce the regulations.[58] It also noted the EPA has the power to "compromise, modify, or remit, with or without conditions, any administrative penalty" for a violation in those proceedings.[59] Under this dual-enforcement structure, the court held, "EPA's ability to determine whether penalties should be assessed for Clean Air Act violations extends only to administrative penalties, not to civil penalties imposed by a court."[60] The regulation creating an affirmative defense for "unavoidable" violations ran afoul of that principle.[61]

---

[53] *Id.*

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

[55] *Id.*, emphasis added.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

Third, the court noted that the Clean Air Act authorizes the EPA to intervene in private litigation.[62] Thus, the court held that "[t]o the extent that the Clean Air Act contemplates a role for EPA in private civil suits, it is only as an intervenor" or "as an amicus curiae."[63] An intervenor or amicus curiae has no power to create an affirmative defense in the actions in which it intervenes or submits its views, the court held.[64]

The reasoning of *NRDC* directly applies here. First, like the Clean Air Act, the TCPA creates a private right of action for "any person" to sue for violations of the regulations prescribed under the statute and directs the Commission to issue those regulations, but it vests the "appropriate court" with the power to determine whether "a violation" has occurred.[65] If the court finds a violation, the TCPA imposes automatic minimum statutory damages of $500, but allows the court "in its discretion" to increase the damages.[66] The TCPA creates *no role* for the Commission in determining whether a violation has occurred, whether it was willful, or whether damages should be increased (and if so, in what amount). Instead, the TCPA "clearly vests authority over private suits in the *courts*," not the Commission.[67] Issuing a "waiver" to prevent the Central District of California from determining that "a violation" occurred is no different than the EPA issuing an affirmative defense to prevent courts from determining that civil penalties are "appropriate" because a defendant's violations were "unavoidable."

Second, just as the Clean Air Act grants the EPA authority to enforce the regulations through administrative penalties, the Communications Act grants the Commission authority to determine whether penalties should be assessed for TCPA violations in forfeiture actions brought pursuant to 47 U.S.C. § 503(b). Like the EPA's attempt to dictate "whether penalties should be assessed" in private litigation, granting a "waiver" for the purpose of extinguishing Medversant's liability in private litigation would run afoul of the bifurcated dual-enforcement structure

---

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

[63] *Id.*

[64] *Id.*

[65] § 227(b)(3).

[66] *Id.*

[67] *NRDC*, 749 F.3d at 1063, emphasis added.

Congress has created. The Commission is free to choose not to enforce its regulations against Medversant, but it cannot make that choice for Simon or the putative class.

Third, the Commission has even *less* authority to grant a waiver than the EPA did to create an affirmative defense because the Clean Air Act at least allows the EPA to intervene in private actions. The TCPA allows the Commission to intervene only in actions brought by state governments to seek civil penalties for violations of the caller-identification requirements.[68] It creates no role for the Commission in private TCPA actions. If an agency with express authority to intervene in a private action enforcing its regulations lacks power to create an affirmative defense in that action, then an agency with no authority to intervene cannot grant an outright "waiver" of a defendant's liability. The Commission is limited to participating in private TCPA actions "as amicus curiae," as it often does.[69]

In sum, in accordance with *NRDC*, the Commission could not create an affirmative defense of "confusion" or "misplaced confidence" that the parties seeking waiver could then attempt to establish in court.[70] If the Commission cannot do that, it cannot take the more radical step of simply "waiving" the violation.

These arguments were laid out in opposition to Medversant's Petition. But the Bureau ignored them, summarily stating:

> [W]e dismiss arguments that by granting waivers while litigation is pending violates the separation of powers as several commenter have suggested. As the Commission has previously noted, by addressing requests for declaration ruling and/or waiver, we are interpreting a statute, the TCPA, over which Congress provided the Commission authority as the expert agency. Likewise, the mere fact that the TCPA allows for private rights of action to enforce

---

[68] § 227(e)(6)(C).

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

[70] As discussed in more detail, *supra,* Medversant did not contend that it was "confused" or had "misplaced confidence" in the Junk Fax Order or its rulemaking. Indeed, it did not assert that it was aware of any of this or of the requirements of § 64.1200(a)(4)(iv).

> rule violations does not undercut our authority, as an expert agency, to define the scope of when and how our rules apply.[71]

By merely claiming to be the "expert" and dismissing without any analysis or explanation the argument that granting waivers violates the separation of powers, the Bureau effectively concedes that this is what is exactly happening.

C. Medversant did not properly allege and cannot show that it obtained prior express permission

1. Medversant failed to properly assert that it obtained prior express permission

In its Petition, Medversant ambiguously requested a waiver with respect to "any faxes" it sent with prior express permission "prior to April 30, 2015." But Medversant never asserted that it actually obtained prior express permission at all, let alone explain how or in what manner it did so. This alone required rejection of Medversant's Petition because "[w]hen an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such."[72]

2. Medversant cannot show that it obtained prior express permission

Medversant claims in the Simon litigation that it obtained prior express permission when medical practitioners, like Simon, provided their facsimile numbers via "Participating Practitioner Agreements" with HWHN. But the mere act of providing a fax number to another does not constitute prior express permission under the TCPA. The Commission has stressed that prior express permission "requires that the consumer understand that by providing a fax number, he or she is agreeing to receive faxed advertisements."[73] Similarly, the Commission has ruled that providing a fax number on an application gives prior express permission only if the form

---

[71] August 28 Order ¶ 13 (citing 47 C.F.R. § 1.3, *Northern Cellular and WAIT Radio*).

[72] *Rio Grande Fam. Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. 1968), cited in *WAIT Radio*, at 1158. The Commission did not, in the *Anda Commission Order* or in August 28 Order, alter this requirement for petitioners.

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

"include[s] a clear statement indicating that, by providing such fax number, the individual agrees to receive facsimile advertisements from that company or organization."[74]

Here, the Participating Practitioner Agreements do not give prior express permission to *anyone,* not even HWHN. HWHN's agreements do not state that medical practitioners, by providing their fax numbers, thereby consent to receive fax ads. Indeed, the agreements do not even mention what use, if any, will be made of fax numbers provided.[75] Accordingly, in proceedings earlier this year in the Simon litigation, the Central District of California squarely rejected the argument that permission to send faxes was given through these agreements: "[T]hat 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."[76] And if HWHN cannot claim prior express permission through the Agreements, then certainly Medversant—a nonparty to those Agreements—cannot claim prior express permission. This is true as a matter of Commission rule and established law.[77]

Accordingly, because Medversant cannot even make a showing that it obtained any prior express permission, it is not entitled to a waiver of section 64.1200(a)(4)(iv). Indeed, granting a waiver under such circumstances would give an unfair and unwarranted advantage to Medversant in the pending litigation and is arbitrary and capricious. It is one thing for the Bureau to state in the August 28 Order that "the granting of a waiver does not confirm or deny whether the petitioners had the prior express permission of the recipients to send the faxes"[78]; it is an entirely different matter here, where Medversant cannot maintain consistent with the TCPA and Commission rules that it obtained any prior express permission. The statement wholly ignores the coercive effect in the Simon litigation of granting a waiver to Medversant now and allowing it only later to try to prove that it obtained prior express permission.

---

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

[75] Simon's Participating Practitioner Agreement with HWHN was submitted as part of the opposition to Medversant's Petition. Certain information on the Agreement had been redacted to protect Simon's privacy.

[76] *Simon v. Healthways*, No. CV 14-08022 BRO, 2015 WL 1568230, at *6 (C.D. Cal. April 7, 2015).

[77] 2006 Junk Fax Order ¶ 45 (limiting prior express permission to "receiv[ing] facsimile advertisements from that company or organization" that requested the fax number); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (defendant cannot take advantage of express consent extended to unaffiliated party).

[78] August 28 Order ¶ 17.

D. Medversant did not plead or attempt to show that it was "confused" or had "misplaced confidence"

1. It is improper for the Bureau to excuse Medversant from pleading specific, detail grounds for confusion or misplaced confidence

In the August 28 Order, the Bureau declared that it "did not require petitioners to plead specific, detailed grounds for individual confusion."[79] The Bureau lacked authority to dispense with this the requirement that Medversant, and all other petitioner seekers, plead with "particularity."[80] The Commission granted waivers in the *Anda Commission Order* because it determined that two specific grounds led to "confusion" or "misplaced confidence" by the petitioners about whether the opt-out requirement applied: the rulemaking for, and footnote 154 in, the 2006 Junk Fax Order. The Commission found that these factors taken *together* justified a waiver.[81] Thus, a party would only be similarly situated to the covered petitioners if it was confused about the opt-out requirement based on *both* of these grounds.

Here, Medversant never claims it was confused on *either* of these two grounds. Instead, Medversant states without any explanation that it "did not believe" that § 64.1200(a)(4) (iv) "required opt-out notices" and that it "did not understand" that it needed to comply with the regulation.[82] But Medversant did not contend that its "belief" or "understanding" stemmed from the two sources of "confusion" or "misplaced confidence" identified in the *Anda Commission Order* (*i.e.*, the rulemaking for, and footnote 154 in, the 2006 Junk Fax Order).[83] Thus,

---

[79] August 28 Order ¶ 19.

[80] *Rio Grande, supra.*

[81] *Anda Commission Order* ¶ 28 ("Taken together, the inconsistent footnote in the *Junk Fax Order* and the lack of explicit notice in the *Junk Fax NPRM* militates in favor of a limited waiver in this instance.").

[82] Without any explanation, these statements are mere conclusions that the Commission must disregard.

[83] The proceedings following the 2006 Junk Fax Order were not discussed in any of the petitions covered by the *Anda Commission Order*, the *Anda Commission Order,* the petitions covered by the August 28 Order, or the August 28 Order. The record of those proceedings demonstrates that regulated parties immediately understood that the plain language of the 2006 rules required an opt-out notice on faxes sent with permission and that no one was "confused" by footnote 154 or the notice of rulemaking. *See, e.g., In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Nos. 02-278, 05-338, Petition for Reconsideration or Clarification of Levanthal Senter & Lerman PLLC (June 2, 2006), and public comments to this Petition for Reconsideration, including those by the American Society of Association Executives and the Named State Broadcasters Associations; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Nos. 02-278, 05-338, Comments of American Society of Association Executives (July 12, 2006); National

Medversant failed to provide facts warranting a waiver and this alone required denial of its Petition.

In fact, Medversant claims through its Rule 30(b)(6) designee in the Simon litigation (Beckerman) that it was *unaware* of the TCPA and its attendant regulations when it blasted the junk faxes at issue. No doubt Medversant takes this position out of concern that knowledge of the TCPA and its attendant regulations would expose it to the potential of an enhancement of up to three times its statutory damages.[84] Consequently, the Medversant's Petition should have been denied outright because, as the Commission emphasized in the *Anda Commission Order* and as claimed by Medversant, "simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for waiver."[85]

2. The Bureau's finding that there is a "presumption" of confusion or misplaced confusion violates due process and is arbitrary and capricious

In the *Anda Commission Order*, the Commission clearly said that "simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for waiver."[86] But in the August 28 Order, there is no mention of this admonition. It completely disappears. In its place, the Bureau said that petitioners, including Medversant, are "entitled to a presumption of

---

Association Broadcasters Comments (July 13, 2006); Joint Comments of the Named State Broadcasters Associations (July 13, 2006).

Likewise, contemporaneous legal observers immediately understood the rule. *See, e.g., FCC Issues Regulations Implementing Junk Fax Prevention Act*, 60 Consumer Fin. L.Q. Rep. 401 (Fall 2006) ("The opt-out notice must be included in all facsimile advertisements, including those based on an established business relationship or in response to a recipient's prior express invitation or permission."). The courts also understood the plain language of the rule. *See, e.g., In re Sandusky Wellness Ctr., LLC*, 570 F. App'x 437 (6th Cir. 2014) (ordering district court to apply the rule); *Nack v. Walburg*, 715 F.3d 680, 687 (8th Cir. 2013) (citing "plain language" of the rule); *Turza*, 728 F.3d at 683 (applying plain language of the rule in affirming class certification and summary judgment).

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

[84] §227(b)(3).

[85] *Anda Commission Order*, ¶ 26.
[86] *Anda Commission Order* ¶ 26.

confusion or misplaced confidence."[87] This purported presumption directly conflicts with the requirement in the *Anda Commission Order* that a petitioner must show more than "ignorance of the law." This shift in the standard by which waivers were determined by the Commission violates due process. *See Blanca Telephone Co. v. FCC*, 743 F.3d 860, 864 (D.C. Cir. 2014); *Morris Communications, Inc. v. FCC*, 566 F.3d 184, 188 (D.C. Cir. 2009). The courts have made clear that, when the Commission changes its course, it "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion, it may cross the line from the tolerably terse to the intolerably mute." *See Greater Boston Television Corp. v. FCC,* 444 F.2d 841, 852 (D.C. Cir. 1970); *see also, e.g. Nat'l Cable and Telecommunications Ass'n v. FCC*, 567 F.3d 659, 667 (D.C. Cir. 2009) (citing *Greater Boston Television* and explaining that a change to prior precedent requires the agency to deliberately make note of the change). The D.C. Circuit also requires the Commission to support its decisions with at least "a modicum of reasoned analysis. *See Hispanic Info & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289, 1297 (D.C. Cir. 1989).

It is also a fundamental tenet of the APA that the Commission is required to treat similarly situated parties the same. This obligation is rooted in the APA's prohibition of "arbitrary and capricious" agency action. *See* U.S.C. § 706(2)(a). Indeed, Medversant does not even contend that it knew about § 64.1200(a)(4)(iv), or the requirement that faxes sent with prior express permission must contain opt-out notices. To the contrary, Medversant testified in the Simon litigation that it was simply ignorant of the law, which the Commission ruled in the *Anda Commission Order* is insufficient for a waiver from § 64.1200(a)(4)(iv).[88]

Likewise, the shift by the Bureau in its standard is arbitrary and capricious.[89] There is no legitimate reason to grant a waiver if a petitioner was not confused and did not have misplaced confidence. At a minimum, a petitioner must show that it was not merely ignorant of the law, as required by the *Anda Commission Order.*

---

[87] August 28 Order ¶ 15.

[88] *See* Exhibit A, at 88:1 – 91:21.

[89] Indeed, this conclusion is directly support by the *Northern Cellular* case cited by the Commission in the August 28 Order.

E. It would violate public policy to grant Medversant a waiver when it was required in all events to provide an opt-out notice on its faxes

Although unnecessary to deny Medversant a waiver because Medversant failed to carry its burden to demonstrate that it is "similarly situated," it would be against the public interest to grant Medversant the waiver it seeks. In the *Anda Commission Order*, the Commission recognized two competing public interests—on one hand, an interest in protecting parties from substantial damages if they violated the opt-out requirement due to confusion or misplaced confidence, and on the other hand "an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads."[90] The former does not apply here (including because, as discussed above, Medversant's failure to provide opt-out notices did not result from confusion or misplaced confidence about the rulemaking of, or footnote 154). The interests of consumers like Simon and Affiliated in obtaining compensation for Medversant's violations of the regulation, by contrast, are manifest—but they have been completely ignored.

In addition, Medversant was required to provide opt-out notices on all of its faxes. In the *Anda Commission Order*, the Commission reiterated that a "waiver does not extend to the similar requirement to include an opt-out notice on fax ads sent pursuant to an established business relationship, as there is no confusion regarding the applicability of this requirement to their faxes."[91]

For example, take any one of the faxes received by Simon or Affiliated and let's assume that it was sent to 1,000 recipients. Assume further that 900 recipients gave prior express permission (although Medversant makes no showing that *any* recipient gave permission) and that the remaining 100 recipients had an established business relationship with Medversant or had no relationship with Medversant. Without question, the TCPA and the *Anda Commission Order* required Medversant to provide a valid opt-out notice on the fax because at least one person (or 100, in the example) did *not* give permission.

It would therefore be against public policy (especially in light of the highly useful purposes served by opt-out notices as explained in the *Anda Commission Order*) to give

---

[90] *Anda Commission Order* ¶ 27.

[91] *Anda Commission Order* ¶ 2, n.2; *see also* ¶ 29.

Medversant a waiver of liability for sending a fax without a compliant opt-out notice just because *some* of the recipients may have given prior express permission, when the statute and FCC regulations required Medversant to provide opt-out notices entirely independent of § 64.1200(a)(4)(iv).[92]

Finally, Simon raised this argument in opposition to Medversant's Petition, but it was completely ignored in the August 28 Order.

Conclusion

The August 28 Order does not withstand scrutiny. Granting of blanket retroactive waivers is inconsistent with the Commission's *Anda Commission Order*. The August 28 Order is arbitrary and capricious and should be overturned. Parties must be able to rely on the Commission's regulations and reliance should not result in harm to them. Maintaining such a result would be a violation of public policy. The granting of the retroactive wavier to Medversant must be reversed and its request for waiver rejected.

[92] Accordingly, at most, a waiver can be given only if a petitioner can plead and prove that *all* recipients of a fax had given prior express permission. Nowhere in its Petition does Medversant assert that it obtained prior express permission from all persons to whom it sent faxes. (Indeed, Medversant fails to show that *any* prior express permission was given.)

September 28, 2015

Respectfully submitted,

Aaron P. Shainis
Shainis & Peltzman, Chartered
1850 M Street NW, Suite 240
Washington, DC 20036
(202) 293-0011

Special Counsel to the Counsel
for Applicants

Scott Z. Zimmermann
Law Offices of Scott Z. Zimmermann
601 S. Figueroa St., Suite 2610
Los Angeles, CA 90017
(213) 452-6509

One of its Attorneys for Edward Simon, DC
and Affiliated Health Care Associates, P.C.

EXHIBIT A

In The Matter Of:

EDWARD SIMON v.

HEALTHWAYS, INC.

JOSEPH BECKERMAN

July 23, 2015

DESIGNATED CONFIDENTIAL UNDER PROTECTIVE ORDER

Barkley Court Reporters

barkley.com

800.222.1231

Original File 394919.txt

Min-U-Script® with Word Index

1 Q Okay.
2 MR. ZIMMERMANN: I want to mark as Exhibit 1
3 the deposition notice for the case. You're going to
4 have to share it with Dan.
5 MR. GOLDBERG: That's fine. No problem.
6 (Exhibit 1 was marked for identification.)
7 Q BY MR. ZIMMERMANN: Now, let's -- before we get
8 into the deposition notice, a little bit about your
9 background:
10 Mr. Beckerman, where did you graduate college
11 and when?
12 A I did not graduate college, sir.
13 Q Okay.
14 A I went to Benedictine High School. I graduated
15 high school, and I took three years of college and
16 decided to -- I was always going to go back to get my
17 degree, and I never did, sir.
18 Q Okay. And what college institution did you
19 attend?
20 A Cleveland State, sir.
21 Q Okay. Now, are you currently employed by
22 Medversant?
23 A Yes, sir.
24 Q And in what capacity?
25 A I'm vice president of national accounts, sir.

BARKLEY & Court Reporters

1 document?
2 A We went through the document. I went through
3 document, yes. I didn't know it was Exhibit 1.
4 Q Okay.
5 A Okay? I'm sorry.
6 Q That's all right. Thank you for working it
7 out.
8 Did you actually read the document, though?
9 A I went through the document. Yes, sir.
10 Q Okay. And how closely did you do that?
11 A Fairly close.
12 Q Okay. Do you have any questions about the
13 topics contained on Exhibit 1 as you sit here now?
14 A No, sir. I do not.
15 Q When did you first learn that you would be
16 appearing as Medversant designee at this deposition?
17 A I want to say roughly four weeks back.
18 Q And --
19 A And tried to adjust schedules and whatnot, and
20 I think it may have been changed on your end one day.
21 Q Right.
22 But about four weeks ago --
23 A Yes.
24 Q -- someone told you that you were going to be
25 Medversant's designee at deposition?

1 A Yes.
2 Q Between that time and now, what have you done
3 to investigate or educate yourself about the topics
4 expected to be testified to at this deposition?
5 MS. FORSHEIT: And I'm just going to object.
6 To the extent that the answer calls for any
7 privileged communications, I'll instruct the witness not
8 to answer. Otherwise, you're absolutely free to answer
9 the question.
10 MR. ZIMMERMANN: He's entitled to say, "I spoke
11 with counsel."
12 MS. FORSHEIT: Absolutely. That's fine.
13 MR. ZIMMERMANN: Okay. And then we'll take it
14 from there.
15 MS. FORSHEIT: Absolutely.
16 THE WITNESS: I spoke with counsel, sir.
17 Q BY MR. ZIMMERMANN: Did you do anything else to
18 educate yourself about the topics for this deposition?
19 A No, sir.
20 Q So you, Joe Beckerman, did not speak to anyone
21 other than counsel about the deposition; correct?
22 A Correct.
23 Q You did not speak to any of your colleagues at
24 Medversant; correct?
25 A Correct. No.

1 Q BY MR. ZIMMERMANN: Okay. Prior to the
2 lawsuit --
3 A Prior to the lawsuit.
4 Q -- being brought, did Medversant know about any
5 laws that regulated the sending of faxes; yes or no?
6 MS. FORSHEIT: All right. And I've got the
7 same objection, and, Scott, let me explain to you why
8 because it -- in it . . .
9 MR. ZIMMERMANN: If it didn't know, then it
10 does not implicate it whatsoever.
11 And if the answer is yes, it does not implicate
12 the attorney-client privilege 'cause it does not seek to
13 divulge the essence of the communication.
14 MS. FORSHEIT: But if there was a communication
15 between an attorney and Medversant in which an attorney
16 said, "There's a law called the 'TCPA'" -- which we're
17 not -- by the way, this is all hypothetical for purposes
18 of this discussion -- that would be a privileged
19 communication, and he would not be able to say "yes" or
20 "no" without disclosing that.
21 MR. ZIMMERMANN: No, I disagree you. So
22 either -- let's just start off with yes or no, and I'll
23 agree that it's without waiver; okay?
24 MS. FORSHEIT: Here's what I'd like to do to
25 try to get us past this question:

1 I'd like to have a chance to talk to the
2 witness briefly, and then we'll come back and we'll tell
3 you if we can answer your question or not because we're
4 not able to get to that point without knowing whether
5 we're implicating a privileged communication or not.
6 MR. ZIMMERMANN: Well, but I'm agreeing that's
7 it's without waiver.
8 MS. FORSHEIT: I don't care if you're agreeing
9 it's without waiver.
10 MR. ZIMMERMANN: Okay.
11 MS. FORSHEIT: I mean I just want to talk to
12 him for two minutes --
13 MR. ZIMMERMANN: Okay.
14 MS. FORSHEIT: -- and then hopefully we can
15 come back and have this be done.
16 MR. ZIMMERMANN: Okay.
17 MS. FORSHEIT: Okay? All right.
18 MR. ZIMMERMANN: Okay.
19 MS. FORSHEIT: Two minutes.
20 (A recess was taken.)
21 MR. ZIMMERMANN: Let's go on the record.
22 Q Now, that you've had a chance to confer with
23 your counsel, what's up?
24 MS. FORSHEIT: I'd like him to read back the
25 question, please. It's okay. We're going to get it

1 done.
2 (The question was read back.)
3 MS. FORSHEIT: And this was -- but it was prior
4 to the lawsuit; right?
5 MR. ZIMMERMANN: Yeah. Right.
6 MS. FORSHEIT: You can answer the question.
7 THE WITNESS: No, sir.
8 Q BY MR. ZIMMERMANN: Prior to the lawsuit being
9 filed, did Medversant know of any requirement, if any,
10 that there be, on certain faxes, a notice of an
11 opportunity not to get future faxes?
12 MS. FORSHEIT: Same objection as before.
13 But to the extent it doesn't disclose
14 privilege, you can answer the question.
15 THE WITNESS: No.
16 Q BY MR. ZIMMERMANN: Prior to the lawsuit being
17 filed, did Medversant, or anyone acting on its behalf,
18 read any orders or reports of the Federal Communication
19 Commission regarding the sending of faxes?
20 MS. FORSHEIT: Again, to the extent that it
21 doesn't implicate counsel, you're welcome to --
22 THE WITNESS: No.
23 MS. FORSHEIT: -- answer the question.
24 Q BY MR. ZIMMERMANN: You, personally, prior to
25 the lawsuit being filed, did you know of any law that

1 regulated the sending of faxes?
2 A No.
3 Q Was there -- prior to the lawsuit being filed,
4 was there any discussion internally within Medversant
5 about any law that regulated the sending of faxes?
6 A No, sir.
7 Q Was there any -- prior to the lawsuit being
8 filed, was there any discussion between Medversant and
9 Healthways regarding any law that regulated the sending
10 of faxes?
11 A No, sir.
12 Q Prior to the lawsuit being filed, did you,
13 personally, know of any requirements that a fax
14 contained a notice about an opportunity not to request
15 any further faxes?
16 A No, sir.
17 Q Was there any such discussion about that topic
18 internally among Medversant?
19 A No, sir.
20 Q How about with Healthways?
21 A No, sir.
22 [redacted]
23 [redacted]
24 [redacted]
25 [redacted]

CERTIFICATE OF SERVICE

I, Michael Nuell, do hereby certify that copies of the foregoing "Application for Review" were sent on this 28th day of September, 2015, via US mail, to the following:

Tanya L. Forsheit
Baker & Hostleter LLP
11601 Wilshire Boulevard
Suite 1400
Los Angeles, CA 90025-0509

Alison Kutler
Acting Chief
Consumer and Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Michael Nuell