Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	CG Docket No. 02-278
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	CG Docket No. 05-338
Junk Fax Prevention Act of 2005	Re: Waiver Request by Medversant Technologies, L.L.C.
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	

To: Office of the Secretary

Attention: The Commission
Consumer and Governmental Affairs Bureau

Reply in Support of Application for Review

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October 23, 2015

Edward Simon ("Simon") and Affiliated Health Care Associates ("Affiliated") (collectively "Applicants"), by their attorneys, submit this reply in support of their Application to Review the August 28, 2015, Order, DA 15-976 ("August 28 Order"), of the Acting Chief, Consumer and Governmental Affairs Bureau granting a retroactive waiver to Medversant Technologies, L.L.C. ("Medversant") and to respond to Medversant's opposition submitted on October 13, 2015.[1]

1. Even if the Commission has the authority to "waive" § 64.1200(a)(4) (which it does not), it could not do so retroactively. The August 28 Order is silent as to the Commission's authority to *retroactively* waive § 64.1200(a)(4), assuming that the Commission could waive it in the first place (which it cannot; *see* ¶ 2 below). This is no coincidence because "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."[2] Just as the TCPA does not expressly (or otherwise) authorize the Commission to issue retroactive rules, it does not authorize the Commission to retroactively waive any of its regulations implementing the TCPA.

Nor can authority for a waiver to Medversant be found in 47 C.F.R. § 1.3, which generally enables the Commission to waive the requirements of a regulation, but not a cause of action already accrued under a *statute* for a violation of a regulation.[3] Applicants' cause of action fully vested

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[1] Medversant incorrectly observes (Opp'n. at 1) that the Application for Review was brought by only Simon; both Simon and Affiliated opposed Medversant's underlying Petition for Waiver and both filed the Application for Review. The page limitation for a reply does not permit Applicants to present all arguments supporting their Application. The fact that Applicants have omitted any argument in this reply should not be construed as a waiver of such argument. Applicants maintain all arguments.

[2] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Even if the Bureau's August 28 Order is considered an adjudicatory rule, it is invalid because it does not satisfy the requirements for retroactive application of adjudicatory rules. *See, e.g., Retail, Wholesale, and Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). According to Medversant, *Bowen* and *Retail, Wholesale* are distinguishable because they involve "new rules" and "not retroactive waivers." (Opp'n. at 4.) But the "new rule" in this situation is the waiver—the abrogation of a statutory private right of action—that is being applied against those who relied on the *existing* rule (§ 64.1200(a)(4)(iv)). Medversant is also wrong about the waiver being for a "limited amount of time." (*Id.*) The waiver is nine years long: from August 2066 (when §64.1200(a)(4)(iv) became operative) through April 30, 2015.

[3] *E.g., National Ass'n of Broadcasters v. F.C.C.*. 569 F.3d 416, 426 (D.C. Cir. 2009) ("the Commission has authority under its rules, see 47 C.F.R. § 1.3, to waive requirements not mandated by statute where strict compliance would not be in the public interest…."). Medversant's quote from this case crucially leaves out the words "*not mandated by statute*." (Opp'n. at 5.)

when they were sent faxes without opt-out notices by Medversant in August 2014. Moreover, Simon commenced the underlying litigation against Medversant in reliance upon § 64.1200(a)(4)(iv) *before* the *Anda Commission Order* issued.[4]

2. The Commission has no authority to "waive" § 64.1200(a)(4), and doing so would violate the separation of powers. Medversant argues that that there is no violation of the separation of powers because the Commission is merely waiving "its own rules" rather than a statutory private right of action. (Opp'n. at 6.) This argument fails because "[i]nsofar as the statute's language is concerned, to violate a regulation that lawfully implements [the statute's] requirements is to violate the statute."[5] In the *Anda Commission Order* the Commission ruled that § 64.1200(a)(4) is a regulation that lawfully implements the TCPA and that a violation of the regulation is a violation of the statute under § 227(b)(3).[6] The Commission simply has no authority under the TCPA or otherwise to "waive" a violation of the TCPA and therefore any purported waiver of § 64.1200(a)(4) is invalid. Contrary to the August 28 Order (at ¶ 13), the Bureau's issuance of a waiver to Medversant does not just "interpret" a statute, but effectively nullifies the TCPA's private right of action. Moreover, issuing a waiver does not just "defin[e] the scope of

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[4] Medversant argues that Simon had no right to rely on § 64.1200(a)(4)(iv) in commencing his litigation because "[t]he "sheer number of petitioners asking for relief due to confusion and misplaced confidence...illustrates that the rule was neither clear nor unambiguous." (Opp'n. 4.) This argument is factually wrong. There is no evidence in this proceeding that any petitioner was actually confused or had misplaced confidence (and Medversant cites to none). Indeed, the evidence in this proceeding is that regulated entities immediately understood the plain language of § 64.1200(a)(4)(iv). (*See* Application for Review at 17-18, n. 83.) Further, the courts also understood the plain language of the regulation. *See, e.g.*, *Nack v. Walburg*, 715 F.3d 680, 687 (8th Cir. 2013) (citing "plain language" of the rule); *Ira Holtzman, C.P.A. & Assocs., Ltd v. Turza*, 728 F.3d 682, 683 (7th Cir. 2013) (applying plain language of the regulation in affirming class certification and summary judgment).

[5] *Global Crossing Telecommc'ns, Inc. v. Metrophones Telecommc'ns, Inc.*, 550 U.S. 45, 54 (2007) (citing *MCI Telecommc'ns Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995); *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12-cv-0729, 2014 WL 7109630, at *14 (W.D. Mich. Dec. 12, 2014). The court in *Stryker* found that "[i]t would be a fundamental violation of the separation of powers for [the Commission] to 'waive' retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court." The court held that "nothing in the waiver...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. *Id.* 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." *Id.*

[6] *Anda Commission Order* ¶¶ 14, 19-20.

when or how our rules apply," but instead attempts to constrict the scope of the private right of action which the Bureau cannot do.[7]

3. Medversant did not properly allege and cannot show that it obtained prior express permission. Medversant relies on the Bureau's determination that no proof of permission is required for a waiver (Opp'n. at 7). Medversant resorts to this because Medversant's Petition made no claim that it obtained any permission to send faxes, even though it was required to "plead with particularity" in order to obtain a waiver.[8]

Then in its Reply Comment, Medversant claimed that recipients of its faxes gave prior express "permission via Healthways Participating Practitioner Agreements."[9] But on April 7, 2015, the Court in the Simon litigation found that these Agreements did not provide prior express permission.[10] This ruling was based on the fact that applications, that become the Participating Practitioner Agreements once accepted, do not state that an applicant, by providing his or her fax number, consents to receive any faxes. Indeed, the Commission stresses that prior express permission "requires that the consumer understand that by providing a fax number, he or she is agreeing to receive faxed advertisements."[11] The Court's ruling is a judicial finding that precludes a waiver of a regulation premised on there being prior express permission.[12]

Now Medversant desperately asserts in its opposition – for the first time to the Commission – that its online "Privacy Policy" somehow gave it prior express permission from recipients credentialed through Medversant's "ProviderSource" service. (Opp'n. at 8-9.) First, we note the irony that Medversant is relying upon a "Privacy Policy" to argue that it received permission. Second, the "Privacy Policy" cannot possibly provide permission when the underlying "ProviderSource" application does not. Medversant's corporate designee at deposition (Joseph

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[7] Because the Bureau's action is contrary to the TCPA it is not entitled to deference under *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), as argued by Medversant. (Opp'n at 6, n. 16.)

[8] Petition 1-5, filed Jan. 7, 2015.

[9] Reply Comment at 7, filed Feb. 20, 2015.

[10] *Simon v. Healthways Inc.*, 2015 WL 1568230, at *6 (C.D. Cal. Apr. 7, 2015)

[11] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 14014, 14129, ¶ 193; *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.")

[12] *See* August 28 Order ¶ 18 stating that a "judicial finding" would rebut a presumption of confusion and misplaced confidence.

Beckerman) acknowledged that the application does not inform providers that by giving their fax telephone numbers, they consent to receive faxes. (Beckerman Dep. 221:7-12, Ex. 20; *see also* 247:11-22, 248:3-15.) Third, the "Privacy Policy" merely states that "Medversant uses the ProviderSource online provider application to collect provider data for all provider data-driven processes including credentialing, enrollment, provider and member relations, marketing and sales, claims assessment, etc." Mr. Beckerman answered "no" to the direct question "[i]s there anything in the privacy policy to indicate to someone that providing his or her fax number, that person would be agreeing to receive faxes." (Beckerman Dep. at 228:12-15, Ex. 23.) (Mr. Beckerman's deposition testimony is attached hereto as Ex. A.) Accordingly, the Court will no doubt also reject this claim of permission for the same reason it rejected Medversant's first claim about permission.[13] Giving a waiver to Medversant is simply unwarranted because it cannot possibly show, based on the Court's ruling and consistent with the Commission's rules, it obtained prior express permission.

4. Medversant failed to demonstrate something more than an ignorance of the law. In the *Anda Commission Order*, the Commission clearly stated that "simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for waiver."[14] Through Mr. Beckerman's testimony Medversant asserts that it was completely ignorant of the law.[15] Medversant cannot have it both ways—it cannot claim ignorance of the law in the Simon litigation in order to try to avoid an enhancement of damages for knowing/willful violations of the law and at the same time obtain a waiver from the Commission based on the same asserted ignorance of the law.[16]

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[13] Neither Simon nor Affiliated were credentialed through Medversant. (Beckerman Dep. 200:7-11.)

[14] *Anda Commission Order* ¶ 26.

[15] Mr. Beckerman claimed in his testimony that prior to the filing of the Simon litigation (1) Medversant did not know about any laws regulating the sending of faxes ; (2) Medversant did not know of any requirement that certain faxes needed to contain an opt-out notice ; (3) nobody from Medversant had read any FCC orders or reports regarding the sending of faxes ; (4) Medversant had never discussed either internally or with other defendants any law regulating the sending of faxes ; and (5) Medversant had never discussed either internally or with other defendants any requirement that certain faxes needed to contain an opt-out notice. *See* Application for Review at 3 and Ex. A thereto.

[16] The Bureau's creation of a "presumption of confusion" and the limited ability to rebut this presumption is not supported by the evidence and is contrary to law. (*Anda Commission Order* ¶¶ 16-18.) Without waiver of those arguments, Mr. Beckerman's testimony about Medversant's ignorance of the law is sufficient to rebut any such presumption. Medversant suggests (Opp'n at 10) that its "reliance" on co-defendant Healthways changes the analysis; it does not. Healthways' corporate designee (Ann Kent) likewise claimed ignorance of the law. (*See* Application for Review

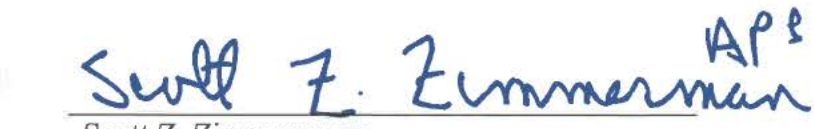
Footnote continued on next page

5. The Bureau's shift in the standard for waiver violated Applicants' due process rights. The Commission's admonition that "simple ignorance of the law" is insufficient completely disappeared from the August 28 order. This shift in the standard by which waivers are to be determined violates Applicants' due process rights.[17]

6. It would violate public policy to grant Medversant a waiver. A waiver of the opt-out notice requirement under § 64.1200(a)(4)(iv) is completely unwarranted if the fax was required to have an opt-out notice independent of the regulation. The Commission declared in *Anda Commission Order* that all faxes must contain an opt-out notice.[18] Accordingly, a waiver, at most, should be granted only if a fax was sent *exclusively* to persons who gave permission; otherwise, it makes no sense to waive the failure to provide an opt-out notice under § 64.1200(a)(4)(iv) because an opt-out notice was required to be on the fax in any case. Medversant makes no showing that it sent faxes only to persons who gave permission (indeed, it makes no showing that anyone, including Simon and Affiliated, gave permission). Medversant's response that fax recipients who did not give permission are unaffected by the waiver completely misses the point. (Opp'n. at 11.) The point is that there is no reason to shield Medversant from liability for its failure to comply with § 64.1200(a)(4)(iv) when it was legally required to provide an opt-out notice in its faxes anyway.[19]

Respectfully submitted,

Aaron P. Shainis



Scott Z. Zimmermann

Footnote continued from previous page
re Healthways' Request for Waiver, p. 3 and Exhibit A thereto containing Ms. Kent's deposition testimony, filed on Sept. 28, 2015.)

[17] For the reasons discussed in the Application for Review, Medversant failed to show that it was "similarly situated" to the petitioners covered by the *Anda Commission Order*. Alternatively, because the granting of a waiver under the August 28 Order is not dependent on any facts pertaining to any individual party requesting a waiver, the Bureau has impermissibly set itself up to grant waivers to each and every party that asks for one without regard to any relevant standard.

[18] *Anda Commission Order* ¶ 2, n. 2; see also ¶¶ 26-29.

[19] It is again noted that Craftwood raised this argument in opposition to United's petition but the argument was ignored by the Bureau in the August 28 Order.

Exhibit A

In The Matter Of:

EDWARD SIMON v.

HEALTHWAYS, INC.

JOSEPH BECKERMAN

July 23, 2015

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1 A Yeah.
2 Q And what did you -- you, Mr. Joe Beckerman --
3 do to investigate or educate yourself about these topics
4 prior to coming to your deposition?
5 A Nothing.
6 Q Were -- was Mr. -- strike that.
7 Was Dr. Simon ever credentialed by Medversant?
8 A I don't believe he was.
9 Q Was Affiliated or any practitioner within that
10 group ever credentialed by Medversant?
11 A I don't believe so.
12 Q Was Affiliated or anyone associated with
13 Affiliated ever a Healthways provider?
14 A I would assume so.
15 Q That's just an assumption on your part; right?
16 MS. FORSHEIT: That calls for speculation.
17 THE WITNESS: Yes.
18 Q BY MR. ZIMMERMANN: You didn't investigate
19 that, did you?
20 A No.
21 Q Did anybody ever tell you that Affiliated or
22 someone associated with them was a Healthways provider?
23 A No.
24 MR. ZIMMERMANN: What's the next exhibit?
25 DEPOSITION OFFICER: 15.

[redacted].

Q [redacted]

A [redacted]

[redacted]

Q Got it. So let me ask you, though, for -- putting that aside for a moment, is there anything in Exhibit 20 to indicate that a person completing this application by providing his or her fax number is agreeing to receive faxes?

A No.

Q [redacted]

MR. ZIMMERM[redacted]

[redacted].

(Exhibit 21 was marked for identification.)

Q BY MR. ZIMMERMANN: [redacted]

[redacted]

A [redacted]

[redacted]

Q [redacted]

[redacted]

[redacted]

A [redacted]

Q [redacted]

1 [redacted]
2 [redacted]
3 A [redacted]
4 Q [redacted]
5 A [redacted]
6 Q [redacted]
7 [redacted]
8 [redacted]
9 [redacted]
10 [redacted]
11 A [redacted]
12 Q Okay. Is there anything in the privacy policy
13 to indicate to someone that by providing his or her fax
14 number, that person would be agreeing to receive faxes?
15 A No.
16 Q [redacted]
17 MR. ZIMMERMANN: [redacted]
18 [redacted]
19 DEPOSITION OFFICER: [redacted]
20 MR. ZIMMERMANN: [redacted]
21 [redacted]
22 Q BY MR. ZIMMERMANN [redacted]
23 [redacted]
24 [redacted]
25 Q [redacted]

1 MS. FORSHEIT: O[redacted]

2 [redacted]

3 MR. ZIMMERMANN: [redacted]

4 [redacted]

5 MS. FORSHEIT: [redacted]

6 MR. ZIMMERMANN: [redacted]

7 [redacted]

8 (Exhibit 28 was marked for identification.)

9 MR. ZIMMERMANN: [redacted]

10 MS. FORSHEIT: [redacted]

11 Q BY MR. ZIMMERMANN: Mr. Beckerman, as your

12 capacity as designee of Medversant, what is Exhibit 28?

13 A The Washington practitioner application.

14 Q For what purpose? Application for what?

15 A Credentialing.

16 Q Okay. Is there anything in this document that

17 would indicate to the applicant that providing his or

18 her fax number, that she or he is agreeing to receive

19 faxes?

20 A I'm not aware that there is, sir.

21 Q So your answer is no, as you sit here?

22 A Yes, sir.

23 Q [redacted]

24 MR. ZIMMERMANN: [redacted]

1 (Exhibit 29 was marked for identification.)
2 THE WITNESS: [redacted]
3 Q BY MR. ZIMMERMANN: What is Exhibit 29?
4 A I want to say that this may be the State of
5 Illinois credentialing application.
6 Q Right.
7 And is there anything in there to indicate to
8 the applicant that by providing his or her fax number,
9 that the applicant is agreeing to receive faxes?
10 A I don't know.
11 Q Sitting here now, do you know of anything in
12 there that would indicate to the applicant that by
13 providing his or her fax number, that he or she is
14 agreeing to provide faxes (sic)?
15 A No.
16 Q [redacted]
17 MR. ZIMMERMANN: [redacted]
18 MS. FORSHEIT: [redacted]
19 MR. ZIMMERMANN: [redacted]
20 MS. FORSHEIT [redacted]
21 [redacted]
22 [redacted]
23 MR. ZIMMERMANN: [redacted]
24 [redacted]
25 [redacted]

1 DEPOSITION OFFICER'S CERTIFICATE

2

3 STATE OF CALIFORNIA }
} ss.
4 COUNTY OF LOS ANGELES }

5

6 I, Salvador Gutierrez, hereby certify:

7 I am a duly qualified Certified Shorthand
8 Reporter in the State of California, holder of
9 Certificate Number CSR 9825 issued by the Court
10 Reporters Board of California and which is in full force
11 and effect. (Fed. R. Civ. P. 28(a)).

12 I am authorized to administer oaths or
13 affirmations pursuant to California Code of Civil
14 Procedure, Section 2093(b) and prior to being examined,
15 the witness was first duly sworn by me. (Fed. R. Civ.
16 P. 28(a), 30(f)(1)).

17 I am not a relative or employee or attorney or
18 counsel of any of the parties, nor am I a relative or
19 employee of such attorney or counsel, nor am I
20 financially interested in this action. (Fed. R. Civ. P.
21 28).

22 I am the deposition officer that
23 stenographically recorded the testimony in the foregoing
24 deposition and the foregoing transcript is a true record
25 / / /

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of the testimony given by the witness. (Fed. R. Civ. P. 30(f)(1)).

Before completion of the deposition, review of the transcript [ ] was [X] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed, are appended hereto. (Fed. R. Civ. P. 30(e)).

Dated: JUL 27 2015,

BARKLEY

STATE OF CALIFORNIA }
} ss.
COUNTY OF LOS ANGELES }

I, Mary Badillo, hereby certify:

I am an employee of Barkley Court Reporters, duly authorized agent for the deposition officer that stenographically recorded the testimony in the foregoing proceeding and authorized to execute this copy certificate.

The foregoing is a true and correct copy of the original transcript of the stated proceeding.

Dated 7-27-2015.

Mary Badillo

CERTIFICATE OF SERVICE

I, Malinda Markland, do hereby certify that copies of the foregoing "Reply in Support of Application for Review" were sent on this 23rd day of October, 2015, via US mail, to the following:

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