IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CARLTON & HARRIS CHIROPRACTIC, INC., a West Virginia corporation, individually and as the representative of a class of similarly-situated persons,	)	
Plaintiff,	)	Civil Action No. 3:15-cv-14887
v.	)	**CLASS ACTION**
PDR NETWORK, LLC, PDR DISTRIBUTION, LLC, PDR EQUITY, LLC and JOHN DOES 1-10,	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

Plaintiff, Carlton & Harris Chiropractic, Inc., responds as follows to Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6). (Doc. 18). As argued below, Defendants' motion should be denied under the controlling ruling of the Federal Communications Commission that faxes offering "free goods and services," such as "free publications," are "advertisements," and Defendants' arguments that the fax attached to the Complaint is purely "transactional" or "informational" is unsubstantiated and cannot be decided on the pleadings in any event.

Background

On November 10, 2015, Plaintiff filed its Class Action Complaint against Defendants under the Telephone Consumer Protection Act of 1991 ("TCPA"). (Doc. 1). The Complaint alleges that on or about December 17, 2013, Plaintiff received an unsolicited fax advertising Defendants' "products, goods, and services," and attached the fax as Exhibit A. (*Id.* ¶ 11–12).

The fax is addressed to "Practice Manager" from "PDR Network" and offers a "FREE 2014 *Physicians Desk Reference* eBook." (Doc. 1-1). The fax states the free PDR eBook

contains the "[s]ame trusted, FDA-approved full prescribing information . . . [n]ow in a new, convenient digital format." (*Id.*) The fax states "[f]or additional information, please contact PDR Network at (866) 925-5155 or customerservice@pdr.net." (*Id.*)

Fine print at the bottom of the fax states: "To opt-out of delivery of clinically relevant information about healthcare products and services from PDR via fax, call 866-469-8327. You are receiving this fax because you are a member of the PDR Network." (*Id.*) The fine print does not (1) provide a fax number for opt-out requests, (2) state that a sender's failure to honor a request within 30 days is unlawful, or (3) disclose the steps a recipient must take to make a legally enforceable opt-out request under the governing FCC regulations. (*Id.*)

The Complaint alleges the fax attached to the Complaint is an "advertisement" under the TCPA and the implementing rules promulgated by the FCC. (Compl. ¶ 29). The Complaint alleges Plaintiff did not give "prior express invitation or permission" to Defendants to send the fax (*id.*) and Plaintiff did not have an "established business relationship" ("EBR") with Defendants (*id.* ¶ 33). The Complaint alleges that, even if Defendants had obtained Plaintiff's prior express permission or had an EBR with Plaintiff, the fax lacks the opt-out notice required by the FCC regulations to assert those defenses. (*Id.* ¶ 29).

The Complaint alleges Defendants sent "the same and other unsolicited facsimiles without the required opt out language to Plaintiff and more than 25 other recipients" (*id.* ¶ 14), and seeks to certify a class of persons similarly situated (*id.* ¶¶ 17–24). The Complaint seeks the relief authorized by the TCPA, 47 U.S.C. § 227(b)(3), consisting of statutory damages of $500 to $1,500 per violation and injunctive relief. (*Id.* at 13; *id.* ¶¶ 19(l) & 31).

On February 5, 2016, Defendants moved to dismiss the Complaint for failure to state a claim on the sole basis that it is not even "plausible" that the fax attached to the Complaint is an advertisement under the TCPA because (1) it "does not offer anything for purchase or sale" and

(2) "its primary purpose is to inform members that the *PDR* is now available to the public as a free eBook for 2014." (Defs.' Mem. at 7).

Legal Standard

To obtain dismissal for failure to state a claim, a defendant must demonstrate the plaintiff does not even have a "plausible" claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Dismissal is warranted only if there is no "reasonable expectation that discovery will reveal evidence" to support the plaintiff's claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). It is not enough that a district court suspects the plaintiff will ultimately "fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." *Id.* at 563 n.8.

Argument

I. The fax is an "advertisement" as a matter of law under the FCC's 2006 Order because it promotes a "free publication."

A. The FCC rulings interpreting the TCPA are binding in this Court.

Defendants argue that in deciding whether a fax is an "advertisement," it is "appropriate for the Court to adopt a reasonable construction of the TCPA" promulgated by the FCC. (Defs.' Mem. at 10). That is incorrect. The FCC's interpretations of the TCPA are binding, and a district court has no jurisdiction to decline to "adopt" them on the basis that they are "unreasonable" or any other reason. The Administrative Orders Review Act (also known as the "Hobbs Act"), 28 U.S.C. § 2342(1), vests "exclusive jurisdiction" to "determine the validity of" a final order of the FCC in the federal court of appeals on direct review of agency action on a petition naming the FCC as respondent. *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984) (district court lacked jurisdiction to find FCC exceeded its statutory authority because "[e]xclusive jurisdiction for review of final FCC orders . . . lies in the Court of Appeals" using Hobbs Act procedures).

Although the Fourth Circuit has not addressed the preclusive effect of the Hobbs Act specifically in the TCPA context, it held in *GTE S., Inc. v. Morrison*, 199 F.3d 733, 742 (4th Cir.

1999), that the district court lacked jurisdiction to review pricing rules issued by the FCC pursuant to the Communications Act because "[u]nder the Hobbs Act courts of appeals have 'exclusive jurisdiction . . . to determine the validity of . . . all final orders' (including those relating to rulemaking) of the FCC." In a recent TCPA case in this Circuit, the district court applied an FCC ruling allowing consumers to revoke their "prior express consent" to telephone calls "using any reasonable method," rejecting the defendant's argument that the ruling contradicted the statute and holding, "[r]egardless of whether this FCC interpretation of the TCPA is entitled to *Chevron* deference, this Court lacks jurisdiction to review its validity" under the Hobbs Act. *Cartrette v. Time Warner Cable, Inc.*, 2016 WL 183483, at *3 (E.D.N.C. Jan. 14, 2016) (quoting *Sacco v. Bank of Am., N.A.*, 2012 WL 6566681, at *9 (W.D.N.C. Dec. 17, 2012)).

Numerous other courts, including four circuit courts of appeal, have held a district court must enforce the FCC's interpretations of the TCPA and a party that disagrees with those rulings must strictly comply with the Hobbs Act procedures. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014) (reversing district court ruling in plaintiff's favor that FCC interpretation of "prior express consent" contradicted the TCPA, holding "[b]y refusing to enforce the FCC's interpretation, the district court exceeded its power"); *Nack v. Walburg*, 715 F.3d 680, 686 (8th Cir. 2013) (reversing district court ruling in defendant's favor, holding district court lacked jurisdiction to find FCC exceeded its authority by requiring opt-out notice on faxes sent with "prior express invitation or permission"); *Leyse v. Clear Channel Broad., Inc.*, 545 F. App'x 444, 459 (6th Cir. 2013) (holding district court "did not have jurisdiction to consider [plaintiff's] arguments that the FCC's exemption decision should be set aside because of

procedural infirmities");[1] *C.E. Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 445–50 (7th Cir. 2010) (affirming district court's refusal to consider plaintiff's argument that FCC exceeded its authority in creating EBR defense to TCPA unsolicited-fax claims); *see also Gottlieb v. Carnival Corp.*, 635 F. Supp. 2d 213, 218–21 (E.D.N.Y. 2009) (Glasser, J.) (granting defendant's motion to reconsider, holding "this Court did not have jurisdiction to invalidate the EBR exemption and must apply it as if it were part and parcel of the TCPA").

In sum, Defendants are correct that the Court should apply the FCC's interpretations of what is and is not an "advertisement" under the TCPA, but they are incorrect that this Court has jurisdiction to "adopt" those rulings or not depending on whether they are "reasonable." The FCC's rulings have the force of law, and they must be applied as if they are "part and parcel of the TCPA." *Gottlieb*, 635 F. Supp. 2d at 218.

B. The FCC's 2006 Order ruled faxes offering "free goods and services," such as "free publications," are presumed to be "advertisements."

In 2006, the FCC issued an order interpreting the definition of "advertisement"[2] and ruling that "facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition." *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report & Order & Third Order on Reconsideration, 21 FCC Rcd. 3787, 3814, ¶ 52 (Apr. 6, 2006) (hereinafter "2006

[1] The 2013 *Leyse* decision superseded the Sixth Circuit's prior ruling that the Hobbs Act did not bar the challenge to the regulation. *Leyse v. Clear Channel Broad. Inc.*, 697 F.3d 360, 376 (6th Cir. 2012). Defendants sometimes attempt to rely on the superseded decision as good law.

[2] The TCPA defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5). The regulations define "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services." 47 C.F.R. § 64.1200(f)(1).

Order"). The FCC was particularly concerned with faxes offering "free publications," explaining its reasoning as follows:

> In many instances, "free" seminars serve as a pretext to advertise commercial products and services. Similarly, "free" publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the facsimile recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the "quality of any property, goods, or services." Therefore, facsimile communications regarding such free goods and services, if not purely "transactional,"[3] would require the sender to obtain the recipient's permission beforehand, in the absence of an EBR.

(*Id.*)

Thus, under the plain language of the 2006 Order, a fax offering a "free publication" is presumed to describe the "quality of any property, goods, or services" and is an "advertisement," even if the free publication itself is not "commercially available." (*Id.*) That does not mean such a fax necessarily violates the TCPA. It simply means the sender must abide by the FCC's rules governing fax advertisements, which require (1) clear and conspicuous opt-out notice informing the recipient how to stop future faxes and (2) either "prior express invitation or permission" from the recipient or an EBR between sender and recipient. 47 C.F.R. § 64.1200(a)(4)(ii)–(iv).

C. The fax attached to the Complaint promotes a "free publication" and is therefore presumed to be an "advertisement" under the 2006 Order.

In this case, the fax attached to the Complaint offers a "Free 2014 *Physicians' Desk Reference* eBook." (Doc. 1-1). The fax therefore promotes a "free publication" and is "presume[d]" to "describe the 'quality of any property, goods, or services,'" making it an "advertisement" under the TCPA, regardless whether the 2014 eBook is "commercially

[3] The reference to "purely transactional" faxes relates to an earlier section of the 2006 Order stating faxes are not advertisements if they "relate specifically to existing accounts and ongoing transactions." (2006 Order ¶ 50). As argued in Section II.B, below, Defendants appear to suggest this exception applies here, but they have provided no evidence to show it, and they cannot do so on a motion to dismiss.

available." (2006 Order ¶ 52). For this reason, the Court should not only deny Defendants' motion, but hold the fax attached to the Complaint is an advertisement as a matter of law.

A ruling that the fax is an "advertisement" will not be case-dispositive. Defendants have signaled they will likely assert affirmative defenses of "prior express invitation or permission" or EBR.[4] Plaintiff will argue those defenses are barred because Defendants failed to include compliant opt-out notice,[5] but that issue is not raised in Defendants' motion to dismiss and should be decided on the merits after class certification. *See Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 688 (7th Cir. 2013) (affirming summary judgment for certified class, holding if faxes lack compliant opt-out notice "it does not matter which recipients consented or had an established business relation with [defendant]"). Plaintiff will also bear the burden to prove each Defendant is a "sender" as defined by FCC regulation.[6] Class certification will also have to be decided after discovery into the full scope of Defendants' fax advertising during the class period. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (Jan. 20, 2016) (holding putative class plaintiff "must be accorded a fair opportunity to show that certification is warranted").

At this stage, however, the only issue raised in Defendants' motion to dismiss is whether the fax attached to the Complaint is even "plausibly" an advertisement. Under the 2006 Order, the fax is "presume[d]" to be an advertisement as a matter of law, and the Court need go no further to deny Defendants' motion to dismiss.

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[4] Defendants mistakenly state Plaintiff must prove the fax was "unsolicited," meaning sent without "prior express invitation or permission." (Defs.' Mem. at 6). Under the 2006 Order, the *sender* bears the burden of proving both EBR and "prior express invitation or permission." (2006 Order ¶¶ 12, 46 ("In the event a complaint is filed, the burden of proof rests on the sender to demonstrate that permission was given.")).

[5] The notice (1) is not "clear and conspicuous," (2) does not provide a fax number for opt-out requests, (3) does not state that failure to honor a request within 30 days is unlawful, and (4) does not inform recipients of the requirements for making an enforceable opt-out request. *See* 47 C.F.R. § 64.1200(a)(4)(iii).

[6] "Sender" is defined as "the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement." 47 C.F.R. § 64.1200(f)(10). The "sender" is directly liable for TCPA violations. *Imhoff Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627, 635 (6th Cir. 2015).

D. Plaintiff need not plead or prove that the Fax is in fact part of an "overall marketing campaign."

The FCC's free-publication rule does not require Plaintiff to plead the fax is *in fact* "part of an overall marketing campaign to sell property, goods, or services." Instead, it states that, because faxes offering free publications are "often" part of a marketing campaign, the FCC "presume[s]" them to be advertisements. (2006 Order ¶ 52). If the FCC required that a particular fax be part of an overall marketing campaign to be an advertisement, there would be no need to *presume* anything. The presumption makes sense only in the context of a *per se* rule covering all faxes that promote "free goods and services" because the FCC determined such messages are "often" and "in many instances" a pretext or part of an overall marketing plan.

Although the validity of the FCC's ruling is not subject to challenge in this Court, the agency acted reasonably in imposing a blanket rule given its finding that faxes promoting free goods and services are prone to abuse. Administrative agencies have the power to, and often do, enact prophylactic rules that are stricter than the underlying statute in order to accomplish the statute's purposes. *See, e.g.*, *Mourning v. Family Publ'n Serv., Inc.*, 411 U.S. 356, 377 (1973) (upholding as a "prophylactic measure" agency regulation enacted under Truth in Lending Act requiring lenders to make disclosures not mandated by the act itself); *United States v. O'Hagan*, 521 U.S. 642 (1997) (upholding SEC regulation prohibiting activity not explicitly covered by underlying statute, holding "[a] prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited"); *Friedman v. Heckler*, 765 F.2d 383, 387 (2d Cir. 1985) (holding "[p]rophylactic rules . . . cannot, and need not, operate with mathematical precision" and the "mere fact that a regulation operates overbroadly does not render it invalid" even if it leads to "unfairness in a particular case").

The FCC is the expert agency on what is or is not an "advertisement," and it has been interpreting and enforcing the TCPA for 25 years. It made a finding that faxes promoting "free publications" are often abused, and it imposed a broad prophylactic rule that such faxes are "presume[d]" to be advertisements. While that rule may not operate with "mathematical precision" or may occasionally lead to "unfairness in a particular case," as in *Freidman*, that does not render the rule invalid.

Notably, the FCC's rule does not preclude Defendants from promoting the PDR by fax. Defendants may continue sending such faxes as long as they follow two simple rules: (1) include compliant opt-out notice and (2) send the faxes only to persons who gave "prior express invitation or permission" to receive them or have an EBR with Defendants. *See* 47 C.F.R. § 64.1200(a)(4)(ii)–(iv). If Defendants find these requirements too burdensome, they should not be using fax machines to promote their free publication and should stick to other avenues, such as direct mail or email.

E. Even those courts that have erroneously required a plaintiff to plead a fax offering free goods and services is a "pretext" or part of an "overall marketing campaign" have refused to dismiss on that basis.

Several district courts in TCPA cases where the faxes offered "free seminars" appear to have proceeded under the assumption that the plaintiff must plead the fax is *in fact* a "pretext" or part of an "overall marketing campaign." Plaintiff maintains that is contrary to the plain language of the 2006 Order, but even these courts have nevertheless denied motions to dismiss for failure to state a claim. *See Physicians Healthsource, Inc. v. Alma Lasers, Inc.*, 2012 WL 4120506, at *2 (N.D. Ill. Sept. 18, 2012) (denying motion to dismiss, holding "faxes promoting a free seminar may constitute an 'unsolicited advertisement' since free seminars are often a pretext to market products or services"); *Addison Automatics, Inc. v. RTC Group, Inc.*, 2013 WL 3771423, at *2 (N.D. Ill. July 16, 2103) (denying motion to dismiss because "free seminars are often a pretext to

market products or services"); *St. Louis Heart Ctr., Inc. v. Forest Pharms., Inc.*, 2013 WL 1076540, at *4 (E.D. Mo. Mar. 13, 2013) (denying motion to dismiss on free-seminar fax); *N. Suburban Chiropractors Clinic v. Merck & Co.*, 2013 WL 5170754, at *3 (N.D. Ill. Sept. 13, 2013) (same). In *Phillip Long Dang, D.C., P.C. v. XLHealth Corp.*, 2011 WL 553826, at *4 (N.D. Ga. Feb. 7, 2011), the court decided a free-seminar fax was not an advertisement at summary judgment following discovery. In *Physicians Healthsource v. Stryker Sales*, 2014 WL 7109630, at *8 (W.D. Mich. Dec. 12, 2014), the court denied summary judgment on a free-seminar fax in light of the FCC's reasoning that such faxes "are usually part of an overall marketing campaign, a fact not necessarily evident from the four corners of the fax."

The only district court decision granting a motion to dismiss on a free-seminar fax Plaintiff's counsel is aware of is *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 2015 WL 144728, at *5 (D. Conn. Jan. 12, 2015), which Defendants rely on heavily. (Defs.' Mem. at 8–12, 15). In that case, the district court recognized the 2006 Order "could be read to categorize all faxes promoting free seminars as unsolicited advertisements," but decided to instead "require plaintiffs to show that the fax has a commercial pretext," eschewing the plain language of the FCC's interpretation for its own. 2015 WL 144728, at *3. That decision is on appeal to the Second Circuit, Appeal No. 15-288, and was argued September 29, 2015. Plaintiff maintains the district court's decision that a plaintiff must plead and prove a free-seminar fax is *in fact* a pretext or part of an overall marketing campaign gives no effect to the FCC ruling that such faxes are "presume[d]" to be advertisements and will likely be reversed.

In the alternative, although Plaintiff maintains it need not plead the fax attached to the Complaint is a "pretext" or part of an "overall marketing campaign" under the 2006 Order, if this Court disagrees, Plaintiff seeks leave to amend to allege the free PDR eBook is part of an "overall marketing campaign." No one can deny that, "while the publication itself may be

offered at no cost," the "products promoted within" the PDR are "commercially available." (2006 Order 52). In addition, the fax attached to the Complaint directs recipients to obtain the free 2014 eBook at www.PDRNetwork.com/ebook14. (Doc. 1-1). That webpage no longer appears to exist, but an existing webpage on the PDR Network website allows a visitor to view (but not download or print) the *2015* PDR eBook, and the first page of that publication is a full-page advertisement for the "PDR Pharmacy Discount Card," stating that "Patients save up to 75% on brand and generic drugs," that the plan "[i]ncludes over 50,000 drugs at 60,000 pharmacies nationwide," and that "[k]its available in English or Spanish." (Declaration of Ryan M. Kelly "Kelly Decl." ¶¶ 3–7). The advertisement states that "[n]o enrollment or periodic fees apply," but "[t]he pharmacy may pay the plan a fee from amounts the pharmacy collects from the member." (*Id.* ¶ 7).

Thus, if the Court determines Plaintiff must plead the fax attached to the Complaint is part of an "overall marketing campaign," which Plaintiff maintains is not required, then Plaintiff seeks leave to amend to allege the fax is part of an overall marketing campaign for the PDR Pharmacy Discount Card or other products, goods, or services promoted in the 2014 PDR eBook, which of course Plaintiff has not yet obtained in discovery. *Drug Reform Coordination Network, Inc. v. Grey House Publ'g, Inc.*, 106 F. Supp. 3d 9, 15 (D.D.C. 2015) (denying motion to dismiss where fax offering free inclusion in directory was not an "advertisement" on its face, but "[i]t remains for discovery to determine whether the Fax was in fact 'part of an overall campaign'").

II. Defendants' reliance on other parts of the 2006 Order and distinguishable district court decisions is misplaced.

Defendants' motion to dismiss does not once mention the FCC's ruling that faxes offering "free publications" are presumed to be advertisements under the TCPA. (Defs.' Mem. at 1–15). Instead, Defendants cherry-pick language from other parts of the 2006 Order regarding

purely "transactional" faxes and "bona fide informational communications," neither of which apply here and neither of which can be decided at the pleading stage.

A. The FCC's general language regarding purely "transactional" or "informational" faxes cannot overcome the specific ruling in the 2006 Order that free-publication faxes are "advertisements."

Federal courts will not disregard a *specific* agency ruling on point in favor of *general* statements in other sections of the agency's rules. *See, e.g.*, *Spreckels v. Helvering*, 315 U.S. 626, 628 (1942) (holding "a general regulation designating 'commissions' as one of a long list of deductible business expenses is not controlling in the face of a specific regulation pertaining to commissions on securities transactions"). "[I]t is an elementary principle of statutory construction that a specific statutory provision controls a more general one," *Warren v. N. Carolina Dep't of Human Res., Div. of Soc. Servs.*, 65 F.3d 385, 390 (4th Cir. 1995), and this "conventional canon of legal interpretation" applies to agency regulations as well as statutes, *Harry C. Crooker & Sons, Inc. v. OSHRC*, 537 F.3d 79, 84 (1st Cir. 2008) (refusing to construe "general regulations to override a separate, highly specific regulation," holding it "would turn the regulatory scheme on its head").

In addition, the Fourth Circuit recognizes "the canon of statutory interpretation that remedial statutes are to be construed liberally." *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 393 (4th Cir. 2014). In *Russell*, the Fourth Circuit applied that canon in favor of the plaintiff in an action under the Fair Debt Collection Procedures Act, interpreting the statute broadly in favor of the plaintiff because the statute "facilitates private enforcement by allowing aggrieved consumers to bring suit" and "[b]y providing prevailing plaintiffs statutory and actual damages, as well as reasonable attorney's fees, Congress plainly intended to regulate unscrupulous conduct by encouraging consumers who were the target of unlawful collection efforts to bring civil actions." *Id.*; *see also Roy v. Cty. of Lexington, S.C.*, 141 F.3d 533, 540 (4th

Cir. 1998) (holding "[e]xemptions from or exceptions to" liability under Fair Labor Standards Act "are to be *narrowly construed*" against defendant).

The Fourth Circuit has not considered whether the TCPA is a "remedial statute," but the district court recognized in *Mey v. Monitronics Int'l, Inc.*, 959 F. Supp. 2d 927, 930 (N.D.W.Va. 2013), that "[t]he TCPA is a remedial statute and thus entitled to a broad construction" in a TCPA action involving voice telephone calls. The court broadly construed the statutory term "on behalf of" in light of the FCC's 2013 ruling that "'on behalf of' liability does not require a formal agency relationship" between a "seller" and telemarketer in a TCPA phone-call case, and denied the defendant's motion for summary judgment. *Id.* at 932; *see also Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 271 (3d Cir. 2013) (holding the TCPA "is a remedial statute that was passed to protect consumers" and broadly construing it to allow consumers to revoke prior express consent to telephone calls, where the statute and regulations were silent on the issue). The FCC agrees. *See In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 7993 ¶ 56 (rel. July 10, 2015) (agreeing with *Gager* that "in light of the TCPA's purpose, any silence in the statute as to the right of revocation should be construed in favor of consumers"). Thus, this Court should construe the term "advertisement" *and* the FCC's interpretations of that term broadly in favor of consumers and against Defendants.

In this case, the FCC issued a specific rule that faxes offering "free publications" are advertisements under the TCPA. Defendants cannot use general statements about "transactional" communications or "bona fide informational communications" in other parts of the Order to undermine the specific rule, given the canon that the specific governs the general. Plus, any ambiguity over the proper interpretation of the FCC's 2006 Order must be resolved in Plaintiff's favor given the maxim that remedial statutes should be broadly construed to protect consumers. The motion to dismiss should therefore be denied based solely on the free-publication ruling in

the 2006 Order. Nonetheless, as argued below, neither the "transactional communication" nor the "bona fide informational communication" language of the 2006 Order applies here, and those are fact-specific arguments that cannot be decided on a motion to dismiss.

B. Defendants fail to establish that the fax is "purely transactional," and that issue cannot be decided on a motion to dismiss.

Defendants state it "is worth mentioning" that the fax attached to the Complaint states "[y]ou are receiving this fax because you are a member of the PDR Network," and seem to suggest the mere presence of this statement on the fax requires dismissal under *Physicians Healthsource, Inc. v. Multiplan Servs. Corp.*, 2013 WL 5299134, at *2 (D. Mass. Sept. 18, 2013). (Defs.' Mem. at 10). In *Multiplan*, the district court dismissed based on language in the 2006 Order regarding "transactional communications," stating a fax that merely notifies the recipient of "a change in terms or features regarding an account, subscription, membership, loan or comparable ongoing relationship, in which the recipient has already purchased or is currently using the facsimile sender's product or service, is not an advertisement." *Multiplan*, 2013 WL 5299134, at *2 (citing 2006 Order ¶ 50). The fax in *Multiplan* met this standard because it was addressed to a specific doctor who was "a current member of the MultiPlan Network," stated that doctor's membership ID number, and apprised the doctor "of features of an account to which he already has access." *Id.* The plaintiff did not dispute that this information was accurate. *Id.*

In contrast, in this case the fax attached to the Complaint is not addressed to any particular person, merely stating a generic, "To: Practice Manager." (Doc. 1-1). It does not state anyone's membership identification number, and Defendants do not explain whether there is even such a thing as a PDR Network membership number. (*Id.*) The fax does not purport to relate to an "account" to which Plaintiff already had access. (*Id.*) The allegations of the Complaint, which must be accepted as true at this stage, are that Plaintiff did not even have an

"established business relationship" with Defendants. (Compl. ¶ 33). That the fax contains the words "[y]ou are receiving this fax because you are a member of the PDR Network" cannot be a basis for dismissal. Otherwise, every unscrupulous fax advertiser would put similar language on its faxes to ensure dismissal of any effort to enforce the TCPA.

Defendants attach to their motion a one-page printout from the PDR website (Doc. 18-1), which they claim provides "descriptive information" about Defendants' products and services. (Defs.' Mem. at 7, n.4). The Court should not consider this document on a motion to dismiss because it is not "integral to and explicitly relied on in the complaint . . . ." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011). The Court should of course consider the fax attached to the Complaint, but the Complaint alleges nothing about Defendants' website. *Id.* (reversing dismissal where district court relied on defendant's assertions that all relevant agreements were before the court where "nothing in the record indicates that full discovery had been undertaken"). In order to consider this document, the Court would have to convert the motion to one for summary judgment under Rule 56 and allow discovery. *Id.*

But even if the Court considers this webpage on a Rule 12(b)(6) motion, the document tends to show that Plaintiff is *not* a member of the "PDR Network" because it states the PDR Network "is made up of e-prescribing, electronic medical record (EMR), and electronic health record (EHR) applications, chain and independent pharmacies, and sponsors of healthcare-related education such as pharmaceutical manufacturers, health plans, payers, and pharmacy benefit managers." (Doc. 18-1). The Complaint does not allege Plaintiff, a chiropractic clinic, falls into any of these categories, and Defendants put forth no evidence of such (which if they did would require a fair opportunity to conduct discovery to test that evidence).

In sum, there is no basis to find on the pleadings that the exception for purely "transactional" communications in the 2006 Order applies in this case. If Defendants intend to

argue that exception applies, which is not clear given their offhand comment that it is merely "worth mentioning," then they can move for summary judgment on that basis following discovery. It is not a basis to dismiss for failure to state a claim.

C. Defendants fail to establish the Fax is a "bona fide informational communication," and that issue cannot be decided on a motion to dismiss.

After the specific ruling that faxes offering "free goods and services" are presumed to be "advertisements," the FCC stated faxes that "contain only information, such as industry news articles, legislative updates, or employee benefit information," are not advertisements. (2006 Order ¶ 53). The FCC ruled that "incidental advertising" in such a "bona fide informational communication" will not convert the entire communication into an advertisement. (*Id.* & n.187). In determining whether a fax is a "bona fide informational communication," the FCC stated it "will consider whether the communication is issued on a regular schedule; whether the text of the communication changes from issue to issue; and whether the communication is directed to specific regular recipients, *i.e.*, to paid subscribers or to recipients who have initiated membership in the organization that sends the communication." (*Id.*)

In this case, Defendants do not argue that (1) their faxes were issued on a regular schedule, (2) the faxes changed from issue to issue, or (3) the faxes were directed to specific, regular recipients. (Defs.' Mem. at 1–15). Defendants do not mention these factors at all. (*Id.*) Thus, Defendants have not shown that the fax attached to the Complaint is a "bona fide informational communication," and the motion to dismiss based on the "informational" language in the 2006 Order must be denied. *Cf. P&S Printing LLC v. Tubelite, Inc.*, 2015 WL 4425793, at *5 (D. Conn. July 17, 2015) (granting motion to dismiss where fax merely stated defendant's updated Labor Day delivery schedule, holding such faxes "inherently informational because they

are sent on a regular schedule, they change each time they are sent (based on the holiday or schedule change in question), and generally target current customers not new ones").

Defendants rely on *Physicians Healthsource v. Janssen Pharm., Inc*., 2013 WL 486207, at *4-5 (D.N.J. Feb. 6, 2013) ("*Janssen I*"), which dismissed on the basis that a fax stating a drug had been reclassified for insurance purposes was not an advertisement. (Defs.' Mem. at 12, 13). The fax did not offer "free goods and services," and the case is therefore inapposite. In addition, Defendants fail to mention the court subsequently granted leave to amend the complaint to allege the "informational" veneer of the fax was a "pretext." *Physicians Healthsource, Inc. v. Janssen Pharm., Inc.*, 2013 WL 2460345, at *4 (D.N.J. June 6, 2013) ("*Janssen II*"). They also do not mention that the district court later denied the defendant's motion for summary judgment, holding evidence gathered in discovery regarding the timing of the faxes and their genesis in the defendant's marketing department raised a genuine issue into "whether there is an advertising intent" behind the faxes. *Physicians Healthsource v. Janssen Pharm., Inc.*, 2015 WL 3827579, at *1, *4 (D. N.J. June 19, 2015) ("*Janssen III*") (citing *Physicians Healthsource v. Stryker Sales*, 2014 WL 7109630, at *8 (W.D. Mich. Dec. 12, 2014) (court need not "put on evidentiary blinders" in deciding whether a free-seminar fax is an advertisement)).

Defendants also do not mention *Physicians Healthsource, Inc. v. Janssen Pharm., Inc.*, 2015 WL 5164821, at *4 (D.N.J. Sept. 2, 2015) ("*Janssen IV*"), denying the defendant's motion to reconsider and rejecting the argument that *Sandusky Wellness Ctr., LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218 (6th Cir. 2015), stands for the proposition that a court should not look past the "four corners" of a fax in determining whether it is an "advertisement." *Janssen IV*, 2015 WL 564821, at *4–5. As the district court held, "the Sixth Circuit specifically went beyond the four corners of the faxes" to examine the record on summary judgment in *Medco*. *Id.* In sum, Defendants' chief authorities stand for the proposition that where a defendant claims a fax is

purely "informational," the plaintiff should be permitted discovery regarding the circumstances under which the faxes were sent and the issue should not be decided at the pleading stage.

Defendants' other authorities are equally unpersuasive. In *Phillip Long Dang, D.C., P.C. v. XLHealth Corp.*, 2011 WL 553826, at *4 (N.D. Ga. Feb. 7, 2011), the court ruled the 2006 Order "does not create a wholesale ban on free seminars, but instead only on ones which promote goods and services," but the case was decided at summary judgment, and the defendant established the speaker at the seminar merely explained the defendant's billing practices. Both *Phillips Randolph Enter., LLC v. Adler-Weiner Research Chicago, Inc.*, 526 F. Supp. 2d 851, 853 (N.D. Ill. 2007), and *Amerigard, Inc. v. Univ. of Kan. Med. Ctr. Research Inst.*, 2006 WL 1766812, at *1–*2 (W.D. Mo. June 23, 2006), involved faxes regarding research studies, not offers for free goods and services, such as a free publication. In *N.B. Indus. v. Wells Fargo & Co.*, 2010 WL 4939970, at *11 (N.D. Cal. Nov. 30, 2010), the fax was an application for an award, also unrelated to the free-goods-or-services ruling.

Finally, Defendants rely on *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 2015 WL 144728, at *5 (D. Conn. Jan. 12, 2015) (Defs.' Mem. at 8–12, 15),[7] but this case is more analogous to the decision *Boehringer* distinguished, *Physicians Healthsource, Inc. v. Purdue Pharma, LP, et al.*, No. 12–CV–1208–SRU, where the court held the faxes were advertisements as a matter of law where they announced a free seminar and stated, "this is a promotional event." *Boehringer*, 2015 WL 144728, at *5. In this case, the fax attached to the Complaint states on its face that Defendants offer "healthcare *products and services* from PDR via fax." (Doc. 1-1 (emphasis added)). That alone is enough to make a "plausible" case the fax attached to the Complaint describes the "quality of any property, goods, or services."

[7] *Boehringer* is currently on appeal to the Second Circuit and was argued September 29, 2015.

Defendants argue the fax is "informational" because the *amount* of advertising is "incidental" under the 2006 Order. The Seventh Circuit rejected this interpretation of the 2006 Order in *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 687 (7th Cir. 2013). In *Turza*, the defendant argued the amount of advertising in his faxes was "incidental," and the Seventh Circuit rejected the argument, holding the FCC defined advertisement as "any material" advertising goods or services and asking "what part of 'any' Turza finds hard to understand." *Id.* (quoting § 64.1200(f)(1)). The Seventh Circuit held the language about "incidental advertising" in the 2006 Order is merely "a declaration of the [FCC's] enforcement plans" not to bring administrative actions based on such faxes,[8] with the language having no effect in private TCPA litigation, given that the reason the TCPA "authorizes private litigation" in the first place is so "recipients [of faxes] need not depend on the FCC." *Id.*

Defendants' reliance on *Holmes v. Back Doctors, Ltd.*, 2009 WL 3425961, at *4 (S.D. Ill. Oct. 21, 2009), is misplaced because it was not a "free goods and services" case and it was decided at summary judgment, with the district court making specific factual findings that the fax was a "bona fide informational communication" where (1) the faxes were issued on a regular schedule, (2) the text changed from issue to issue, and (3) the faxes were directed to regular recipients who had agreed to receive them. (*See* 2006 Order ¶ 53 & n.187). In contrast, this case is at the pleading stage, and Defendants do not even claim the fax attached to the Complaint meets the standards for a "bona fide informational communication." (Defs.' Mem. at 1–15).[9]

[8] The TCPA may be enforced by private parties, 47 U.S.C. § 227(b)(3), state attorneys general, *id.* § 227(g), and the FCC, *id.* § 503(b).

[9] To the extent *Holmes* compared "the amount of space devoted to advertising versus the amount of space used for information," under Seventh Circuit law, that rationale was rejected in *Turza*, 728 F.3d at 687. That aspect of *Holmes* is no longer of any persuasive value.

Conclusion

Defendants' motion to dismiss should be denied because (1) the FCC's controlling interpretation of the TCPA states that faxes offering "free publications" are presumed to be advertisements, and (2) Defendants have failed to establish that the exception for purely "transactional" communications or "bona fide informational communications" applies, and those fact-bound issues cannot be decided at the pleading stage.

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