NO. 16-2185

In The

United States Court of Appeals

For The Fourth Circuit

CARLTON & HARRIS CHIROPRACTIC, INC.

Plaintiff-Appellant,

v.

PDR NETWORK, LLC; PDR DISTRIBUTION, LLC; AND PDR EQUITY, LLC; AND JOHN DOES 1-10,

Defendants-Appellees.

On Appeal From The United States District Court For The Southern District Of West Virginia At Huntington
3:15-cv-14887
(Honorable Robert C. Chambers)

APPELLEES' RESPONSE BRIEF

BLANK ROME LLP
Jeffrey N. Rosenthal
Rosenthal-j@blankrome.com
One Logan Square, 130 N. 18th St.
Philadelphia, PA 190103
Telephone: 215.569.5553
Facsimile: 215.832.5553

Counsel for Appellees

BLANK ROME LLP
Ana Tagvoryan
ATagvoryan@BlankRome.com
2029 Century Park East, 6th Floor
Los Angeles, CA 90067
Telephone: 424.239.3400
Facsimile: 424.239.3434

Counsel for Appellees

NELSON, MULLINS, RILEY & SCARBOROUGH LLP
Marc E. Williams
Marc.Williams@nelsonmullins.com
949 Third Ave., Suite 200
Huntington, WV 25701
Telephone: 304.526.3501
Facsimile: 304.526.3541

Counsel for Appellees

NELSON, MULLINS, RILEY & SCARBOROUGH LLP
Robert L. Massie
Bob.Massie@nelsonmullins.com
949 Third Ave., Suite 200
Huntington, WV 25701
Telephone: 304.526.3502
Facsimile: 304.526.3542

Counsel for Appellees

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 16-2185 Caption: Carlton & Harris Chiropractic, Inc. v. PDR Network, LCC et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

PDR Network, LCC; PDR Distribution, LLC; PDR Equity, LLC
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☐ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:

Defendant-Appellee PDR Distributions, LLC's parent corporation is PDR, LLC
Defendant-Appellee PDR Equity LLC's parent corporation is PSKW Holdings, LLC
Defendant-Appellee PDR Network LLC's parent corporation is PDR, LLC

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Marc E. Williams Date: October 27, 2016

Counsel for: PDR Network, LLC; PDR Distribution

CERTIFICATE OF SERVICE

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I certify that on October 27, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Brian J. Wanca
Ryan M. Kelly
Anderson + Wanca
3701 Algonquin Road, Suite 500
Rolling Meadows, IL 60008

D. Christopher Hedges
David H. Carriger
W. Stuart Calwell
The Calwell Practice, LC
500 Randolph Street
Charleston, WV 25302

/s/ Marc E. Williams
(signature)

October 27, 2016
(date)

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JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of West Virginia had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and section 227(b)(3) of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 *et seq*. (the "TCPA"), as amended by the Junk Fax Prevention Act of 2005 (the "JFPA"). *See also Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368 (2012).

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. On September 30, 2016, the District Court entered its *Memorandum Opinion and Order* dismissing Appellant's TCPA claim under Federal Rule 12(b)(6)—which, while not expressly stated as being "with prejudice," constitutes a final order that disposed of all of Appellant's claims. (A137) (ordering that this "case be dismissed and stricken from the docket of this Court."). *Carter v. Norfolk Cmty. Hosp. Ass'n*, 761 F.2d 970, 974 (4th Cir. 1985) ("A district court's dismissal under Rule 12(b)(6) is, of course, with prejudice unless it specifically orders dismissal without prejudice.").

Appellant timely filed its Notice of Appeal on October 12, 2016. (A138.)

STATEMENT OF THE ISSUES

1. Whether the District Court properly concluded the single fax at issue did not constitute an "advertisement" subject to the TCPA whereby unambiguous statutory language requires that a fax be commercial in nature, and neither the fax nor the free drug reference book mentioned therein exhibited a commercial aim.

2. Whether the District Court properly harmonized the unambiguous statutory definition of an "advertisement" in the TCPA with the Federal Communication Commission's ("FCC") presumptively valid guidance for faxes that "promote" free goods and services in conformity with the Administrative Order Review Act (the "Hobbs Act"), 28 U.S.C. § 2342.

3. Whether the District Court was correct in refusing to broadly interpret the TCPA in favor of Appellant where the Fax was clearly not an advertisement—thus rendering the issue "moot"—no canon of statutory construction was violated, and various authorities have recognized the TCPA should be interpreted plainly.

STATEMENT OF THE CASE

This is a simple case that raises only one real issue on appeal: whether the District Court properly determined that the single fax Plaintiff/Appellant Carlton & Harris Chiropractic, Inc. ("Carlton & Harris") received from Defendants/Appellees PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC (collectively, "PDR Network") did not constitute an "advertisement" subject to the TCPA.

A. The Parties.

PDR Network delivers drug information and safety products/services that support drug prescribing decisions and patient adherence to improve health. (A29.) To further these goals, PDR Network provides healthcare professionals with multichannel access to important drug information, including the *Physicians'*

Desk Reference® (the "PDR"). (*Id.*) The *PDR* is the most recognized drug information reference available in the United States. (*Id.*; A34.) The *PDR* is provided to health care professionals—free of charge—and contains full FDA-approved drug label information, including warnings/precautions, drug interactions, and hundreds of full-color pill images. (A23; A95.) According to one federal judge, the *PDR* is:

> [A] compilation of manufacturers' prescribing information (package insert) on prescription drugs, updated annually [and d]esigned to provide physicians with the full legally mandated information relevant to writing prescriptions (just as its name suggests)[.] The compilation is financially supported in part by pharmaceutical manufacturing corporations which create drugs listed within its pages.

See United States v. Rodella, 2015 U.S. Dist. LEXIS 20704, at *9 n.2 (D.N.M. Feb. 2, 2015). The *PDR*'s importance to population health—and its ability to shield drug manufacturers from liability where drug labels were properly written and distributed via the *PDR*[1]—has been recognized in dozens of cases. (A34-35.)

Carlton & Harris is a chiropractic medical office located in West Virginia. (A11 ¶ 8.) Carlton & Harris has conceded the *PDR* is free to physicians, and is not offered for sale to Carlton & Harris. (A32; A80; A95 ¶ 9; A115 15:3-10; A130.)[2]

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[1] For example, pharmaceutical companies are required to widely disseminate information about the safety risks and side effects of their products to physicians and other prescribers in order to satisfy state "duty to warn" laws. (A33.)

[2] At oral argument, the District Court specifically observed how Carlton & Harris "did not dispute [PDR Network's] description of the reference book or of [the

B. The Complaint.

The Complaint purports to "challenge [PDR Network's alleged] practice of sending unsolicited facsimiles" under the JFPA and FCC regulations promulgated thereunder. (A9 ¶¶ 1-2.) Carlton & Harris asserts that, "upon information and belief," PDR Network "sent facsimile transmissions of unsolicited advertisements to [Carlton & Harris] and the [putative] Class in violation of the JFPA, including, but not limited to, the" December 17, 2013, fax at issue (the "Fax"). (*Id.* ¶ 2.)

According to Carlton & Harris, the Fax "describes the commercial availability or quality of [PDR Network's] goods and services," (*id.*), and thus "constitute[s] an advertisement under the [JFPA]." (*Id.* ¶ 29.) Carlton & Harris also alleges that PDR Network "benefit[s] or profit[s] from the sale of the products, goods and services being offered on [the Fax]." (*Id.* ¶ 12.)

C. The Fax.

The Fax informs Carlton & Harris of the availability of a free copy of the 2014 *PDR* in electronic form. (A23.) The "Subject" line of the Fax reads: "*FREE* 2014 *Physicians' Desk Reference eBook* – Reserve Now." (*Id.*; emphasis added) The body of the fax itself contains two (2) additional references to the 2014 *PDR* eBook as being "free." (*Id.*) The Fax also makes clear that the *PDR* is "[n]ow in a new, convenient digital format," while still consisting of the "[s]ame trusted, FDA-

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PDR] itself as an informational resource which is free to recipients and that [PDR Network] does not sell the reference or sell anything in the reference." (A130.)

approved full prescribing information." (*Id.*) According to the Fax, this update to an eBook version of the *PDR* for 2014 was "[d]eveloped to support [physicians'] changing digital workflow." (*Id.*) To drive the point home, an image of the 2014 *PDR* eBook is also depicted on an iPad® screen on the center of the page. (*Id.*)

D. PDR Network's Motion to Dismiss Under Federal Rule 12(b)(6).

On February 5, 2016, PDR Network moved to dismiss the Complaint for failure to state a claim under Federal Rule 12(b)(6) (the "Motion to Dismiss"). (A24-55.) The Motion to Dismiss explained how a prerequisite to liability under the TCPA is that the Fax must qualify as an "unsolicited advertisement"—which is defined as "any material advertising the commercial availability or quality of any property, goods, or services[.]" (A31.) Critically, courts across the nation have held the term "commercial availability" requires that the communication advertise products/services as being available for purchase or sale. (A32.) Because the *PDR* is *not* available for sale to healthcare providers like Carlton & Harris; PDR Network does *not* manufacture and/or sell the drugs listed in the *PDR*; and the Fax merely *informed* Carlton & Harris of its ability to reserve a *free PDR* eBook, Carlton & Harris could not satisfy this threshold legal requirement. (*Id.*) Nor was the Fax a "pretext" for offering goods/services for sale in another context. (*Id.*)

On March 4, 2016, Carlton & Harris filed its opposition to the Motion to Dismiss (the "Opposition"). (A56-78.) The Opposition alleged PDR Network was

encouraging the District Court to ignore a final order by the FCC interpreting the definition of an "advertisement" in Section 227(a)(5) of the TCPA as inclusive of faxes that "promote goods or services even at no cost." (A60-61) (citing *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) ("2006 Order")).[3] Carlton & Harris also claimed that the 2006 Order created an immutable rule that *all* faxes promoting "free publications" are "presumed" to be "advertisements," and that the Hobbs Act further compelled the District Court to adopt Carlton & Harris's self-servingly expansive interpretation of the FCC's 2006 Order. (*Id.*)

PDR Network filed a reply on March 18, 2016 (the "Reply"). (A79-100.) The Reply clarified how PDR Network was *not* asking the District Court to ignore the 2006 Order, but rather, was asking that it be applied in harmony with the TCPA and the canons of statutory construction. (A80.) The FCC was simply illustrating how, in some instances, a "free" seminar or publication *may* be a "pretext" to advertise commercial products/services, or is "part of an overall marketing

[3] Carlton & Harris refers to the April 2006 *Report and Order And Third Order on Reconsideration* from the FCC as the "2006 Order." However, the *Final Rule* from the FCC actually appears in the Federal Register at *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 71 FR 25967 (May 3, 2006). Unless indicated, the language from the April 2006 *Report and Order* and May 2006 *Final Rule* is the same. PDR Network will cite to the April 2006 *Report and Order* for consistency.

campaign." (*Id.*) Without this foundational "presumption" argument—which had been rejected by multiple courts—Carlton & Harris could not state a claim. (*Id.*)

E. The District Court's Order Dismissing The Complaint.

On September 30, 2016—following full motion briefing and an oral argument—Chief Judge Robert C. Chambers granted PDR Network's Motion to Dismiss and dismissed Carlton & Harris's Complaint in its entirety. (A102-137.)

As the District Court elucidated, the Fax was not an "advertisement" as defined by the TCPA because while it "certainly offer[ed] a good to [Carlton & Harris,] neither the [F]ax nor [the *PDR*] exhibit a commercial aim." (A132.) On the contrary, "[t]he [F]ax offers, for free, a reference book that contains information about prescription drugs. PDR [Network] does not sell prescription drugs, nor does it sell the reference book. The essential commercial element of an advertisement is missing from the fax; that is, there is no 'hope to make a profit' from the offer and distribution of the reference book" at any time. (*Id.*) And "although it is *possible* that PDR [Network] accrues some commercial benefit from distribution of the reference book," the District Court held Carlton & Harris failed to "allege[] any facts, other than a conclusory recitation of the elements of a TCPA claim, that plausibly indicates that PDR [Network] gains financially from the distribution of the [*PDR*] beyond speculative or ancillary gains." (*Id.*) (emphasis in original).

The District Court also explained how Carlton & Harris was "mistaken about the effect of the Hobbs Act." (A133.) According to the District Court, because the "validity" of the 2006 Order was never challenged by either party, the Hobbs Act—which "vests exclusive jurisdiction to . . . determine the validity of all final orders of the [FCC] in the Circuit Courts of Appeals"—had no bearing here. (*Id.*) Moreover, the District Court expressly stated "*for the purposes of this case, the [District] Court presumes the FCC's order is valid*." (*Id.*) (emphasis added).

Further, while the 2006 Order's validity was "presumed," this did not mean the District Court was bound to "defer" to the FCC's interpretation where, as here, the TCPA's definition of an "advertisement" was "unambiguous" and "clear and easy to apply." (*Id.*) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984); *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.,* 788 F.3d 218, 223 (6th Cir. 2015), *pet. for rehearing en banc denied*, 2015 U.S. App. LEXIS 12411 (July 16, 2015); *Physicians Healthsource, Inc. v. Janssen Pharms., Inc.*, 2013 U.S. Dist. LEXIS 15952, at *9 (D.N.J. Feb. 6, 2013)). Thus, the 2006 Order was not due "substantial deference," and the District Court need not "defer to the ruling." (*Id.*)

The District Court next addressed Carlton & Harris's contention that the 2006 Order interpreting the TCPA's definition of "unsolicited advertisement"

created a "presumption" that "any fax that offers free services or goods is an advertisement." (*Id.*) Notably, the District Court opined that "even if it were to defer to the FCC's interpretation, a careful reading of the section cited by [Carlton & Harris] further supports [the District] Court's decision." (*Id.*) For the District Court, the FCC's guidance regarding faxes that "*promote* goods or services, even at no cost" must still be promoting with a commercial aim. (A134; emphasis added). But here, the Fax "cannot be read to 'promote' anything other than information." (*Id.*) This reading, the District Court observed, properly "harmonizes" the FCC's interpretation with the TCPA's plain meaning—both of which require a "commercial" aim. (*Id.*) Any other construction "would read 'commercial' out of the TCPA's definition of 'unsolicited advertisement'[.]" (*Id.*)

Likewise, based on the FCC's stated rationale for its characterization of faxes that "promote" free goods and services, it was clear to the District Court that "the evil to be combatted are faxes that are either overtly commercial in nature, meaning they directly offer something for sale, or are a pretext for a commercial transaction that will inevitably follow from the fax." (A134-35.) In fact, "[t]o read the FCC's guidance as a blanket ban on any fax that offers a free good or service without any commercial aspect either directly or indirectly"—as Carlton & Harris proposed—would "obviate[] the eminently rational purpose to the FCC's guidance and strips essential meaning from the TCPA." (A135.) Based on the above, the

District Court held Carlton & Harris's "interpretation . . . *is too broad and cannot be borne by the TCPA or the FCC interpretation*." (A134-35; emphasis added).

Finally, the District Court also held it "need not reach the disputed and thorny issue of whether the TCPA is a remedial statute and if it should be read broadly or plainly." (A135.) Because the Fax was "clearly not an advertisement," any dispute over the "remedial nature" of the TCPA was rendered "moot." (*Id.*)

SUMMARY OF THE ARGUMENT

As the District Court properly concluded, the single Fax did not constitute an "advertisement" under the TCPA as a matter of law. The essence of a prohibited fax under the TCPA is a fax that advertises a product/service or attempts to increase sales. As the FCC Rules and Regulations enacted pursuant to the TCPA make clear, a fax sent to convey information and/or that lacks a commercial aim is not a prohibited advertisement.

The instant Fax was not an advertisement. Rather, the Fax offered, *for free*, a reference book (the *PDR*) containing only information about prescription drugs. The Fax informed Carlton & Harris of its option to "reserve" as many free electronic copies of the *PDR* as it desired. The Fax did not promote the sale of any product or service from PDR Network to Carlton & Harris; in fact, it is undisputed that the *PDR* is *not* offered to physicians like Carlton & Harris for sale. PDR Network thus had no hope of making a profit from anything Carlton & Harris did

with respect to the Fax *or* the *PDR*. As such, the District Court properly concluded that the Fax—on its face—was not an actionable "advertisement" under the TCPA.

Carlton & Harris raises three arguments for reversal. First, Carlton & Harris claims the District Court erred in holding it was not "required" to adopt the FCC's interpretation of the TCPA, and was not "obligated" to "defer to the FCC's interpretation." The District Court was correct as to both propositions—citing authority on how courts are not required to defer to an agency's interpretation of an "unambiguous" statute. Carlton & Harris then shifts its position to instead assert the Hobbs Act bars "a challenge to an FCC Order." But the Hobbs Act—which prohibits courts from challenging the *validity* of a final agency ruling—is a red-herring. Here, the District Court (and PDR Network) "*presume[d]* the FCC's order [was] valid," and did not seek to undermine, challenge or ignore the agency's interpretation of an "advertisement." In fact, the District Court held the FCC's interpretation "further support[ed]" its position, and, on this basis, "harmonize[d]" the unambiguous statutory definition with the FCC's interpretation to determine the Fax cannot be read to "promote anything other than information." And even setting that aside, numerous opinions—including multiple cases cited by Carlton & Harris itself—have recognized that interpreting FCC rulings and determining if a party's actions abide by them "remains [a] province" of the courts.

Second, Carlton & Harris argues even if the District Court applied the FCC's order, it misinterpreted the ruling by not imposing a so-called "free-goods-or-services rule" that would inflict liability upon every fax that "promote[d] goods or services even at no cost." But there is no such "rule" in the 2006 Order or elsewhere. At best, the FCC was providing *examples* of where a free fax is really a pretext to a commercial activity—such as garnering a buyer's acceptance, or increasing sales of those same goods/services. It was not creating a "rule," as the District Court correctly held. And as the District Court also observed, Carlton & Harris's misreading of the law would have violated canons of statutory construction, was "too broad," and simply "cannot be borne by the TCPA or the FCC interpretation."

Third, Carlton & Harris argues the District Court erred because it applied the "narrowest possible interpretation" of an "advertisement." Insisting that the TCPA is a "remedial statute," Carlton & Harris claims it should be "construed liberally" in "favor of those it is designed to protect." But as the District Court rightly observed, the TCPA only "seeks to curtail faxes with a commercial nature"—which the instant Fax lacked—so it was *already* protecting those for whom the statute was designed. Carlton & Harris also neglected to inform this Court that the Sixth Circuit *rejected* this exact argument. Lastly, Carlton & Harris asks this Court to issue an advisory opinion on whether the TCPA should be read "liberally"—an

issue not addressed by the District Court based on its decision to avoid needlessly reaching this "thorny" dispute that was rendered "moot" by the nature of the Fax.

ARGUMENT

I. The District Court Properly Concluded, as a Matter of Law, That the Fax Did Not Constitute An Advertisement Subject to the TCPA.

A. Standard of Review.

The standard of review for dismissal on a motion to dismiss based on the failure to state a claim under Federal Rule 12(b)(6) is "*de novo.*" *See SD3, LLC v. Black & Decker (U.S.) Inc.*, 2015 U.S. App. LEXIS 18834, at *14 (4th Cir. Oct. 29, 2015) (citation omitted). As such, the Court will "accept as true all well-pled facts in the complaint and construe them in the light most favorable to [the plaintiff]." *Id.* (citing *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 632 n.1 (4th Cir. 2015)). It will not, however, "accept as true a legal conclusion couched as a factual allegation." *Id.* (citing *Anand v. Ocwen Loan Servicing, LLC*, 754 F.3d 195, 198 (4th Cir. 2014)). Nor will it accept "unwarranted inferences, unreasonable conclusions, or arguments," and it can further put aside any "naked assertions devoid of further factual enhancement." *Id.* (citing *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014)).

B. Carlton & Harris Concedes the Fax Does Not Sell Anything.

As the District Court observed, it is undisputed that the *PDR* is "an informational resource which is free to recipients and that [PDR Network] does not

sell the reference or sell anything in the reference." (A130.) Carlton & Harris is thus forced to *indirectly* attack the Fax as qualifying an "advertisement" using purported "presumptions" in the FCC's 2006 Order, or inapplicable jurisdictional statutes. For the reasons stated, this approach is also foreclosed as a matter of law.

C. Carlton & Harris's Arguments Regarding the Hobbs Act and the Level of Deference to be Afforded to the FCC's Interpretations Are Meritless, and Were Properly Rejected by the District Court.

The District Court held that the "Hobbs Act does not require a federal court to adopt an FCC interpretation of the TCPA," and that it "need not defer to the FCC's interpretation of an unambiguous statute." (A133.) Both rulings were correct and well-supported. This is not a valid basis to reverse the District Court.

For one, the circuit court opinions cited by Carlton & Harris—including the Fourth, Sixth, Seventh, Eighth and Eleventh Circuits—are distinguishable in that they dealt with challenges to the "validity" of the FCC's guidance, including the process and/or methodology by which it arose. That is far from the situation here.

For example, this Court in *GTE S., Inc. v. Morrison*, rejected a plaintiff's effort to "avoid application of the FCC's pricing rules by arguing that their *methodology* is contrary to the [Communications] Act." 199 F.3d 733, 742 (4th Cir. 1999) (emphasis added). In *Pornomo v. United States*, the plaintiff argued an order of Secretary of Transportation violated a motor safety statute—and this Court determined that because such an argument was tantamount to a "challenge to the

validity of [the] regulation," the district court lacked jurisdiction. 814 F.3d 681, 690 (4th Cir. 2016). In *Blitz v. Napolitano*, the plaintiff asserted a constitutional challenge to a Transportation Security Administration order, for which the district court lacked jurisdiction. 700 F.3d 733, 737 (4th Cir. 2012). Here, however, the District Court correctly recognized there *was no challenge to the 2006 Order*, and "presume[d]" it was valid. (A133.) These cases are unhelpful to Carlton & Harris.

So too is *Cartrette v. Time Warner Cable, Inc.*, 157 F. Supp. 3d 448 (E.D.N.C. 2016). In *Cartrette*, the defendant claimed the FCC's guidance in a 2015 order regarding the revocation of consumer consent was contradicted by the TCPA. *Id.* at 452. In discussing *Cartrette*, Carlton & Harris correctly cited the court's language that "[r]egardless of whether the FCC interpretation of the TCPA is entitled to *Chevron* deference, this Court lacks jurisdiction to review its validity." (App. Br. at 10.) However, Carlton & Harris selectively *omitted* the remaining language in that same paragraph about the court "accept[ing] as valid" the FCC's order, and, more importantly, opining that "[h]owever, *the matters of interpreting and applying the FCC's rulings remain within the province of the court*." *Id.* at 454 (emphasis added) (citing *Sacco v. Bank of Am., N.A.*, 2012 U.S. Dist. LEXIS 178030, at *29, *30 n.8 (W.D.N.C. Dec. 17, 2012) ("The matter of interpreting the FCC's ruling and determining whether Defendant's actions here abide by that ruling remains within the province of this Court.")). Indeed, once the

court had "accept[ed] the FCC's rulings on these issues," it then "focuse[d] on the tasks of interpreting and applying those rulings' relevant portions." *Id.* at 456. That is exactly what the District Court did here in applying the FCC's 2006 Order.

Carlton & Harris then points to four other circuits that have applied the Hobbs Act with respect to the FCC's interpretation of the TCPA. (App. Br. at 10.) None of these cases come close to creating the kind of circuit split alluded to here.

In *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110 (11th Cir. 2014), the Eleventh Circuit reversed the district court because it "lacked the power to consider in any way the *validity* of the 2008 FCC Ruling" under the Hobbs Act. *Id.* at 1113 (emphasis added). Critically, it was the district court's conclusion that the 2008 rule "was not entitled to any deference because it *conflicted* with the clear meaning of the TCPA" that exceeded the lower court's jurisdiction. *Id.* at 1115 (emphasis added). As the Eleventh Circuit explained, "[t]he district court reasoned that the FCC's interpretation of the meaning of the term 'prior express consent' could not be reconciled with the statutory language, and therefore it discarded the administrative agency's rulemaking determination." *Id.* at 1119. Here, the District Court did not claim the 2006 Order "conflicted" with the TCPA such that it should be "discarded"; on the contrary, the District Court was able to fully "harmonize[]" these two sources while giving meaning to every term contained therein. (A134.)

Moreover, although the district court in *Mais* "lacked the power to review the validity of the FCC's interpretation," the Eleventh Circuit still addressed the lower court's determination as to whether the "facts and circumstances of this case somehow fall outside the scope of the [r]uling." *Id.* at 1121 (citing *Osorio v. State Farm Bank, FSB*, 746 F.3d 1242, 1257 (11th Cir. 2014) ("[W]e are not called upon here to assess the order's validity. We are instead simply deciding whether the FCC's . . . ruling is applicable to the present case."); *Self v. Bellsouth Mobility, Inc.*, 700 F.3d 453, 463 (11th Cir. 2012) (determining the "scope" of an FCC order)). The court then conducted a separate analysis to determine if the ruling fit the facts presented. *Id.* at 1122-26. This too is exactly what the District Court did.

Nack v. Walburg, 715 F.3d 680 (8th Cir. 2013), also involved a prohibited challenge to the *validity* of an FCC ruling not present here. In *Nack*, although the defendant "initially argued primarily that the [FCC] regulation could not be interpreted as applying to 'solicited' faxes," he later "focuse[d] his argument upon the validity of the regulation[.]" *Id.* at 684. It was on this express basis that the Eighth Circuit held the "Hobbs Act generally precludes our court from holding the contested regulation invalid outside the statutory procedure mandated by Congress." *Id.* at 686. But this holding did not bar the court from "interpret[ing] the [2006 Order] in a manner consistent with its plain language." *Id.* at 685.

Carlton & Harris similarly overstates the reach of the Sixth Circuit's *Leyse v. Clear Channel Broad., Inc.*, 545 F. App'x 444 (6th Cir. 2013), opinion. Notably, the Sixth Circuit observed that "[a]s an initial matter," "resolving a TCPA claim like Leyse's does not *necessarily* implicate the Hobbs Act." *Id.* at 447 (emphasis in original).[4] Indeed, because Leyse first argued the defendant's conduct did not fit within the TCPA's exemption for radio calls created by the FCC in 2003, the court would "only reach the question of Hobbs Act and its jurisdictional restrictions if [it] disagree[d] with Leyse as to the scope of the FCC's rules." *Id.* at 448-449. Critically, the Sixth Circuit *only* applied the Hobbs Act due to the "facial attack on the TCPA exemption"—in that Leyse argued "the rule *should be set aside because of procedural deficiencies in its promulgation*." *Id.* at 458 (emphasis added).

Carlton & Harris's limited discussion of Sixth Circuit precedent ignores the import of the near-identical case of *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218 (6th Cir. 2015). Carlton & Harris's present counsel was also counsel to the plaintiff in *Sandusky*. (A114 14:6-8.)

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[4] *Leyse* also cited *C.E. Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 446 n.3 (7th Cir. 2010)—another case relied on by Carlton & Harris—for the proposition that: "[a]lthough the Hobbs Act prevents the district court from considering the validity of final FCC orders, the court retains jurisdiction to determine whether the parties' actions violated the FCC rules." *C.E. Design*, in turn, cited both *U.S. West. Commcn's Inc. v. Jennings*, 304 F.3d 950, 958 n.2 (9th Cir. 2002), as well as this Court's *GTE S., Inc.* opinion for the same proposition.

In *Sandusky*, defendant Medco Health Solutions, Inc. was a "pharmacy benefit manager" that provided services to health-plan sponsors, such as employers. 788 F.3d at 220. Medco's services specifically included "keeping and updating a list of medicines (known as the 'formulary') that are available through a healthcare plan." *Id.* Like PDR Network, Medco also did not manufacture or sell the listed drugs. *Id.* Medco sent the plaintiff two faxes, one of which was the formulary, and the other of which was an update to the formulary. *Id.* at 220-21. The plaintiff, a healthcare provider, claimed these faxes violated the TCPA. *Id.*

In affirming the district court's grant of summary judgment to Medco, the Sixth Circuit acknowledged that the faxes contained information concerning the availability of Medco's product, the formulary, *id.* at 222, but concluded that the faxes lacked the required *commercial* aspect because, as seen here, "Medco ha[d] no interest whatsoever in soliciting business from [the plaintiff]," and the faxes were "not sent with hopes to make a profit, directly or indirectly, from [the plaintiff] *or others similarly situated*." *Id.* (emphasis added). Rather, Medco's faxes were designed to "inform [the plaintiff] what drugs its patients might prefer, based on Medco's formulary—a paid service already rendered not to [the plaintiff] but to Medco's clients."[5] *Id.*

[5] At the district court, Judge Carr admonished Carlton & Harris's present counsel for filing such "frivolous ligation" on behalf of "medical providers like plaintiff." (A44-45) (citing *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 2014

The Sixth Circuit also addressed—*and rejected*—Carlton & Harris's failed contention regarding a requirement that courts "defer" to the FCC's interpretation of the term "advertisement" based on its "unambiguous" definition:

> Our conclusion—that the Act unambiguously defines advertisements as having commercial components, and that these faxes lack those components—allows us to avoid wading into another dispute: determining the effect (if any) of the [FCC's] interpretation on this case[.] There is a circuit split on whether to defer to the [FCC's] explanation of its definition. *But where our 'construction follows from the unambiguous terms of the statute'—as it does here—we do not defer to the agency's interpretation*.

See Sandusky, 788 F.3d at 223 (emphasis added; citations omitted); *see also Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court . . . ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.") (citations omitted). This alone is sufficient to affirm the District Court's decision as to the proper level of agency "deference" to be afforded here.

U.S. Dist. LEXIS 166777, at *5 n.1 (N.D. Ohio Dec. 2, 2014) ("I trust this opinion will serve as a warning to plaintiff and others who receive faxes of this sort, which serve a useful, and not a disruptive or illegal purpose not to file similar fruitless litigation in the future. *If plaintiffs or others fail to heed this warning, I trust my colleagues will respond appropriately*.") (emphasis added)). Likewise, the Sixth Circuit noted that "Sandusky *and its attorneys* did not heed that warning. Not only did Sandusky appeal this case, its attorneys have filed suits (and appeals after losing) in other courts as well." 788 F.3d at 221 (emphasis added). (A45; A88.)

Further, in *C.E. Design*, the defendant also argued the "FCC-created [established business relationship] defense *conflicts* with the TCPA's plain language[.]" 606 F.3d at 447 (emphasis added). In response, the Seventh Circuit held "[defendant's] request that the court 'ignore' the rule is just another way of asking it *not* to enforce the rule," which implicated the Hobbs Act's jurisdictional bar. *Id.* at 448 (emphasis in original). Here, PDR Network did *not* claim the 2006 Order "conflicts" with the TPCA. Nor did it ask the District Court to "ignore" the ruling—quite the contrary. (A80) ("PDR Network does not ask the Court to ignore the FCC's ruling; . . . PDR Network asks the Court to apply the ruling in harmony with the TCPA as well as the canons of statutory construction."). The District Court, accordingly, did not "ignore" the FCC's ruling, and instead analyzed its language/rationale to hold Carlton & Harris's interpretation was mistaken. (A135.)

As shown, Carlton & Harris's claim that the District Court's holding "directly contradicts four circuit courts of appeals applying the Hobbs Act in TCPA cases" withers under even limited scrutiny. (App. Br. at 15.) In reality, Carlton & Harris conflates a challenge to the 2006 Order's *validity* (which is prohibited by the Hobbs Act) with a challenge to the 2006 Order's *applicability* to the facts of this case (which remains the "province of the courts"). Carlton & Harris simply disagrees with the manner in which the District Court *applied* the

2006 Order.[6] In not "adopting" the FCC's guidance, the District Court never sought to invalidate the ruling—for which the District Court itself recognized it "lack[ed] jurisdiction." (A133.) The Hobbs Act was not violated.

The District Court properly acknowledged that it was not bound by the 2006 Order in light of the unambiguous statutory definition of the term "advertisement." Indeed, the District Court cited two U.S. Supreme Court cases (*Nat'l Cable & Telecomm. Ass'n* and *Chevron*), the leading appellate opinion on point (*Sandusky*), and an attendant district court case (*Janssen Pharms*)[7] in support of its conclusion that it need not "defer" to the FCC's interpretation of an "unambiguous" statute. (A133.) Carlton & Harris's brief is silent as to these authorities. The District

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[6] *See, e.g., Alpha Tech Pet, Inc. v. Lagasse, LLC*, 2016 U.S. Dist. LEXIS 120452, at *9 n.3 (N.D. Ill. Sep. 7, 2016) ("Contrary to Defendants' argument, this Court is not determining the validity of an FCC ruling by finding that the FCC ruling is not binding, but is merely following the Seventh Circuit's decision that the particular FCC ruling at issue here is not binding with respect to interpreting the statutory and regulatory language relevant to this case."); *IMHOFF Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627, 637 (6th Cir. 2015) (noting that "though [the defendant] questioned the reasoning of the FCC's letter brief and its application to this case, it ha[d] not directly challenged the legitimacy of the FCC's definition of sender").

[7] *See* 2013 U.S. Dist. LEXIS 15952, at *10 ("[U]nder *Chevron*, it does not appear that the FCC's interpretation [of what constitutes an advertisement] is entitled to substantial deference.") (citing *N.B. Indus. v. Wells Fargo & Co.*, 2010 U.S. Dist. LEXIS 126432, at *12-14 (N.D. Cal. Nov. 30, 2010) (observing that "[i]f the statute's definition of 'unsolicited advertisement' were ambiguous, the court would be inclined to give the *FCC Rules and Regulations* substantial deference under *Chevron*," but declining to do so where "[t]he plain meaning of 'advertisement' in the statute . . . is not difficult to apply."), *aff'd*, 465 F. App'x 640 (9th Cir. 2012)).

Court's approach in not deferring to the FCC—while still analyzing said guidance to "harmonize[]" it with the TCPA—was entirely proper.[8]

And despite the freedom to determine if PDR Network's actions abided by the 2006 Order, the District Court *still* considered Carlton & Harris's proposed interpretation. The problem for Carlton & Harris was the District Court held the language of the 2006 Order, the FCC's stated rationale, and concerns regarding cannons of statutory construction, all resulted in a finding that Carlton & Harris's "interpretation that any fax that offers a free good or service is barred by the statute is too broad and cannot be borne by the TCPA *or the FCC interpretation*." (A.135) (emphasis added). The Hobbs Act is merely a distraction.

Carlton & Harris's cited authority either has no bearing on this case or *actually supports PDR Network's position*. And if this Court follows Carlton & Harris's suggestion to "consider whether [this Court's] decisions fall in line with those of our [co-equal] sister circuits," (App. Br. at 15), then *Sandusky* would be

[8] In deciding whether to defer to the FCC's interpretation for "unambiguous" statutory text, state appellate courts in junk fax cases have reached the same result as that of the District Court after performing an identical analysis. *Karen S. Little, LLC v. Drury Inns, Inc.*, 306 S.W.3d 577, 582-83 (Mo. Ct. App. 2010) ("Because the TCPA is plain and clear on its face, the inquiry ends before even considering the FCC's interpretation. There was no reason for the trial court either to accept or reject the FCC's interpretation the statute, and, therefore, Drury's argument that the Hobbs Act establishes a jurisdictional bar is irrelevant. The trial court read the statute and found it unambiguous. The trial court, applying the appropriate method of statutory construction under *Chevron*, used the plain and unambiguous language of the statute itself and the inquiry was complete. Because Congress was clear, there was no need to delve into the FCC Rules[.]") (citations omitted).

instructive in that it addressed the *same* statutory and regulatory scheme; the *same* operative language as to the definition of an "advertisement"; the *same* arguments regarding the level of deference afforded the FCC in light of the "unambiguous" statutory text; and the *same* plaintiff's counsel trying (and failing) to argue that the district court erred.[9]

D. The District Court Properly Interpreted the TCPA and the FCC's Guidance to Hold that Faxes Promoting "Free Goods or Services" Must Contain a Commercial Purpose in Order to be Actionable.

The District Court rejected Carlton & Harris's claim that *any fax* "offering a free good or service" is barred by the TCPA. (A135.) The District Court rested its analysis on the sound premise that "in order for an unsolicited fax to become an

[9] As an aside, Carlton & Harris's effort to manufacture concern over a "circuit split" is meritless. (App. Br. at 17.) For one, as the Sixth Circuit observed, there is *already* a "circuit split" on "whether to defer to the [FCC's] explanation of its definition." *See Sandusky*, 788 F.3d at 223 (comparing *N.B. Indus.*, 465 Fed. Appx. at 642-43 (giving *Chevron* deference to FCC's interpretation regarding incidental ads) to *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 687-88 (7th Cir. 2013) (rejecting FCC's interpretation regarding incidental ads)). So regardless of how this Court decides the issue, the divide will likely expand; as such, Carlton & Harris's arguments on this point are irrelevant. (App. Br. at 15-16.) Yet this "split" is no reason to acquiesce to Carlton & Harris's clear misreading of the law—especially when the most-recent appellate decision in *Sandusky*, analyzing this exact language, held it was proper *not* to "defer" to the FCC. Nor do courts even need to decide the level of deference to rule whether a fax was an "advertisement." For instance, the district court in *ARcare v. IMS Health*, which also observed this split, held it "need not decide the level of deference warranted" with respect to the FCC's regulations to hold a fax was not an advertisement under the TCPA. 2016 U.S. Dist. LEXIS 125262, at *6-7 n.2 (E.D. Ark. Sept. 15, 2016).

advertisement the fax must have a commercial aim."[10] (A131.) The District Court next observed how "[c]ase law from other federal [circuit] courts likewise interpret the TCPA to require a commercial element to find that a fax is an advertisement." (*Id.*) And that "[o]ther district courts have held that where the sender of an unsolicited fax had nothing to sell, even if offering a good or service, the fax was not an advertisement." (*Id.*) (citing *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 2015 U.S. Dist. LEXIS 3029, at *10 (D. Conn. Jan. 12, 2015); *Phillips Randolph Enters., LLC v. Adler-Weiner Research Chi., Inc.*, 526 F. Supp. 2d 851, 853 (N.D. Ill. 2007); *Ameriguard, Inc. v. Univ of Kan. Medical Ctr.*, 2006 U.S. Dist. LEXIS 42552 (W.D. Mo. Jun. 23, 2006); *Janssen*, 2013 U.S. Dist. LEXIS 15952, at *13)). "In light of this raft of authority," the District Court opined that "the single [F]ax . . . is not an 'advertisement'" because it was "not commercial in nature." (A132.)

[10] To reach this conclusion, the District Court first considered: (a) the language of the statute itself, 47 U.S.C. § 227(b)(1)(C); (b) persuasive secondary sources; and (c) instructive TCPA fax opinions from both the Sixth and Ninth Circuits. (A131.) (citing *Sandusky*, 788 F.3d at 222 ("An advertisement is any material that promotes the sale (typically to the public) of any property, goods, or services available to be bought or sold so some entity can profit.") (citing 47 U.S.C. § 227(a)(5)); *Advertisement*, BLACK'S LAW DICTIONARY (10th ed.); *N.B. Indus.*, 465 Fed. Appx. at 642 ("To be commercially available within the meaning of [TCPA], a good or service must be available to be bought or sold (or must be a pretext for advertising a product that is so available.")) (citing *Commerce*, THE AMERICAN HERITAGE DICTIONARY (3d ed. 1994)).

The District Court then noted how the 2006 Order "further support[ed] [its] decision" because, "[a]ccording to the FCC's interpretation, the offending message must '*promote* goods or services.'" (A134) (citations omitted; emphasis added). Critically, the term "promote" has "an explicit commercial nature, meaning that faxes that offer free goods or services must aim, through *those* goods and services, to garner a buyer's acceptance or attempt to increase sales. The [F]ax here cannot be read to 'promote' anything other than information." (*Id.*) (emphasis added). The District Court's opinion was well-reasoned and amply supported by law.

Carlton & Harris challenges the District Court's conclusion on the basis that "under the plain language of the 2006 Order, a fax offering 'free publication' is *presumed* to describe the 'quality of any property, goods, or services' and is an 'advertisement' under the TCPA's definition." (App. Br. at 18; emphasis added). But this so-called "presumption" (assuming it even exists) very quickly transforms into what Carlton & Harris refers to as the "free-good-or-services-*rule*." (*Id.*; emphasis added). As explained to the District Court (A82-84), and as the District Court held, there is no such "rule" in the TCPA or the FCC's guidance that acts as "a blanket ban on any fax that offers a free good or service without any commercial aspect either directly or indirectly[.]"[11] (A135.)

[11] In fact, Carlton & Harris conceded in its Opposition that a least one district court had *rejected* this very proposition. (A73) ("in *Phillip Long Dang, D.C., P.C. v. XLHealth Corp.*, 2011 WL 553826, at *4 (N.D. Ga. Feb. 7, 2011), the court

Carlton & Harris claims the District Court erred in not "end[ing] the analysis" once it determined that the Fax "offers a good"—in the form of the *PDR* eBook—at "no cost." (App. Br. at 18.) And that it was also error for the District Court to have "imported" a "'selling' requirement into the rule" via its discussion of the word "promote." (*Id.*) Carlton & Harris is again mistaken.

First, the word "promote" appears in the 2006 Order and is not defined therein; it was thus proper for the District Court to examine this term and consider whether the Fax falls within the purview of the FCC's ruling. Section I.B., *supra*. The District Court's recognition of a prerequisite "commercial aim"—what Carlton & Harris refers to as a "'selling' requirement"—was well-supported and reasoned.

Second, the District Court's analysis goes hand-in-glove with the Sixth Circuit's reason for why *it* rejected Carlton & Harris's counsel's similar argument:

> The term 'advertisement' unambiguously contains commercial components: To be an ad, the fax must promote goods or services that are for sale, and the sender must have profit as an aim. The record uniformly shows that these faxes lack those commercial aspects: They did not solicit business for a commercially available product or service. So they are not 'advertisements' under the Act.

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ruled the 2006 Order 'does not create a wholesale ban on free seminars, but instead only on ones which promote goods and services[.]"). Moreover, PDR Network's Reply further explained how the *Dang* court actually went one step further to hold that "[f]or the FCC to then find, *per se*, that all free seminars violated the statute—*without concern for whether the seminar promoted the commercial availability of goods and services*—would exceed that agency's mandate, and this [c]ourt would not be bound by that regulation." (A83-84) (citing *id.* at *10-11; emphasis added).

. . . .

> Sandusky's proposed definition of 'advertisement' sweeps much too broadly. The company says that anything that 'makes known' the quality or availability of a good or service is an ad. Notice what's missing? It's the concept that an ad (at least an ad under the Act) is *commercial* in nature. The word 'commercial' is in the Act's definition, and the concept is part of the common understanding of what constitutes an ad[.] So 'commercial' must play a role—*some* role. But Sandusky reads it out of the statute. We don't. The jury must be able to reasonably conclude that Medco sent the faxes 'from the point of view of profit,' to promote the availability or quality of something available to be bought or sold. Based on these faxes and this record, it cannot do so here.

Sandusky, 788 F.3d at 223-24 (citations omitted; emphasis in original). As the District Court acknowledged when it "harmonize[d]" the 2006 Order and TCPA:

> The TCPA unequivocally defines 'unsolicited advertisement' as commercial in nature. The plain meaning of 'promote' likewise has a commercial aim. *To read the FCC interpretation in any other way would read 'commercial' out of the TCPA's definition of 'unsolicited advertisement'—a clear abdication of elementary statutory construction*.

(A134) (emphasis added).[12] Other sections of the 2006 Order further undermine Carlton & Harris's misreading of the scope of the TCPA. *See, e.g.,* 2006 Order at

[12] Other courts have similarly found that the terms "advertisement" and "commercial availability" unambiguously relate to something being "offered for sale." *See Green v. Anthony Clark Int'l Ins. Brokers, Ltd.*, 2010 U.S. Dist. LEXIS 8744, at *14 (N.D. Ill. Feb. 1, 2010) ("A person of ordinary intelligence knows that an 'advertisement,' as used in the TCPA, is an announcement of something offered for sale and that 'advertising' is the act of announcing something for sale. The phrase 'commercial availability . . . of any property, goods, or services' is also easily understood by a person of ordinary intelligence as describing a property, good, or service that is available for sale or other commercial arrangement.").

3810 ¶ 43 ("[W]e agree . . . that messages that are not commercial in nature . . . do not constitute 'unsolicited advertisements' and are therefore not covered by the facsimile advertising prohibition. We clarify that messages that do not promote a commercial product or service . . . are not unsolicited advertisements under the TCPA."). In other words, the product offered for free must otherwise be "commercially available" such that the fax promotes an increase in sales. Here, the *PDR* eBook is *not* offered for sale (as a free magazine subscription or catalog may be).

Moreover, Carlton & Harris's argument that the District Court reached an "erroneous conclusion" because it "omitted the words 'such as' from the FCC ruling" does not change the result. (App. Br. at 19.) Indeed, the portion of the 2006 Order Carlton & Harris cites refers to "*such* messages" and "*such* free goods and services." (App. Br. at 17-18; emphasis added). These phrases follow the FCC's explanation that offers of "free" publications or seminars often serve as a "pretext," or are "part of an overall marketing campaign to sell property, goods, or services." (2006 Order at 3814 ¶ 52.) Carlton & Harris's interpretation essentially gives no meaning to the term "such"—instead reading the FCC's explanation as referring to *all* offers of free goods or services as constituting "advertisements."

This reading of the 2006 Order should be rejected—if for no other reason than because it violates the canons of statutory construction.[13]

Carlton & Harris then makes essentially the same argument by equating "such messages" with "faxes promoting free goods or services," and then again by arguing "such messages" are "often a pretext or part of an overall marketing campaign[.]" (App. Br. at 20.) But the operative text of the 2006 Order reveals that the term "pretext" refers to the free *seminar*—not the fax communication—and that "such messages" refers to "the *products* promoted within the [free] publication"—not the fax offering the free publication. (2006 Order at 3814 ¶ 52; *see also id.* ¶ 53 ("By contrast, facsimile communications that contain only information . . . would not be prohibited by the TCPA rules.")).

Nor did the District Court read into the 2006 Order a notion that a fax is an advertisement only if it attempts to increase sales "of some *other* good or service that is *not* free." (App. Br. at 17) (first emphasis added). Instead, the District Court reasonably concluded that, per the FCC's guidance, faxes that offer free goods or services must aim, *through those same goods and services*, to garner acceptance or attempt to increase sales of such goods or services. (A134.) Here, there was no intent to later sell the *PDR* eBook. Simply stated, the District Court

[13] As both the District Court (A134), and the U.S. Supreme Court have observed, statutes should not be construed as to make words superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Yet that is exactly what Carlton & Harris would have this Court do here.

did not import an improper selling requirement into the "free-goods-or-services rule" of the FCC; rather, it harmonized the word "promote" with the TCPA.

Carlton & Harris next argues it was "reasonable for the FCC to impose a bright-line rule" for faxes promoting free goods and services that may be "stricter than the underlying statute." (App. Br. at 21.) But regardless of whether or not it would have been "reasonable," the FCC simply did *not* promulgate such a "rule" in the 2006 Order or elsewhere. Nor did it need to. As the District Court explained, the FCC's guidance makes clear that the "evil to be combatted" were faxes that are "overtly commercial in nature," or are a "pretext for a commercial transaction that will inevitably follow from the fax." (A135.) As courts have recognized, this required "commercial" aspect is fundamental to imposing TCPA liability. *Hinman v. M & M Rental Ctr., Inc.*, 596 F. Supp. 2d 1152, 1163 (N.D. Ill. 2009) ("While Congress's clear intent was to prohibit unsolicited advertising, it is equally clear that Congress intended non-commercial messages to fall outside the ban."). The FCC—with its use of the term "promote"—never sought to challenge this mandate.

In sum, the District Court properly applied the 2006 Order, and did not err in upholding the core concept of a "commercial aim" for faxes subject to the TCPA.

E. Because the District Court Concluded the Dispute Over Whether the TCPA is a Remedial Statute Was Rendered "Moot" by the Fax Not Being an Advertisement, this Issue is Not Ripe for Review and Would Not Have been Decided in Carlton & Harris's Favor.

Carlton & Harris concedes the 2006 Order can be interpreted as *not* containing a "*per se*" rule for faxes discussing free goods and services—as the District Court observed. (App. Br. at 23-25) (A133-35.) Despite this concession, Carlton & Harris argues the 2006 Order is "ambiguous"—and goes on to assert that not only must this ambiguity be resolved in its favor, but that the District Court must be *reversed* because this Court recognizes the canon that "remedial statutes are to be constructed liberally." (*Id.*) But there is at least one obvious shortfall with this argument: the District Court never ruled on this issue, so it is not ripe for appellate review. And even if it had ruled, the District Court would not have agreed with Carlton & Harris based on persuasive circuit case law.

As discussed, because the District Court held the "[F]ax at issue is clearly not an advertisement," it wisely *avoided* ruling on whether, as a so-called "remedial" statute, the TCPA should be read "broadly or plainly"—finding this issue to be "moot." (A135.) As a result, this Court should similarly decline to review this "disputed and thorny issue" for the first time on appeal. (*Id.*) Indeed, appellate courts routinely "do not address and resolve issues when it is unnecessary to do so." *See United States v. Lamothe*, 586 F. App'x 550, 553 (11th Cir. 2014) (citing *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) (*per curiam*)

("Any decision on the merits of a moot . . . issue would be an impermissible advisory opinion.")); *see also Senior Transeastern Lenders v. Official Comm. of Unsecured Creditors (In re TOUSA, Inc.)*, 680 F.3d 1298, 1315 (11th Cir. 2012) ("[W]e will not address an issue that the district court has not yet considered").

But even if this Court were inclined to independently consider the issue, the Sixth Circuit's *Sandusky* decision is again instructive:

> And no, we won't 'broadly construe' the [the TCPA] in Sandusky's favor because it is a so-called 'remedial statute.' As applied today, that canon is 'either incomprehensible or superfluous.' Why interpret a statute's language broadly or narrowly (as opposed to just reasonably or fairly)? And since all statutes remedy what's seen as a problem, which statutes do not deserve a broad construction? In any event, insofar as our case law requires the canon's application at all, it doesn't require it when the statute's language is plain, as it is here. 'The broad remedial goals of the [] Act' (assuming there are such goals) 'are insufficient justification for interpreting a specific provision more broadly than its language and the statutory scheme reasonably permit.' The language and statutory scheme of this Act do not reasonably permit an interpretation that makes these faxes 'advertisements.' And so they're not.

788 F.3d at 224 (citations omitted). Whether analyzing the 2006 Order or the TCPA itself, the law should be read "no more broadly than its language and the statutory scheme reasonably permit." *Id.* This is especially true where, as here, the "statute's language is plain." *Id.* Indeed, as the District Court observed, "a plain reading of the TCPA and the FCC interpretation demonstrates that they intend to curtail the transmission of faxes *with a commercial aim*." (A135;

emphasis added). Because Carlton & Harris cannot overcome this fundamental legal prerequisite, its claim was properly dismissed without the District Court opining on whether the TCPA should be read "broadly or plainly."[14] This was the proper outcome. *See Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180, 182 (E.D. Pa. 1994) ("Plaintiff's redress, if any, lies elsewhere. No matter how sympathetic plaintiff's case may be, the court may not rewrite the [TCPA] to enjoin or penalize behavior not prohibited by Congress."); *see also P&S Printing LLC v. Tubelite, Inc.*, 2015 U.S. Dist. LEXIS 93060, at *6 (D. Conn. July 17, 2015) (it is "undisputed" that if the fax "was not an 'unsolicited advertisement,' [plaintiff] has failed to state a claim under the TCPA."); *Chesbro v. Best Buy Stores, LP*, 705 F.3d 913, 918 (9th Cir. 2012) (in divining proper interpretation of FCC rulings with respect to the TCPA, court "approach[ed] the problem with a measure of common sense"); *Freidman v. Massage Envy Franchising, LLC*, 2013

[14] Carlton & Harris's reliance on *Mey v. Monitronics Int'l, Inc.*, 959 F. Supp. 2d 927, 930 (N.D. W. Va. 2013), is misplaced. (App. Br. at 25.) While the *Mey* court did state the "TCPA is a remedial statute and thus entitled to a broad construction," it then backtracked to explain that "[a] remedial purpose will not justify reading a provision more broadly than its language and the statutory scheme reasonably permit." *Id.* (citations and internal quotations omitted). Carlton & Harris conveniently left out the rest of the court's language. *Mey* also involved "voice telephone calls" under the TCPA, not fax advertisements. Further, in discussing the specific phrase "on behalf of," *Mey* noted the Sixth and Seventh Circuits had both concluded the phrase was "ambiguous." (citing *Charvat v. EchoStar Satellite LLC*, 630 F.3d 459, 466 (6th Cir. 2010); *In re StarNet, Inc.*, 355 F.3d 634, 639 (7th Cir. 2004)). Here, the Sixth Circuit in *Sandusky*, 788 F.3d at 223-24, held the term "advertisement" was decidedly "unambiguous"—thus further distinguishing *Mey*.

U.S. Dist. LEXIS 84250, at *12 (S.D. Cal. June 13, 2013) (noting "Ninth Circuit uses a 'common sense' approach to TCPA claims").

Carlton & Harris's subsequent request that this Court construe the term "advertisement" using the "second-broadest" interpretation of the 2006 Order should also be rejected. (App. Br. at 25.) Carlton & Harris would have this Court *create* a burden-shifting scheme that forces all TCPA defendants to "rebut" a plaintiff's unfounded allegation a fax promoting a free publication is "presume[d]" to be a "pretext" or part of an "overall marketing campaign." Such an obligation does not exist in the law. Carlton & Harris is unable to cite a single TCPA case applying the 2006 Order in this novel fashion. Rather, the cited cases observe how free seminars are "often" a pretext to market products/services, or "may" be an unsolicited advertisement. (*Id.* at 26-27.) These cases did not just "presume" a free-seminar fax *was* a pretext or part of an overall marketing scheme (requiring a defendant to "rebut" this allegation) unless some *other fact* lead to that outcome, or a plausible allegation existed. Here, a pretext was not "plausible." (A132, A135.)

Moreover, PDR Network provided the District Court with numerous examples of cases throughout the country dismissing TCPA fax cases based solely on the content of the fax itself—prior to summary judgment and/or the commencement of discovery. (A80 n.1.) Carlton & Harris's transparent attempt to dismiss this slew of authority as "irrelevant" or "inapposite" because they did not

involve "free goods or services" is erroneous—as they stand for the equally-important proposition that "where the sender of an unsolicited fax had nothing to sell, even if offering a good or service, the fax was not an advertisement." (A131.)

Carlton & Harris's other tired arguments regarding *Boehringer* and *Janssen* can also be dismissed out-of-hand. (App. Br. at 27-28.) *Boehringer*'s status as being "on appeal" does not diminish its relevant holding that *plaintiffs*—not defendants—must show "the fax has a commercial pretext" under the TCPA. (A83) (citing *Lapique v. Dist. Ct.*, 8 F.2d 869, 870 (9th Cir. 1925), *cert. denied*, 271 U.S. 689 (1926) ("In our opinion, the decree of the District Court must stand, unless reversed by appeal to this court, as must the rulings upon the several motions[.]")). So too is *Janssen*'s subsequent history unhelpful. There, the court noted an "assumption underlying [its] previous Opinion [dismissing the case based on a fax discussing the drug Levaquin as informational, and not an advertisement,] was that a reclassification had occurred and that new information was being shared with prescribing physicians." (A86-87) (citing *Physicians Healthsource v. Janssen Pharm., Inc.*, 2015 U.S. Dist. LEXIS 79712 (D.N.J. June 19, 2015)). Upon reconsideration, the court became concerned that this "may not be accurate." *Id.*

Here, Carlton & Harris has not and cannot point to any inaccuracy with respect to the nature or content of the Fax to imply a potentially faulty assumption necessitating leave to amend. In fact, Carlton & Harris *already* tried (and failed) to

manufacture such a "pretext" where none exists by referring the District Court to the *2015* "PDR Pharmacy Discount Card"—which PDR Network explained was *also* provided free of charge to physicians, and which does not result in any revenue to PDR Network. (A87; A94-96). The District Court implicitly determined such a fishing expedition for a "pretext" was no bar to dismissal. And thus found that no amendment—even if sought[15]—could cure said deficiencies.

Finally, Carlton & Harris argues the "products promoted within" the *PDR* are "commercially available." (App. Br. at 30.) But, critically, PDR Network does *not* manufacture the products listed in the *PDR*. Nor are said products "promoted" therein—meaning they are intended to encourage sales *to PDR Network*. On the contrary, they are merely listed for informational purposes to physicians. And as the District Court correctly observed, even if PDR Network "accrues some commercial benefit from distribution of the reference book," Carlton & Harris had failed to allege anything beyond mere "speculative or ancillary gains." (A132.)

In sum, this Court need not even address whether the TCPA is a "remedial statute," and, if so, whether it should be read broadly or plainly. But if it were to undertake such an analysis, guidance from the Sixth Circuit instructs that a "reasonable" approach is the proper one. It is not "reasonable" to impose either a

[15] There are no allegations regarding the PDR Pharmacy Discount Card in Carlton & Harris's pleadings, and Carlton & Harris is not permitted to amend its Complaint via its Opposition. (A9-23.) Regardless, Carlton & Harris never even moved to amend, for which leave of court would have been required. (A88-89.)

bright-line rule *or* a rebuttable presumption that *all* faxes promoting a free good or service are "advertisements," as Carlton & Harris suggests. Finding such an interpretation is "too broad and cannot be borne by the TCPA or the FCC interpretation," (A134-35), the District Court properly dismissed the Complaint.

CONCLUSION

The underlying lawsuit is one of many similar putative class actions seeking to dramatically expand liability under the TCPA in a manner Congress never intended. While the precise allegations vary from suit to suit, the core problem remains the same: stretching the plain meaning and purpose of the TCPA to target non-advertisement, informational communications—not the spam, not the intrusive marketing, and not the invasion of privacy the statute was designed to curtail.

As the District Court observed, the Fax is not an "advertisement" subject to the TCPA as a matter of law. For these reasons, PDR Network respectfully submits that this Court should affirm the District Court's judgment.

WAIVER OF ORAL ARGUMENT

Appellees PDR Network believes that this case presents a straightforward application of basic principles of statutory and regulatory construction to undisputed facts. All of the issues raised by Carlton & Harris on appeal are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. For instance, there is no need to answer

questions regarding the Hobbs Act's jurisdictional limitations with respect to final FCC orders because the Hobbs Act does not apply and/or was not violated by Chief Judge Chambers's opinion below. For this reason, PDR Network submits that oral argument is unnecessary. To the extent this Court sets the case for oral argument, however, PDR Network reserves its right to present argument.

Date: January 20, 2017

Respectfully submitted,

BLANK ROME LLP

By: *s/ Jeffrey N. Rosenthal*
Jeffrey N. Rosenthal
Rosenthal-j@blankrome.com
One Logan Square, 130 N. 18th St.
Philadelphia, PA 190103
Telephone: 215.569.5553
Facsimile: 215.832.5553

Ana Tagvoryan
ATagvoryan@BlankRome.com
2029 Century Park East, 6th Floor
Los Angeles, CA 90067
Telephone: 424.239.3400
Facsimile: 424.239.3434

NELSON MULLINS RILEY & SCARBOROUGH LLP
Marc E. Williams
Marc.Williams@nelsonmullins.com
949 Third Ave., Suite 200
Huntington, WV 25701
Telephone: 304.526.3501
Facsimile: 304.526.3541

Robert L. Massie
Bob.Massie@nelsonmullins.com
949 Third Ave., Suite 200
Huntington, WV 25701
Telephone: 304.526.3502
Facsimile: 304.526.3542

Attorneys for Defendants-Appellees

PDR NETWORK, LLC; PDR DISTRIBUTION, LLC; AND PDR EQUITY, LLC

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Briefing Orders issued before 12/01/2016

No. 16-2185 **Caption:** Carlton & Harris Chiropractic, Inc. v. PDR Network LLC

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(s) Jeffrey N. Rosenthal

Attorney for Appellees

Dated: 1/20/17

CERTIFICATE OF SERVICE

I certify that on January 20, 2017, the foregoing **Response Brief of Defendants/Appellees PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC**, was served on all parties or their counsel of record through the CM/ECF System.

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s/ Jeffrey N. Rosenthal
Jeffrey N. Rosenthal
BLANK ROME LLP
Rosenthal-j@blankrome.com
One Logan Square, 130 N. 18th St.
Philadelphia, PA 190103
Telephone: 215.569.5553
Facsimile: 215.832.5553