IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

CARLTON & HARRIS CHIROPRACTIC, INC., a West Virginia corporation, individually and as the representative of a class of similarly-situated persons,

Plaintiff,

v. **Civil Action No. 3:15-CV-14887**

CLASS ACTION

PDR NETWORK, LLC, PDR DISTRIBUTION, LLC, PDR EQUITY, LLC and JOHN DOES 1-10,

Defendants.

DEFENDANTS PDR NETWORK, LLC, PDR DISTRIBUTION, LLC, AND PDR EQUITY, LLC'S REPLY IN SUPPORT OF MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

COME NOW, Defendants PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC (collectively, "PDR Network"), by and through their undersigned counsel, hereby submit this Reply in support of their Motion to Dismiss pursuant to Rule 12(b)(6) (the "Motion") with respect to Plaintiff Carlton & Harris Chiropractic, Inc.'s ("Plaintiff") Class Action Complaint. Such a Reply is necessary to correct the legal and factual errors in Plaintiff's Response (the "Response").

INTRODUCTION

Stripped of its veneer, Plaintiff's Response fails to rebut the central premise of PDR Network's Motion—*i.e.*, that the single fax at issue is not an "advertisement" under the Junk Fax Prevention Act ("JFPA") as a matter of law because neither the Fax nor the ***free*** 2014 *PDR*

eBook mentioned therein advertises the "commercial availability" of any goods or services Plaintiff can "buy" or "purchase" from PDR Network. Indeed, none of the drugs whose labels are contained within the *PDR* eBook drug information reference guide are sold by PDR Network, and PDR Network does not sell any other goods or services to physicians like Plaintiff. Based solely on the content of the fax itself, various federal courts throughout the country have dismissed similar JFPA claims for this very reason prior to summary judgment and/or the commencement of discovery.[1]

Desperate to avoid the same result here, Plaintiff mischaracterizes PDR Network's dispositive arguments for dismissal. For example, PDR Network does not ask the Court to ignore the FCC's ruling; to the contrary, PDR Network asks the Court to apply the ruling in harmony with the TCPA as well as the canons of statutory construction. The Hobbs Act has no place here. Plaintiff then concocts a self-serving theory surrounding purported "presumptions" with respect to communications discussing "free goods or services." Specifically, Plaintiff claims a 2006 ruling by the FCC states that all faxes offering "free goods and services" are "presumed" to be "advertisements." This is not the law; there is no such presumption. Otherwise, the burden of proving the elements of the TCPA would shift impermissibly to defendants. Rather, even a cursory review of the FCC's actual ruling indicates that the agency was simply illustrating how, ***in some instances***, a "free" seminar or publication ***may*** be a "pretext" to advertise commercial products and services, or is "part of an overall marketing

[1] *See Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 2015 U.S. Dist. LEXIS 3029, at *6-7 (D. Conn. Jan. 12, 2015) (granting motion to dismiss); *P&S Printing LLC v. Tubelite, Inc.*, 2015 U.S. Dist. LEXIS 93060, at *12 (D. Conn. July 17, 2015) (same); *Physicians Healthsource, Inc. v. Multiplan Servs.*, 2013 U.S. Dist. LEXIS 133397, at *4-5 (D. Mass. Sept. 18, 2013) (same); *Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180, 181 (E.D. Pa. 1994) (same); *Phillips Randolph Ent., LLC v. Adler-Weiner Research Chicago, Inc.*, 526 F. Supp. 2d 851, 853 (N.D. Ill. 2007) (cited by Plaintiff, and granting motion to dismiss); *N.B. Indus. v. Wells Fargo & Co.*, 465 Fed. Appx. 642, 643 (9th Cir. 2012) (affirming district court's grant of motion to dismiss).

campaign." But Plaintiff cannot support any claim the Fax was a pretext to sell other goods or services, or was part of an overall marketing campaign.

Once Plaintiff's foundational "presumption" argument is exposed for what it truly is—a failed theory, previously rejected by multiple courts—its entire Response comes crashing down.

A. Faxes Offering Free Goods And Services Are Not Presumptively "Advertisements."

Plaintiff's Response is riddled with overt misstatements as to PDR Network's arguments. First, PDR Network is not asking Court to ignore the 2006 Order, (Resp. at 5), or suggesting that it should decline to "adopt" FCC interpretations on the basis they are "unreasonable." (*Id.*) Instead, PDR Network simply implores this Court to approach the FCC's rulings (and the JFPA itself) with a measure of "common sense" by giving them a "reasonable interpretation"—as was done by various courts applying this same statutory scheme. (*See* Mot. at 10) (citing *Boehringer*, 2015 U.S. Dist. LEXIS 3029, at *6-7 (citations omitted)). This is not a controversial proposition. *See, e.g., Chesbro v. Best Buy Stores, L.P.*, 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 U.S. Dist. LEXIS 84250, at *12 (S.D. Cal. June 13, 2013) (observing that the "Ninth Circuit uses a 'common sense' approach to TCPA claims"). And it has been followed by several federal courts. *See Holmes v. Back Doctors, Ltd.*, 2009 U.S. Dist. LEXIS 97592, at *8 (S.D. Ill. Oct. 21, 2009) (citing *United States v. Mead Corp.*, 533 U.S. 218, 229-31 (2001); *Bais Yaakov of Spring Valley v. Alloy, Inc.*, 936 F. Supp. 2d 272, 282 (S.D.N.Y. 2013)); *see also Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218, 224 (6th Cir. 2015). Accordingly, Plaintiff's prolix discussion of the Hobbs Act, as applied to this case, is nothing more than a red-herring. (*See* Resp. at 3-5.)

Second, the FCC never stated in the 2006 Order—or elsewhere—that all faxes offering a "free publication" are "presumed to describe the 'quality of any property, goods, or services' and [are] 'advertisement[s],' even if the free publication[s] [themselves are] not 'commercially available.'" (Resp. at 6.) For one, there is no "as a matter of law" language anywhere in the 2006 Order. *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). And the language provided indicates the FCC was merely describing "instances" where seemingly "free" advertisements are "often" part of an "overall marketing campaign," or that the products promoted therein are "often" "commercially available." *Id.* This is not the case here, however.

Rather than accept Plaintiff's draconian interpretation, the 2006 FCC Order can reasonably be read to mean "free" publications are "advertisements" ***only when*** they are part of an "overall marketing campaign" to sell "property, goods or services," such as those promoted within the publication itself. Only then could such a "presumption" logically apply. Otherwise, an automatic presumption that ***all*** free publications are "advertisements" would improperly shift the burden of proving the elements of the JFPA—including that a particular fax was an "advertisement"—onto defendants to prove that they were not. *See* 47 U.S.C. § 227(b)(l)(C), (a)(5). Clearly the FCC did not intend such a striking reversal.

As a result, Plaintiff's so-called "conclusion" that a fax offering a "free" publication is an advertisement "as a matter of law"—even if the free publication itself is not "commercially available"—is plainly wrong. None of the cases cited by Plaintiff supports this proposition. In fact, courts as recently as last year have reached the exact ***opposite*** conclusion. For example,

Plaintiff fails to rebut the significance of *Boehringer*[2]—a case it acknowledges PDR Network "rel[ies] on heavily" in the Motion. (Resp. at 10.) Indeed, Plaintiff ***concedes*** how *Boehringer* rejected the very "presumption" regarding free seminar faxes Plaintiff proposes here, instead requiring the plaintiff in that case be able to "show that the fax has a commercial pretext." (*Id.*)

Left with no other option, Plaintiff tries to diminish *Boehringer* by implying that because the district court's opinion was appealed to the Second Circuit this somehow undercuts its impact here. (*See* Resp. at 10, 18 n.7.) Plaintiff is wrong. Just because an appeal was taken is ***not*** a valid basis to disregard persuasive authority from an unreserved district court opinion. *See 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[.]"). *Boehringer* thus remains good law, and is instructive.

In any event, the district court in *Boehringer* got it right; it did not "eschew[]" the FCC's language. (Resp. at 10.) Rather, the court merely interpreted the 2006 Order in a "reasonable" way so as to avoid harshly categorizing "all faxes promoting free seminars as unsolicited advertisements." 2015 U.S. Dist. LEXIS 3029, at *9-10. Indeed, the court held this was the ***only*** reading that "conforms with both the statutory text . . . and the FCC's own interpretation." *Id.*

Nor is *Boehringer* the only case to reject Plaintiff's theory. Notably, Plaintiff ***concedes*** how courts have held "the 2006 [FCC] Order 'does not create a wholesale ban on free seminars, but instead only on ones which promote goods and services.'" (*See* Resp. at 18) (citing *Phillip Long Dang, D.C., P.C. v. XLHealth Corp.*, 2013 U.S. Dist. LEXIS 133397 (N.D. Ga. Feb. 7,

[2] After conceding that the court in *Boehringer*, 2015 U.S. Dist. LEXIS 3029, at *16, granted "a motion to dismiss on a free-seminar fax," Plaintiff nevertheless attempts to imply that this is a rare occurrence, or that this Court must await "summary judgment following discovery" to make such a ruling. (Resp. at 10.) This is incorrect; courts routinely grant such motions to dismiss prior to discovery. *See* footnote 1, *supra*.

2011)). But the *Dang* opinion goes further than Plaintiff lets on. Specifically, the court held 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 Court would not be bound by that regulation." 2013 U.S. Dist. LEXIS 133397, at *10-11 (emphasis added). In *Dang*, a fax from a preferred provider organization to a non-participating chiropractor was held not to be an advertisement because the fax did not promote the benefits of becoming a member of the PPO network, nor did it purport to sell insurance to the recipient. *Id.* at *11-12. As a result, the fax was "not pretext for a commercial enterprise." *Id.* at *12. Yet Plaintiff tries to dismiss *Dang* because the case was decided at summary judgment, and the speaker "merely explained the defendant's billing practices." (Resp. at 18.) But the true takeaway from *Dang*—*i.e.*, that because the fax did not "promote the goods and services," it was also not a "pretext for a commercial enterprise"—cannot be so easily ignored. (*See* Mot. at 7-10.)

B. Plaintiff is Not Entitled to A Stricter Reading of the JFPA or the FCC's Interpretations.

As discussed, Plaintiff's proposed *per se* "advertisement" rule should be rejected. The FCC did not impose a blanket rule—and nothing suggests that it did. *Boehringer*, 2015 U.S. Dist. LEXIS 3029, at *9-10; *Dang*, 2013 U.S. Dist. LEXIS 133397, at *10-11. Indeed, Plaintiff goes even ***further*** out on a limb to suggest that the 2006 Order was "prophylactic" (and stricter than the underlying statute) because faxes promoting free goods and services are prone to abuse. (*See* Resp. at 9.) The reality, however, is Plaintiff's claim that remedial statutes should be construed liberally has no place in this case. (*Id.* at 13.) For one, the JFPA is not a "remedial" statute—as it does not allow for attorneys' fees. Second, there is no ambiguity concerning the FCC's 2006 Order.

Notably, *Sandusky*—a case with which Plaintiff's counsel is intimately familiar, as it also represented the plaintiff there—disposed of this exact argument. After conceding the Fourth Circuit has not considered the issue, Plaintiff boldly claims that this Court should "construe the term 'advertisement' ***and*** the FCC's interpretations of that term broadly in favor of consumers and against Defendants." (Resp. at 13.) As support, Plaintiff cites *Mey v. Monitronics Int'l, Inc.*, 959 F. Supp. 2d 927, 930 (N.D. W. Va. 2013), a case "involving voice telephone calls" under the TCPA—***not*** fax advertisements under the JFPA. (*Id.*) But even setting that aside, the Sixth Circuit in *Sandusky*—which ***did*** deal with fax advertisements under the JFPA—resoundingly ***refused*** to "'broadly construe' the Act in [plaintiff's] favor because it is a so-called 'remedial statute.'" *Id.* at 224. Rather, the Sixth Circuit opined that 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***." *Id.* (internal quotations and citation omitted; emphasis added). *Sandusky* thus vitiates the interpretation posed by Plaintiff.

There is simply no maxim that "remedial statutes" should automatically be interpreted to provide a windfall to plaintiffs. As the court in *Lutz* observed, this Court must apply the TCPA ***as written***, including imposing limitations on liability for the sending of non-advertisement faxes:

> 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. Plaintiff's complaint will be dismissed for failure to state a claim upon which relief can be granted.

859 F. Supp. at 182; *see also Sandusky*, 788 F.3d at 224 ("[t]he language and statutory scheme of this Act do not reasonably permit an interpretation that makes these faxes 'advertisements.' And so they're not.") *Id.* Here, as in *Sandusky* and *Lutz*, the Fax is not an advertisement because it

does not discuss the "commercially availability" of goods or services available for sale by PDR Network, which, again, does not sell any goods or services whatsoever to physicians like Plaintiff.

C. Plaintiff Cannot Overcome PDR Network's Authority Supporting Dismissal.

Without this alleged "presumption" in place, Plaintiff has no grounds left to distinguish PDR Network's remaining authority. For instance, Plaintiff claims PDR Network's reliance on *Physicians Healthsource v. Janssen Pharm., Inc.*, 2013 U.S. Dist. LEXIS 15952 (D.N.J. Feb. 6, 2013) ("*Janssen I*")—a similar case in which a JFPA claim was dismissed on the basis the fax was not an advertisement—is "inapposite" because the fax did not "offer 'free goods and services.'" (Resp. at 17.) As stated, whether a fax offers "free goods and services" is not itself a valid basis to distinguish cases that undercut Plaintiff's contentions. Rather, *Janssen* remains pertinent authority in that the district court granted dismissal where, as here, there was "***nothing on the face of the faxes*** which would suggest the presence of a commercial pretext." *See Janssen I*, 2013 U.S. Dist. LEXIS 15952, at *20 (emphasis added); *see also P&S Printing LLC*, 2015 U.S. Dist. LEXIS 93060, at *12 (dismissing claim where fax did not "tend to propose a commercial transaction and does not appear ***on its face*** to have been sent based on a commercial pretext.") (emphasis added).

Nor does *Janssen*'s subsequent history support Plaintiff's transparent request for "discovery regarding the circumstances under which the faxes were sent" so it can attempt to contrive of a "pretext" where none exists. (Resp. at 18.) Indeed, Plaintiff notes that "the [*Janssen*] court subsequently granted leave to amend the complaint to allege the 'informational' veneer of the fax was a 'pretext.'" (*Id.* (citing *Physicians Healthsource, Inc. v. Janssen Pharm., Inc.*, 2013 U.S. Dist. LEXIS 79557 (D.N.J. June 6, 2013) ("*Janssen II*"); *Physicians Healthsource v. Janssen Pharm., Inc.*, 2015 U.S. Dist. LEXIS 79712 (D.N.J. June 19, 2015)

("*Janssen III*")). But the ***reason*** such an amendment was allowed there is conspicuously absent here. In *Janssen II*, the court noted that an "assumption underlying [its] previous Opinion was that a reclassification had occurred and that new information was being shared with prescribing physicians." *Id.* Upon reconsideration, the court was concerned this "may not be accurate." *Id.* at *12. Specifically, the plaintiff had raised a new issue regarding "the timing of the tier change for the drug Levaquin," which led the court to evaluate whether this altered the "seemingly informational message of the fax." *Id.* at *13 n.3. It was on this express basis that the court granted leave to amend. *Id.* at *13.[3]

Here, Plaintiff has not and cannot point to any inaccuracy with respect to the nature of the Fax to imply a potentially faulty assumption necessitating leave to amend. Plaintiff claims the 2014 *PDR* eBook could theoretically be part of an "overall marketing campaign" because one of its attorneys went online to a ***different*** webpage than that listed on the Fax, to download a ***different*** version of the *PDR* eBook. (*See* Resp. at 10-11.) For his efforts, Plaintiff's attorney then claims the "first page of that publication"—*i.e.*, the ***2015*** *PDR* eBook—contains a "full-page advertisement for the 'PDR Pharmacy Discount Card.'" (*See id.* at 11.) But as explained in the attached Affidavit, Plaintiff is grasping at straws to make its failed theory work because PDR Network does not sell the PDR Pharmacy Discount Card to physicians—this too is a free service.[4]

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[3] Plaintiff also fails to mention how Judge Wolfson in *Janssen III* noted that "I will not revisit my analysis in my earlier opinion regarding the content of the Faxes"—meaning that, based on the face of the fax itself, the court held it remained a non-advertisement as a matter of law. 2015 U.S. Dist. LEXIS 79712, at *10.

[4] Ironically, while claiming this Court should not consider "a one-page printout from the PDR website (Doc. 18-1)" on a motion to dismiss, (*see* Resp. at 15)—even though PDR Network sought to have it judicially noticed, and provided supporting authority that such a review was, in fact, permissible (Mot. at 7 n.5)—Plaintiff seemingly had no qualms with introducing a Declaration with hearsay statements concerning the alleged contents of the *PDR* eBook in a year unrelated to the Fax. (Dkt. No. 28-1.) Because Plaintiff has not properly put this evidence before the Court, it should be ignored. Regardless, to

D. Plaintiff Should Not Be Allowed To Amend Its Complaint Via The Response.

As demonstrated herein, because the Motion exposes a "basic deficiency" in the Complaint, the appropriate response is for this Court to immediately dismiss Plaintiff's claims now—*i.e.*, "at the point of minimum expenditure of time and money by the parties and the Court." *See, e.g., Earle v. City of Huntington*, 2015 U.S. Dist. LEXIS 127444, at *3-4 (S.D. W. Va. Sept. 23, 2015) (Chambers, J.) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007)).

Critically, the reason Plaintiff did not initially allege that the 2014 *PDR* eBook was a "pretext," or was part of an "overall marketing campaign," is because it clearly is not. For one, the content of the Fax does not mention any other commercial promotion. Rather, the Fax merely reminds recipients to "reserve" as many ***free*** copy(ies) of the 2014 *PDR* eBook as they desire. (Mot. at 7-10.) Plaintiff is thus being disingenuous when it states it can show "pretext" because the products promoted within the *PDR* are "commercially available," as neither the Fax nor the *PDR* eBook offers any products or services Plaintiff can "buy" or "purchase" from PDR Network. Nor could any new allegation change the fact that none of the drugs discussed within the *PDR* are sold by PDR Network to any physicians, including Plaintiff. (*Id*. at 3-4, 14.)

Notably, this was more than sufficient for the Sixth Circuit to affirm the dismissal of a similar JFPA claim in *Sandusky* after Judge Carr admonished Plaintiff's counsel for filing such "frivolous ligation" on behalf of "medical providers like plaintiff." 788 F.3d at 222; *see also Sandusky*, 2014 U.S. Dist. LEXIS 166777, at *5 n.1 ("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

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correct these erroneous and misleading contentions, PDR Network has supplied its own Affidavit regarding the true nature of the "PDR Pharmacy Discount Card" to demonstrate how it has no bearing on the current dispute. A true and correct copy of this Affidavit is attached hereto as Exhibit "1."

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).[5]

Accordingly, this Court should not permit Plaintiff to posthumously amend its Complaint via its misguided Response.[6] However, should this Court be inclined to convert the instant Motion into a motion for summary judgment (which it need not do), any resultant discovery should be expressly limited to the issues raised in the Motion, and all other discovery—including class discovery—should be stayed pending the resolution of this dispositive issue.

CONCLUSION

For the reasons stated herein and in Defendants PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC's Motion to Dismiss, (Dkt. No. 19), the Motion should be granted, and Plaintiff's Class Action Complaint should be dismissed, with prejudice.

[5] In order to illustrate the similarities between the subject Fax and the faxes at issue in *Sandusky*, which were found to not be advertisements, a copy of the faxes in *Sandusky* have been attached as Exhibit "2."

[6] As a final matter, Plaintiff has not properly sought leave to amend its Complaint. Nor is Plaintiff simply permitted to amend without leave of Court—as more than twenty-one (21) days have passed since PDR Network filed its operative Motion on February 5, 2016. (Dkt. No. 19). *See* FED. R. CIV. P. 15(a)(1)(B).

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