APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0247p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MATTHEW N. FULTON, D.D.S., P.C., individually and as the representative of a class of similarly situated persons, *Plaintiff-Appellant,* *v.* ENCLARITY, INC.; LEXISNEXIS RISK SOLUTIONS, INC.; LEXISNEXIS RISK SOLUTIONS GA, INC.; LEXISNEXIS RISK SOLUTIONS FL, INC.; JOHN DOES 1–12, *Defendants-Appellees.*	No. 17-1380

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:16-cv-13777—Denise Page Hood,
Chief District Judge.

Decided and Filed: November 2, 2018

Before: GIBBONS, WHITE, and STRANCH,
Circuit Judges

COUNSEL

ON BRIEF: Phillip A. Bock, David M. Oppenheim, BOCK, HATCH, LEWIS & OPPENHEIM, LLC, Chicago, Illinois, for Appellant. Tiffany Cheung, Benjamin F. Patterson, MORRISON & FOERSTER LLP, San Francisco, California, Joseph R. Palmore, Bryan J. Leitch, MORRISON & FOERSTER LLP, Washington, D.C., for Appellees.

STRANCH, J., delivered the opinion of the court in which WHITE, J., joined. GIBBONS, J. (pg. 11), delivered a separate dissenting opinion.

OPINION

JANE B. STRANCH, Circuit Judge. Plaintiff Matthew N. Fulton, DDS, P.C., a dental practice in Linden, Michigan, brings this suit on behalf of itself and others similarly situated. Fulton alleges that it received a fax from Defendants in September 2016 that was an unsolicited advertisement under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, but that failed to include the requisite opt-out provision. Arguing that the fax did not qualify as an advertisement under the TCPA, Defendants moved to dismiss the complaint. The district court granted the motion. Applying the standards governing dismissal of a complaint for failure to state a claim, we find that Fulton has plausibly alleged that the fax was an unsolicited advertisement insofar as it alleged that the fax served as a pretext to

send Fulton additional marketing materials. Accordingly, we **REVERSE** and **REMAND** this case for additional proceedings consistent with this opinion.

I. BACKGROUND

This lawsuit stems from a fax Fulton's dental practice received on September 7, 2016.[1] The fax provided in pertinent part:

> Re: Fax Number Verification for Delivery of Patient PHI (Internal ID: 34290748)
>
> The purpose of this Fax Verification Request is to help preserve the privacy and security of your patients' Protected Health Information ("PHI"), as defined by the Health Insurance Portability and Accountability Act ("HIPAA"). LexisNexis is seeking your cooperation to verify or update your information. We validate and update the fax in our system so our clients can use them for clinical summaries, prescription renewals, and other sensitive communications. Verifying the practice address, phone number[,] and your secure fax number(s) for this location will minimize the potential privacy risks that could arise from information sent to an unsecured location. As part of our effort to assure that the [sic] transmission of PHI, it is vital to verify the information for Dr. Matthew Norman Fulton, DDS

[1] This action was filed by Fulton's eponymous dental practice, not by Fulton as an individual.

> is accurate. This information will be verified once each year.

(R. 1-2 at PageID 32) The fax then provided space for recipients either to validate the contact information listed in the fax's heading or to update their contact information. It also had a signature line and room for comments. The fax ended by providing a phone number and by incorporating a website of Frequently Asked Questions (FAQs) with the inclusion of the following Universal Resource Locator (URL): http://www.enclarity.com/providerfaqs.php. The fax did not contain an opt-out notice.

Fulton attached the LexisNexis Provider FAQs as an exhibit to the complaint. The FAQs indicate that the "system" referred to in the fax is the Master Provider Referential Database. Defendants explain that providers' contact information will be licensed to their "customer base," which is comprised of "health insurance plans, preferred provider organizations, pharmacy network companies, pharmacy benefit managers, property and casualty insurance carriers, retail pharmacies, government entities, as well as life sciences companies (pharmaceutical and medical device manufacturers)." (R. 1-3 at PageID 35) According to the FAQs, Defendants "have compiled the largest, most accurate database of medical provider business and professional demographic data in the United States." (*Id.* at PageID 36) The FAQs also indicate what will happen to providers' verified contact information:

> Our customers use provider information in a variety of ways, including communicating patient prescription data, validating provider identity for claims payments, reimbursing providers for medical bills, updating provider directories, renewing prescriptions, researching health care practitioners to invite them to become part of a provider network, sending important notifications, such as product recalls, and other uses.

(*Id.* at PageID 37) Validating one's contact information, the FAQs state, will "help to drive more business to you." (*Id.* at PageID 40)

Other portions of Defendants' website promote the advantages of using Defendants' "ProviderLookup" product, which is their "Web-based, real-time provider information search service" that uses the information in the Master Provider Referential Database. (R. 1-4 at PageID 43) In other words, the contact information gathered by faxes like the one Fulton received is used to build the Master Provider Referential Database, which Defendants sell to their customer base through ProviderLookup.

Fulton filed a two-count class action complaint in October 2016. Count I asserted that the fax violated the TCPA, and Count II asserted a state law conversion claim. Fulton named as Defendants Enclarity, Inc., LexisNexis Risk Solutions, Inc., LexisNexis Risk Solutions GA, Inc., LexisNexis Risk Solutions FL, Inc., and John Does 1–12 (collectively referred to herein as Defendants). The complaint included the fax itself, as

well as printouts from Defendants' referenced website, including the FAQs, a provider lookup form, Defendants' privacy policy, and Defendants' terms and conditions. Fulton alleged that the fax was a pretext to obtain both "participation in Defendants' proprietary database" and "consent . . . to send additional marketing faxes to recipients." (R. 1 at PageID 5) Fulton alleged that both "Defendants and third parties will use the information to contact the recipients regarding products, services, competitions and promotions." (*Id.* at PageID 13)

Fulton also contended that the fax was "a pretext to increase awareness and use of Defendants' proprietary database service and increase traffic to Defendants' website." (*Id*.) According to Fulton, "Defendants consolidate healthcare provider contact information into their proprietary Master Provider Referential Database, a commercially available product or service that Defendants sell or lease to their subscribers and licensees." (*Id.* at PageID 8) The complaint set forth class allegations, including that Defendants sent the same fax that Fulton received to at least 39 other similarly situated individuals.

Defendants responded to the complaint by filing a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). They argued that the fax did not meet the TCPA's definition of an advertisement and therefore was not required to have an opt-out provision. The district court agreed. It found that "[n]othing mentioned in the fax is available to be bought or sold," and concluded that the fax

"lack[ed] the commercial components inherent in ads." *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, No. 16-13777, 2017 WL 783499, at *3 (E.D. Mich. Mar. 1, 2017) (citations and internal quotation marks omitted). The court also found that even if Defendants might "profit from verifying Plaintiff's contact information to third parties, there is no allegation or argument that Defendants are advertising—or will advertise—any goods or services to Plaintiff." *Id.* The district court disregarded the attachments to the complaint, on the basis that this court's decision in *Sandusky Wellness Center., LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218, 221 (6th Cir. 2015), constrained its analysis to the four corners of the fax. *Id.* After dismissing Fulton's TCPA claim with prejudice, the district court determined that the state law conversion claim belonged in state court and dismissed it without prejudice. *Id.* at *5.

II. DISCUSSION

A Standard of Review

We review de novo the grant of a motion to dismiss under Rule 12(b)(6). *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012). Courts must "construe the complaint in the light most favorable to the plaintiff[] [and] accept all well-pleaded factual allegations as true." *Hill v. Snyder*, 878 F.3d 193, 203 (6th Cir. 2017). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its

face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. The *Sandusky* Decision

We begin by clarifying this court's decision in *Sandusky*, 788 F.3d 218. The district court's opinion is founded upon its interpretation of *Sandusky*, which it understood as compelling its holding that the TCPA claim fails unless the commercial nature of the fax is evident from the face of the fax. The district court also adopted the Defendants' argument that *Sandusky* requires a fax to "propose a commercial exchange between the sender and the recipient" to trigger TCPA coverage. These holdings reflect an improper understanding of *Sandusky* and impose undue restrictions on TCPA claims.

Sandusky, a summary judgment decision, addressed two faxes sent to a chiropractor by Medco Health Solutions, a benefit manager that acted "as an intermediary between health plan sponsors (often employers) and prescription drug companies." 788 F.3d at 220. The faxes contained notifications of certain drugs included in Medco's "formulary," the list of drugs available to some of the chiropractor's patients through healthcare plans offered by one of Medco's sponsor-clients. *Id.* The chiropractor brought suit under the

TCPA, alleging that the faxes were unsolicited advertisements. Applying summary judgment standards, we concluded that "[t]he undisputed facts in the record . . . show that each [fax] merely informed [the plaintiff] which drugs its patients might prefer, irrespective of Medco's financial considerations." *Id.* at 221. After examining the record, *Sandusky* found that the faxes were "not sent with hopes to make a profit, directly or indirectly, from [the plaintiff] or others similarly situated" and no "record evidence show[ed] that Medco hope[d] to attract clients or customers by sending the faxes." *Id.* at 222. Instead, we determined that those faxes had a "purely informational" and "non-pecuniary" purpose and were sent as part of "a paid service already rendered not to [the plaintiff] but to Medco's clients." *Id.* Summarizing the applicable TCPA test, *Sandusky* held that to qualify as an unsolicited advertisement under the TCPA, a fax "must promote goods or services that are for sale, and the sender must have profit as an aim." *Id.* at 223–24. Because the faxes Medco sent did not meet this definition, the TCPA was not implicated.

The plaintiff in *Sandusky* also asked that the faxes be interpreted in the context of Medco's previous business, a mail-order pharmacy, and Medco's history of noncompliance with state laws when operating that pharmacy. *Id.* at 225. We declined to factor in this "extraneous and speculative down-the-stream evidence" for the purpose of determining whether "Medco might financially benefit from these faxes several locks down the stream of commerce." *Id. Sandusky* stands for the

proposition that in this situation, an "ancillary, remote, and hypothetical economic benefit later on does not convert a noncommercial, informational communication into a commercial solicitation." *Id.* at 225. But nowhere does *Sandusky* confine a court's consideration of TCPA claims to the face of the challenged fax. To the contrary, *Sandusky* repeatedly surveyed "the record evidence" for proof of a financial benefit to Medco and, in so doing, went beyond the faces of the two faxes. *Id.*; *see also id.* at 222 (reviewing the record evidence). *Sandusky* also acknowledged that a fax could be an advertisement without overtly offering a product or service for sale, such as offers for free seminars that turn out to be pretext for a later solicitation. *Id.* at 225 (citing Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006)). Finding a fax to be pretext for a subsequent advertising opportunity would require looking to what came after the fax. A court could not possibly resolve a claim that a fax was pretextual if it confined its evaluation to the fax itself.

Sandusky thus does not entail the two requirements imposed by the district court: that the fax must propose a direct commercial transaction between the sender and the recipient and that courts are constrained to examining only the face of the fax. In contravention of such requirements, *Sandusky* recognizes that the fax "need not be an explicit sale offer" and that the "best ads" are sometimes not "so overt," and then concludes that TCPA coverage is accorded where the

fax is "an indirect commercial solicitation, or pretext for" such a solicitation." *Id.* at 225. This understanding of the TCPA is buttressed by the text of the statute itself, which likewise lacks the requirements imposed by the district court. *See* 47 U.S.C. § 227.

This clarification of *Sandusky* governs our analysis. The district court misconstrued *Sandusky* when it disregarded the exhibits attached to Fulton's complaint. The exhibits are part of the record, and we may consider them when evaluating Fulton's TCPA claim. And we may do so without converting Defendants' motion to dismiss into one for summary judgment. *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335–36 (6th Cir. 2007) (explaining that courts may consider documents "referred to in the pleadings" and "integral to the claims . . . without converting a motion to dismiss into one for summary judgment"). Under this circuit's precedent, "documents attached to the pleadings become part of the pleadings and may be considered on a motion to dismiss." *Id.* (citing Fed. R. Civ. P. 10(c)). Indeed, Defendants do not challenge the authenticity of Fulton's exhibits, having conceded that their contents may be accepted as facts. (R. 18 at PageID 126–27) Our review of Defendants' motion to dismiss properly includes the exhibits Fulton attached to the complaint.

C. Unsolicited Faxes Under the TCPA

The TCPA prohibits sending a fax that is an "unsolicited advertisement" unless, among other

requirements, the fax has a satisfactory opt-out notice. *See* 47 U.S.C. § 227(b)(1)(C).[2] The TCPA creates a private right of action for recipients of unsolicited advertisements, which provides for statutory damages of $500 per violation and for injunctive relief to prevent future violations. *Id.* § 227(b)(3). The parties do not dispute that the fax Defendants sent to Fulton was unsolicited and lacked an opt-out provision. The issue is whether the fax qualified as an advertisement within the meaning of the TCPA.

Whether a fax constitutes an unsolicited advertisement is a question of law. *See Sandusky*, 788 F.3d at 221. The TCPA defines an unsolicited advertisement as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5). As we acknowledged in *Sandusky*, the TCPA covers faxes that serve as "pretext for a commercial solicitation." 788 F.3d at 225. The Federal Communications Commission (FCC) has promulgated a rule defining unsolicited advertisements and explaining pretextual faxes:

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[2] In 1991, Congress passed and President George H.W. Bush signed the Telephone Consumer Protection Act. *See* Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified as amended at 47 U.S.C. § 227). In 2005, Congress passed and President George W. Bush signed the Junk Fax Prevention Act, which amended the 1991 Act. *See* Pub. L. No. 109-21, 119 Stat. 359 (2005) (codified at 47 U.S.C. § 227). For simplicity, we refer to the combined amended legislation as the TCPA.

> The Commission concludes that facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition. In many instances, "free" seminars serve as a pretext to advertise commercial products and services. Similarly, "free" publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the fascimile [sic] recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the "quality of any property, goods, or services." Therefore, facsimile communications regarding such free goods and services, if not purely "transactional," would require the sender to obtain the recipient's permission beforehand, in the absence of an [established business relationship].

71 Fed. Reg. at 25973. According to Fulton's complaint, providing verified contact information paves the way for Defendants' customers to "send additional marketing faxes to recipients." (R. 1 at PageID 5) This allegation finds some support in the FAQs, which confirm that Defendants' customers use the system to "invite [providers] to become part of a provider network" and "send[ ] important notifications," among "other uses." (R. 1-3 at PageID 37) The potential for future advertising is also implied by Defendants' assertion that

verifying contact information will "drive more business to" providers. (*Id.* at PageID 40) Defendants have not contested this allegation.

The Second Circuit recently considered whether a TCPA plaintiff who claimed that a fax was pretextual had satisfied the Rule 12(b)(6) pleading standard. *See Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92 (2d Cir. 2017). In *Boehringer*, a medical office received a fax inviting a doctor to a free dinner meeting to discuss certain health conditions, which was sponsored by the defendant, a pharmaceutical company. *Id.* at 93. The defendant had created a drug to treat those health conditions but could not legally market its treatment until it had received approval from the Federal Drug Administration. *Id.* at 94. The district court reviewed the FCC's rule, acknowledged that it tracks the language of the statute, then dismissed the complaint on the basis that plaintiffs were required "to show that the fax has a commercial pretext—i.e., 'that the defendant advertised, or planned to advertise, its products or services at the seminar.'" *Id.* at 95 (quoting *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, No. 3:14-CV-405, 2015 WL 144728, at * 3 (D. Conn. Jan. 12, 2015)). The Second Circuit reversed, emphasizing that at the motion to dismiss phase, a plaintiff need only plausibly allege a commercial pretext, not actually show it, and noting that a requirement of more specificity would "impede the purposes of the TCPA." *Id.* at 95–96. Even though the free dinner meeting would not feature discussion of the defendant's drug, the Second Circuit

found sufficient the allegation that the defendant sent a fax on a subject that "relate[d] to [its] products or services," which led to "a plausible conclusion that the fax had the commercial purpose of promoting those products or services." *Id.* at 95.

The decision in *Boehringer* centered on the alleged "commercial nexus" between the free dinner offered in the fax and the defendant's "business, i.e., its property, products, or services." *Id.* at 96. According to Fulton, that same nexus exists here: The fax solicits information to verify its system of provider information, which Defendants make commercially available to other health care organizations, who may subject Fulton to future unsolicited advertising.

Taking the complaint's allegations as true and drawing all inferences in Fulton's favor, as we must at the motion to dismiss stage, we find that Fulton has adequately alleged that the fax Fulton received was an unsolicited advertisement because it served as a commercial pretext for future advertising opportunities. Fulton has therefore stated a plausible TCPA claim under the fax-as-pretext theory. Because this conclusion is sufficient to warrant reversing and remanding the case, we need not reach Fulton's alternative theory that the fax was an advertisement because Defendants sent it with a profit motive.

D. Fulton's State Law Claim

After dismissing Fulton's TCPA claim, the district court dismissed Fulton's state law conversion claim.

The district court concluded that "[b]ecause no federal law claim remains before the Court, and because this case is in its preliminary stages, the court concludes that the litigation of Plaintiff's state law claim would most appropriately be conducted in state court." *Fulton*, 2017 WL 783499, at *5. Because Fulton stated a TCPA claim over which the district court had original jurisdiction, Fulton's conversion claim also remains before the district court.

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the judgment in favor of Defendants and **REMAND** Fulton's TCPA and conversion claims for further proceedings consistent with this opinion.

DISSENT

JULIA SMITH GIBBONS, Circuit Judge, dissenting. I agree with the majority's analysis of *Sandusky*'s import and its assessment of the district court's errors. But I disagree with its legal conclusion that the fax at issue was an unsolicited advertisement under TCPA.

The majority holds that Fulton has plausibly alleged that the fax was an unsolicited advertisement, because "it alleged that the fax served as a pretext to send Fulton additional marketing materials." (Majority at 2.)

However, I respectfully disagree on this point. In its complaint, Fulton alleges that if it updated its contact information as requested by the fax, it would then have agreed to Enclarity's privacy policy, which in turn would have allowed Enclarity to send promotional material for other products and services. But, as Enclarity refutes, this argument is highly speculative. There are no alleged facts suggesting that Enclarity would have used, or even intended to use, this fax as a stepping stone to future solicitations of Fulton. Moreover, as Enclarity points out, Fulton is able to manage any of its communications preferences and opt out of receiving any future faxes from Enclarity. A conclusory allegation stating that Enclarity sent this request for information as a pretext to advertise is not sufficient to survive a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (stating that "a complaint must contain sufficient factual matter," and that it will not suffice "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement'" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007))).

Thus, I believe the fax was not an advertisement under the TCPA because its primary purpose was to improve the service and not to solicit business or sales from, or through, Fulton. Accordingly, we should affirm the district court's decision based on alternative reasoning.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MATTHEW N. FULTON, D.D.S., P.C., individually and as the representative of a class of similarly-situated persons,

Plaintiff,

v.

ENCLARITY, INC., LEXISNEXIS RISK SOLUTIONS INC., LEXISNEXIS RISK SOLUTIONS GA INC., LEXISNEXIS RISK SOLUTIONS FL INC., and JOHN DOES 1-12,

Defendants. /

Case No. 16-13777
HON. DENISE PAGE HOOD

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS [#18]

(Filed Mar. 1, 2017)

I. INTRODUCTION

On October 24, 2016, Plaintiff filed this action, alleging that Defendants violated the Telephone Consumer Protection Act, 47 U.S.C. § 227, and the accompanying regulations prescribed by the Federal Communications Commission ("FCC"), 47 C.F.R. § 64.1200 (collectively, the "TCPA"), when Defendants

sent Plaintiff an unsolicited facsimile (the "Fax"). On December 16, 2016, the identified Defendants filed a Motion to Dismiss [Dkt. No. 18] pursuant to Federal Rule of Civil Procedure 12(b)(6). The Motion is fully briefed, and on February 22, 2017, the Court held a hearing on Defendants' Motion. For the reasons that follow, the Court grants Defendants' Motion.

II. BACKGROUND

Defendants sent the Fax to Plaintiff, a dental practice in Linden, Michigan. A copy of the Fax is set forth below.

LexisNexis®

Provider: Dr. Matthew Norman Fulton, DDS
Address: 401 N Bridge St, Linden, MI 48451
Practice Phone: (810) 735-7815
Secure Fax: (810) 735-1905

Re: Fax Number Verification for Delivery of Patient PHI (Internal ID:34290748)

The purpose of this Fax Verification Request is to help preserve the privacy and security of your patients' Protected Health Information ("PHI"), as defined by the Health Insurance Portability and Accountability Act ("HIPAA"). LexisNexis is seeking your cooperation to verify or update your information. We validate and update the fax in our system so our clients can use them for clinical summaries, prescription renewals, and other sensitive communications. Verifying the practice address, phone number and your secure fax number (s) for this location will minimize the potential privacy risks that could arise from information sent to an unsecured location. As part of our effort to assure that the transmission of PHI, it is vital to verify the information for Dr. Matthew Norman Fulton, DDS is accurate. This information will be verified once each year.

☐ YES - ALL of the printed information shown above is CORRECT and secure for communications containing PHI.

☐ NO - Updated info Below / Not at this location / Deceased (please circle).

Complete if changed:
Practice Address:
Practice Phone:
Provider Email:
Secure Fax:

SIGN & FAX BACK TO (866) 699-0422

I confirm that the above information is true and correct and safe for communication containing PHI to the best of my knowledge.

Name:
Title(if other than Provider):
Email(if other than Provider):

Signature:

Date:

Comments:

Prior to receiving the Fax, Plaintiff did not have a relationship with any of the Defendants.

Plaintiff filed a two-count Complaint. In Count I, Plaintiff alleges Defendants violated the TCPA. In Count II, Plaintiff alleges a state law conversion claim.

III. APPLICABLE LAW & ANALYSIS

A. Standard of Review

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the plaintiff's complaint. Accepting all factual allegations as true, the court will review the complaint in the light most favorable to the plaintiff. *Eidson v. Tennessee Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007). As a general rule, to survive a motion to dismiss, the complaint must state sufficient "facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint must demonstrate more than a sheer possibility that the defendant's conduct was unlawful. *Id.* at 556. Claims comprised of "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id*. at 555. Rather, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. Analysis Regarding TCPA Claim

Defendants argue that Plaintiff's TCPA does not apply TCPA does not apply [sic] to the Fax because it is not an advertiment [sic]. Whether a fax constitutes an advertisement under the TCPA is a question of law. *Sandusky Wellness Ctr., LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218, 221 (6th Cir. 2015) ("So were these faxes advertisements? It is a question of law our court has never addressed").

The TCPA forbids the use of "any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). An "unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise."[1] 47 U.S.C. § 227(a)(5); 47 C.F.R. § 64.1200(f)(1) The FCC defines "advertisement" as follows:

> We conclude that facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition. In many instances, "free" seminars serve as a pretext to advertise commercial products and services. Similarly, "free" publications are

[1] It is undisputed that Plaintiff did not solicit, nor did Plaintiff consent to Defendants sending Plaintiff, the Fax.

> often part of an overall marketing campaign to sell property, goods, or services.

In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 Junk Fax Prevention Act of 2005, 21 F.C.C.R. 3787, 3814 (April 6, 2016). The *Sandusky* court stated,

> Advertising is "[t]he action of drawing the public's attention to something to promote its sale," Black's Law Dictionary 65 (10th ed. 2014), or "the action of calling something (as a commodity for sale, a service offered or desired) to the attention of the public," Webster's Third New International Dictionary 31 (1986). So material that advertises something promotes it to the public as *for sale.* For another thing, we know what's advertised—here, the "availability or quality of any property, goods, or services"—must be *commercial* in nature. Commercial means "of, in, or relating to commerce"; "from the point of view of profit: having profit as the primary aim." Webster's Third at 456. It's something that relates to "buying and selling." Black's Law Dictionary 270 (6th ed. 1990). So to be an ad, the fax must promote goods or services to be bought or sold, and it should have profit as an aim.

Sandusky, 788 F.3d at 221-22 (emphasis in original).

Defendants argue that the plain language of the Fax establishes that it is not an advertisement because it does not "advertis[e] the commercial availability or quality of any property, goods, or services." 47 U.S.C. § 227(a)(5). Defendants assert that the Fax seeks only

to verify or validate contact information related to Plaintiff, namely the location, practice, and contract [sic] information of Plaintiff (and health care providers who receive like faxes). Defendants maintain that the Fax does not offer any property, goods, or services to Plaintiff, and that Defendants did not and will not sell anything to Plaintiff.

Plaintiff argues that the Fax is an advertisement because "Defendants could include [Plaintiff's contact information] in their proprietary database to sell to their subscribers, and so Defendants and their subscribers could advertise and sell their goods to Plaintiff." [Dkt. No. 23, PgID 162] Plaintiff suggests the Fax "was sent to Plaintiff with the goal of ultimately making profit—*i.e.*, the fax was a pretext to obtain consent from Plaintiff so Defendants could later market additional goods and services to Plaintiff, and direct and increase traffic to Defendants' website." *Id.* Plaintiff contends that "the [F]ax was an indirect commercial solicitation or a pretext for a commercial solicitation sent as an overall marketing campaign for the purpose of making a profit." *Id.* Plaintiff cites a case from the Middle District of Florida to support its position. *See Comprehensive Health Care Systems of the Palm Beaches, Inc. v. M3 USA Corp.*, No. 16-cv-80967, 2017 WL 108029, at *3 (S.D. Fla. Jan. 11, 2017). Based on the facts of that case (which are distinguishable from this case, as noted below), the court stated that the "ultimate question of whether Defendant's survey fax is merely a pretext for advertising its good or

services is a question of fact not suitable for a disposition as a matter of law upon a motion to dismiss." *Id.*

Plaintiff also states that "[t]he commercial and for-profit reason for the transmission of the [F]ax is revealed on the Lexis Page." [Dkt. No. 23, PgID 161]. Plaintiff argues that the "Lexis Page" contains advertising, whether it be through the "Terms & Conditions," the "Privacy Policy," or the revelation that contact information will be shared with many other entities on the "Lexis Page." [Dkt. No. 23, PgID 163]

The Court finds that the Fax is not actionable under 47 U.S.C. 227(b)(1)(C), as a matter of law. The content of the Fax, on its face, does not constitute an advertisement. *Sandusky*, 788 F.3d at 222 (emphasis added) ("So to be an ad, the fax must promote goods or services to be bought or sold.") Nothing mentioned in the Fax is "available to be bought or sold." *NB. Indus., Inc. v. Wells Fargo & Co.*, 465 F. App'x 640, 642 (9th Cir. 2012). The Fax does not offer—or even mention—any product, good, or service to Plaintiff, nor does it not [sic] offer or solicit any product, good, or service for sale. *See*, *e.g.*, *Golan v. Veritas Entm't, LLC*, 788 F.3d 814, 819-20 (8th Cir. 2015) ("the content of the [communications] controlled whether they were 'advertisements,'" and "[b]ecause the messages did not mention property, goods, or services, we agree that they were not advertisements"). For that reason, the Fax "lack[s] the commercial components inherent in ads." *Sandusky*, 788 F.3d at 223; *Vinny's Landscaping, Inc. v. United Auto Credit Corp.*, 2016 WL 4801276, at *8 (E.D. Mich. Sept.

14, 2016) ("there is no dispute that a fax must advertise something" to fall within the TCPA).

Plaintiff's key arguments are inconsistent with the law in the Sixth Circuit. First, pursuant to *Sandusky, "*[t]he possibility that future economic benefits will flow from a non-commercial fax, ancillary to the content of the fax, is legally irrelevant to determining whether the fax is an ad." *Sandusky*, 788 F.3d at 225 (rejecting the argument that "[n]o matter what faxes look like on their face, a jury might conclude that, taken together, they have a positive effect on [defendant's] business."). Even if Defendants were to profit from verifying Plaintiff's contact information and selling it to third parties, there is no allegation or argument that Defendants are advertising—or will advertise—any goods or services to Plaintiff.

Second, even if the "Lexis Page" contains the advertising language the Plaintiff alleges, the "Lexis Page" is not a part of the Fax, nor is any of the information Plaintiff notes on the face of the Fax. The "Lexis Page" is a webpage that one can access upon entering the domain name ("www.enclarity.com/providerfaqs.php") set forth at the bottom of the Fax. The *Sandusky* court expressly rejected the plaintiff's argument that it "should look outside of the four corners of the faxes to see that they're ads." *Sandusky*, 788 F.3d at 224.[2]

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[2] As the Court is bound by *Sandusky*, Plaintiff's citation to a case from the Southern District of Florida does not aid its position. *See Eden Day Spa, Inc. v. Morris D. Loskove d/b/a Loskove Insurance Agency*, No. 14-81340-civ, 2015 WL 1649967 at *3 (S.D. Fla. April 14, 2015) (analysis to determine if fax is part of an

See also Smith v. Blue Shield of CA, No. 16-100108, 2017 U.S. Dist. LEXIS 5620, at *29 (C.D. Cal. Jan. 13, 2017) (the "mere fact that parts of Blue Shield's website contain the capabilility of allowing consumers to engage in commerce does not transform any message including [the web address of] its homepage into telemarketing or advertising").

Finally, numerous cases cited by Plaintiff do not support its position because, unlike this case, the cited cases recognize that some product, good, or service has been offered to the recipient. *See*, *e.g.*, *Vinny's Landscaping, Inc.*, 2016 WL 4801276, at **1-3 (motion to dismiss denied as to fax titled "Introducing Our New Bankruptcy Program" as the "primary purpose [of the fax] could plausibly be construed as promoting the commercial availability of Defendants' new bankruptcy program"); *Herrick v. QLess, Inc.*, No. 15-cv-14092, 2016 WL 6902544, at *3 (E.D. Mich. Oct. 26, 2016) (motion to dismiss denied as to text message advertising free app); *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 493 (W.D. Mich. Jan. 12, 2015) (motion for summary judgment denied as to fax offering free steak dinner at a seminar because it constituted a "pretext to advertise"); *Bais Yaakov of Spring Valley v. Alloy, Inc.*, 936 F.Supp.2d 272, 282-83 (S.D.N.Y. 2013) (motion to dismiss denied as to fax offering free equipment and services); *North Suburban*

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overall marketing campaign will require inquiry beyond four corners of the complaint). The *Eden Day Spa* court also found that the fax at issue could be an advertisement "[o]n the face of the complaint," which is not the situation here.

Chiro. v. Merck & Co., No. 13-C-3113, 2013 WL 5170754, at **3-4 (N.D. Ill. Sept. 13, 2013) (motion to dismiss denied as to fax inviting recipients to medical education program); *G.M. Sign, Inc. v. MFG.com, Inc.*, No. 08 C 7106, 2009 WL 1137751, at **2-3 (N.D. Ill. Apr. 24, 2009) (motion to dismiss denied as to fax promoting free services).

This case is unlike *Comprehensive Health Care Systems of the Palm Beaches*, a case Plaintiff cited as persuasive authority at the hearing. In that case, there are two significant "facts" cited by the court that distinguish that case from this one: (a) "The faxes at issue direct a potential participant to [defendant's] survey weblink," and (b) "Defendant offers compensation for participation in online surveys and advertises the commercial availability of Defendant's online paid survey program, through which Defendant gathers market research and opinions from health professionals for its clients." *Comprehensive Health Care Systems of the Palm Beaches*, 2017 WL 108029, at *3 (emphasis added). Based on those "facts," which differ from this case, that court concluded that there was a question whether the defendant's survey fax was mere "pretext for advertising its [*i.e.*, the defendant's] goods or services." As noted above, nothing on the Fax (or even on Defendants' website) advertises for sale any good, products, or services of Defendants. In addition, as the Court is bound by *Sandusky*, Plaintiff's citation to this case from the Southern District of Florida does not aid its position, particularly as the Florida court relied on

documentation outside of the four corners of the fax. *Id.*

The facts of the instant case also differ significantly from *Drug Reform Coordination Network, Inc. v. Grey House Publishing, Inc.*, 106 F.Supp.3d 9 (D.D.C. 2015), another case Plaintiff noted at the hearing. In *Grey House Publishing*, the court noted that "the Fax offered a free listing [for plaintiff's business]" and defendant would "follow up . . . with subsequent email, fax, telephone communications, and other methods that solicit the purchase of Defendant's directories." *Id.* at 11-15 (emphasis added). In this case, Defendants did not offer anything for free and, more importantly, did not seek to sell any products, goods, or services to Plaintiff at any time.

The Court finds that no amendment could cure the deficiencies in the Complaint. Any amendment would be futile because an amendment would not change the content of the Fax, and the content of the Fax is insufficient to constitute an advertisement, as a matter of law. As any amendment would be futile, the Court dismisses Count I of Plaintiff's Complaint, with prejudice.

The Court notes that it understands Plaintiff's position—and agrees that it appears—that: (1) Defendants send recipients the Fax for the purpose of gathering contact information; (2) Defendants provide that contact information to third-parties (presumably at a profit); and (3) the third-parties then utilize the information collected by Defendants to attempt to sell

products, goods, and services to recipients of the Fax. Based on *Sandusky* and the language of the TCPA, however, the Court must conclude that Defendant does not violate the TCPA when sending the Fax to recipients because Congress did not include language in the TCPA to prohibit such conduct.

C. Dismissal of State Law Conversion Claim

It is undisputed that Plaintiff's conversion claim in Count II is rooted entirely in state law. Because no federal law claim remains before the Court, and because this case is in its preliminary stages, the Court concludes that the litigation of Plaintiff's state law claim would most appropriately be conducted in state court. For those reasons, the Court declines to retain jurisdiction over Count II of Plaintiff's Complaint. 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction"); *Carnegie-Mellon v. Cohill*, 484 U.S. 343 (1988). The Court dismisses Count II of Plaintiff's Complaint, without prejudice.

IV. CONCLUSION

For the reasons stated above,

IT IS ORDERED that: (1) Defendants' Motion to Dismiss [Dkt. No. 18] is **GRANTED**; (2) Count I of Plaintiff's Complaint is **DISMISSED WITH PREJUDICE**, (3) Count II of Plaintiff's Complaint is

DISMISSED WITHOUT PREJUDICE, and (4) Plaintiff's cause of action is **DISMISSED**. Judgment will be entered accordingly.

IT IS SO ORDERED.

S/Denise Page Hood
Denise Page Hood
Chief Judge, United States District Court

Dated: March 1, 2017

I hereby certify that a copy of the foregoing document was served upon counsel of record on March 1, 2017, by electronic and/or ordinary mail.

S/LaShawn R. Saulsberry
Case Manager

APPENDIX C

No. 17-1380

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MATTHEW N. FULTON, D.D.S., P.C., INDIVIDUALLY AND AS THE REPRESENTATIVE OF A CLASS OF SIMILARLY SITUATED PERSONS, Plaintiff-Appellant, v. EXCLARITY [sic], INC.; LEXISNEXIS RISK SOLUTIONS, INC.; LEXISNEXIS RISK SOLUTIONS GA, INC.; LEXISNEXIS RISK SOLUTIONS FL, INC.; JOHN DOES 1-12, Defendants-Appellees.	ORDER (Filed Dec. 27, 2018)

BEFORE: GIBBONS, WHITE and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Gibbons would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/ Deb S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D

Case No. 17-1380

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORDER

(Filed Jan. 16, 2019)

MATTHEW N. FULTON, DDS, PC, individually and as the representative of a class of similarly situated persons

Plaintiff - Appellant

v.

ENCLARITY, INC.; LEXIS NEXIS RISK SOLUTIONS, INC.; LEXIS NEXIS RISK SOLUTIONS GA, INC.; LEXIS NEXIS RISK SOLUTIONS FL, INC.; JOHN DOES, 1-12

Defendants - Appellees

BEFORE: GIBBONS, Circuit Judge; WHITE, Circuit Judge; STRANCH, Circuit Judge;

Upon consideration of motion to stay mandate,

It is **ORDERED** that the mandate be stayed to allow appellee time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the petition is

not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Issued: January 16, 2019 /s/ Deb S. Hunt

APPENDIX E

§ 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i) of this section, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).[1]

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[1] So in original. Second closing parenthesis probably should not appear.

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with

the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to

such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d) of this section;

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies

with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and

the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3

times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall—

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those

calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall—

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as

required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall—

(A) in developing procedures for gaining access to the database, consider the different. needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on

behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State—

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States—

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the

date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Prohibition on provision of inaccurate caller identification information

(1) In general

It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to

cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).

(2) Protection for blocking caller identification information

Nothing in this subsection may be construed to prevent or restrict any person from blocking the capability of any caller identification service to transmit caller identification information.

(3) Regulations

(A) In general

Not later than 6 months after December 22, 2010, the Commission shall prescribe regulations to implement this subsection.

(B) Content of regulations

(i) In general

The regulations required under subparagraph (A) shall include such exemptions from the prohibition under paragraph (1) as the Commission determines is appropriate.

(ii) Specific exemption for law enforcement agencies or court orders

The regulations required under subparagraph (A) shall exempt from the prohibition

under paragraph (1) transmissions in connection with—

(I) any authorized activity of a law enforcement agency; or

(II) a court order that specifically authorizes the use of caller identification manipulation.

(4) Report

Not later than 6 months after December 22, 2010, the Commission shall report to Congress whether additional legislation is necessary to prohibit the provision of inaccurate caller identification information in technologies that are successor or replacement technologies to telecommunications service or IP-enabled voice service.

(5) Penalties

(A) Civil forfeiture

(i) In general

Any person that is determined by the Commission, in accordance with paragraphs (3) and (4) of section 503(b) of this title, to have violated this subsection shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this paragraph shall be in addition to any other penalty provided for by this chapter. The amount of the forfeiture penalty determined under this paragraph shall not exceed $10,000 for each violation, or 3 times that amount for each day of a continuing violation, except that the

amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act.

(ii) Recovery

Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) of this title.

(iii) Procedure

No forfeiture liability shall be determined under clause (i) against any person unless such person receives the notice required by section 503(b)(3) of this title or section 503(b)(4) of this title.

(iv) 2-year statute of limitations

No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 2 years prior to the date of issuance of the required notice or notice of apparent liability.

(B) Criminal fine

Any person who willfully and knowingly violates this subsection shall upon conviction thereof be fined not more than $10,000 for each violation, or 3 times that amount for each day of a continuing violation, in lieu of the fine provided by section 501 of this title for such a violation. This subparagraph does not supersede the provisions of section 501 of this title relating to imprisonment or the imposition of a penalty of both fine and imprisonment.

(6) Enforcement by States

(A) In general

The chief legal officer of a State, or any other State officer authorized by law to bring actions on behalf of the residents of a State, may bring a civil action, as parens patriae, on behalf of the residents of that State in an appropriate district court of the United States to enforce this subsection or to impose the civil penalties for violation of this subsection, whenever the chief legal officer or other State officer has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of this subsection or a regulation under this subsection.

(B) Notice

The chief legal officer or other State officer shall serve written notice on the Commission of any civil action under subparagraph (A) prior to initiating such civil action. The notice shall include a copy of the complaint to be filed to initiate such civil action, except that if it is not feasible for the State to provide such prior notice, the State shall provide such notice immediately upon instituting such civil action.

(C) Authority to intervene

Upon receiving the notice required by subparagraph (B), the Commission shall have the right—

(i) to intervene in the action;

(ii) upon so intervening, to be heard on all matters arising therein; and

(iii) to file petitions for appeal.

(D) Construction

For purposes of bringing any civil action under subparagraph (A), nothing in this paragraph shall prevent the chief legal officer or other State officer from exercising the powers conferred on that officer by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(E) Venue; service of process

(i) Venue

An action brought under subparagraph (A) shall be brought in a district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28.

(ii) Service of process

In an action brought under subparagraph (A)—

(I) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(II) a person who participated in an alleged violation that is being

litigated in the civil action may be joined in the civil action without regard to the residence of the person.

(7) Effect on other laws

This subsection does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(8) Definitions

For purposes of this subsection:

(A) Caller identification information

The term "caller identification information" means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service.

(B) Caller identification service

The term "caller identification service" means any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service. Such term includes automatic number identification services.

(C) IP-enabled voice service

The term "IP-enabled voice service" has the meaning given that term by section 9.3 of the Commission's regulations (47 C.F.R. 9.3), as those regulations may be amended by the Commission from time to time.

(9) Limitation

Notwithstanding any other provision of this section, subsection (f) shall not apply to this subsection or to the regulations under this subsection.

(f) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(g) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of

Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(h) Junk fax enforcement report

The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include—

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)—

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)—

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery—

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the

number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.