APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-1393

FAMILY HEALTH PHYSICAL MEDICINE, LLC,
an Ohio limited liability company, individually
and as the representative of a class of
similarly-situated persons,

Plaintiff-Appellant,

v.

PULSE8, LLC, a Maryland limited liability company;
PULSE8, INC., a Maryland corporation,

Defendants-Appellees.

PUBLISHED

Appeal from the United States District Court
for the District of Maryland, at Baltimore.

Stephanie A. Gallagher, District Judge.
(No. 1:21-cv-02095-SAG)

Argued: May 10, 2024
Decided: June 21, 2024
Document No. 61

Before KING, AGEE, and HEYTENS, Circuit Judges.

Reversed and remanded by published opinion. Judge Heytens wrote the opinion, which Judge King

joined. Judge Agee wrote an opinion concurring in part and dissenting in part.

[* * * Counsel block omitted]

OPINION

TOBY HEYTENS, Circuit Judge:

With some exceptions not applicable here, a federal statute forbids using "any . . . device to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). The question before us is whether a complaint plausibly alleged that a fax which was sent by a company that sells a product containing medical coding technology and invited recipients to attend a free webinar where that sort of coding would be promoted was a covered advertisement. Concluding the answer is yes, we reverse and remand for further proceedings.

I.

Pulse8, LLC is a "Healthcare Analytics and Technology Company." JA 9.[1] The company sells a "platform" to "health-plans and at-risk providers" that Pulse8 says will help those providers "achieve the greatest financial impact in the ACA Commercial, Medicare Advantage, and Medicaid markets." *Id.* The

[1] The complaint also names as a defendant another entity we are told "no longer exists." Pulse8 Br. i n.1. Because the complaint alleges that both defendants were independently responsible for sending the relevant fax, any difference between the two is immaterial to this appeal.

"[p]latform includes," among other things, "Coding Technology." *Id.*

In 2020, Pulse8 sent Family Health Physical Medicine LLC a fax inviting it to attend a free webinar. The fax encouraged recipients to "Open your Mind to Behavioral Health Coding" and "Expand your knowledge by learning how to successfully document and code conditions that are due to substance abuse, major depression, schizophrenia, bipolar, and other mental health disorders." JA 20. The fax included a link to register at "https://pulse8.zoom.us" and directed questions to "providerengagement@pulse8.com." *Id.* It also offered recipients "a chance to win a $25 Amazon gift card" by "[c]omplet[ing] the webinar survey." *Id.*

Just over a year later, Family Health filed this suit. As relevant here, the complaint alleged the fax was an unsolicited advertisement and thus violated the federal Telephone Consumer Protection Act (TCPA). Pulse8 moved to dismiss for failure to state a claim, arguing the fax did not qualify as an advertisement under the TCPA because the webinar was free. The district court granted the motion.

We placed Family Health's appeal in abeyance pending this Court's resolution of a different appeal that also involved the proper interpretation of "unsolicited advertisement" in the TCPA. See *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC (PDR)*, 80 F.4th 466, 470 (4th Cir. 2023). After that case was decided, this one was returned to the argument calendar.

II.

Family Health's complaint pressed four theories for why Pulse8's fax satisfied the statutory definition of "unsolicited advertisement"—specifically, why the fax constituted "material advertising the commercial availability or quality of any property, goods, or services." 47 U.S.C. § 227(a)(5). The district court concluded each set of allegations failed as a matter of law. We review that decision "de novo, applying the same standards as the district court." *Pendleton v. Jividen*, 96 F.4th 652, 656 (4th Cir. 2024).

A.

As Family Health conceded at oral argument, *PDR* forecloses the complaint's first theory of liability. *PDR* holds that the TCPA's definition of "unsolicited advertisement" "does not include offers or solicitations with no commercial component or purpose" and that, as a result, merely "promot[ing] the quality of a free good or service" is not enough to make something an advertisement. 80 F.4th at 474–75 (quotation marks removed). For that reason, that the fax "ma[de] known" and "call[ed] public attention" to the free webinar did not, standing alone, make it an advertisement. Family Health Br. 8–9 (quotation marks removed).

B.

We reach a different conclusion about the complaint's second theory. The complaint also alleged that the fax was an advertisement because it promoted a webinar that "relate[d] to [Pulse8's] for-profit business"—selling software containing medical coding technology. JA 10; see also JA 7, 9. In other

words, the complaint alleged that the webinar was being used to market Pulse8's product. See *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011) ("In deciding whether a complaint survives a motion to dismiss, a court evaluates the complaint in its entirety[.]"). We conclude Family Health has plausibly alleged the fax was an advertisement under this theory.[2]

PDR makes clear that a fax need not "propose a specific commercial transaction on its face" to be covered by the TCPA. 80 F.4th at 476 (quotation marks removed). Instead, the most natural "understanding of the term advertise" means transmitting "information with a commercial nexus to the sender's business." 80 F.4th at 472–73 (quotation marks removed). To qualify as an "advertisement" under the TCPA, then, "there must be a commercial component" to the fax "or a commercial nexus" between the fax and "the sender's business—its property, products, or services." *Id.* at 474 (quotation marks removed).

Family Health plausibly alleged such a connection here. *PDR* explained that "[a]cceptance of a free good or service" can be "leveraged into an opportunity for a sales pitch," thereby giving the offer

---

[2] We disagree with Pulse8's suggestion that Family Health forfeited this argument by failing to develop it in its opening brief. Family Health argued that the "subject of the webinar . . . relate[d] to Pulse8's commercially available Coding Technology" and spent pages explaining why that relationship meant the fax should "be presumed to at least plausibly be an advertisement at the pleading stage." Family Health Br. 6, 21 (quotation marks removed). That is enough to preserve the issue for our review.

of a free good or service the requisite "commercial component." 80 F.4th at 474 (third quote), 478–79 (first and second quotes). Pulse8 thus misreads *PDR* as holding that a fax which offers something for free is commercial *only* if "there is a 'direct mechanism by which the sender will profit if the offer is accepted.'" Pulse8 Suppl. Br. 1. To the contrary, *PDR* identified "the fax at issue in" *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 847 F.3d 92 (2d Cir. 2017)—one that invited recipients to "a free dinner meeting" (*id.* at 93)—as the "prototypical . . . example" of one kind of covered advertisement. *PDR*, 80 F.4th at 478.

If *Boehringer* provides the prototypical example, this case falls comfortably within its rule. As in *Boehringer*, Family Health's complaint alleged that Pulse8 is "in the business," 847 F.3d at 97, of providing coding technology to be used by "providers" in managing their billing. JA 9. As in *Boehringer*, the complaint alleged that the webinar was about a "subject related to" Pulse8's "business," 847 F.3d at 93—"how to successfully document and code" certain health "conditions." JA 10. And, as in *Boehringer*, it is reasonable to draw the inference in Family Health's favor—as we must at this stage—that Pulse8 sent the fax "hop[ing] to persuade" recipients to use Pulse8's products. 847 F.3d at 97. For that reason, we conclude that Family Health sufficiently "alleged that [Pulse8's] fax advertised a free seminar relating to its business" (*id.*), which gives the fax "the commercial nexus necessary to qualify as [an] advertisement," *PDR*, 80 F.4th at 478 (quotation marks removed).

Echoing the district court, Pulse8 faults Family Health for failing to allege anything about what happened at the webinar that it declined to attend. But *Boehringer* addressed that argument too. Like the Second Circuit, we conclude that Family Health did not need to "plead specific facts alleging that specific products or services would be, or were, promoted at the free" webinar to survive a motion to dismiss for failure to state a claim. *Boehringer*, 847 F.3d at 96. Rather, it is reasonable to "infer[ ]" that a company that invites you to a free webinar on a "subject . . . relate[d] to [its] business" intends to promote its products during that event. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (first quote); *Boehringer*, 847 F.3d at 96 (second quote).

We also disagree with the suggestion that the complaint is deficient because it included no allegations about Pulse8's "overarching motive or purpose" in sending the fax. Oral Arg. 30:30–30:50. Unlike neighboring sections of the same statute, the TCPA's definition of "unsolicited advertisement" makes no "reference to the sender's purpose." *Ambassador Animal Hosp., Ltd. v. Elanco Animal Health Inc.*, 74 F.4th 829, 831 (7th Cir. 2023). That is why, as *PDR* explained, a sender's "profit motive alone" is not enough to give a fax "the requisite commercial character." 80 F.4th at 476. Instead, the inquiry turns on *objective* facts: the content of the fax and its "commercial nexus" with the sender's business. *Id.*

We recognize that the Seventh Circuit rejected a claim that looks something like the one before us, but we see no necessary conflict between that decision and

ours. In *Ambassador Animal Hospital, Ltd. v. Elanco Animal Health Inc.*, 74 F.4th 829 (7th Cir. 2023), the Seventh Circuit concluded that a fax sent by "an animal health products and services company" to "veterinarians" inviting them to "free dinner programs" about animal health conditions did "not indicate . . . to a reasonable recipient that" the sender "was promoting or selling some, good, service, or property." *Id.* at 830. But the test the Seventh Circuit announced in that case is consistent with the one this Court adopted in *PDR* and that we apply here: does "the fax itself . . . indicate—directly or indirectly—to a reasonable recipient that the sender is promoting or selling some good, service, or property"? *Id.* at 832. True, the Seventh Circuit concluded that the fax at issue in *Ambassador Animal Hospital* did not satisfy that test. See *id.* But the court acknowledged that "there could be situations in which a similar fax message would qualify as an indirect advertisement." *Id.* We think this is one such situation.

For its part, Pulse8 tries to walk a tightrope by arguing that *this* fax was not an advertisement while conceding that others resembling it would be advertisements. Imagine a fax from a car dealership whose text reads: "Come take a free test drive today." The text is laid over a photo of an open road on a sunny day, and the dealership's name and logo are at the bottom. There is no car in the image, no prices—nothing else at all. The dealership does not sell test drives, nor does it necessarily profit if the fax's recipient takes it up on the offer of a free test drive.

But all agree—including Pulse8—that this hypothetical fax would be a covered advertisement. As

Pulse8's counsel put it, "advertisements are clever," and any reasonable reader knows that the car dealership is hoping you come take the test drive so it can show you how great that new car is and get you to drive it home. Oral Arg. 19:20–19:25. That hypothetical fax, however, is a lot like the one Pulse8 sent. And although a fully developed record might show the webinar was not promoting Pulse8's products in any way, at this stage Family Health is entitled to the plausible inference that Pulse8—a company in the business of providing "Coding Technology"—was using a free webinar about "Behavioral Health Coding" to demonstrate just how useful its own coding technology can be. JA 9–10.

Undeterred, Pulse8 insists that this situation falls outside the TCPA because its fax did not, on its face, tell recipients that Pulse8 sells a product containing coding technology. But the same could be true of the hypothetical fax sent by the car dealership, and here, as in that example, we need not "blind[ ]" ourselves to the nature of Pulse8's business. *Boehringer*, 847 F.3d at 97. Indeed, doing so would depart from this Court's previous treatment of similar matters. In *PDR*, for example, the fax's "commercial character" stemmed from the fact that every time a recipient accepted an offer of a free e-book, the sender received money from a third party that placed advertisements in the book. 80 F.4th at 476–77. The Court never asked if that financial arrangement was mentioned in the fax itself (and it seems clear it was not). See *id.* at 470–71 (describing the fax). Instead, it was enough that the plaintiff—which seemingly had looked beyond the face of the fax to understand the nature of the sender's business—alleged in its

complaint that the sender "earned a commission." *Id.* at 472. So too here. That Family Health apparently went to Pulse8's website to understand how Pulse8 describes its own business in no way diminishes the fax's commercial character.

Finally, we reject Pulse8's late-breaking suggestion that we should adopt its preferred reading of the statute because considering the nature of a sender's business when deciding whether an unsolicited fax is a covered advertisement raises "grave First Amendment concerns." Pulse8 Suppl. Br. 4–5. As Pulse8 admits, the TCPA's exclusive focus on commercial speech means that the statute elicits fewer constitutional concerns than it would if it covered non-commercial speech as well, and identifying commercial speech always requires considering "the economic interests of the speaker." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). For that reason, considering *who* is sending a particular fax—a business that sells a product related to the subject of the ostensibly "free" service or a person or entity with no direct economic interests at stake—does not create First Amendment concerns. It helps avoid them.[3]

---

[3] At oral argument Pulse8 also suggested the fax was not an advertisement because it said the webinar was "AAPC CEU approved"—meaning it was approved as a continuing education course by a professional organization—and because Pulse8 only sells its technology to "risk-bearing entities," not doctor's offices. See Oral Arg. 20:40–21:00; 22:00–22:36. We will not consider "newly minted argument[s], made for the first time at oral argument." *United States v. Clay*, 627 F.3d 959, 966 n.2 (4th Cir. 2010). We also note these arguments do not explain why the fax

C.

The complaint's third theory of liability was that the fax was an "advertisement" because Family Health could not accept Pulse8's offer to attend the webinar without providing its contact information and consenting to receiving further promotional materials. We conclude these allegations also asserted a plausible theory for relief.

Much of what we have already said applies with equal force here. According to the complaint, "[a]cceptance of" the invitation to the free webinar was "leveraged into an opportunity for a sales pitch" in future promotional messages. *PDR*, 80 F.4th at 479. This familiar marketing tactic gave the fax the requisite "commercial nexus" to Pulse8's business to survive a motion to dismiss. *Id.* at 478.

This situation is different from *PDR*, where the plaintiff failed in making a similar argument. In *PDR*, the complaint alleged that a fax was a covered advertisement in part because the sender "would continue" sending "faxes about healthcare products" going forward. 80 F.4th at 472 (quotation marks removed). The Court concluded the complaint could not survive a motion to dismiss on such a theory because—according to the plaintiff's own allegations—the sender would keep sending faxes "*regardless of whether* [the plaintiff] accept[ed] the free eBook" being offered in the initial fax. *Id.* at 479 (emphasis added). In those circumstances, the Court explained, the initial fax had "nothing to do with" whether the

---

contains an email address devoted to *provider* engagement. JA 20.

plaintiff would receive future advertisements. *Id.* Here, by contrast, Family Health says that its acceptance of Pulse8's offer to attend the free webinar mentioned in the initial fax is the very thing that would trigger future advertising. For that reason—and unlike in *PDR*—Family Health's complaint asserted that acceptance of the "free offer" has everything "to do with the future sales promotions." *Id.*

Our decision on this point accords with one from the Sixth Circuit holding that similar allegations plausibly alleged a violation of the TCPA. In *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, 962 F.3d 882 (6th Cir. 2020), the plaintiff received a fax asking it to "validate" or "update" its "contact information" on a "database of medical provider business[es]." *Id.* at 885–86. The Sixth Circuit held the plaintiff had plausibly alleged the fax was a covered advertisement, and that court's reasoning was the same as ours: because the recipient's decision to provide its contact information would "pave[ ] the way" to it being sent "additional marketing materials." *Id.* at 885 (second quote), 890 (first quote).

D.

The complaint's final theory was that the fax was an advertisement because it offered Family Health the "chance to win a gift card in exchange for" completing a survey. Family Health Br. 11. Pulse8 says Family Health forfeited this argument by merely taking a "passing shot" at it in its opening brief. Pulse8 Br. 26. "[W]e need not decide" if Pulse8 is right about that, because "[e]ven if we assume that [Family Health]

preserved the argument . . . it fails." *United States v. Zayyad*, 741 F.3d 452, 459 (4th Cir. 2014).

Return one last time to the statutory text: To be covered, a fax must "advertis[e] the commercial availability or quality of any *property, goods, or services*." 47 U.S.C. § 227(a)(5) (emphasis added). Family Health does not assert that the gift card the fax offered is "property" or a "good" whose availability Pulse8 was advertising. Nor did the complaint allege that the survey was a disguised sales tool whose completion Pulse8 used to pitch products or collect data for future advertising. Instead, Family Health says the chance to win a gift card made the fax a covered advertisement because it "offer[ed] [Family Health] the opportunity to sell" its own "participation in" the Pulse8-provided webinar. Family Health Br. 12 (quotation marks removed). On this view, Pulse8 was operating somewhat like a pawn shop—offering recipients the chance to exchange one thing (their time in completing a survey) for another (a chance to win an Amazon gift card).

But Family Health does not allege that Pulse8 is in the business of selling Amazon gift cards or buying survey data. The complaint says Pulse8 is a "Healthcare Analytics and Technology Company." JA 9. Perhaps there are businesses whose offers to buy something amount to the advertisement of a service. (To continue with the previous example: a pawn shop might be seen as selling the service of exchanging personal property for cash.). But Pulse8 is not one of those businesses. Nor has Family Health alleged that Pulse8 is in the business of conducting market research surveys, which means we need not decide

whether a company of that kind is advertising when it sends a fax offering to pay for survey participation. Compare *Fischbein v. Olson Rsch. Grp., Inc.*, 959 F.3d 559, 561 (3d Cir. 2020) (concluding that such a fax is an advertisement), with *Bruce Katz, M.D., P.C. v. Focus Forward, LLC*, 22 F.4th 368, 370 (2d Cir. 2022) (not an advertisement). We thus hold that Pulse8's offer of the chance to win a gift card was not enough, by itself, to make this fax one that "advertis[ed] the commercial availability or quality of any property, goods, or services." 47 U.S.C. § 227(a)(5).

* * *

"[T]his litigation remains in its early stages," and Family Health's allegations may not ultimately "be borne out by discovery." *PDR*, 80 F.4th at 478; see *Robert W. Mauthe MD PC v. Millenium Health LLC*, 58 F.4th 93, 94, 96–97 (3d Cir. 2023) (per curiam) (affirming a grant of summary judgment for the defendant where the evidence revealed that a free seminar promoted in a fax did not promote any good, services, or property). But the complaint plausibly alleged that Pulse8's fax was an unsolicited advertisement, which was all that is required to survive a motion to dismiss. The district court's judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED

AGEE, Circuit Judge, concurring in part and dissenting in part:

I agree that the complaint's first and fourth theories of liability fail to state a claim and so concur in the majority opinion's disposition of those theories. With respect, however, I believe that the complaint's second and third theories also fail to state a claim. In concluding otherwise, the majority effectively adopts a "pretext" theory of liability for this circuit. That is an erroneous decision in my view. As other jurists have explained, the pretext theory impermissibly expands the meaning of "unsolicited advertisement" as defined by the TCPA, providing a cause of action to nearly every recipient of a fax from a for-profit entity, regardless of the content of the fax itself. I disagree with this result because it rewrites what Congress said in the statute. Therefore, I respectfully dissent from the majority opinion as to its conclusions on the second and third theories.

The TCPA prohibits a person or entity from sending an "unsolicited advertisement" to a telephone facsimile machine without the recipient's prior express invitation or consent, among other conditions. 47 U.S.C. § 227(b)(1)(C). The Act defines "unsolicited advertisement" in relevant part as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person." *Id.* § 227(a)(5).

As this plain language demonstrates, "the TCPA creates an objective standard narrowly focused on the content of the faxed document": "to be an unsolicited advertisement under the TCPA, *the fax itself* must indicate—directly or indirectly—to a reasonable

recipient that the sender is promoting or selling some good, service, or property." *Ambassador Animal Hosp., Ltd. v. Elanco Animal Health Inc.*, 74 F.4th 829, 832–33 (7th Cir. 2023) (emphasis added); *see also Robert W. Mauthe MD PC v. Millennium Health LLC*, 58 F.4th 93, 96 (3rd Cir. 2023) (per curiam) ("[A]n objective standard governs whether a fax constitutes an unsolicited advertisement."); *id.* at 103 (Phipps, J., concurring) ("[T]he TCPA confines the meaning of the term 'unsolicited advertisement' to the *material transmitted*[.]"); *BPP v. CaremarkPCS Health, L.L.C.*, 53 F.4th 1109, 1113 (8th Cir. 2022) (stating that the TCPA's focus is on whether the "fax would be *plainly understood* as promoting a commercial good or service" (emphasis added)).

The problem with the pretext theory—and the majority opinion—is that it "involves consideration of facts extrinsic to the fax itself" and thus cannot be squared with the TCPA's express text. *Millennium Health*, 58 F.4th at 103 (Phipps, J., concurring).

As explained by this Court in *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC (PDR)*, under the pretext theory, a fax constitutes an "unsolicited advertisement" if it can plausibly be alleged to be a "'pretext' to *future* advertising"—that is, "[a] fax that offers a good or service that is free but will be used, once accepted, to promote goods or services at a cost." 80 F.4th 466, 478 (4th Cir. 2023) (emphasis added) (citation omitted); *see also id.* at 478–79 (stating that the "basic idea" of the pretext theory is that "[a]cceptance of a free good or service is leveraged into an opportunity for a [future] sales pitch, giving the free fax offer a 'commercial pretext'" (quoting

Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc. (Boehringer), 847 F.3d 92, 95 (2d Cir. 2017))).[1] But to determine whether a complaint plausibly alleges that a fax is a pretext to future advertising, a court is necessarily required to look beyond the fax itself to the "subjective motivations" of the sender in transmitting the fax as well as its "subsequent conduct." *Ambassador Animal Hosp.*, 74 F.4th at 833.[2]

And therein lies the rub. By "depend[ing] on facts beyond those contained in the fax," the pretext theory improperly "expand[s] the meaning of the term 'unsolicited advertisement'" under the TCPA, with no limiting principle in sight. *Millennium Health*, 58 F.4th at 104 (Phipps, J., concurring). Indeed, "in almost all cases, a recipient of a fax could argue under the pretext theory that a fax from a commercial entity is an advertisement." *Mauthe v. Nat'l Imaging Assocs., Inc.*, 767 F. App'x 246, 250 (3d Cir. 2019). Such a

---

[1] Although the *PDR* panel stated that it had "no reason to doubt the legal viability of [the] pretext theory," the Court expressly stopped short of adopting it. 80 F.4th at 479. As illustrated herein, today's majority opinion finishes the job.

[2] Indeed, that is precisely what other courts that have adopted the pretext theory have done. *See, e.g., Boehringer*, 847 F.3d at 95–97 (holding that a complaint sufficiently pled that a fax promoting a free dinner seminar "discussing a subject that relates to the" sender's business constituted an "unsolicited advertisement" because the sender "would *presumably hope to persuade* [the recipient doctor] to prescribe [the sender's pharmaceutical] drugs to patients," and stating that the sender could rebut this inference after discovery "by showing that it did not or would not advertise its products or services *at the seminar*" (emphases added)).

result, however, "would extend [the] TCPA's prohibition too far." *Id.*

Because the pretext theory rests on an understanding of the term "unsolicited advertisement" that is "[un]tethered . . . to the text of the fax itself," it "cannot be reconciled with the TCPA, which defines that term in reference to only *the material transmitted*." *Millennium Health*, 58 F.4th at 103–04 (Phipps, J., concurring) (emphasis added); *cf. Ambassador Animal Hosp.*, 74 F.4th at 831 ("Section 227 asks whether *the content of a fax* advertises the commercial availability or quality of a thing. It does not inquire of the seller's motivation for sending the fax or the seller's subsequent actions." (emphasis added) (citation omitted)); *Millennium Health*, 58 F.4th at 96 ("The statutory definition of the term 'unsolicited advertisement' does not depend on the subjective viewpoints of either the fax sender or recipient."). Accordingly, any court that applies the pretext theory, in my view, misapplies the law.

That is why I cannot join my colleagues in the majority in upholding the complaint's second and third theories of liability, both of which are premised on the pretext theory.

True, the majority opinion never expressly employs the term "pretext theory," but it is evident that its holding fully embraces that atextual scheme. Indeed, in upholding the complaint's second and third theories, the majority opinion consistently invokes—seemingly as binding—*PDR*'s dicta concerning the pretext theory. *Compare ante* at 5 ("*PDR* explained that '[a]cceptance of a free good or service' can be 'leveraged into an opportunity for a sales pitch,'

thereby giving the offer of a free good or service the requisite 'commercial component.'" (alteration in original) (quoting *PDR*, 80 F.4th at 474, 478–79)), *and ante* at 5 ("*PDR* identified 'the fax at issue in' [*Boehringer*], 847 F.3d 92 (2d Cir. 2017)—one that invited recipients to 'a free dinner meeting' (*id.* at 93)—as the 'prototypical . . . example' of one kind of covered advertisement." (second alteration in original) (quoting *PDR*, 80 F.4th at 478)), *with PDR*, 80 F.4th at 477–78 (making those statements only while discussing, in dicta, the pretext theory).

And just as the pretext theory demands, the majority opinion assesses Family Health's TCPA claim by looking beyond the text of Pulse8's fax, even if it fails to acknowledge it.

For instance, without pointing to anything in the fax itself—the very thing that the TCPA regulates—the majority opinion declares that it is reasonable to infer "that Pulse8 sent the fax '*hop*[*ing*] *to persuade*' recipients to use Pulse8's products." *Ante* at 6 (alteration in original) (emphasis added); *accord ante* at 6 (stating that "it is reasonable to infer that a company that invites you to a free webinar on a subject related to its business *intends to promote its products during that event*" (emphasis added) (cleaned up)). The majority opinion thus focuses on the inferred subjective motivation of Pulse8 in transmitting the fax, even though § 227 disregards any such intent. *See Ambassador Animal Hosp.*, 74 F.4th at 831 (finding "particularly significant" "[t]he absence of any reference to the sender's purpose in § 227" given that

"the TCPA expressly considers a sender's purpose in other provisions").[3]

The majority opinion then features another hallmark of the pretext theory by "assum[ing] that [Pulse8's] subsequent conduct . . . is relevant to the TCPA analysis." *Id.* at 833. The majority opinion suggests that Pulse8 may not be liable under the TCPA if "a fully developed record [shows] the webinar was not promoting Pulse8's products in any way." *Ante* at 8. But as explained above, a sender's subsequent conduct is totally extrinsic to the TCPA's sole focus—the "material . . . which is transmitted," *i.e.*, the fax. 47 U.S.C. § 227(a)(5).

And for reasons not apparent to me, the majority opinion further claims that there is "no necessary conflict between" its holding and the Seventh Circuit's decision in *Ambassador Animal Hospital*. *Ante* at 7. To the contrary, there is clear conflict.

In short, the Seventh Circuit applied the correct statutory standard: "the fax itself must indicate—directly or indirectly—to a reasonable recipient that the sender is promoting or selling some good, service, or property. In other words, the 'material . . . which is transmitted'—the faxed document—must perform the advertising." *Ambassador Animal Hosp.*, 74 F.4th at 832. The majority opinion asserts that this test is "consistent with" the test that it applies today. *Ante* at 7. Respectfully, that's incorrect. Unlike the

[3] Significantly, the majority opinion acknowledges that § 227 "makes no reference to the sender's purpose." *Ante* at 6 (cleaned up). Yet that recognition does not prevent it from considering that extrinsic factor all the same.

majority opinion, *Ambassador Animal Hospital* expressly "decline[d] to manufacture a pretext element unsupported by the TCPA's text." 74 F.4th at 833. Unlike the majority opinion, *Ambassador Animal Hospital* did not "assume subjective motivations behind faxes that advertise no goods or services" or "assume that subsequent conduct of senders is relevant to the TCPA analysis." *Id.* And unlike the majority opinion, *Ambassador Animal Hospital* applied "an *objective* standard narrowly focused on *the content of the faxed document*." *Id.* (emphases added). In light of these material differences, *Ambassador Animal Hospital* simply cannot be harmonized with the majority opinion.

Without the statutorily unsupported pretext theory as a crutch, the complaint's second and third theories have no legs to stand on. The fax at issue advertises a free webinar titled "Open your Mind to Behavioral Health Coding." J.A. 20. In its entirety, the main text of the fax states: "Expand your knowledge by learning how to successfully document and code conditions that are due to substance abuse, major depression, schizophrenia, bipolar, and other mental health disorders." J.A. 20. The top right corner of the fax includes a notation that the webinar is an approved continuing education course for a professional organization, while the bottom right corner displays Pulse8's logo. Nothing on the face of the fax indicates—directly or indirectly—that Pulse8 is advertising a good or service for sale. Indeed, nothing in the fax communicates to the recipient that Pulse8 offers *anything* for sale or otherwise engages in a particular line of business.

But even accepting, as the complaint alleges, that Pulse8 is in the coding technology business, simply offering a free webinar "related to" its business, *ante* at 5, is not enough to expose the company to liability under the TCPA. Indeed, *Ambassador Animal Hospital* rejected the same theory when confronting a fax materially similar to the one here:

> Ambassador argues that Elanco's faxes did, in fact, contain advertising content. Namely, Ambassador emphasizes that Elanco included its name and logo on the faxes, the seminar topics related to products sold by Elanco, and the invitations targeted recipients and requested RSVPs of particular employees. But none of these features transformed Elanco's invitations to free dinners and continuing education programs into advertisements for a good, service, or property. Use of Elanco's trademarked logo on the invitations did not reasonably encourage readers to buy any of Elanco's products or services. Nor did simply mentioning subject matter related to Elanco's business. The TCPA does not go so far as to prohibit sending faxes on company letterhead to promote free education on topics that relate to the sender's business—it prohibits advertising products or services. . . .
>
> The faxes certainly promoted goodwill for Elanco and helped the company manage its brand and image. And there could be situations in which a similar fax message would qualify as an indirect advertisement—

> perhaps if Elanco had said something like "Join us for a free dinner discussion of how Alenza [Elanco's product] can help manage canine inflammation" or "RSVP for a free event hosted by Elanco on the best medication available for canine osteoarthritis." But not only did these faxes lack that promotional aspect, nothing in them directly or indirectly alluded to the commercial availability or the quality of Elanco's products, as the statutory definition requires.

74 F.4th at 832; *see also Millennium Health*, 58 F.4th at 96 (holding that "no reasonable recipient of [an] unsolicited free-seminar fax could view it as promoting the purchase or sale of goods, services, or property" where the fax included no "discussion of anything that can be bought or sold" but spoke only of a free "academic" seminar). This same logic applies with equal force here.

As the district court below succinctly observed, Pulse8's fax "offer[ed] recipients a free webinar and nothing more." *Fam. Health Physical Med., LLC v. Pulse8, LLC*, No. SAG-21-2095, 2022 WL 596475, at *5 (D. Md. Feb. 28, 2020). It lacked "direct[] or indirect[] allu[sion] to the commercial availability or the quality of [Pulse8's] products, as the statutory definition requires." *Ambassador Animal Hosp.*, 74 F.4th at 832. In those circumstances, Pulse8's fax simply does not give rise to liability under the TCPA.[4]

---

[4] Although we said in *PDR* that a plaintiff states a claim under the TCPA when it plausibly alleges the existence of a "direct

In sum, I find the majority opinion's holding on the complaint's second and third theories to be contrary to the plain text of the TCPA and without a limiting principle. Respectfully, therefore, I dissent from that holding and would affirm in full the district court's order dismissing Family Health's complaint.

---

mechanism by which the sender will profit if the offer is accepted," 80 F.4th at 477, Family Health's complaint makes no such allegation here, a fact that even the majority appears to accept.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

No. 1:21-cv-02095-SAG

FAMILY HEALTH PHYSICAL MEDICINE, LLC,
Plaintiff,
v.
PULSE8, LLC, *et al.*,
Defendants.

Decided: April 1, 2022
Document No. 30

ORDER

Plaintiff has not filed a motion for leave to amend its complaint, and the time for doing so has now expired. Therefore, it is this 1st day of April, 2022, by the United States District Court for the District of Maryland, HEREBY ORDERED that the order of dismissal without prejudice, ECF 29, is converted to a dismissal with prejudice, and the Clerk is directed to CLOSE this case.

/s/

Stephanie A. Gallagher
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

No. 1:21-cv-02095-SAG

FAMILY HEALTH PHYSICAL MEDICINE, LLC,
Plaintiff,
v.
PULSE8, LLC, *et al.*,
Defendants.

Decided: February 28, 2022
Document No. 28

MEMORANDUM OPINION

Plaintiff Family Health Physical Medicine, LLC ("Family Health") filed this action alleging violations of the federal Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*, ("TCPA") and the Maryland Telephone Consumer Protection Act, Md. Code Ann., Com. Law §§ 14-3201-3202 ("MD TCPA"), based upon a fax it received from Defendants Pulse8, LLC and Pulse8, Inc. (together, "Pulse8"[1] or "Defendants").[2]

---

[1] In August, 2020, Pulse8, Inc. converted to Pulse8, LLC. ECF 15-1 at 7 n.1. Defendants argue, therefore, that Pulse8, LLC is the only proper defendant. Whether or not that is legally correct, this Court will simply refer to the Defendants as "Pulse8."

[2] Family Health concedes that Count II of its complaint, brought pursuant to the MD TCPA, is properly subject to

ECF 1. Pulse8 has filed a Motion to Dismiss the Complaint for failure to state a claim, incorporating a Rule 23(c)(1) Motion to Strike the Class Allegations. ECF 15. Family Health filed an opposition, ECF 22, and Pulse8 filed a reply, ECF 24. A hearing is not necessary. *See* Local Rule 105.6 (D. Md. 2021). For the reasons that follow, Pulse8's motion shall be granted and Family Health's claims shall be dismissed without prejudice.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to its Complaint, Family Health is an Ohio limited liability company. ECF 1 ¶ 12. On or about August 13, 2020, it received a fax on its telephone facsimile machine ("the Fax") inviting recipients to attend a "Monthly Webinar Series" entitled "Open your Mind to Behavioral Health Coding." *Id.* ¶¶ 15-16. The Fax stated that the attendees of the webinar can "[e]xpand [their] knowledge by learning how to successfully document and code conditions that are due to substance abuse, major depression, schizophrenia, bipolar, and other mental health disorders." *Id.* ¶ 16. The Fax also provided a link to register for the webinar and to win an Amazon gift card by completing a webinar survey. *Id.*

The Complaint alleges that Pulse8, the sender of the Fax, is a for-profit business selling a variety of products to health care providers, including "Coding Technology" for use in obtaining insurance reimbursement. *Id.* ¶ 14. The Complaint posits that

---

dismissal. ECF 22 at 1 n.1. This Court will grant Pulse8's motion to dismiss that Count without further analysis.

the webinar advertised in the Fax "relates to Defendants' for-profit business" of selling coding technology. *Id.* ¶ 18. The Complaint also alleges that the Fax is "pretext" for further advertising because attendees registering for the webinar had to agree that Pulse8 could use their personal data to deliver future promotional information. *Id.* ¶ 19. The Complaint does not contain any factual allegations regarding the specific content shared with webinar attendees.

II. STANDARDS OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits a defendant to test the legal sufficiency of a complaint by way of a motion to dismiss. *In re Birmingham*, 846 F.3d 88, 92 (4th Cir. 2017); *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 165-66 (4th Cir. 2016). A Rule 12(b)(6) motion constitutes an assertion by a defendant that, even if the facts alleged by a plaintiff are true, the complaint fails as a matter of law "to state a claim upon which relief can be granted." *See In re Birmingham*, 846 F.3d at 92.

Whether a complaint states a claim for relief is assessed by reference to the pleading requirements of Federal Rule of Civil Procedure 8(a)(2). That rule provides that a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The purpose of the rule is to provide the defendants with "fair notice" of the claims and the "grounds" for entitlement to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

To survive a motion under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain facts sufficient to "state a claim to relief that is plausible on its face." *Id.* at 570; *see Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions' ...."); *see also Willner v. Dimon*, 849 F.3d 93, 112 (4th Cir. 2017). But a plaintiff need not include "detailed factual allegations" in order to satisfy Rule 8(a)(2). *Twombly*, 550 U.S. at 555. Moreover, federal pleading rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11 (2014) (per curiam).

Nevertheless, the rule demands more than bald accusations or mere speculation. *Twombly*, 550 U.S. at 555; *see Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013). If a complaint provides no more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action," it is insufficient. *Twombly*, 550 U.S. at 555. Rather, to satisfy the minimal requirements of Rule 8(a)(2), the complaint must set forth "enough factual matter (taken as true) to suggest" a cognizable cause of action, "even if ... [the] actual proof of those facts is improbable and ... recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation marks omitted).

In reviewing a Rule 12(b)(6) motion, a court "must accept as true all of the factual allegations contained in the complaint" and must "draw all reasonable inferences [from those facts] in favor of the plaintiff." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*,

637 F.3d 435, 440 (4th Cir. 2011) (citations omitted); *see Semenova v. Maryland Transit Admin.*, 845 F.3d 564, 567 (4th Cir. 2017); *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015). But, a court is not required to accept legal conclusions drawn from the facts. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986). "A court decides whether [the pleading] standard is met by separating the legal conclusions from the factual allegations, assuming the truth of only the factual allegations, and then determining whether those allegations allow the court to reasonably infer" that the plaintiff is entitled to the legal remedy sought. *A Soc'y Without a Name v. Virginia*, 655 F.3d 342, 346 (4th Cir. 2011).[3]

III. DISCUSSION

The TCPA prohibits sending an "unsolicited advertisement" to a telephone facsimile machine, absent certain conditions. 47 U.S.C. § 227(b)(1)(C). The statute defines "unsolicited advertisement" in relevant part as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person." *Id.* § 227(a)(5).

The operative questions, then, are first, whether the Fax advertises "the commercial availability or quality of any property, goods, or services" and second, what standard this Court should apply to answer that question. These legal issues were previously examined

---

[3] Although Pulse8's motion asks in the alternative that Family Health's class allegations be stricken, this Court's disposition of Pulse8's motion to dismiss renders consideration of those arguments unnecessary.

in *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, Civil Action No. 3:15-14887, 2016 WL 5799301 (S.D.W. Va. Sept. 30, 2016) ("*PDR I*"), the first in an extensive series of litigation winding up to the Supreme Court and back. *PDR I* involved an unsolicited fax, sent to a West Virginia chiropractic office, offering the recipient a free copy of the "Physicians' Desk Reference eBook." *Id.* at *1. The plaintiff alleged that the fax constituted an advertisement on its face and a pretext to future advertising, because the distribution of the eBook was intended to lead to future sales of other goods and services to benefit its sender, PDR Network, the publisher of the "Physicians' Desk Reference eBook." *Id.*

In *PDR I*, United States District Judge Robert C. Chambers held that the fax was not an unsolicited advertisement because it was advertising something free and, therefore, lacked "[t]he essential commercial element of an advertisement[.]" *Id.* at *3. Nonetheless, the plaintiff in *PDR I* "strenuously urge[d]" the district court to defer to a 2006 order from the Federal Communications Commission ("the 2006 FCC Order"), which interpreted the TCPA's definition of "unsolicited advertisement." *Id.* at *3. The 2006 FCC Order expressly states that "facsimile messages that promote goods or services even at no cost . . . are unsolicited advertisements under the TCPA's definition." Rules and Regulations Implementing Tel. Consumer Prot. Act of 1991, 71 Fed. Reg. 25,967, 25,873 (May 3, 2006). Relying on the *Chevron* framework for judicial review of administrative rules, Judge Chambers concluded that because the TCPA's definition of "unsolicited advertisement" is clear and

unambiguous, the court was not required to defer to the FCC's interpretation. *PDR I*, 2016 WL 5799301, at *4 ("The Court is not obliged to defer to the FCC's interpretation of an unambiguous statute."). Therefore, in the absence of plausible allegations that PDR Network would benefit commercially from offering free eBooks to the facsimile recipients, Judge Chambers dismissed the complaint without granting leave to amend. *Id.* at *5.

On appeal, the Fourth Circuit held that Judge Chambers erred by conducting a *Chevron* analysis, because the Hobbs Act required the district court to adopt the FCC's interpretation of the TCPA. *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459, 464 (4th Cir. 2018) ("*PDR II*"). The Supreme Court subsequently granted certiorari, and ultimately held that the lower courts needed to resolve certain preliminary questions before it could determine whether the 2006 FCC Order bound the lower courts. *PDR Network LLC v. Carlton & Harris Chiropractic, Inc.*, ___ U.S. ___, 139 S. Ct. 2051, 2055 (2019) ("*PDR III*"). With respect to one of those preliminary questions, the Supreme Court suggested that if the 2006 FCC Order constitutes only an interpretive rule that lacks the force and effect of law, lower courts may not be bound by its contents. *Id.* at 2055-56.

After the Supreme Court ruling, the Fourth Circuit agreed with both parties that the relevant portions of the 2006 FCC Order are interpretive, such that a district court is not bound to follow them. *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 982 F.3d 258 (4th Cir. 2020) ("*PDR IV*"). The Fourth Circuit remanded the case to Judge Chambers

to consider the appropriate degree of deference to be afforded to the agency's interpretation of the TCPA under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *PDR IV*, 982 F.3d at 265-66. Judge Chambers recently issued his opinion. *See Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, Civil Action No. 3:15-14887, 2022 WL 386097 (S. D. W.Va. Feb. 8, 2022) ("*PDR V*"). He first found that the TCPA was unambiguous in its requirement that an advertisement relate to the buying and selling of goods or services. *Id.* at *3, 4. Thus, he determined, "[b]y its terms, the TCPA requires a commercial element to find that an unsolicited fax is an advertisement." *Id.* at *4. He reasoned that, in the absence of any statutory ambiguity, he need not resort to the interpretive 2006 FCC Order to determine the TCPA's meaning. However, quoting the Fourth Circuit, he noted that even if he had considered the order, he would not have afforded it much deference after weighing "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position." *Id.* at *5-6 (quoting *PDR IV*, 982 F.3d at 264-65). In Judge Chambers's view, the 2006 FCC Order "is 'not written in the manner of a conventional regulation.'" *Id.* at *5 (quoting *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 847 F.3d 92, 100 (2d Cir. 2017) (Leval, J., concurring)). Judge Chambers further reasoned that the order "has a striking absence of reasoning regarding its categorical conclusion that faxes promoting goods and services even at no cost are unsolicited advertisements under the TCPA." *Id.* He concluded that the 2006 FCC Order, then, is entitled to no deference. *Id.* at *6.

This Court concurs with Judge Chambers's persuasive assessment of the deference to be afforded the 2006 FCC Order. Certainly, the motivating policy behind the FCC's expansive interpretation is clear: to prevent businesses from exploiting an obvious loophole in the TCPA's protections by sending faxes that advertise a non-commercial, complimentary item or event with the intent to use the complimentary offering to further the business's commercial purposes.[4] But the FCC's broad-brush approach to

[4] As other courts have noted, the 2006 FCC Order does not clearly delineate the breadth of its preferred interpretation. The order apparently contemplates imposing liability under some circumstances even where the commercial purpose does not appear on the face of the fax. That said, reading it to prohibit a for-profit company from sending any unsolicited faxes whatsoever would seem to disregard the plain language Congress included in the TCPA. But any interpretation between these two poles would involve a seemingly arbitrary exercise in "line-drawing" to determine the nexus or degree of commercial purpose a company must have in order to violate the statute. In other words, must the company try to sell its products at the webinar in order to connect the fax to marketing purposes? What if it simply collects the contact information from webinar attendees for potential marketing months or years later? What if it never markets anything to the attendees but sells the attendees' contact information to another company to make a profit? What if it simply uses the free webinar to increase its name recognition in the industry, in the hopes of increasing its market share without engaging in any direct sales efforts? Congress's choice of narrow language in the TCPA, restricting its prohibition to "any material advertising the commercial availability or quality of any property, goods, or services," may have intentionally sacrificed broader protection from uninvited faxes in favor of a clear, bright-line standard mindful of First Amendment principles. In this Court's view, that bright-line standard requires that the fax *itself*—not some broader or separate marketing or advertising initiative—must advertise the commercial availability or quality

closing the loophole lacks any statute-based reasoning, evidentiary support, or explanation of the process the agency employed to reach its seemingly conclusory determination, leaving the order entitled to no deference.

As Judge Chambers noted, however, this Court's determination that it will not defer to the FCC's interpretation of the TCPA is not dispositive, because this Court must then consider the Fax in light of the TCPA's plain text. In other words, is the Fax a "material advertising the commercial availability or quality of any property, goods, or services"?

"Commercial" is defined in this context as "[o]f, relating to, or involving the buying and selling of goods; mercantile." *Commercial, Black's Law Dictionary* (11th ed. 2019). And as Judge Chambers indicated, "Principles of ordinary English grammar dictate that this Court read the adjective 'commercial' to modify both 'availability' and 'quality' of any property, goods, or services." *PDR V*, 2022 WL 386097, at *4 (citing Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012) ("When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.")). Thus, to constitute an unsolicited advertisement under the TCPA, the Fax itself must relate to or involve the buying and selling of property, goods, or services.

---

of property, goods, or services in order to constitute an "unsolicited advertisement" in violation of the TCPA.

The Fax advertises a webinar alone. ECF 1-2. While the face of the Fax does not indicate whether there is a charge to attend the webinar, Family Health's complaint, which must be taken as true at this stage, repeatedly asserts that the webinar is free. ECF 1 ¶¶ 17, 18, 19d. The Fax makes no reference to any products sold by Pulse8 or any other entity. ECF 1-2. The picture on the Fax depicts hard copy files appearing to be in a file cabinet. *Id.* The Complaint does not allege that either files or file cabinets are products sold by Pulse8. There are two small logos on the bottom of the Fax reading "CareSource" and "Pulse8," without any indicia of what types of companies those are or what products or services, if any, they sell. *Id.* Thus, like the fax Judge Chambers considered in *PDR V*, "the fax itself does not offer any products that Defendants directly sell, nor does it discuss the quality or availability of those products to customers like health care providers." *PDR V*, 2022 WL 386097, at *7.

It is true, of course, that the content of the information Pulse8 shared with webinar attendees remains unknown. Here, then, in contrast to *PDR V*, it is plausible that the Fax may have advertised a webinar that was itself used to market Pulse8's commercial products. But because Family Health apparently did not attend the free webinar, it does not allege any such facts. Instead, Family Health's Complaint includes four theories of how the Fax might constitute an advertisement: (1) because it contains an offer of a "free good or service," namely the webinar; (2) because it advertises a free good or service relating to Pulse8's for-profit business; (3) because it is a "pretext" for Family Health to collect contact

information that it can use for future promotional advertising to recipients; and (4) because it allows the recipients to register to win an Amazon gift card by completing a survey. ECF 1 ¶¶ 17-21. Theories one and four can be easily rejected. Theory one fails because, as noted above, an advertisement that merely offers a "free good or service" does not, without more, violate the TCPA—it must relate to the buying and selling of property, goods, or services. And theory four has been rejected by most courts to have considered it, because offering a gift card (or, as here, only the opportunity to win a gift card) in exchange for a survey response seeks information, but does not promote the commercial availability of a good or service. The gift card, in other words, is not for sale. As the Second Circuit describes, faxes seeking survey participation do not advertise the availability of a good or service, but merely the opportunity to exchange goods or services. *See Bruce E. Katz, M.D., P.C. v. Focus Forward LLC*, 22 F.4th 368 (2d Cir. 2022) (affirming district court's decision in *Bruce E. Katz, M.D., P.C. v. Focus Forward LLC*, 532 F. Supp. 3d 170 (S.D.N.Y. 2021)); *see also Podiatry in Motion, Inc. v. Interviewing Servs. of Am., LLC*, No. 20 C 3159, 2020 WL 5909063, at *3 (N. D. Ill. Oct. 5, 2020) ("Limiting the analysis to the language of the statute, as the Court must, the Court agrees that the instant fax is not making something commercially available; rather, it is asking for the recipient to complete a survey.").

Family Health's second and third theories present closer questions. In other words, is it sufficient if the Fax itself does not advertise the commercial availability of any good or service, if it advertises a webinar intended to advance the company's future

commercial efforts? In this Court's view, those sorts of ancillary or tangential marketing efforts do not suffice to allege a violation of the TCPA. As Judge Chambers held, these kinds of allegations cannot "create the required underlying commercial nexus where it does not exist within the fax at issue." *PDR IV*, 2022 WL 386097, at *7. The TCPA prohibits sending an unsolicited fax containing "any material advertising the commercial availability of quality of any property, good, or services." It does not prohibit sending a free invitation to an event or seminar that later advertises such commercial availability. Had Congress intended to give the statute broader reach, it could have done so. It could have, for instance, defined an "unsolicited advertisement" to include "complimentary offers leading to the advertising of commercial opportunities," or it could have prohibited for-profit companies from sending any unsolicited fax communications, irrespective of their commercial nature. Congress may have intentionally drafted a narrower prohibition, or it may not have. As the statute is drafted, however, this Court agrees with Judge Chambers that "alleging an underlying and distant commercial purpose" is insufficient. *Id.* This Fax does not fall within the statutory prohibitions because it offers recipients a free webinar and nothing more.

Family Health, of course, urges a more expansive reading of the TCPA's prohibitions, citing to a number of district court cases and the opinion issued by the United States Court of Appeals for the Second Circuit in *Physicians Healthsource*, 847 F.3d 92. Relying heavily on the 2006 FCC Order, the *Physicians Healthsource* Court adopted that order's "pretext"

theory and accordingly required minimal pleading of a commercial nexus. In that vein, it determined that a plaintiff's allegations that an unsolicited fax promoted a free seminar "discussing a subject that relates to the firm's products or services" sufficed to plausibly allege "that the fax had the commercial purpose of promoting those products or services." *Id.* at 95. Of course, *Physicians Healthsource* predated the Supreme Court's opinion in *PDR III*, and it is unclear whether the Second Circuit would afford the 2006 FCC Order the same degree of deference after that ruling. Regardless, this Court is not bound by Second Circuit precedent, and for the reasons stated above believes that merely alleging that a facially non-commercial fax has a pretextual commercial purpose is insufficient to state a claim that the fax is an "unsolicited advertisement" under the TCPA. Because the Fax is not a "material advertising the commercial availability or quality of any property, goods, or services," Family Health has not plausibly alleged a TCPA violation.

IV. CONCLUSION

For the reasons set forth above, Pulse8's Motion to Dismiss, ECF 15, is granted. Family Health's Complaint is dismissed without prejudice, although if Family Health does not seek leave to amend its complaint within thirty days of the date of this memorandum opinion and order, the dismissal will convert to dismissal with prejudice. A separate Order follows.

February 28, 2022
Date

/s/
Stephanie A. Gallagher
United States District Court

Appendix D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. 1:21-cv-02095-SAG

FAMILY HEALTH PHYSICAL MEDICINE, LLC
641 E. State Street
Alliance, OH 44601

Plaintiff,

v.

PULSE8, LLC
175 Admiral Cochran Drive Suite 302
Annapolis, MD 21401

and

PULSE8, LLC
175 Admiral Cochran Drive Suite 302
Annapolis, MD 21401

Defendants.

Docketed: August 17, 2021, Document No. 1
Corrected: August 18, 2021, Document No. 4

CLASS ACTION COMPLAINT

Plaintiff, FAMILY HEALTH PHYSICAL MEDICINE, LLC ("Plaintiff"), brings this action on behalf of itself and all others similarly situated, through its attorneys, and except as to those allegations pertaining to Plaintiff or its attorneys, which allegations are based upon personal knowledge,

alleges the following upon information and belief against Defendants, PULSE8, LLC and PULSE8, INC. ("Defendants"):

PRELIMINARY STATEMENT

1. This case challenges Defendants' practice of sending unsolicited advertisements by facsimile.

2. The federal Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005, 47 U.S.C. § 227 (collectively, "TCPA" or the "Act"), and the regulations promulgated under the Act, prohibit a person or entity from sending fax advertisements without the recipient's "prior express invitation or permission." The TCPA provides a private right of action and provides minimum statutory damages of $500 per violation.

3. On or about August 13, 2020, Defendants sent Plaintiff an unsolicited fax advertisement in violation of the TCPA (the "Fax"), a true and correct copy of which is attached hereto as Exhibit A and made a part hereof.

4. Upon information and belief, Defendants sent the Fax and other facsimile transmissions of unsolicited advertisements to Plaintiff and the Class in violation of the TCPA.

5. The Fax describes the commercial availability or quality of Defendants' property, goods, or services, namely, Defendants' Behavioral Health Coding system, by offering a webinar to learn how to successfully document and code various mental health conditions. (Exhibit A).

6. Plaintiff alleges on information and belief that Defendants have sent, and continue to send, unsolicited advertisements via facsimile transmission in violation of the TCPA, including but not limited to the advertisements sent to Plaintiff.

7. Unsolicited faxes damage their recipients. A junk fax recipient loses the use of its fax machine, paper, and ink toner. An unsolicited fax wastes the recipient's valuable time that would have been spent on something else. A junk fax intrudes into the recipient's seclusion and violates the recipient's right to privacy. Unsolicited faxes occupy fax lines, prevent fax machines from receiving authorized faxes, prevent their use for authorized outgoing faxes, and cause undue wear and tear on the recipients' fax machines. Unsolicited fax advertisements require additional labor to attempt to discern the source and purpose of the unsolicited message.

8. On behalf of itself and all others similarly situated, Plaintiff brings this case as a class action asserting claims against Defendants under the TCPA and the Maryland Telephone Consumer Protection Act, or MD-TCPA. Plaintiff seeks to certify a class which were sent the Fax and other unsolicited fax advertisements that were sent without prior express invitation or permission and without compliant opt-out language (to the extent the affirmative defense of "established business relationship" is alleged). Plaintiff seeks statutory damages for each violation of the TCPA and injunctive relief.

9. Plaintiff is informed and believes, and upon such information and belief avers, that this action is based upon a common nucleus of operative facts

because the facsimile transmissions at issue were and are being done in the same or similar manner. This action is based on the same legal theory, namely liability under the TCPA. This action seeks relief expressly authorized by the TCPA: (i) injunctive relief enjoining Defendants, their employees, agents, representatives, contractors, affiliates, and all persons and entities acting in concert with them, from sending unsolicited advertisements in violation of the TCPA; and (ii) an award of statutory damages in the minimum amount of $500 for each violation of the TCPA, and to have such damages trebled, as provided by § 227(b)(3) of the Act in the event the Court determines any TCPA violations were willful or knowing.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 47 U.S.C. § 227.

11. This Court has personal jurisdiction over Defendants because Defendants transact business within this judicial district, have made contacts within this judicial district, are citizens within this judicial district, and/or have committed tortious acts within this judicial district.

PARTIES

12. Plaintiff, FAMILY HEALTH PHYSICAL MEDICINE, LLC, is an Ohio limited liability company.

13. On information and belief, Defendant, PULSE8, LLC, is a Maryland limited liability company, and Defendant, PULSE8, INC., is a

Maryland corporation. Defendants' principal place of business is in Annapolis, Maryland.

14. Defendants ("Pulse8") offer a "Visualization & Reporting platform that risk-bearing entities need to master the intertwined worlds of Risk Adjustment and Quality Metrics for all government programs: ACA Commercial, Medicare Advantage, and Managed Medicaid." (www.pulse8.com, last visited 6/21/2021). The Pulse8 website further provides as follows:

> Pulse8 is the only Healthcare Analytics and Technology Company delivering complete visibility into the efficacy of your Risk Adjustment, Quality Management, and Pharmacy programs.
>
> Pulse8 seamlessly integrates our modular products to create the exact solution suite that best meets your organization's needs. Based on our innovative and powerful Illumin8 technology platform, Pulse8's uniquely pragmatic solutions deliver unprecedented visibility into the efficacy of your risk adjustment, quality management, and pharmacy programs. The Pulse8 Platform includes cutting-edge Analytics, Coding Technology, EDPS/RAPS, and EDGE Server Submission Solutions.
>
> We enable health plans and at-risk providers to achieve the greatest financial impact in the ACA Commercial, Medicare Advantage, and Medicaid markets. By combining advanced analytic methodologies with extensive health plan experience, Pulse8 has developed a suite

> of uniquely pragmatic solutions that are revolutionizing risk adjustment and quality.
>
> We are a compassionate team of leaders and industry experts focused on bringing our customers the best value through our advanced analytical solutions. We strive to enhance our customers' products and services by providing innovative and transformative knowledge that will increase revenues, contain costs, and help people live healthier and longer lives.

(*Id.*)

FACTS

15. On or about August 13, 2020, Defendants sent the Fax to Plaintiff's ten-digit telephone number to Plaintiff's telephone facsimile machine, using a telephone facsimile machine, computer, or other device. (Exhibit A).

16. The Fax states, in part:

> MONTHLY WEBINAR SERIES
>
> Open your Mind to Behavioral Health Coding
>
> Expand your knowledge by learning how to successfully document and code conditions that are due to substance abuse, major depression, schizophrenia, bipolar, and other mental health disorders."
>
> The fax provides a link to register for Defendants' August 18 or 20 webinar… "Register Here:

> https://pulse8.zoom.us Click *Public Even List* and search by webinar title"

See Exhibit A. The fax further offers a chance to win a gift card: "Complete the webinar survey for a chance to win a $25 Amazon gift card!" (*Id.*)

17. Exhibit A is an "advertisement" because it contains an offer of a "free good or service," namely the webinar entitled "Open your Mind to Behavioral Health Coding." (Ex. A).

18. Exhibit A is an "advertisement" because it contains an offer of a "free good or service," namely the webinar entitled "Open your Mind to Behavioral Health Coding," and that free good or service relates to Defendants' for-profit business.

19. Exhibit A is an "advertisement" because, on information and belief, it is a "pretext" to further advertising. Plaintiff's belief that Exhibit A is a pretext to further advertising is based on the following:

> a. A fax recipient who followed the Zoom link to register for the webinar on "Open your Mind to Behavioral Health Coding" would be directed to a webpage asking for the recipient's contact information and stating that "Information you provide when registering will be shared with the account owner and host and can be used and shared by them in accordance with their Terms and Privacy Policy."
>
> b. The "account owner" is "the organization hosting the meeting," which in this instance is Defendants.

c. The "Privacy Policy" on Defendants' website, Section 6, states the following:

> We use personal data about you to improve our marketing and promotional efforts; to statistically analyze site usage; to improve our content and product offerings; and to customize our sites' content, layout and services. *We may also use your personal data to deliver information to you that, in some cases, is targeted to your interests, new services and promotions.* We believe these uses allow us to improve our site and better tailor it to meet our visitors' needs. Allscripts may combine non-personal data collected automatically (e.g., through web log data) with your previously submitted personal data.
>
> https://www.allscripts.com/legal/privacy-policy/ (emphasis added).

d. Thus, inviting fax recipients to register for the free webinar on "Open your Mind to Behavioral Health Coding" is a pretext for Defendants to gather "personal data" about those fax recipients that Defendants (or Allscripts) will then use "to deliver information to [the fax recipient] that, in some cases, is targeted to your interests," including "new services" and "promotions" advertising the commercial availability or quality of property, goods, or services.

20. Exhibit A is an "advertisement" because it announces the availability of an opportunity for the

fax recipient to exchange goods or services for compensation by taking a survey in exchange for a chance to win a $25 gift card, making Exhibit A "material advertising the commercial availability or quality of any property, goods, or services" under the TCPA because a fax offering the opportunity to sell is just as commercial in character as a fax offering the recipient the opportunity to buy property, goods, or services.

21. Defendants created or made the Fax, or directed and paid a third party to do so, and the Fax was sent by or on behalf of Defendants with Defendants' knowledge and authorization.

22. Plaintiff did not give Defendants "prior express invitation or permission" to send the Fax.

23. On information and belief, Defendants faxed the same and other unsolicited facsimiles advertisements without first receiving the recipients' prior express invitation or permission, and without the required opt-out language, *see* 47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(4), thereby precluding the affirmative defense of established business relationship.

24. There is no reasonable means for Plaintiff (or any other class member) to avoid receiving unauthorized fax advertisements. "Stand-alone" fax machines are left on and ready to receive the urgent communications their owners desire to receive.

25. The Fax does not display a proper opt-out notice as required by 47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(4).

CLASS ACTION ALLEGATIONS

26. In accordance with Fed. R. Civ. P. 23(b)(3), Plaintiff brings this class action pursuant to the TCPA, on behalf of the following class:

> All persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages, (3) that are the same or similar to the Fax attached to the Complaint that contain statements regarding behavioral health coding, and/or invite recipients to a webinar regarding behavioral health coding, and/or offers a chance at a reward for completing a webinar survey.

Plaintiff reserves the right to amend the class definition following class certification discovery, including the right to add additional faxes to the class definition sent during the four-year class period. Excluded from the Class are Defendants, their employees and agents, independent contractors who transmitted the fax, and members of the Judiciary. Plaintiff seeks to certify a class which includes, but is not limited to, the Fax advertisement sent to Plaintiff.

27. Class Size (Fed. R. Civ. P. 23(a)(1)): Plaintiff is informed and believes, and upon such information and belief avers, that the number of persons and entities of the Plaintiff Class is numerous and joinder of all members is impracticable. Plaintiff is informed and believes, and upon such information and belief avers, that the number of class members is at least forty.

28. Commonality (Fed. R. Civ. P. 23(a)(2)): Common questions of law and fact apply to the claims

of all class members. Common material questions of fact and law include, but are not limited to, the following:

(a) Whether the Fax and other faxes sent during the class period constitute advertisements under the TCPA and its implementing regulations;

(b) Whether each Defendants meets the definition of "sender" for direct TCPA liability, meaning a "person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement," 47 C.F.R. § 64.1200(f)(10);

(c) Whether Defendants had prior express invitation or permission to send Plaintiff and the class fax advertisements;

(d) Whether the Fax contains an "opt-out notice" that complies with the requirements of § (b)(1)(C)(iii) of the Act, and the regulations promulgated thereunder, and the effect of the failure to comply with such requirements;

(e) Whether Defendants should be enjoined from faxing advertisements in the future;

(f) Whether Plaintiff and the other members of the class are entitled to statutory damages; and

(g) Whether the Court should award treble damages.

29. Typicality (Fed. R. Civ. P. 23(a)(3)): Plaintiff's claims are typical of the claims of all class members. Plaintiff received the same or similar faxes as the Fax

sent by or on behalf of Defendants advertising the commercial availability or quality of Defendants' property, goods, or services during the Class Period. Plaintiff is making the same claims and seeking the same relief for itself and all class members based upon the same federal statute. Defendants have acted in the same or in a similar manner with respect to Plaintiff and all the class members by sending Plaintiff and each member of the class the same or similar faxes or faxes which did not contain the proper opt-out language or were sent without prior express invitation or permission.

30. Fair and Adequate Representation (Fed. R. Civ. P. 23(a)(4)): Plaintiff will fairly and adequately represent and protect the interests of the class. Plaintiff is interested in this matter, has no conflicts, and has retained experienced class counsel to represent the class.

31. Predominance and Superiority (Fed. R. Civ. P. 23(b)(3)): Common questions of law and fact predominate over any questions affecting only individual members, and a class action is superior to other methods for the fair and efficient adjudication of the controversy because:

(a) Proof of the claims of Plaintiff will also prove the claims of the class without the need for separate or individualized proceedings;

(b) Evidence regarding defenses or any exceptions to liability that Defendants may assert and attempt to prove will come from Defendants' records and will not require individualized or separate inquiries or proceedings;

(c) Defendants have acted and are continuing to act pursuant to common policies or practices in the same or similar manner with respect to all class members;

(d) The amount likely to be recovered by individual class members does not support individual litigation. A class action will permit a large number of relatively small claims involving virtually identical facts and legal issues to be resolved efficiently in one proceeding based upon common proofs; and

(e) This case is inherently manageable as a class action in that:

(i) Defendants identified persons to receive the Fax transmissions and it is believed that Defendants' and/or Defendants' agents' computers and business records will enable Plaintiff to readily identify class members and establish liability and damages;

(ii) Liability and damages can be established for Plaintiff and the class with the same common proofs;

(iii) Statutory damages are provided for in the statute and are the same for all class members and can be calculated in the same or a similar manner;

(iv) A class action will result in an orderly and expeditious administration of claims and it will foster economics of time, effort, and expense;

(v) A class action will contribute to uniformity of decisions concerning Defendants' practices; and

(vi) As a practical matter, the claims of the class are likely to go unaddressed absent class certification.

COUNT I

Claim for Relief for Violation of the TCPA, 47 U.S.C. § 227 *et seq.*

32. The TCPA makes it unlawful for any person to "use any telephone facsimile machine, computer or other device to send, to a telephone facsimile machine, an unsolicited advertisement . . . ." 47 U.S.C. § 227(b)(1)(C).

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

34. The TCPA defines "telephone facsimile machine" as any "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." 47 U.S.C. § 227(a)(3).

35. *The Fax.* Defendants sent the Fax on or about August 13, 2020. The Fax was "addressed" to the recipients,' *i.e.*, proposed class members,' ten-digit

telephone fax numbers. The Fax was transmitted from a telephone facsimile machine, computer, or other device, through regular telephone lines, to the recipients' telephone facsimile machines as defined in the TCPA. *See supra* ¶ 34. The Fax constitutes an advertisement under the Act and the regulations implementing the Act. Defendants failed to comply with the Opt-Out Requirements in connection with the Fax, thereby precluding Defendants from sustaining the affirmative defense of established business relationship. By virtue thereof, Defendants violated the TCPA and the regulations promulgated thereunder by sending the Fax via facsimile transmission to Plaintiff and members of the Class. Plaintiff seeks to certify a class which includes the Fax and all others sent during the four years prior to the filing of this case through the present.

36. Plaintiff and the proposed Class were subjected to an invasion of their privacy and their interest in seclusion in being sent the unsolicited fax advertisement, and the Fax was a nuisance. Plaintiff and the proposed Class wasted their time determining that the Fax was an unsolicited advertisement, and the costs of advertising were shifted from the Defendants to the Plaintiff and the proposed Class. Plaintiff and the proposed Class wasted money on paper and toner in the event that Fax was printed, and Defendants accessed/occupied Plaintiff and the proposed Class's telephone fax lines and telephone facsimile machines. Plaintiff seeks to certify a class which includes this Fax and all others sent during the four years prior to the filing of this case through the present.

37. *Defendants' Other Violations.* Plaintiff is informed and believes, and upon such information and belief avers, that during the period preceding four years of the filing of this Complaint and repeatedly thereafter, Defendants have sent via facsimile transmission from telephone facsimile machines, computers, or other devices to the subscribed to the ten-digit telephone numbers and telephone facsimile machines of Plaintiff and the proposed Class members other faxes that constitute advertisements under the TCPA that were transmitted to persons or entities without their prior express invitation or permission (and/or that Defendants are precluded from sustaining the affirmative defense of EBR due to a noncompliant or nonexistent opt-out notice). By virtue thereof, Defendants violated the TCPA and the regulations promulgated thereunder.

COUNT II

Maryland Annotated Code, Commercial Art. § 14-3201-3202

38. Plaintiff incorporates the allegations in the preceding paragraphs as if fully set forth in this count.

39. The violations alleged above also violate the Maryland Telephone Consumer Protection Act or MD-TCPA, Maryland Annotated Code, Commercial Art. § 14-3201-3202.

40. The MD-TCPA provides for attorneys' fees and expressly states that each "prohibited practice" is to be regarded as a separate violation.

WHEREFORE, Plaintiff, FAMILY HEALTH PHYSICAL MEDICINE, LLC, individually and on

behalf of all others similarly situated, demands judgment in its favor and against Defendants, PULSE8, LLC and PULSE8, INC., jointly and severally, as follows:

A. That the Court adjudge and decree that the present case may be properly maintained as a class action, appoint Plaintiff as the representative of the class, and appoint Plaintiff's counsel as counsel for the class;

B. That the Court award actual monetary loss from such violations or the sum of five hundred dollars ($500.00) for each violation, whichever is greater, and that the Court award treble damages of $1,500.00 if the violations are deemed "willful or knowing";

C. That the Court award attorneys' fees as provided by the MD-TCPA;

D. That the Court enjoin Defendants from additional violations; and

E. That the Court award pre-judgment interest, costs, and such further relief as the Court may deem just and proper.

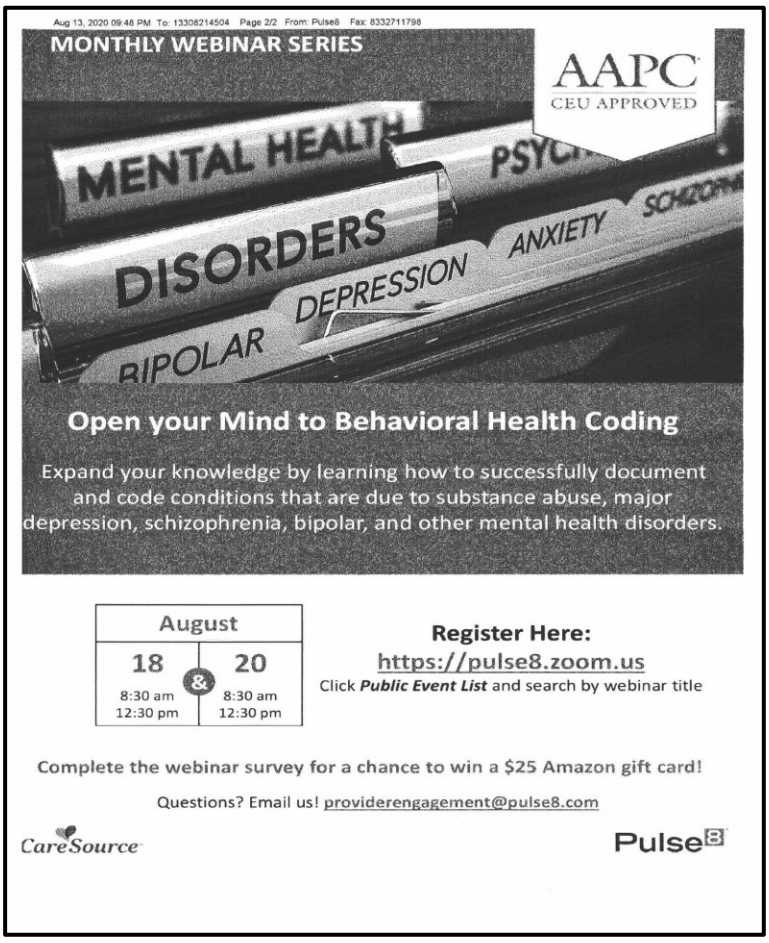
Respectfully submitted,

FAMILY HEALTH PHYSICAL MEDICINE, LLC, individually, and as the representative of a class of similarly-situated persons

By: /s/ Stephen H. Ring

[* * * Counsel block and cover sheet omitted]

Exhibit A


Aug 13, 2020 09:46 PM To: 13308214504 Page 2/2 From: Pulse8 Fax: 8332711798
MONTHLY WEBINAR SERIES
AAPC
CEU APPROVED
MENTAL HEALTH
DISORDERS
BIPOLAR
DEPRESSION
ANXIETY
Open your Mind to Behavioral Health Coding
Expand your knowledge by learning how to successfully document and code conditions that are due to substance abuse, major depression, schizophrenia, bipolar, and other mental health disorders.
August
18 & 20
8:30 am 12:30 pm
8:30 am 12:30 pm
Register Here:
https://pulse8.zoom.us
Click Public Event List and search by webinar title
Complete the webinar survey for a chance to win a $25 Amazon gift card!
Questions? Email us! providerengagement@pulse8.com
CareSource
Pulse8

Appendix E

Relevant Statutes

47 U.S.C. § 227(a)(5) provides:

> 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.

47 U.S.C. § 227(b)(1) provides:

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 …
>
> > to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement … .