No. ______________

IN THE
Supreme Court of the United States

ROBERT W. MAUTHE, M.D., P.C., individually and as the representative of a class of similarly-situated persons,

Petitioner,

v.

OPTUM, INC., and OPTUMINSIGHT, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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September 23, 2019

QUESTION PRESENTED

Did the Third Circuit err by holding that a commercial fax cannot be an "advertisement" as defined by the TCPA unless it promotes a direct sale of the sender's goods or services to the recipient where the Sixth Circuit held the opposite in *Matthew N. Fulton, DDS, P.C. v. Enclarity, Inc.,* 907 F.2d 948 (6th Cir. 2018), *reh'g denied,* 2018 U.S. App LEXIS 36638 (Dec. 27, 2018), *pet. for cert. filed, Enclarity Inc. v. Matthew N. Fulton DDS, P.C.,* No. 18-1258 (U.S. March 27, 2019).

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Court's Rule 29.6, undersigned counsel states that Petitioner, Robert W. Mauthe, M.D., P.C., has no parent corporation and that no publicly held company owns 10% or more of its stock.

PROCEEDINGS IN OTHER COURTS

Robert Mauthe, M.D., v. Optum, Inc. and Optuminsight, Inc., No. 17-1643, United States District Court for the Eastern District of Pennsylvania. Judgment entered July 27, 2018.

Robert Mauthe, M.D., v. Optum, Inc. and Optuminsight, Inc., No. 18-2894, United States Court of Appeals for the Third Circuit. Judgment entered July 3, 2019.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Robert W. Mauthe, M.D., P.C. ("Plaintiff") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

The Telephone Consumer Protection Act ("TCPA") broadly defines an "advertisement" as a fax containing "*any* material advertising the commercial availability or quality of any property, goods, or services which is transmitted to *any* person." 47 U.S.C. §227(a)(5) (emphases added). This case involves an unsolicited and unwanted fax to Plaintiff's medical practice requesting its contact information for a database Defendants sell or license to health care, insurance, and pharmaceutical companies. At issue is whether such a fax is an "advertisement" under the TCPA, because while it promoted the commercial availability and quality of the database as a means of inducing Plaintiff's response to Defendants' request for the information they intended to market and sell to others, the fax did not offer to sell or license the Database to Plaintiff.

In an earlier case, the Sixth Circuit held that a virtually identical fax from Defendants' competitor could be an advertisement because "[t]he fax solicits information to verify its system of provider information, which Defendants make commercially available to other health care organizations, who may subject [the plaintiff] to future unsolicited advertising." *Matthew N. Fulton, DDS, P.C. v. Enclarity, Inc.,* 907 F.2d 948 (6th Cir. 2018), *reh'g*

denied, 2018 U.S. App LEXIS 36638 (Dec. 27, 2018) *("Enclarity").* A petition for certiorari is pending in *Enclarity. Enclarity, Inc. v. Matthew N. Fulton DDS, P.C.,* No. 18-1258 (U.S. March 27, 2019).

In the present case, the Third Circuit ignored *Enclarity*, and reached the opposite conclusion. The court of appeals acknowledged that "defendants intended their faxes to obtain information enhancing the quality of their services, and thus reasonably calculated their faxes to increase their profits by keeping their database updated." 925 F.3d at 135. However, the court held that "the faxes did not attempt to influence the purchasing decisions of any potential buyer, whether a recipient of a fax or a third party." *Ibid.* The court also held that Plaintiff had not shown that the fax was a pretext for future advertising, because there was no evidence that Defendants "intended to send [Plaintiff] Mauthe any future faxes, let alone any more advertisements." *Ibid.*

The Third Circuit's opinion ignored the TCPA's broad definition of "advertisement" and literally opens the floodgates to creative fax marketing.

Certiorari should be granted to resolve the split among the Circuits on the standard for determining whether a fax is an advertisement as defined by the TCPA.

OPINIONS BELOW

The opinion of the Third Circuit below is reported at *Robert W. Mauthe, M.D., P.C. v. Optum Inc.,* 925 F.3d 129 (3d Cir. 2019) and reproduced at App.1a. The memorandum opinion of the district court granting Defendants' motion for summary judgment is reported at *Robert W. Mauthe, M.D., P.C. v. Optum Inc.,* 2018 U.S. Dist. LEXIS 125796 (E.D. Pa. July 27, 2018) and reproduced at App.12a.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2019. Fourteen days later, Plaintiff filed a timely Petition for Rehearing or for Rehearing en Banc on June 12, 2019. Fed. R. App. P. 35(c), 40(a)(1). The court of appeals denied Plaintiff's petition on June 25, 2019. App.32a.

This petition is timely because it is being filed within 90 days of the Third Circuit's denial of Plaintiff's petition for rehearing or for rehearing en banc. 28 U.S.C. §2101(c); Sup. Ct. R. 13.5. This Court has jurisdiction to hear this petition under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

A. The Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §227.

Restrictions on use of telephone equipment
(a) Definitions
As used in this section--

***

(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. The Codified FCC Regulation Implementing the TCPA, 47 C.F.R. §64.1200(f) (15).

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.

STATEMENT OF THE CASE

A. Statement of Facts.

Plaintiff commenced this action on April 11, 2017, by filing a complaint alleging that defendants Optum, Inc. and OptumInsight, Inc. (collectively "Optum" or "Defendants") violated the TCPA by sending Plaintiff an unsolicited advertisement by facsimile. CA-Appx020.[1] Plaintiff alleged that Optum sent the same "junk fax" to a class of others. *Ibid.*

Optum's fax touted its commercially available "Optum Provider Database" (the "Database"), which Optum says contains demographic data about medical providers throughout the country, and the fax solicited Plaintiff's participation in it. CA-Appx039-041.

Optum licenses access to the Database to its customers for profit. CA-Appx121-125. Optum considers the Database its "asset," and the licensing and use of the Database by its customers as "services." CA-Appx422:12-25.

Optum's business is licensing the Database to customers. CA-Appx447-452. Optum's fax solicited Plaintiff's participation in the Database, requesting that Plaintiff verify or update its demographic data,

[1] "CA-Appx" refers to Plaintiff-Appellant's Four-Volume Appendix filed in the court of appeals, Third Cir. No. 18-2984 (filed December 13, 2018).

and stated that Plaintiff's information would "be promptly updated" in the Database. CA-Appx039-041. The fax stated that Plaintiff's data would be "used by health care related organizations to aid in claims payment, assist with provider authentication and recruiting, augment their own provider data, mitigate health care fraud and publish accurate provider directories." *Ibid.* Discovery elucidated the meaning of these assertions.

Optum refers to the Database as an "asset" because the value of the Database is the data itself, which can be used in a number of different ways to provide services and value for Optum's customers. CA-Appx422:12-25. The Database was "developed to help companies improve the quality of their provider data." CA-Appx474:10-19. Optum intends the Database to provide "a source of truth" for the accuracy of healthcare provider data for Optum's customers, and includes data about all medical healthcare providers. CA-Appx576-77. Optum charges customers a license fee to use the Database. CA-Appx447-452. All of Optum's license fees are "really based upon the data, the volume of data and the data elements that you receive back." CA-Appx451:11-13; 487-488.

Optum sells or licenses the Database to its customers in three ways. CA-Appx447-452. The first way is through an "extract of the database." CA-Appx447:25-448:1. Optum's customers request a subset of the Database, request how frequently they

want the data, and pay a license fee, and then Optum delivers the "data set" to the customers. CA-Appx448-449. The second way is via the "comparison, correction, and augmentation service." CA-Appx449:13-16. Customers send Optum a list of the customers' healthcare provider data, Optum compares the customers' data to the Database, the customers pay a license fee to Optum, and then Optum returns the customers' original data file together with the "augmented or supplemental data" based on Optum's Database. CA-Appx449-450. The third way is by providing customers with "an online tool that allows them to access the [D]atabase." CA-Appx450:17-20. Optum charges customers a license fee to "access the data and pull back whatever data they happen to need." CA-Appx450:20-23.

Optum created the Database in 2004. CA-Appx574:9-15. Initially, it included only doctors, dentists, and optometrists, but the Database has "expanded to the ancillary specialties and then over the last few years [Optum] started adding the nurse practitioners and the physician assistants because they do have the ability of seeing patients now and writing scripts, so they're all included now as well." CA-Appx577:1-8. In 2004, Optum created an offshore team in India to help verify provider data. CA-Appx586, 598. Optum had 250 people in India placing outbound phone calls to medical providers to verify their data. *Ibid.* at 598. "After the first year, priority shifted, new leadership came in, and they didn't want to spend the $2 million on the 250 agents and they

wanted to cut it down to 50." CA-Appx598:12-15. There are now only 14 offshore agents located in India. CA-Appx584-85. Despite having cut the number of offshore agents, Optum still demanded that its employees meet the same internal objective; *i.e.*, the quality of the Database should increase every year. CA-Appx598-99.

As a result of the downsizing, and the increase in the amount of data, Optum looked for other ways to improve the quality and marketability of the Database. CA-Appx599-600. To that end, Optum sends faxes, like the fax Plaintiff received, on a daily basis. CA-Appx597:8-14, 600, 604-06. Through these fax campaigns, Optum receives confirmed or updated demographic information from medical providers at a return of 15 per hour, compared to a return of three per hour through telephone voice calls. CA-Appx601. Sending such faxes was a "no-brainer" because it improved the efficiency and productivity of Optum's primary goal of enhancing the quality and marketability of the Database by "get[ting] rid of stale data" and "mak[ing] sure that [Optum has] providers collapsed together correctly." CA-Appx602-603, 610-611, 617.

Optum's fax to Plaintiff touted the Database's commercial qualities and its availability. CA-Appx039. Optum promoted the Database's commercial qualities to fax recipients, because data verification is critical to selling the Database, and Optum decided it was important that the fax

recipients understood that the Database was a high-quality product. CA-Appx628-629. Otherwise, recipients might ignore the faxes, which would undermine the efficiency and effectiveness of Optum's faxing campaigns. CA-Appx602-603.

Optum tells potential customers that the Database "can deliver immediate and substantial financial benefits across your enterprise." CA-Appx662, 500:16-501:22. Optum represents that the Database can save customers money by reducing manual claims adjudication, returned mail, redundant mailings, incorrect payments and 1099 forms, prompt pay penalties and fines, unnecessary adjustment requests and claims appeals, poor provider/member relations and bad press, excess file maintenance and rework, and excessive call center staffing due to unnecessary correction calls. CA-Appx651; CA-Appx500:16-504:14, 489:7-25, 544:9-25, 443:17-444:9, 457:19-23, 423:15-19, 506:6-17.

Optum tells potential customers that the Database can provide positive financial benefit through complete, correct, and consistent healthcare provider data. CA-Appx500-504. Noting the high cost imposed by bad or inaccurate healthcare provider data, Optum markets the Database as a benefit to its customers' commercial endeavors. CA-Appx500:16-501:22. Optum wants customers to start "thinking about the return on investment for leveraging [Optum's] third-party data set." CA-Appx501:11-22.

Optum's competitors have developed similar provider-database assets, and sell that information to the same client base to which Optum seeks to license its Database. CA-Appx461. "The primary player in this space is LexisNexis [Enclarity]. … There's another out there called SK & A … there are [also] a number of small players." CA-Appx461-62. Optum believes that its "outreach verification program," including the fax outreach component, makes its Database better than the competition. CA-Appx617:1-10, 657-658. Optum is committed to investing in the continuous improvement of its outreach verification program to improve the efficiency and productivity of its efforts to improve the quality and marketability of the Database. CA-Appx598:10-24, 649-663.

B. Procedural History.

Plaintiff commenced this action on April 11, 2017, by filing a two-count complaint against Defendants. CA-Appx020. Count I alleged that the fax was an unsolicited "advertisement" Optum sent in violation of the TCPA. *Ibid.* at ¶¶ 1-61. Count II alleged that the sending of the fax constituted common-law conversion. *Ibid.* at ¶¶ 62-69. Optum moved to dismiss, arguing that as a matter of law, the fax was not an advertisement, that the district court therefore should dismiss Count I, and that the court should decline to exercise supplemental jurisdiction over the Count II state law claim. CA-Appx147.

On August 16, 2017, Plaintiff filed an amended complaint ("the Complaint"). CA-Appx119. The Complaint included 13 additional allegations detailing the way in which Optum's faxes were part of, and a pretext for, Optum's marketing and sale of the Database to customers for profit. CA-Appx119 ¶¶ 13, 15-18, 21-22, 25, 27-28, 31, 33-34. Optum again moved to dismiss, making the same arguments set forth in its original motion to dismiss. CA-Appx178 (motion to dismiss amended complaint).

On October 17, 2017, the district court denied Optum's motion to dismiss. CA-Appx287. The denial was without prejudice to Optum raising the same arguments on summary judgment, and the court ordered the parties to engage in limited discovery "on the question of whether the fax was an advertisement or a pretext; *i.e.*, whether it was part of a larger advertising scheme." *Ibid.*

On April 6, 2018, Optum moved for summary judgment, again arguing its fax was not an "advertisement" under the TCPA. CA-Appx057. Plaintiff filed a response, presenting evidence and argument that Optum sent the fax in furtherance of its fundamental business model; *i.e.*, to enhance the Database's quality and marketability in order to increase its sales and licensing to customers, thereby generating profit to Optum. CA-Appx288, 310, 396. Stated differently, Plaintiff presented evidence that Optum's fax was an advertisement because it was sent for the purpose of obtaining indirect financial

gain. CA-Appx289-305. Optum filed a reply, arguing the fax was not an advertisement because it did not promote the commercial availability or quality of any goods or services available for direct purchase by Plaintiff. CA-Appx327-329, 331, 334-37, 339.

On July 27, 2018, the district court granted Optum's motion for summary judgment on Plaintiff's TCPA claim. App-12a. The court held that Optum's fax "was neither an advertisement nor a pretext for an advertisement." App-13a. More specifically, the court held that, on its face, the fax "did not market the availability of a good or service, nor was it a pretext for a larger scheme to market the availability of a good or service." App-15a. The district court repeatedly emphasized the fact that Optum's Database—the primary subject matter of the fax—was neither offered nor available for sale to Plaintiff or any other recipient of the fax. App-15a. ("Optum does not market the Provider Database to individual provider offices"); App-17a ("the fax states '… This is not an attempt to sell you anything.' [] And discovery has confirmed that this fax was not an attempt to sell anything to the plaintiff."); App-21a ("the fax sent to the plaintiff was not … an offer to sell the database to the plaintiff or anyone else").

The district court acknowledged that the fax could be construed to "declare" the availability of Optum's Database. App-28a ("At most, the fax 'declares' the availability of a good or service"). But the court drew a distinction between "declaring" and "promoting."

Ibid. ("…merely declaring the availability of a good or service is insufficient. The fax must draw the public's attention to something to promote its sale….") (citations and internal quotation marks omitted). App-25a ([F]or a fax to violate the TCPA it must do more than declare the commercial availability of a good or service—it must 'promote' the availability of a good or service"), *citing Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.,* 788 F.3d 218, 222 (6th Cir. 2015)).

Having concluded that the fax was not an advertisement on its face, the court considered whether the fax was a pretext for a larger advertising scheme. App-29a ("Because the fax is not facially an advertisement, the court must consider whether the fax was a pretext for a larger advertising scheme[,] … [i.e.,] 'part of an overall marketing campaign to sell property, goods, or services'"). Notwithstanding evidence confirming that Optum sent the fax as part of an outreach effort to improve the quality of the Database in order to enhance its marketability to Optum's customers, all in furtherance of Optum's ultimate profit, App-15a (finding "undisputed material fact[]" that "[t]he [D]atabase is usually 'purchased and used by organizations that manage a health care network and pay claims…'"), the court held there was no evidence that the fax was part of an overall marketing campaign to sell Optum's goods or services. App-29a ("Discovery … has shown that the fax here was not a pretext for a larger advertising scheme").

The district court reached this seemingly anomalous conclusion by rejecting the notion that Optum's motive to profit indirectly from the fax—*i.e.*, by marketing the enhanced quality of the Database to its customers, leading to increased sales and licensing of the Database to such customers—could be relevant to the determination of whether the fax was an advertisement by pretext. App-29a (describing Plaintiff's pretext argument to be "functional equivalent" of Plaintiff's "indirect future economic benefit argument"). Despite acknowledging that the FCC had taken a "broad view" of the meaning of the term "advertisement" under the TCPA, App-18a, the court rejected the notion that a defendant's intention to profit indirectly by sending a fax can make the fax an advertisement. App-22a ("The TCPA … does not prohibit faxes sent in furtherance of indirect commercial solicitations or transactions with third parties. *** [F]axes sent in furtherance of indirect commercial solicitations or transactions with third parties are not unsolicited advertisements."); App-26a ([T]he court rejects the plaintiff's argument that any fax that indirectly furthers a commercial transaction with a third party is an advertisement").

On appeal, the Third Circuit affirmed the district court's opinion. The appellate court began by noting that "liability for a TCPA violation is not necessarily limited to a situation in which fax is sent to potential direct purchasers of the sender's product or services." App-5a. Because Plaintiff did not claim to be a direct

purchaser, the court concluded that the fax was not an "advertisement" as that term is conventionally used. *Ibid.* However, the court considered "a possible broader basis for liability predicated on the fact that this case involves third parties beyond defendants and [Plaintiff] Mauthe, *i.e.,* the users of defendants' database." *Ibid.*

The court held that a TCPA violation could be based on "third party liability" in some circumstances, giving the example of "a fax sent to a doctor encouraging the doctor to prescribe a particular drug to the doctor's patients who, rather than the doctor, are the likely purchasers of the sender's product." App-5a.

The court created a three-prong test to determine whether a fax is an "advertisement" in the "third party liability" context:

> We are satisfied that to establish third-party based liability under the TCPA a plaintiff must show that the fax: (1) sought to promote or enhance the quality or quantity of a product or services being sold commercially; (2) was reasonably calculated to increase the profits of the sender; and (3) directly or indirectly encouraged the recipient to influence the purchasing decisions of a third party.... It is not enough that the sender sent a fax with a profit motive—in order to show that the sender is trying to make a sale, there must be a nexus

> between the fax and the purchasing decisions of an ultimate purchaser whether the recipient of the fax or a third party. The liability standard … in a third-party based liability situation, hinges on whether the fax was somehow intended to influence a potential buyer's decision in making a purchase, irrespective of whether the sender sent the fax to the potential buyer or to a third party and must have been intended to or at least be capable of influencing a buyer's purchasing decision.

App-7a.

The court concluded that Plaintiff did not satisfy this test:

> Though defendants intended their faxes to obtain information enhancing the quality of their services, and thus reasonably calculated their faxes to increase their profits by keeping their database updated, the faxes did not attempt to influence the purchasing decisions of any potential buyer, whether a recipient of a fax or a third party. Moreover, the fax sent to [Plaintiff] Mauthe did not encourage him to influence the purchasing decisions or those of a third party.

App-10a.

Assuming that a fax sender could be held liable under a "pretext theory of liability under the TCPA," the Third Circuit held that Plaintiff could not prevail on such a "pretext" claim because "there was no evidence that defendants 'intended to send Mauthe any future faxes, let alone any more advertisements." App-2a, *quoting Mauthe v. Nat'l Imaging Assocs., Inc.,* No. 18-2119, 2019 U.S. App. LEXIS 11232 (3d Cir. Apr. 17, 2019).

REASONS FOR GRANTING THE PETITION

A. The Court Should Hold the Petition for *Enclarity* and Then Consider Vacating and Remanding.

The Court should hold this petition pending the outcome in *Enclarity*. After a decision in *Enclarity*, it may be appropriate to grant this petition, vacate the judgment below, and remand for further proceedings in light of the decision.

Like this case, *Enclarity* involves a healthcare provider's claim for damages under the TCPA based on receipt of a fax that the provider contends was a solicitation for information. Like Defendants here, the *Enclarity* defendant maintains and sells a database of medical provider information. Like Defendants here, the *Enclarity* defendant faxed a form to medical providers asking for verification of their contact information for inclusion in a commercially-available database.

After the district court dismissed the *Enclarity* plaintiff's TCPA claim, the Sixth Circuit reversed. The court held that the plaintiff had asserted a plausible TCPA claim "insofar as it alleged that the fax served as a pretext to send [plaintiff] Fulton additional marketing materials." 907 F.3d at 949. To allege a "fax-as-pretext" theory, according to the panel majority, TCPA plaintiffs need only posit a "commercial nexus" between the fax and the sender's business. 907 F.3d at 955 (quoting *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.,* 847 F.3d 92, 95-96 (2d Cir. 2017)). The Sixth Circuit thus concluded that the plaintiff had alleged a sufficient "nexus" here by asserting that Enclarity's "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." *Ibid.*

The *Enclarity* defendant has filed a petition for certiorari now pending in this Court, *Enclarity Inc. v. Matthew N. Fulton DDS, P.C.,* No. 18-1258 (U.S. March 27, 2019). The issue presented is "Whether faxes that only request information and propose no commercial transaction with recipients are 'advertisements' under the TCPA." *Enclarity* thus presents the same question presented here.

If the Court grants the petition in *Enclarity,* the Court should either grant this petition and take the appeals together or, alternatively, hold this petition

and, in light of the ultimate disposition in *Enclarity*, if appropriate, grant this petition, vacate the Third Circuit's judgment, and remand for further consideration in light of *Enclarity.*

B. If the Court Does Not Remand, It Should Grant Plenary Review.

1. The Circuits are divided on the meaning of "advertisement" under the TCPA in situations where the fax recipient is not the ultimate intended purchaser of the identified goods or services.

The question of what is an "advertisement" under the TCPA's prohibition of unsolicited facsimiles, and the weight owed FCC statements on the issue, has generated substantial litigation and is the subject of numerous recent decisions with disparate results. *See, e.g.*, *Enclarity,* 907 F.3d 948; *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019); *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 847 F.3d 92, 96 (2d Cir. 2017); *Ira Holtzman, C.P.A. v. Turza,* 728 F.3d 682 (7th Cir. 2013).

In fashioning its own test for defining "advertisement" in this case, the Third Circuit did not cite or discuss the sister circuit opinions, and reached a conclusion contrary to them. Not only does the opinion below directly conflict with *Enclarity,* but its underlying reasoning and standard announced are in

conflict with the reasoning of these sister circuit opinions.

The meaning of "advertisement" under the TCPA is a question on an "important matter" where the circuit courts of appeal have disagreed, so there is a need for this Court to provide a uniform national standard.

2. The opinion below conflicts with the decisions of other circuits bearing on the same issue.

In *Boehringer*, *supra*, the Second Circuit reviewed the dismissal of a TCPA action involving a fax inviting doctors to a dinner at which defendant allegedly would promote its pharmaceutical drugs. 847 F.3d at 93, 95, 97. The district court held it was not an advertisement. *Ibid.* at 94. The Second Circuit reversed, holding it would be an advertisement if defendant intended to advertise its drugs to fax recipients attending the dinner. *Ibid.* at 95. The court understood defendant was not promoting its drugs for sale to fax recipients, but rather attempting to induce them to prescribe its drugs to patients, who would purchase those drugs from a pharmacy, which in turn purchases the drugs from defendant, thereby indirectly translating to increased sales of defendant's drugs. *Ibid.* at 97.

In *Carlton*, *supra*, the Fourth Circuit reviewed dismissal of a TCPA action involving a fax offering doctors a free e-book. *Carlton & Harris Chiropractic,*

Inc. v. PDR Network, LLC, 883 F.3d 459, 461 (4th Cir. 2018), *vacated and remanded*, 139 S. Ct. 2051 (2019).[2] It was not alleged the fax sought to sell anything to recipients. Nevertheless, the Fourth Circuit held it was an advertisement because the FCC has held faxes offering free goods or services are advertisements. *Ibid.* at 463-68. The Fourth Circuit noted it was plausible to infer defendant received compensation from someone for distributing free e-books to fax recipients, even if recipients never bought anything from defendant. *Ibid.* at 468.[3]

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[2] The Court granted the defendant's petition for certiorari on the narrow question of the proper deference to be paid to the FCC's statements on the issue in light of the Hobbs Act, 28 U.S.C. §2342(1). *Carlton,* supra, 139 S. Ct. at 2053. The Court did not reach the issue, however. *Ibid.* Instead, the Court vacated and remanded for the Fourth Circuit to consider preliminary issues necessary to resolve the proper application of the Hobbs Act to the FCC statements at issue. *Carlton,* supra, 139 S. Ct. at 2055-2056.

[3] District court decisions are in accord. *See Mussat v. Enclarity, Inc.*, No. CIV. A. 16-07643, 2018 WL 1156200, at *5 (N.D. Ill. Mar. 5, 2018); *Comprehensive Health Care Systems of the Palm Beaches, Inc. v. M3 USA Corp.*, Case No. 16-cv-80967-BLOOM/Valle, 2017 WL 108029, at *2 (S.D. Fla. Jan. 11, 2017); *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 491 (W.D. Mich. 2014) (amended Jan. 12, 2015); *Herrick v. QLess, Inc.*, 216 F. Supp. 3d 816, 820 (E.D. Mich. 2016); *AL and PO Corp. v. Med-Care Diabetic & Med. Supplies, Inc.*, No. 14 C 01893, 2014 WL 6999593, at *3 (N.D. Ill. Dec. 10, 2014). *But see Mauthe v. ITG Inc.*, No. 18-1968, 2019 U.S. Dist. LEXIS 147171 (Aug. 29, 2019) (applying *Optum* standard for third-party based liability).

Without mentioning these decisions, the Third Circuit's opinion below adopted a standard that irreconcilably conflicts with them. Although the Third Circuit seemingly attempted—through the third prong of its standard—to accommodate the *Boehringer* scenario (while at the same time never actually mentioning *Boehringer*),[4] its attempted accommodation fails. In the *Boehringer* context, drug manufacturers sell their drugs to pharmacies, which in turn sell those drugs to patients with prescriptions written by doctors. Doctors do not purchase the drugs; they are merely a means by which drug manufacturers—through fax promotion directed to the doctors—seek to induce them to take actions (write prescriptions) generating increased sales by the drug manufacturers to third parties (pharmacies). 847 F.3d at 97. In this scenario, the "nexus" between the drug manufacturer's fax and the "inducement" leading the pharmacy to purchase more of the manufacturer's drugs is indirect and attenuated, but *Boehringer* held this nexus sufficient to sustain a viable TCPA claim.

Here, the nexus between (1) Defendants' fax, and (2) ultimate inducement leading Defendants' customers to purchase/license Defendants' database,

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[4] In providing an example of a viable case of so-called third-party based liability, the panel decision actually hypothesizes a scenario similar to that at issue in *Boehringer*, *i.e.*, a fax soliciting a physician to prescribe the sender's pharmaceutical drugs to his patients.

is no more indirect or attenuated than that held sufficient in *Boehringer*. The marketability and profitability of Defendants' Database derives from its accuracy and reliability, and Defendants sent the fax to maintain and improve that accuracy and reliability, intending that doing so would induce increased sales/licensing of the database to their customers. In both *Boehringer* and the case at bar, fax recipients are cogs in the defendants' marketing machines, solicited by faxes to take actions ultimately intended to indirectly induce third parties to purchase more of the defendants' goods or services. There is no way to square the decision below with *Boehringer*.

And yet, it is unclear whether the conflict between the Third Circuit decision and *Boehringer* derives from the Third Circuit standard for "third-party based liability" itself, or from its (mis)application of that standard to the facts of the case at bar. The third prong of the standard speaks to a "nexus" between the fax and the ultimate inducement leading a third party to purchase the defendant's goods or services. As indicated above, such a nexus exists in the case at bar. Indeed, the decision below acknowledges the nexus:

> …[D]efendants intended their faxes to obtain information enhancing the quality of their services, and thus reasonably calculated their faxes to increase their profits by keeping their database updated….

App-10a.

Although unstated, the Third Circuit panel obviously was acknowledging that the enhanced quality of Defendants' database, resulting from the faxes sent by Defendants, would trigger increased profits to Defendants by inducing customers to increase purchasing/licensing of the database. Nevertheless, the court held this nexus insufficient to satisfy the third prong of its standard because:

> …[T]he faxes did not attempt to influence the purchasing decisions of any potential [third-party] buyer.… Moreover, the fax sent to Plaintiff did not encourage him to influence the purchasing decisions … of a third party.

App-10a.

These findings are plainly erroneous, and actually are contradicted by the court's acknowledgement of Defendants' intentions in sending the faxes. The faxes *did* attempt to influence the purchasing decisions of Defendants' customers through the improved quality of the database that Defendants expected to result from sending the faxes. And the fax sent to Plaintiff *did* encourage it to influence the purchasing decisions of Defendants' customers by soliciting Plaintiff to take actions that Defendants intended to have just that effect.

If the Third Circuit refused to find a sufficient nexus here because it concluded the demonstrated nexus was too attenuated, (1) the court did not articulate that reasoning, (2) its earlier articulation of the standard neither stated nor implied that the requisite nexus incorporated some corollary requirement that the nexus be direct as opposed to indirect, and (3) requiring that the nexus be direct is irreconcilable with *Boehringer*.

The Third Circuit's assertion that "the fax sent to [Plaintiff] Mauthe did not encourage him to influence the purchasing decisions … of a third party," is perplexing. App-10a. Admittedly, the fax did not tell Plaintiff that the actions the fax solicited it to take were intended to influence the purchasing decisions of Defendants' customers, but Defendants undisputedly knew the fax solicited Plaintiff to take actions they intended to influence their customers' purchasing decisions. Why should the status of the fax as an advertisement depend on whether Plaintiff understood the ultimate influencing/inducing effect of its solicited actions upon Defendants' customers? The opinion below does not say, and there is no logical explanation why Plaintiff's understanding should factor into the determination of whether the fax was an "advertisement."

If, after articulating its standard for third-party based liability, the Third Circuit had held that Plaintiff met that standard, Plaintiff would not object to that standard because there would be no conflict

with *Boehringer*. But the court held Plaintiff did not meet that standard, meaning either the standard is flawed and conflicts with *Boehringer* or the standard as articulated is correct, but the court misapplied it in this case.

The opinion below also runs contrary to observations by the Fourth Circuit in the free-promotion context (*i.e.*, *Carlton*). There the fax recipient was not asked to purchase anything, but the court observed it was plausible the sender *somehow* made money *from someone* by sending the faxes. 883 F.3d at 468 ("The free distribution of the e-book, then, may not impose a financial cost on healthcare providers, but [defendant] may nevertheless stand to profit when a provider accepts a free copy"). *Carlton* noted construing the TCPA term "advertisement" must take account of "modern business models" and marketing methods serving such models:

> [R]equiring a fax to propose a specific commercial transaction on its face takes too narrow a view of the concepts of commercial activity and promotion, and ignores the reality of many modern business models. *** [G]iving away products in the hope of future financial gain is a commonplace marketing tactic. *** All told, we think it entirely plausible that [defendant] distributes the free e-books to further its own economic interests.

Ibid.

Enclarity, supra, similarly noted that a fax may be an advertisement without appearing to be so on its face, and the "best ads" sometimes do just that. 907 F.3d at 953.

But the opinion below—whether viewed as articulating a flawed standard or misapplying a correct standard—actually rewards creative marketing designed for modern business models by holding faxes serving the overall marketing purposes of those business models fall outside the TCPA's reach. The opinion literally opens the floodgates to creative fax marketing.

3. The opinion below is contrary to the plain language of the TCPA's definition of a fax "advertisement."

The Third Circuit's decision is also contrary to the TCPA's plain language because it requires a nexus between the recipient of the fax and promotion of the sale of the sender's goods or services. The TCPA's definition of "advertisement" requires no such nexus.

The TCPA broadly defines "advertisement" to prohibit all "junk faxes" regardless of the proximity between the targets of those faxes and the purchasers of the sender's goods or services:

> 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(a)(5) (emphasis added). The definition covers "any [such] material" sent to "any person." *Ibid.* It does not require a connection between the recipient and the ultimate potential purchasers of the sender's goods or services. This makes sense because the focus of the TCPA is to stop unwanted faxes that promote the sender's business at the expense of recipients who have not given "prior express invitation or permission." *Ibid.* Why the sender targeted the recipient should not matter. It should only matter that the sender did so for the sender's profit without regard to the recipient's wishes.

4. The opinion below runs contrary to the legislative history of the TCPA.

The Third Circuit's decision distinguishes between "advertising faxes," which the TCPA prohibits, and "commercial faxes," which supposedly are not prohibited. App-6a ("[T]he TCPA only prohibits unsolicited <u>advertisements</u>, not any and all faxes even if sent for a commercial purpose. *** After all, a commercial entity takes almost all of its actions with a profit motivation.") (emphasis in original). This

purported distinction is unsupported by, and inconsistent with, the legislative history.

In particular, in Congressional Committee Reports leading to the enactment of the 2005 JFPA (amending the TCPA), the legislative history reflects the terms "fax advertisements" and "commercial faxes" being used synonymously and interchangeably. *See, e.g.*, S. Rep. 109-76, at 2 ("The purposes of this legislation are to: Create a limited statutory exception to the current prohibition against the faxing of unsolicited *advertisements* to individuals without their 'prior express invitation or permission' by permitting such transmission by senders of *commercial faxes* to those with whom they have an established business relationship") (emphasis added); *id.* at 7 ("The legislation would result in new or incremental costs for senders of commercial faxes … and provide cost free mechanisms that allow recipients to choose whether to receive future commercial faxes") (emphasis added).

The Third Circuit's purported distinction between supposedly lawful "commercial faxes" and unlawful "advertising faxes" thus disserves the legislative history of the TCPA. It also disserves the TCPA itself because it carves out an entire category of "commercial faxes" that the TCPA was intended to prohibit, and effectively invites creative marketers to develop faxes with obvious advertising purpose, but shrouding that purpose just enough to avoid the denomination "advertisement." The TCPA is also

known as the Junk Fax Protection Act of 2005, Pub.L. 109-21, 119 Stat. 359 (2005). The decision below creates an unwarranted gap in the protection against unsolicited junk faxing that the TCPA was designed to prohibit.

5. The opinion below runs contrary to the FCC's multiple interpretations of the TCPA that broadly construe the term "advertisement."

The FCC has not issued a formal rule or regulation expressly addressing whether indirect financial gain a sender receives by sending a fax makes it an advertisement. But all of the FCC's pronouncements construing the TCPA term "advertisement" reflect a broad construction. For example, the FCC has held faxes offering free goods are advertisements. 2006 Rules, 71 F.R. at 25973. The FCC also has held faxes inviting recipients to participate in surveys are advertisements if the faxes are pretexts to future marketing to the recipients. *Id.* Indeed, the FCC has recognized very few exceptions to advertisement status—*e.g.*, exceptions for "bona fide 'informational communications'" and "transactional communications." *Id.* The FCC's overall intent is clear: commercial faxes containing advertising are advertisements unless they fall within one of the FCC's enumerated exceptions.

In holding "commercial faxes" separate and distinct from "advertising faxes" and not covered by the TCPA's junk-fax prohibitions, the Third Circuit

decision disserves the FCC's long history of rulemaking liberally construing the term "advertisement" and did so without comment.

CONCLUSION

The Third Circuit's decision directly conflicts with the Sixth Circuit's decision in *Enclarity,* and with the reasoning of sister circuits, on the important issue of the meaning of "advertisement" in a situation where the fax recipient is not the intended direct purchaser of the sender's goods and services. The Court should grant certiorari to consider this issue.

Respectfully submitted,

s/ Phillip A. Bock

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED MAY 28, 2019

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2894

ROBERT W. MAUTHE, M.D., P.C.,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED

v.

OPTUM INC., OPTUMINSIGHT, INC.

ROBERT W. MAUTHE, M.D., P.C.,

Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania.
(D.C. Civ. No. 5-17-cv-01643)
Honorable Edward G. Smith, District Judge

March 8, 2019, Argued
May 28, 2019, Filed

BEFORE: AMBRO, RESTREPO,
and GREENBERG, *Circuit Judges*.

GREENBERG, *Circuit Judge*

I. INTRODUCTION

This matter comes on before this Court on the appeal of plaintiff Robert W. Mauthe M.D. P.C. challenging the District Court's grant of summary judgment against its complaint brought under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"). We consolidated this case for argument with *Mauthe v. Nat'l Imaging Assocs., Inc.,* No. 18-2119, 2019 U.S. App. LEXIS 11232, 2019 WL 1752591 (3d Cir. Apr. 17, 2019) ("*NIA*"), a case that the same plaintiff filed against a different defendant under the TCPA because the two cases raised similar issues. Although the plaintiff in both cases is a professional corporation, we will refer to the plaintiff as Robert W. Mauthe, as though an individual, as we did in *NIA.* In this case, Mauthe alleged that he received an unsolicited advertisement via fax from defendants Optum, Inc. and OptumInsight, Inc., related entities, in violation of the TCPA and included in his complaint a supplemental state law claim for common law conversion. Defendants moved for summary judgment, and the Court granted their motion on the TCPA claim and dismissed the state law claim without prejudice, as it declined to exercise jurisdiction over it. *Robert Mauthe, M.D. PC v. Optum,* Civ. No. 17-1643, 2018 U.S. Dist. LEXIS 125796, 2018 WL 360912 (E.D. Pa. July 27, 2018) ("Optum"). For the reasons stated below, we will affirm the order of the Court in both respects.

II. FACTUAL BACKGROUND

The facts of this case are essentially undisputed. Defendants maintain a national database of healthcare providers, containing providers' contact information, demographics, specialties, education, and related data. Defendants market, sell, and license the database typically to health care, insurance and pharmaceutical companies, who use it to update their provider directories, identify potential providers to fill gaps in their network of providers, and validate information when processing insurance claims. Obviously, it is important that the information contained in the database be accurate and Mauthe, who is a healthcare provider, does not contend otherwise.

One of the ways defendants update and verify the information in their database is to send unsolicited faxes to healthcare providers listed in the database, requesting them to respond and correct any outdated or inaccurate information. The faxes inform the recipients that:

> As part of ongoing data maintenance of our Optum Provider Database product, Optum regularly contacts healthcare practitioners to verify demographic data regarding your office location(s). This outreach is independent of and not related to your participation in any Optum network. By taking a few minutes to verify your practice information is current, your information will be promptly updated in Optum Provider Database.

> This data is used by health care related organizations to aid in claims payment, assist with provider authentication and recruiting, augment their own provider data, mitigate healthcare fraud and publish accurate provider directories.

Optum, 2018 U.S. Dist. LEXIS 125796, 2018 WL 3609012, at *2. The faxes also advise the recipients that "[t]here is no cost to you to participate in this data maintenance initiative. This is not an attempt to sell you anything." *Id. T*he fax that defendants sent Mauthe included these provisions.

III. STANDARD OF REVIEW

We exercise *de novo r*eview on this appeal. *See Bradley v. West Chester Univ. of Pa. State Sys. of Higher Educ.*, 880 F.3d 643, 650 (3d Cir. 2018). "Our review of the District Court's [summary judgment] decision is plenary, and we apply the same standard as the District Court to determine whether summary judgment was appropriate." *State Auto Prop. & Cas. Ins. Co. v. Pro Design, P.C.*, 566 F.3d 86, 89 (3d Cir. 2009). "[S]ummary judgment is properly granted 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Sconiers v. United States*, 896 F.3d 595, 597 n.3 (3d Cir. 2018) (quoting Fed. R. Civ. P. 56(a)).[1]

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1. The District Court had jurisdiction under 28 U.S.C. § 1331 and we have jurisdiction under 28 U.S.C. § 1291.

IV. DISCUSSION

Under the TCPA, it is unlawful to send an unsolicited advertisement by fax. *NIA,* 2019 U.S. App. LEXIS 11232, 2019 WL 1752591, at *2. Mauthe asks us to hold that the fax was an unsolicited advertisement which the TCPA prohibited defendants from sending to him. In *NIA,* we articulated the standard to determine when a fax has been sent to a potential direct purchaser of a product or service in violation of the TCPA, but we also opined that liability for a TCPA violation is not necessarily limited to a situation in which a fax is sent to potential direct purchasers of the sender's product or services. 2019 U.S. App. LEXIS 11232, [WL] at *3 n.3. Mauthe does not claim to be a potential direct purchaser of defendants' services and defendants disclaim any intention to sell him anything. Indeed, their fax to him recited as much, as it said that the fax was not an attempt to sell him anything. After our examination of the fax we have concluded that there is no basis on which defendants can be held to have violated the TCPA on the basis of the fax if the meaning of the advertisement is viewed in a conventional way. Consequently, we consider a possible broader basis for liability predicated on the fact that this case involves third parties beyond defendants and Mauthe, i.e., the users of defendants' database.

An example of a possible TCPA violation by the sending of a fax to an entity other than a possible direct purchaser of the sender's product or services is a fax sent to a doctor encouraging the doctor to prescribe a particular drug to the doctor's patients who, rather than the doctor, are the

likely purchasers of the sender's product. *Id. W*e refer to liability in such situations as "third-party based liability,"[2] as the sender is not attempting to sell the recipient anything. *Id. B*ut in *NIA b*ecause potential third-party based liability was not at issue, we did not address the question of whether there could be a third-party based liability by reason of the sending of a fax. That issue now is squarely before us because defendants sent the fax to Mauthe in order to update their database to be accessed by third parties who were not the recipients of defendants' faxes and the faxes were not an attempt to sell Mauthe or the putative class members anything.

Mauthe advances his third-party based liability argument on a theory that, although he was not a purchaser of defendants' products or services, defendants violated the TCPA because they had a profit motive in sending him the fax so that the fax should be regarded as an advertisement. Mauthe asserts that defendants sought the information in the fax to enhance the accuracy of their database and thus increase their profits. We agree with the stated factual basis for his claim because defendants were using the faxes to improve the accuracy of their database. However, the TCPA only prohibits unsolicited *advertisements,* not any and all faxes even if sent for a commercial purpose. It seems beyond doubt that a fax does not become an advertisement merely because the sender intended it to enhance the quality of its products or services and thus its profits. After all, a commercial entity

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2. We used the term "third-party based liability" even though the parties do not do so in their briefs. They do, however, refer to third parties in their briefs.

takes almost all of its actions with a profit motivation. But as we opined in *NIA*, "[a]dvertising is the action of drawing the public's attention to something to promote its sale. 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." *NIA*, 2019 U.S. App. LEXIS 11232, 2019 WL 1752591, at *2 (internal quotations, quotation marks and citations omitted).

We are satisfied that to establish third-party based liability under the TCPA a plaintiff must show that the fax: (1) sought to promote or enhance the quality or quantity of a product or services being sold commercially; (2) was reasonably calculated to increase the profits of the sender; and (3) directly or indirectly encouraged the recipient to influence the purchasing decisions of a third party. As we explained in *NIA*, "the fax must convey the impression . . . that a seller is trying to make a sale[.]" *NIA*, 2019 U.S. App. LEXIS 11232, 2019 WL 1752591, at *2. It is not enough that the sender sent a fax with a profit motive—in order to show that the sender is trying to make a sale, there must be a nexus between the fax and the purchasing decisions of an ultimate purchaser whether the recipient of the fax or a third party. The liability standard articulated in *NIA*, and the one we articulate here in a third-party based liability situation, hinges on whether the fax was somehow intended to influence a potential buyer's decision in making a purchase, irrespective of whether the sender sent the fax to the potential buyer or to a third party and must have been intended to or at least be capable of influencing a buyer's purchasing decision. If we adopted a less demanding standard, we would risk extending too

far the prohibitions that the TCPA established. We believe that our construction of the TCPA faithfully adheres to what the TCPA facially prohibits, while broadly construing the TCPA to provide plaintiffs with an alternative theory of liability even when the fax is not sent to potential direct purchasers of a defendant's products or services.

We give an example that supports our conclusion and demonstrates why we must be concerned with possible overreaching of the application of the TCPA that we derive from the analogous field of telemarketing, a practice that the TCPA regulates. In dealing with telemarketing the TCPA prohibits

> 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).

47 U.S.C. § 227(b)(1)(B). Under the rules promulgated by the Federal Communications Commission, calls are exempt from the statutory prohibition "if not made for a commercial purpose" or, as germane here, if they do "not include or introduce an advertisement or constitute telemarketing." 47 C.F.R. § 64.1200(a)(3). The FCC has also opined that "calls conducting research, market surveys, political polling or similar activities [that] do not involve solicitation as defined by our rules" are exempt from the statutory prohibition on artificially prescribed calls. *In the Matter of Rules and Regulations*

Implementing the TCPA, 7 F.C.C.R. 8752, 1992 WL 690928, at *15, 7 FCC Rcd. 8752, 8774 ¶ 41 (Oct. 16, 2012). Consequently, a marketing firm making calls to conduct pure market research, and a pollster conducting a political poll by telephone, do not violate TCPA's telemarketing prohibition.[3]

Commercial entities conducting research sometimes do so by sending faxes. Under Mauthe's theory, these firms would violate TCPA's prohibition on the sending of an unsolicited fax advertisement because they would send their faxes for the purposes of improving their operations and thus their profits. But such faxes would not promote the sale of any products or services, or seek to influence the purchasing decisions of a potential buyer. We will not adopt a construction that broadly would limit commercial activities to the extent Mauthe invites. *See NIA*, 2019 U.S. App. LEXIS 11232, 2019 WL 1752591, at *2-3. The requirement for establishing TCPA liability that we set forth is that there be a nexus between the sending of the fax and the sender's product or services and the buyer's decision to purchase the product or services accomplishes the TCPA objective without infringing on other commercial activities.[4]

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3. We note that there is a petition for expedited declaratory ruling on whether market research surveys are fax advertisements as defined by the TCPA pending before the FCC. *See Lyngaas v. J. Reckner Assocs., Inc.*, No. 2:17-cv-12867, 2019 U.S. Dist. LEXIS 4632, 2019 WL 166227, at *1-2 (E.D. Mich. Jan. 10, 2019).

4. In fact, under Mauthe's theory an employer with a letterhead listing its address, telephone number and products and services would violate the TCPA if it sent a fax on its letterhead

Turning to the facts of this case, Mauthe's claim does not survive our standard for third-party based liability or any other theory of liability under the TCPA. Though defendants intended their faxes to obtain information enhancing the quality of their services, and thus reasonably calculated their faxes to increase their profits by keeping their database updated, the faxes did not attempt to influence the purchasing decisions of any potential buyer, whether a recipient of a fax or a third party. Moreover, the fax sent to Mauthe did not encourage him to influence the purchasing decisions or those of a third party. Though we appreciate the annoyance and/or harassment Mauthe felt receiving unsolicited faxes, we are constrained in reaching our decision by what the TCPA actually prohibits—it does not prohibit all unsolicited faxes, just advertisements. We will not distort the meaning of "advertisement" to accommodate Mauthe's case. Therefore, we will uphold the District Court's conclusion that defendants' fax was not an "advertisement" under the TCPA.

The District Court also held that the fax was not a pretext to more commercial solicitation. *Optum,* 2018 U.S. Dist. LEXIS 125796, 2018 WL 3609012, at *7. As we stated in *NIA,* we have not endorsed and do not now do so the pretext theory of liability under the TCPA, a matter that is still open. 2019 U.S. App. LEXIS 11232, 2019 WL 1752591, at *3. However, for the same reasons that we set forth in *NIA* in rejecting a pretext claim even if such a claim is potentially viable, Mauthe's pretext claim fails

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to inquire about the qualifications of a job applicant from the applicant's former employer because employee selection is certainly related to making a profit.

because there was no evidence that defendants "intended to send Mauthe any future faxes, let alone any more advertisements." 2019 U.S. App. LEXIS 11232, [WL] at *3 n.4. We recognize that defendants may send Mauthe another fax to verify his information, but that fax will no more be an advertisement than the fax here if it is of similar content. Moreover, there is no evidence that the fax that defendants already sent was a pretext so that it later could send an additional fax. Thus, we also will uphold the District Court's ruling that defendants' fax was not a pretext to further commercial solicitation.

Inasmuch as we hold that the District Court did not err in granting summary judgment in favor of defendants on Mauthe's TCPA claim, the only federal claim in the case, we also hold that the Court did not err in declining to exercise supplemental jurisdiction over Mauthe's state law claim. In this regard a court does not err if it declines to exercise supplemental jurisdiction over state claims after it dismisses a federal claim on which its jurisdiction is based in the absence of extraordinary circumstances. *Bright v. Westmoreland Cty.*, 380 F.3d 729, 751 (3d Cir. 2004). There are no extraordinary circumstances here.

V. CONCLUSION

For the foregoing reasons we will affirm the order of July 27, 2018.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, FILED JULY 27, 2018

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 17-1643

ROBERT MAUTHE, M.D., P.C.,

Plaintiff,

v.

OPTUM, INC. AND OPTUMINSIGHT, INC.,

Defendants.

July 27, 2018, Decided
July 27, 2018, Filed

MEMORANDUM OPINION

Smith, J.

The defendants maintain a national database of health care providers. The plaintiff is a health care provider. This case arises out of a facsimile (“fax”) the defendants sent to the plaintiff to verify information in their database. After receiving this single-page fax, the plaintiff filed the instant lawsuit alleging that the fax was an unsolicited advertisement in violation of the Telephone Consumer

Protection Act. The plaintiff also contends that the fax unlawfully converted his printer paper and toner.

The parties have now engaged in limited discovery on the issue of whether the fax was an advertisement or a pretext for an advertisement, and the defendants have moved for summary judgment. Discovery has confirmed that the fax was neither an advertisement nor a pretext for an advertisement. The fax did not market the availability of a good or service, nor was it a pretext for a larger scheme to market the availability of a good or service. Accordingly, the court grants the motion for summary judgment on count I and declines to exercise jurisdiction over the pendant state law conversion claim.

I. PROCEDURAL HISTORY

On April 11, 2017, the plaintiff, Dr. Robert Mauthe, filed a complaint alleging that the defendants, Optum, Inc. and Optum Insight, Inc. (collectively referred to as "Optum"), sent him an unsolicited fax that (1) violated the Telephone Consumer Protection Act ("TCPA") and (2) unlawfully converted his fax paper and printer toner. *See* Compl. at 9, 17, Doc. No. 1. Optum filed a motion to dismiss on June 15, 2017. Doc. No. 13. After the parties briefed the motion, the court granted the motion and dismissed the complaint because the fax "does not [on its face] advertise the commercial availability of any good or service . . . ." July 19, 2017 Order, Doc. No. 24.

On August 16, 2017, the plaintiff filed an amended complaint, which Optum moved to dismiss on August 22,

2017. Doc. Nos. 25, 28. The court denied this motion to dismiss without prejudice to Optum raising its arguments in a motion for summary judgment. *See* Oct. 17, 2017 Order, Doc. No. 33. In the order denying the motion to dismiss, the court also ordered the parties to perform limited discovery on the issue of whether Optum's "fax was an advertisement or a pretext, *i.e.*, whether it was part of a larger advertising scheme." *Id.* The parties concluded limited discovery on March 2, 2018. *See* Jan. 31, 2018 Stipulation and Order, Doc. No. 39.

On April 6, 2018, Optum filed a motion for summary judgment. Doc. No. 40. The plaintiff filed a response on April 23, 2018. Doc. No. 47. Optum filed a reply to the response to the motion on April 30, 2018. Doc. No. 50. The court heard oral argument on the motion for summary judgment on May 18, 2018, and the motion is now ripe for adjudication.

III. DISCUSSION

A. Standard of Review

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(a). The court must examine the evidence presented in the light most favorable to the non-movant. *See Boyle v. Cty. of Allegheny Pennsylvania*, 139 F.3d 386, 393 (3d Cir. 1998).

B. Undisputed Facts

After reviewing the record, the court finds that there is no genuine dispute as to any material fact. The undisputed material facts are as follows: the plaintiff is a private health care provider. *See* Pl.'s Resp. to Defs.' Separate Statement of Undisputed Facts at ¶ 1 ("Pl.'s Statement"), Doc. No. 47-1. Optum runs a "national referential database of [health care] providers." Pl.'s Statement at ¶ 6; *see also* Eide Dep. at 16, Doc. No. 40-5. This national database "includes various data points about medical providers, including provider name, address, phone number, fax number, specialty, National Provider Identifier, medical school, and residency." Pl.'s Statement at ¶ 7. The database is usually "purchased and used by organizations that manage a health care network and pay claims, such as third-party payors or a third-party administrator." *Id.* at ¶ 8. "The organizations that purchase and use the Database typically have 5,000-plus providers in their network." *Id.* at ¶ 10 (internal quotation marks omitted). These organizations purchase the Database to, *inter alia*, "(a) correct[] inaccurate provider data in their directories, (b) identify[] potential providers to fill gaps in their networks, and (c) validat[e] provider information before paying a claim, such as an insurance claim." *Id.* at ¶ 11 (citations omitted). "Optum does not market the Provider Database to individual provider offices."[1] Defs.'

1. The plaintiff disputes this fact, *see* Pl.'s Statement at ¶ 12, but the dispute is not genuine. The plaintiff has pointed to no facts indicating that Optum markets the database to individual provider offices. *See id.* Optum, on the other hand, has provided extensive deposition testimony indicating that not only does Optum not

Separate Statement of Undisputed Facts at ¶ 12 ("Defs.' Statement"), Doc. No. 40-2.

In its efforts to update and verify the information in the database, Optum sends faxes to health care providers asking them to verify their information. *See* Pl.'s Statement at ¶¶ 16-18; *see* Bellis Dep. at 58-63. Optum sent one of these faxes to the plaintiff. *See* Am. Compl. at Ex. A; Bellis Dep. at 30-31. The single-page fax listed the contact information Optum currently has for the plaintiff and asked him to "[c]heck below if the data displayed is correct." Am. Compl. at Ex. A. If the data was wrong, the fax asked the plaintiff to "write the correct data in the space provided." *Id.* The fax also describes the Optum database and why the plaintiff is receiving the fax:

> As part of ongoing data maintenance of our Optum Provider Database product, Optum regularly contacts healthcare practitioners to verify demographic data regarding your office location(s). This outreach is independent of and not related to your participation in any Optum network. By taking a few minutes to

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market the database to individual providers, but there is not even a foreseeable reason for an individual provider to purchase the database. *See* Eide Dep. at 141 ("Q. Do you market the provider database to provider offices? A. We don't."); *id.* at 140 ("There is no use case that I can think of why an individual provider would purchase this data."); Bellis Dep. at 79 ("Q. Mr. Bellis, are you aware of whether Optum markets the provider database to provider offices? A. Not to my knowledge."), Doc. No. 40-6; *id.* ("Q. Is there any reason why a provider would ever want to purchase the provider database? A. No.").

> verify your practice information is current, your information will be promptly updated in Optum Provider Database.
>
> This data is used by health care related organizations to aid in claims payment, assist with provider authentication and recruiting, augment their own provider data, mitigate healthcare fraud and publish accurate provider directories.

Id. As indicated above, discovery has confirmed the accuracy of these statements regarding the purpose of the fax and the nature of the database.

The fax also provides a link to a page on Optum's website. *See id.* The link is to a FAQ (frequently asked questions) page and is included on the fax to assist in answering any questions health care providers may have regarding why they are receiving the fax and its purpose. *See id.*; *see also* Pl.'s Statement at ¶ 24. "The purpose of the FAQ is to provide answers to common questions from recipients of the fax." Pl.'s Statement at ¶ 24. The fax also states that if the plaintiff has questions or would like to opt out of future faxes, he can e-mail or call Optum (the fax provides both an e-mail address and a phone number). *See* Am. Compl. at Ex. A. Finally, the fax states that "[t]here is no cost to you to participate in this data maintenance initiative. This is not an attempt to sell you anything." *Id.* And discovery has confirmed that this fax was not an attempt to sell anything to the plaintiff. *See* Defs.' Statement at ¶ 12; Eide Dep. at 140-41; Bellis Dep. at 79.

C. Analysis

The TCPA prohibits sending unsolicited advertisements "to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). Thus, the issue here is whether the fax sent to the plaintiff is an advertisement under the TCPA. 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). The FCC has interpreted this section of the TCPA and has taken a broad view of the meaning of "unsolicited advertisement." *See* FCC Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25967, 25973; *see, e.g., Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459, 466 (4th Cir. 2018) (applying FCC interpretation to hold fax offering free e-book was an unsolicited advertisement).

This court is bound by the FCC's interpretation. *See Carlton & Harris Chiropractic*, 883 F.3d at 466 (holding that district court was bound by FCC's interpretation). In a typical case involving an agency's interpretation of a statute it administers, the court would evaluate the validity of the agency's interpretation under *Skidmore* or *Chevron. See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944). Here, unlike the typical case, "the Hobbs Act prevents the district court from

considering the validity of final FCC orders." *Grind Lap Servs., Inc. v. UBM LLC*, No. CIV. A. 14-6448, 2015 U.S. Dist. LEXIS 152134, 2015 WL 6955484, at *3 (N.D. Ill. Nov. 10, 2015) (citation and internal quotation marks omitted). Final FCC orders are only reviewable by "filing a petition in the court of appeals for the judicial circuit where the petitioner resides or has its principal office, or in the Court of Appeals for the D.C. Circuit." *Carlton*, 883 F.3d at 464. Because neither of the parties have challenged the FCC's rule in that manner, the court is bound by the FCC's interpretation to the extent that it covers the conduct in this case. *See id.*

Generally, there are two ways a fax can violate subsection 227(b)(1)(C) of the TCPA. First, a fax will violate the TCPA if, on its face, it promotes "the commercial availability or quality of any property, goods or services . . . ." 47 U.S.C. § 227(a)(5); *see Physicians Healthsource, Inc. v. Janssen Pharms., Inc.*, No. CIV. A. 12-2132, 2013 U.S. Dist. LEXIS 15952, 2013 WL 486207, at *4-6 (D.N.J. Feb. 6, 2013). Second, even if a fax does not facially promote a good or service, it will nonetheless violate the TCPA if it is a pretext for a larger advertising scheme. *See, e.g.*, FCC Rules and Regulations, 71 Fed. Reg. at 25973 ("[S]urveys that serve as a pretext to an advertisement are subject to the TCPA's facsimile advertising rules.").

Additionally, under the FCC's interpretation any materials that promote or offer free services and products are "advertis[ements] [that promote] the commercial availability or quality of any property, goods

or services . . . ."[2] 47 U.S.C. § 227(a)(5); *see* FCC Rules and Regulations, 71 Fed. Reg. at 25973 ("[F]acsimile communications regarding [] free goods and services, if not purely 'transactional,' would require the sender to obtain the recipient's permission beforehand, in the absence of an EBR."); *see also Carlton*, 883 F.3d at 467-68. As the FCC Rule notes, "'free' publications are often part of an overall marketing campaign to sell property, goods, or services. . . . [W]hile the publication itself may be offered at no cost to the [facsimile] recipient, the products promoted within the publication are often commercially available." FCC Rules and Regulations, 71 Fed. Reg. at 25973. In other words, the FCC has determined that offers for free goods and services are so frequently "part of an overall marketing campaign to sell [something]," that the statute's purpose will be achieved by preemptively banning all offers for free goods and services. *See Carlton*, 883 F.3d at 468. Notably, if this rule were not in place, a plaintiff would have to show that the offer for a free good or service was a pretext for a larger, "overall marketing campaign to sell [something]." FCC Rules and Regulations, 71 Fed. Reg. at 25973.

2. There is disagreement in the federal courts regarding the scope of this rule. Specifically, some courts require plaintiffs to still prove that the fax has a "commercial nexus," whereas others have held that it is a de facto rule. *Compare Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 847 F.3d 92, 96 (2d Cir. 2017) (requiring the plaintiff to prove the existence of a commercial nexus before TCPA liability can be imposed), *with Carlton*, 883 F.3d at 467-68 (noting that the FCC has "declined to require such a fact-based inquiry").

For most other faxes, if they do not facially "advertis[e] the commercial availability or quality of any property, goods or services," 47 U.S.C. § 227(a)(5), they must be proven to be pretextual before TCPA liability can be imposed. *See* FCC Rules and Regulations, 71 Fed. Reg. at 25973. For example, the FCC contrasts faxes promoting free goods or services with informational communications and surveys. An informational communication is one that "contain[s] only information, such as industry news articles, legislative updates, or employee benefit information . . . ." *Id.* Unless they are pretextual, informational messages and surveys do not violate the TCPA. *See id.* (providing guidance on how to determine whether a fax "is a bona fide 'informational communication'" and stating that "any surveys that serve as a pretext to an advertisement are subject to the TCPA's facsimile advertising rules").

In the instant case, the fax sent to the plaintiff was not (1) an offer to provide the database for free; (2) an offer to sell the database to the plaintiff or anyone else (*i.e.*, it was not an advertisement); or (3) a pretext to an overall scheme to sell the database to the plaintiff or anyone else. Undeterred, the plaintiff argues that "[f]axes sent in furtherance of indirect commercial solicitations or transactions with third parties are 'advertisements' within the meaning of the TCPA." Pl.'s Resp. in Opp. to Def.'s Mot. for Summ. J. at 5 ("Pl.'s Resp."), Doc. No. 47 (emphasis omitted). He contends that because Optum sends this fax to improve the quality of its database, *see id.* at 11, the fax is sent "in furtherance of . . . transactions with third parties . . .," *id.* at 5. This argument simply has no support in the law.

The TCPA only prohibits faxes "advertising the commercial availability or quality of any property, goods or services . . . ." 47 U.S.C. § 227(a)(5). This language does not prohibit faxes sent in furtherance of indirect commercial solicitations or transactions with third parties. Advertising is "'[t]he action of drawing the public's attention to something to promote its sale . . . .'" *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218, 221 (6th Cir. 2015) (quoting Black's Law Dictionary (10th ed. 2014)). Unless they promote the sale of an item by drawing public attention to it, faxes sent in furtherance of indirect commercial solicitations or transactions with third parties are not unsolicited advertisements. *See* 47 U.S.C. § 227(a)(5).

And while the FCC has taken considerable liberty in broadly interpreting the language chosen by Congress, it has stopped far short of the interpretation espoused by the plaintiff. The FCC's interpretation broadens the scope of TCPA liability to cover faxes promoting free goods or services, but it says nothing about faxes that indirectly create commercial benefits.[3] In fact, many examples the FCC provides of faxes that do not fall within the scope of the TCPA, such as industry news articles, likely would fall within the scope of the TCPA if the court were to find that TCPA liability attached to any unsolicited fax sent by a business that could foreseeably further transactions with third parties.

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3. The interpretation frequently distinguishes between commercial and non-commercial faxes. *See* FCC Rules and Regulations, 71 Fed. Reg. at 25973. But it does not—and likely could not (for constitutional reasons)—impose a blanket ban on all commercial faxes. *See id.*

Further, the plaintiff's argument is unsupported by the cases he cites. He relies heavily on *Carlton* for his proposed interpretation. *See* Pl.'s Resp. at 5-6. In *Carlton*, the defendants sent a fax to the plaintiff that offered "a free copy of the defendant[s'] e-book, *Physicians* [sic] *Desk Reference* . . . ." *Id.* at 6; *see Carlton*, 883 F.3d at 462-63. The court was faced with the question of whether the fax offering this free desk reference constituted an "unsolicited advertisement." *See Carlton*, 883 F.3d at 463. As noted above, the FCC rule specifically states that offers to provide free goods or services are "unsolicited advertisements." *See* FCC Rules and Regulations, 71 Fed. Reg. at 25973.

The district court was concerned about the scope of the FCC's rule. *See Carlton*, 883 F.3d at 466-68 (discussing district court's concern). TCPA liability typically requires that a fax both (1) promote something and (2) be of a commercial nature. *See id.; see also Sandusky Wellness Ctr.*, 788 F.3d at 222 ("[T]o be an ad, the fax must *promote* goods or services to be bought or sold . . . ." (emphasis added)); *Physicians Healthsource*, 2013 U.S. Dist. LEXIS 15952, 2013 WL 486207, at *2 ("Congress intended that non-commercial faxes fall outside the TCPA's prohibition."). It was apparent that the fax promoted the free e-book, but the district court expressed concern that the FCC's blanket prohibition on faxes promoting free goods or services "would read *commercial* out of the TCPA's definition of unsolicited advertisement . . . ." *Carlton*, 883 F.3d at 468 (citation and internal quotation marks omitted) (emphasis added). The Fourth Circuit indicated that the district court's apprehension was

unwarranted because the defendant "receive[d] money from pharmaceutical companies whose drugs are listed in the *Physicians' Desk Reference*." *Id.* In light of this, it was possible that "the amount of money" the defendant "receives turns on how many copies of the *Physicians' Desk Reference* it distributes." *Id.* It was also possible that the defendant was incentivized to distribute e-books and that it was acting to "further its own economic interests" rather than provide a free service. *Id.*

The court's "further its own economic interests" statement was not a blanket holding that anytime a fax indirectly furthers the sender's own economic interests it violates the TCPA. *See id.* Rather, the court was indicating the fax was commercial in nature and that the commercial nexus aspect of TCPA liability was likely satisfied. *See id.* at 468-69. Yet, the plaintiff here argues that whenever a business sends a fax to "further its own economic interests" the fax is an "unsolicited advertisement" under *Carlton. See* Pl.'s Resp. at 5. This reading of *Carlton* is plainly incorrect. But even if it was not, the statement is contained in dicta and the decision is not binding on this court. Thus, the court would still decline to follow it.

The plaintiff also cites *Mussat v. Enclarity, Inc.*, No. CIV. A. 16-07643, 2018 U.S. Dist. LEXIS 35142, 2018 WL 1156200 (N.D. Ill. Mar. 5, 2018), at length. *See* Pl.'s Resp. at 7. *Mussat* presents almost the exact same factual scenario as the case at hand. In that case, the district court denied a motion to dismiss because (1) the fax declared the commercial availability of the sender's services, and (2) it was foreseeable that the fax was a

pretext for a larger advertising scheme. *Mussat*, 2018 U.S. Dist. LEXIS 35142, 2018 WL 1156200, at *4. Despite its factual similarity, *Mussat* holds little persuasive value for the court's resolution of the instant motion.

For one, the case was resolved at the motion to dismiss stage and the defendant benefited from the generous, deferential 12(b)(6) standard. *See* 2018 U.S. Dist. LEXIS 35142, [WL] at *1. Additionally, the court disagrees with *Mussat*'s formulation and application of the rule. The TCPA, as interpreted by the FCC, prohibits unsolicited faxes that advertise the commercial availability of goods or services. Advertise, as discussed above, is synonymous with "promote." *See Sandusky*, 788 F.3d at 222 ("[T]o be an ad, the fax must promote goods or services to be bought or sold . . . ."). But the district court in *Mussat* held that the plaintiff survived dismissal because "on its face, [the fax] *declares* the commercial availability of [the defendant's] services. The fax states that [the defendant] validates and updates health care provider contact information for its clients so that its clients can use the information or clinical summaries, prescription renewals, and other sensitive communications." *Mussat*, 2018 U.S. Dist. LEXIS 35142, 2018 WL 1156200, at *4 (emphasis added). But for a fax to violate the TCPA it must do more than declare the commercial availability of a good or service—it must "promote" the availability of a good or service. *See Sandusky*, 788 F.3d at 222.

On pretext, *Mussat* is even less persuasive. Pretext is a fact-intensive inquiry. At the 12(b)(6) stage in *Mussat*, the plaintiff only needed to allege sufficient facts

indicating that fax was plausibly pretextual. *See* 2018 U.S. Dist. LEXIS 35142, 2018 WL 1156200, at *3. Here, the court can resolve the pretext issue on the merits rather than by simply reviewing the allegations in the amended complaint.

Additionally, in *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, No. CIV. A. 16-13777, 2017 U.S. Dist. LEXIS 28439, 2017 WL 783499 (E.D. Mich. Mar. 1, 2017), the district court addressed the same fax at issue in *Mussat* and reached the opposite conclusion. *See* 2017 U.S. Dist. LEXIS 28439, 2017 WL 783499, at *4-5. The district court granted the defendant's motion to dismiss and held that the fax did not constitute an unsolicited advertisement within the meaning of the TCPA.

In light of these reasons, the court rejects the plaintiff's argument that any fax that indirectly furthers a commercial transaction with a third party is an advertisement. Accordingly, the court will analyze whether the fax is an advertisement on its face, and if not, whether the fax is a pretext for an advertisement.

Turning to the facial analysis first, the fax listed the contact information Optum currently had for the plaintiff, and asked him to "[c]heck below if the data displayed is correct." Am. Compl. at Ex. A. If the data was wrong, the fax asked the plaintiff to "write the correct data in the space provided." *Id.* The fax also included a brief description of the Optum database and told the plaintiff why he was receiving the fax:

> As part of ongoing data maintenance of our Optum Provider Database product, Optum regularly contacts healthcare practitioners to verify demographic data regarding your office location(s). This outreach is independent of and not related to your participation in any Optum network. By taking a few minutes to verify your practice information is current, your information will be promptly updated in Optum Provider Database.
>
> The data is used by health care related organizations in claims payment, assist with provider authentication and recruit, augment their own provider data, mitigate healthcare fraud and publish accurate provider directories.

Id. The fax also provided a link to a FAQ page on Optum's website. *See id.* Additionally, the fax stated that if the plaintiff had questions or wanted to opt out of future faxes, he could e-mail or call Optum. *See id.* The fax provided both an e-mail and a phone number. *See id.* The fax also stated that "[t]here is no cost to you to participate in this data maintenance initiative. This is not an attempt to sell you anything." *See id.*

The court has previously determined that the fax is not an advertisement on its face. *See* July 19, 2017 Order, Doc. No. 24. There is no reason to depart from this prior determination:

> The fax at hand mentions Optum's database, but does not indicate that it is a product available for sale. . . . The fax does not express any intent to earn profit, receive payment, or sell anything. The fax at hand simply does not advertise the commercial availability of any good or service, and the fact that Optum could gain some ancillary commercial benefit is not enough to make the fax qualify as an advertisement.

Id. at 1 n.1 (citation omitted).

At most, the fax "declares" the availability of a good or service. However, as noted above, merely declaring the availability of a good or service is insufficient. The fax must "'draw[] the public's attention to something to promote its sale . . . .'" *Sandusky*, 788 F.3d at 221 (quoting Black's Law Dictionary (10th ed. 2014)). Here, the statements in the fax describing Optum's database do not draw the public's attention to it to promote its sale. *See* Am. Compl. at Ex. A. Rather, the fax provides the recipient with information about the database so that the recipient will understand why he or she is receiving the fax. *See id.* In sum, the fax was not an effort to promote the availability of the database nor was it an effort to sell the database to the plaintiff. *See* Def.'s Statement at ¶ 12; Eide Dep. at 140-41; Bellis Dep. at 79.

Because the fax is not facially an advertisement, the court must consider whether the fax was a pretext for a larger advertising scheme. The classic example of a pretext for an advertisement is a free seminar where

the seminar is really just a chance for the defendant to "advertise commercial products and services." *Fulton*, 2017 U.S. Dist. LEXIS 28439, 2017 WL 783499, at *2 (citation and internal quotation marks omitted). Similarly, offers for free publications (such as the ones prohibited by the FCC's interpretation) are often "part of an overall marketing campaign to sell property, goods, or services." FCC Rules and Regulations, 71 Fed. Reg. at 25973. Discovery, however, has shown that the fax here was not a pretext for a larger advertising scheme. Rather, the fax was exactly what it claimed to be on its face—a legitimate effort by Optum to verify the information in its database. *See* Pl.'s Statement at ¶¶ 16-18; Bellis Dep. at 58-63.

> Nonetheless, the plaintiff argues that the fax was pretextual because the fax was sent as part of [defendant's] fax outreach verification program intended to gather information that would improve the accuracy and quality of their Database and related services, which Defendants not only then sell or license to third-party clients, but which Defendants market to such potential clients with express representations about Database accuracy and the fax outreach verification program that generates such accuracy.

Pl.'s Resp. at 18. This argument is the functional equivalent of the plaintiff's indirect future economic benefit argument. *See* Pl.'s Resp. at 5. As discussed above, this proposed rule is too broad; it is not supported by the language of the TCPA, the FCC's rule, or the relevant

case law. That Optum will use this fax to improve the quality of its database does not transform the fax into an advertisement or make it pretextual. *See Physicians Healthsource*, 2013 U.S. Dist. LEXIS 15952, 2013 WL 486207, at *4.

Additionally, the fact that the fax includes a link to Optum's FAQ page on its website does not make the fax pretextual. The FAQ link is informative, *i.e.*, it is included to provide additional information to the recipient of the fax so that he or she can fully understand why he or she is receiving the fax. *See* Pl.'s Statement at ¶¶ 22-25. It also provides an easy means for the recipient to find out how the information he or she gives to Optum will be used. *See id.* For these reasons, the court finds that the fax was not a pretext for an advertisement. Because the fax is neither an advertisement nor a pretext for an advertisement, the plaintiff's TCPA claim fails.

The only remaining claim is the plaintiff's state law conversion claim. *See* Am. Compl. at 18. In the Third Circuit, "where the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so." *Hedges v. Musco*, 204 F.3d 109, 123 (3d Cir. 2000). Here, the parties have only taken discovery on the issue of whether the fax was a pretext. *See* Oct. 17, 2017 Order, Doc. No. 33. Accordingly, the court finds that there is no affirmative justification warranting the court to exercise supplemental jurisdiction over this additional claim.

IV. CONCLUSION

The TCPA prohibits unsolicited fax advertisements. The fax at issue in this case is neither an advertisement on its face nor a pretext for an overall marketing scheme. Rather, the fax was a genuine effort to gather and verify information for Optum's health care provider database. Accordingly, the court grants the motion for summary judgment on Count I of the amended complaint and will dismiss without prejudice Count II of the amended complaint.

The court will issue a separate order.

BY THE COURT:

/s/ *Edward G. Smith*
EDWARD G. SMITH, J.

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JUNE 25, 2019

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2894

ROBERT W. MAUTHE, M.D., P.C.,
INDIVIDUALLY AND ON BEHALF OF ALL
OTHERS SIMILARLY SITUATED,

v.

OPTUM INC., OPTUMINSIGHT, INC.,

ROBERT W. MAUTHE, M.D., P.C.,

Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 5-17-cv-01643)
Honorable Edward G. Smith, District Judge

SUR PETITION FOR REHEARING

BEFORE: SMITH, *Chief Judge*, and MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and GREENBERG, *Circuit Judges*

The petition for rehearing filed by appellant, Robert W. Mauthe, M.D., P.C., in the above captioned matter having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the Court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service who are not disqualified not having voted for rehearing by the Court *en banc*, the petition for rehearing by the panel and the Court *en banc* is denied. Judge Greenberg's vote is limited to denying rehearing before the original panel.

BY THE COURT:
/s/Morton I. Greenberg
Circuit Judge