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July 28, 2014

John Ley, Clerk of Court
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

**Re: *Palm Beach Golf v. John G. Sarris, D.D.S., P.A.*, No. 13-14013**

Dear Mr. Ley:

The July 17, 2014 letter from counsel for the Federal Communications Commission (the "July 17 Letter") does not warrant reversal of the district court's decision: (1) the regulation, 47 C.F.R. 64.1200(f)(8)(currently, 47 C.F.R. 64.1200(f)(10))(the "Regulation"), relied on by attorneys for the FCC, first became effective on August 1, 2006—after the fax at issue was sent; (2) prior to August 1, 2006, as repeatedly confirmed by the FCC, TCPA liability for fax advertising incorporated federal common law principles of vicarious liability; (3) absent express language to the contrary, it is implicit that Congress intended to incorporate principles of vicarious liability; and, (4) even assuming the Regulation applies (and it does not), it does not set forth the scope of liability under the TCPA; it defines who may take advantage of a defense, the established business relationship ("EBR"), as part of an amendment to the TCPA, and to conclude otherwise incongruously expands fax advertising liability.

## *The August 2006 Regulation Simply Does Not Apply To The Fax Advertising of December 2005*

**1. Statutory Background.** The TCPA provides it "shall be unlawful" for any person "***to use*** any telephone facsimile machine, computer, or other device ***to send***" an unsolicited advertisement. *See* 47 U.S.C. § 227 (b)(1)(C)(2003)(emphasis added); *see also* 47 U.S.C. § 227 (b)(1)(C)(2005).

"In July 2005, Congress enacted the JFPA [Junk Fax Prevention Act], which amended the TCPA to codify an [established business relationship, "EBR"] exemption to the prohibition against unsolicited facsimile advertisements." *Biggerstaff v. F.C.C.*, 511 F.3d 178, 182 (D.C. Cir. 2007), citing 47 U.S.C. § 227(b)(1)(C)(i). Only by the JFPA did Congress add the word "sender," *see* 47 U.S.C. § 227(b)(1)(C)(i-ii)(2005), and then only as to an exception or defense

based on EBR ("unless…"). *See id.*[1]

That the term "sender" was only added at the time of the JFPA, and for very specific purposes, is evinced by the earlier version of the TCPA—where the word "sender" is nowhere found—and by a reading of the JFPA, where Congress does not define "sender" nor use it in its proscription for fax advertising. 47 U.S.C. § 227 (2005).

Certainly, the TCPA by its terms did not impose liability on "'a defendant who [transmitted] no facsimile to the plaintiff, but whose independent contractor did,'…so long as the transmitted fax constitutes an unsolicited facsimile advertisement promoting the defendant's goods or services." (Jul. 17, 2014 Letter at 7.)

**2. Regulatory Background.** The FCC regulations and statements reveal that "[o]n behalf of" liability is and has been the appropriate inquiry for fax advertising.

In **August 1995**, the FCC stated: "[w]e clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements…" *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd 12,391, 12,407 (Aug. 7, 1995).

In **July 2003**, to elucidate the potential liability apportionment between a fax broadcaster and the "advertiser," the FCC explained that a "'facsimile broadcaster' [means] a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14,014, 14,131 (Jul. 3, 2003).

In **2006**, with the new directives of the JFPA, the FCC again used the phrase "on behalf of," defining "sender" to mean "the 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). At the same time, the FCC took the opportunity:

> [T]o emphasize that … the sender is the person or entity on whose behalf the advertisement is sent. In most instances, this will be the entity whose product or service is advertised or promoted in the message…

*In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991: Junk Fax Prevention Act of 2005*, 21 FCC Rcd 3787, 3808 ¶ 39 (Apr. 6, 2006). The FCC explained: "a definition of 'sender' would help distinguish between the business on whose behalf

[1] "[S]ender" was also newly added in other portions of the JFPA: directives to the FCC to prescribe regulations for providing appropriate "notice" in advertisements and to promulgate a "rule" on compliance with requests to opt-out of future advertisements, for example. 47 U.S.C. § 227(b)(2)(D-G).

the fax is sent and a vendor who does nothing more than transmit a fax." *Id.* at fn. 141[2].

**3. The Faxing at Issue Was not Subject to the FCC Regulation.** The faxing at issue occurred in December 2005. It is undisputed that the Regulation first became effective on August 1, 2006. Accordingly, the alleged faxing was not subject to or governed by the Regulation.

The Junk Fax Prevention Act of 2005, P.L. 109-21, § 2(h), 119 Stat. 362 (Jul. 2005), provided in part that: "not later than 270 days after the date of enactment of this Act, the Federal Communications Commission shall issue regulations to implement the amendments made by this section [amending subsecs. (a) and (b) of this section]." While complying with the JFPA's requirements, the FCC extended the effective date for the Regulation and others adopted pursuant to the JFPA, explaining: "the amended facsimile advertising rules will become effective within 90 days of date of publication [August 1, 2006] in the Federal Register [May 3, 2006]." *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 Junk Fax Prevention Act of 2005*, 21 F.C.C. Rcd. 3787, 3815-16 (2006); *see also* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25967-01 (May 3, 2006)(The FCC regulation was adopted on April 5, 2006, made public the following day, and published in the Federal Register on May 3, 2006.)

Thus, the Regulation did not apply to John G. Sarris D.D.S., P.A., whom plaintiff claims "faxed a commercial advertisement" on December 13, 2005.

**4. In December 2005, Fax Advertiser Liability was Available Only by Application of Federal Common Law Agency Principles.** Based on the plain terms of the statute and the FCC's repeated pronouncements prior to 2006, the liability query, here, was appropriately whether the third-party fax broadcaster sent advertisements on defendant's behalf.

The TCPA imposes liability on the person that "uses" a device to send an unsolicited fax advertisement. The "use" of a facsimile machine or other device necessarily must be read against a legal background of ordinary tort-related vicarious liability rules. *Meyer v. Holley,* 537 U.S. 280, 285-86, 123 S. Ct. 824 (2003). Thus, the statute requires a plaintiff to show that a fax broadcaster worked at the direction of or with the authority of a defendant (the advertiser).

That "on behalf of" liability for fax advertisements necessitates a plain meaning analysis is confirmed by the FCC in May 2013: "the standard dictionary definitions of the phrase 'on behalf of' include, among other things, 'in the interest of,' 'as a representative of,' and 'for the benefit of' — concepts that easily can be read to encompass common law agency principles." *In the Matter of the Joint Petition Filed by Dish Network, LLC*, Declaratory Ruling Concerning the Tel. Consumer Prot. Act (TCPA) Rules, 28 F.C.C. Rcd. 6574, 6582, 6585 (May 2013)(emphasis

[2] A careful reading of the Regulation reveals the term "sender" is limited. 47 CFR 64.1200(f)(8) *and* (a)(3)(currently 47 CFR 64.1200(a)(4)). Significantly, the Regulation limits the definition of the term "sender" "for purposes of paragraph (a)(3)." 47 CFR 64.1200(f)(8). The term "sender" appears nineteen (19) times in paragraph (a)(3) of the Regulation; however, all nineteen occurrences pertain, *only,* to requirements necessary for the established business relationship defense and an opt out requirement. 47 CFR 64.1200(a)(3)(i), *et seq*.

added)("*Dish Network*"). Stated another way, the FCC explained:

> Since we find below that vicarious liability for violations of section 227(b) is available only under federal common law agency principles, reading 'on behalf of' to provide for more extensive vicarious liability in the context of do-not-call violations under section 227(c) would implausibly require that phrase to have different meanings under our rules, depending on the particular violations at issue, without any indication in past precedent that different meanings were intended.
> 28 F.C.C. Rcd. at 6586 (emphasis added).

And, given the FCC's statements and its recognition of the plain meaning of "on behalf of," any attempt to expand liability beyond federal common law agency principles would require rulemaking. For instance, in May 2013, the FCC left "open the possibility that [it] could interpret section 227(c) to provide a broader standard of vicarious liability…" because it "could not come to such a conclusion in a declaratory ruling proceeding, but only after notice and comment rulemaking." 28 F.C.C. Rcd. at 6583-84. (emphasis added).

That the "on behalf of" analysis must be given a consistent meaning, absent additional notice and comment making, makes sense. Relying on different definitions of the same terms without further explanation or without precedent is unfair to the regulated community. How are those subject to the regulations supposed to divine that when the FCC uses "on behalf of" liability one time it means liability as established by federal common law principles and when it uses "on behalf of" liability another time—i.e., for those "advertisers" that use fax broadcasters—it means much more expansive liability?

### ***The Regulation Should Not Be Read to Expand Liability to a Specious Point.***

Even assuming the Regulation applied (and it does not), it does not create two categories of "sender," either of which may be independently liable for violations of the TCPA. To conclude otherwise is irreconcilable.

If all a plaintiff need show for its cause of action under 47 U.S.C. § 227 (b)(1)(C) is receipt of "an unsolicited facsimile advertisement promoting the defendant's goods or services," fax broadcasters could subject companies to crushing liability by taking a ream of paper from a company's work, creating a promotion on the company's letterhead and blasting the advertisements to every fax number in the state. This not strict liability; it is *absolute* liability. Advertisements could be sent without authorization or a shred of knowledge by the company whose goods or services are advertised, but it would be unconditionally liable for $500 per advertisement transmitted.[3] This expands the liability that Congress, alone, can legislate. Such a

[3] If the attorneys for the FCC intended to say that the fax advertisement must have been sent by the defendant's "independent contractor," and then, the defendant is strictly liable if its goods or services are advertised, then this conclusion still runs counter to the claim that vicarious liability analysis is not part of the question of liability for 47 U.S.C. § 227 (b)(1)(C), as the question of "independent contractor," alone, necessitates a vicarious liability analysis.

liability analysis spawns abundant hypotheticals of unintended TCPA liability: "[a]s a matter of simple illustration, [defendant-company] could hardly be liable under the TCPA if one of its competitors maliciously sent unwanted facsimiles advertising [defendant-company] products in an effort to sour customers on [defendant-company]." *Glen Ellyn Pharmacy, Inc.*, *v. Meda Pharmaceuticals, Inc.*, Case No. 09 C 4100, Doc.#305 at 2 (N.D. Ill. Mar. 5, 2010). This result was not contemplated by either Congress or the full FCC.

Instead, as *Dish Network* explained: "the prohibitions contained in ***section 227(b)*** incorporate the federal common law of agency and ... such vicarious liability principles reasonably advance the goals of the TCPA." 28 F.C.C.R. at 6587 (emphasis added).[4]

### *The July 17 Letter is due no Deference.*

Given the foregoing, to the extent that the July 17 Letter purports to interpret its own regulation, it should be given no deference. *See Auer v. Robbins,* 519 U.S. 452, 117 S. Ct. 905 (1997).

An agency's interpretation of its own regulation is entitled to no deference if it has, "under the guise of interpreting a regulation, [created] *de facto* a new regulation." *Comcast Cable Communications, LLC v. F.C.C.*, 717 F.3d 982, 999 (D.C. Cir. 2014)(concur), citing *Christensen v. Harris Cnty.,* 529 U.S. 576, 588, 120 S. Ct. 1655 (2000). The July 17 Letter may be "entitled to respect," but only to the extent that the lawyers for the FCC's interpretations have the "power to persuade." *Christensen*, 529 U.S. at 586-87, *citing Skidmore v. Swift & Co.,* 323 U.S. 134, 65 S. Ct. 161 (1944). When considering such interpretations "persuasive power" the "weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *See Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1238 (11th Cir. 2002).

Here, the July 17 Letter provides no regulatory interpretation that applies to a matter regarding events of December 2005. And, even if the later interpretation of "sender" applied as now articulated by the agency's lawyers, it needs to be viewed through the *Skidmore* lens and is unpersuasive. It disregards the over-a-decade's worth of rulemaking by the FCC, wherein liability for advertisers was framed in the "on behalf of" context, creates a new *de facto* regulation by reading absolute liability into 47 U.S.C. 227(b)(1)(C), and does an about face on what the FCC, itself, provided in May 2013.

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[4] The Supreme Court has also considered Rule 227(b) TCPA violations similarly. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745, 181 L. Ed. 2d 881 (2012)(TCPA principally outlaws four practices including sending unsolicited advertisements to fax machines). In *Dish Network*, the FCC also considered 227(b) similarly, citing to a fax advertising case, *Accounting Outsourcing, LLC v. Verizon Wireless Personal Comms.*, 329 F. Supp. 2d 789, 793-94 (M.D. La. 2004) for the application of vicarious liability principles.

Respectfully submitted,

/s/ Molly A. Arranz

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**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that on July 28, 2014, she caused a true and correct copy of the foregoing **Defendant's Response to the July17, 2014 FCC Letter** to be served upon all counsel of record, listed below, via electronic filing.

/s/ Molly A Arranz

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