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July 28, 2014

By CM/ECF
John Ley, Clerk of Court
US Court of Appeals for the Eleventh Circuit
56 Forsyth St., NW
Atlanta, GA 30303

Re: *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, No. 13-14013.

Dear Clerk:

Pursuant to the Court's Order of July 25, 2014, Plaintiff-Appellant Palm Beach Golf Center-Boca, Inc. submits this letter brief responding to the letter brief of the Federal Communications Commission answering the Court's July 7, 2014 question to the FCC.

The FCC's Letter Brief confirms that the district court erred and should be reversed. The FCC's letter brief shows the arguments Plaintiff has made on appeal are correct. Opening Brief, pp. 22-23, 35-38; Reply Brief, pp. 1-11. Defendant, whose services were advertised in faxes sent by its independent contractor, is liable to Plaintiff as the "sender" of the fax advertisement at issue in this case as defined by 47 C.F.R. § 64.1200(f)(10) under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1)(C). As the FCC Letter Brief states, "Such liability does not depend upon the application of federal common law vicarious liability principles." The Court should follow the FCC's Letter Brief and reverse the district court's summary judgment against Plaintiff.

I. The FCC's Letter Brief Shows that under the Hobbs Act, 47 C.F.R. § 64.1200(f)(10) Governs this Case.

As the FCC's Letter Brief explains, federal district courts do not have jurisdiction to invalidate rules promulgated by the FCC interpreting the Communications Act which includes the TCPA. 28 U.S.C. § 2342(1); *Nack v. Walburg*, 715 F.3d 680, 685 (8th Cir. 2013); *Self v. BellSouth Mobility, Inc.*, 700 F.3d 453, 461-464 (11th Cir. 2012); *CE Design, Ltd. v. Prism Bus., Media, Inc.*, 606 F.3d 443, 446 (7th Cir. 2010). Consequently the district court lacked jurisdiction to ignore

the definition of "sender" in section 64.1200(f)(10), and its judgment should be reversed.

A. Section 64.1200(f)(10) Codified the FCC's Longstanding Interpretation and Did Not Change the Law.

Defendant has suggested that the definition of "sender" adopted in section 64.1200(f)(10) may not apply to this case because it was promulgated after Defendant's fax broadcast. Defendant is wrong because the codification of the definition was not a change in the law or the FCC's view. The 2006 codification simply reflected the FCC longstanding view as expressed in its prior orders that an "advertiser" such as Defendant is liable as a "sender" under the TCPA's junk fax ban. 68 Fed. Reg. 44144-01, 44169, ¶ 138 (July 25, 2003). As early as 1995, the FCC held that advertisers and not fax broadcasters are primarily liable:

> We clarify that the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with this rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with this rule.

In the Matter of Rules and Regulations Implementing the Tel. Consumer Protection Act of 1991, 10 F.C.C.R. 12391, 12407, ¶ 35 (Aug. 7, 1995).

When it proposed the regulation, the FCC expressly noted that it was not changing its view that "advertisers" are primarily liable as "senders," but simply codifying it:

> 39. We take this opportunity to emphasize that under the Commission's interpretation of the facsimile advertising rules, 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. … Accordingly, we adopt a definition of sender for purposes of the facsimile advertising rules.
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> 40. Under the current rules, a fax broadcaster also will be liable for an unsolicited fax if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity … In such circumstances, the sender and fax broadcaster will be liable for an unsolicited fax that does not contain the required notice and contact information.

In the Matter of Rules and Regulations Implementing the Tel. Consumer Protection Act of 1991, 21 F.C.C.R. 3787, 3808 (April 6, 2006). Thus, the formal promulgation of section 64.1200(f)(10) did not change the FCC's longstanding view that

advertisers like Defendant are "senders," and it is applicable to this case regardless of when Defendant sent its fax advertisement to Plaintiff.

B. The FCC Has Never Contradicted its Codified Definition of "Sender."

Defendant also suggests that the FCC has made "prior inconsistent statements" about the meaning of the word "sender," but this is not true. As the 1995, 2003, and 2006 orders quoted above show, the FCC's definition of "sender" has been consistently articulated since the TCPA was first enacted to include persons whose goods or services are promoted in a fax advertisement. Defendant suggests the FCC's use of the phrase "in most instances," contradicts the plain language of the codified definition of "sender," but it does not. First, under both the codified definition of sender and the FCC's prior orders, the sender has always been either the person "on whose behalf" the fax was sent *or* whose "goods or services are advertised." Thus, the use of the phrase "in most instances" cannot be read as a limitation on the meaning of the codified definition of "sender," since a sender could be the person "on whose behalf" the fax is sent even if it does not advertise that person's goods or services. Second, the FCC has generally exempted fax broadcasters from liability as "senders" even though they literally "send" the fax. In 1992, the FCC held that fax broadcasters are ordinarily not liable as "senders" unless they have a "high degree of involvement" in the violation. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C.R. 8752, 8780, ¶ 54 (Oct. 16, 1992). In 2003, the FCC stated, "[W]here both the fax broadcaster and advertiser demonstrate a high degree of involvement, they may be held jointly and severally liable for violations of the unsolicited facsimile provisions." 68 Fed. Reg. at 44169, ¶ 138. The FCC went on to codify a definition of "fax broadcaster" including when they are liable as a "senders." *Id.* (codified at 47 C.F.R. § 64.1200(a)(4)(vii), (f)(7)). Thus, a fax broadcaster can be a "sender" but "in most instances" is not because it is only the person whose goods or services are advertised who is the "sender" under the TCPA. It is, thus, clear that the phrase "in most instances" simply acknowledges potential broadcaster liability and does not contradict the plain language of section 64.1200(f)(10), or leave room for Defendant's theory that Plaintiff must prove Defendant's vicarious liability under common law principles of agency.

II. The FCC's Letter Brief Must Be Given Deference.

Even if the plain language of section 64.1200(f)(10) did not govern here, the FCC's Letter Brief would still be binding authority resolving any ambiguity in the text of the TCPA or the regulations promulgated thereunder. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, __ U.S. __, 131 S. Ct. 2254, 2261-2262 (2011) (citing *Chase Bank USA, N.A. v. McCoy*, __ U.S. __, 131 S. Ct. 871, 880 (2011) ("In the absence of any unambiguous statute or regulation, we turn to the FCC's interpretation of its regulations in its *amicus* brief.") Thus, even if the TCPA and regulations governing

fax advertising were ambiguous as to whether a person whose goods or services were advertised in an unsolicited fax advertisement were liable as a "sender" under the TCPA, the Court would be required to defer to the FCC's view on the question as expressed in its Letter Brief. Defendant cannot point to any unambiguous statement in either the TCPA or any regulation that supports the Defendant's position or the district court's judgment. At most, the TCPA and regulations are ambiguous on the question of who is a "sender," and, therefore the FCC's Letter Brief in this case is persuasive, entitled to deference, and should be followed.

Both Defendant and the district court placed great reliance on *In re Dish Network, LLC*, 28 F.C.C.R. 6574 (May 9, 2013), for the proposition that common law principles of vicarious liability govern Defendant's liability in this case. The FCC's Letter Brief flatly contradicts this view as it unequivocally states that *Dish* was not a fax case and, therefore, has no relevance. As the FCC's Letter Brief states and Plaintiff has argued, *Dish* never mentions faxes and addresses a separate and distinct regulatory scheme that governs only voice and text messages. Reply Brief, pp. 4-7. *Dish* is unambiguously inapplicable to faxes. But even if one could argue that *Dish* was ambiguous in its relevance, the Court would still be required to defer to the FCC's resolution of this ambiguity. *Talk Am* 131 S. Ct. at 2265; *Chase Bank* 131 S. Ct. at 880. Defendant argues that numerous district court decisions have applied *Dish* to fax cases, but these decisions are not persuasive on the question of the meaning of the FCC's own prior decision in the face of an amicus brief in this case contradicting them. The FCC Letter Brief leaves no room for this Court to interpret *Dish* as the district court did below and it should be reversed.

Sincerely,

/s/ Phillip A. Bock

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2014, I caused the foregoing to be filed using the Court's CM/ECF System which will send notification of such filing to all counsel of record:

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