

21-1224-cv

Bruce Katz, M.D., P.C., v. Focus Forward, LLC

In the
United States Court of Appeals
for the Second Circuit

AUGUST TERM 2021

No. 21-1224-cv

BRUCE KATZ, M.D., P.C., D/B/A/ JUVA SKIN AND LASER CENTER, A NEW
YORK PROFESSIONAL CORPORATION, INDIVIDUALLY AND AS THE
REPRESENTATIVE OF A CLASS OF SIMILARLY-SITUATED PERSONS,

Plaintiff-Appellant,

v.

FOCUS FORWARD, LLC,
*Defendant-Appellee.**

On Appeal from the United States District Court
for the Southern District of New York

ARGUED: DECEMBER 15, 2021

DECIDED: JANUARY 6, 2022

* The Clerk of Court is directed to amend the caption as set forth above.

Before: CABRANES, LOHIER, and LEE, *Circuit Judges*.

Plaintiff Bruce Katz, M.D., P.C. appeals the April 6, 2021 order and judgment of the United States District Court for the Southern District of New York (Paul A. Crotty, *Judge*) granting Defendant Focus Forward, LLC's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). This appeal presents the question of whether an unsolicited faxed invitation to participate in a market research survey in exchange for money constitutes an "unsolicited advertisement" under the Telephone Consumer Protection Act of 1991 (the "TCPA"). Finding that it does not, we **AFFIRM** the order and judgment of the District Court.

GLENN L. HARA, Anderson + Wanca, Rolling Meadows, IL, *for Plaintiff-Appellant*.

SAMANTHA L. SOUTHALL, Buchanan Ingersoll & Rooney PC, Philadelphia, PA, *for Defendant-Appellee*.

PER CURIAM:

The question presented is whether an unsolicited faxed invitation to participate in a market research survey in exchange for

money constitutes an “unsolicited advertisement” under the Telephone Consumer Protection Act of 1991 (the “TCPA”). Finding that it does not, we **AFFIRM** the order and judgment of the District Court.

I. BACKGROUND

Bruce Katz, M.D., P.C. (“Plaintiff”) is a professional corporation, doing business as Juva Skin and Laser Center, that provides medical services. Focus Forward, LLC (“Defendant”) is a market research company that conducts market surveys and receives payment from its clients for providing them with the information it gathers. Plaintiff’s complaint alleged that on or about September 12, 2019, and October 25, 2019, Defendant sent Plaintiff two unsolicited faxes seeking participants in market research surveys, in violation of the TCPA, as amended by the Junk Fax Prevention Act of 2005 (the “JFPA”).¹

The September 12 fax was addressed to the attention of “Nurse Practitioners,” and the October 25 fax was addressed to “Nurses & Physician Assistants.” Both faxes explained that Defendant was “currently conducting a market research study” and “offer[ed] an honorarium of \$150 for [the recipient’s] participation in a . . . telephone interview.” The faxes are reproduced as Appendix A and Appendix B of this opinion.

After Plaintiff filed a putative class action alleging violations of the TCPA and seeking both injunctive relief and statutory damages,

¹ See 47 U.S.C. § 227(b)(1)(C).

Defendant filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that an unsolicited faxed invitation to participate in a market research survey does not constitute an “unsolicited advertisement” under 47 U.S.C. § 227(b)(1)(C). The District Court agreed and granted the motion to dismiss.

II. DISCUSSION

“We review *de novo* a district court’s dismissal of a complaint pursuant to Rule 12(b)(6).”² In doing so, we “accept all factual allegations as true, and draw all reasonable inferences in the plaintiff’s favor.”³ Moreover, this appeal turns on the interpretation of what constitutes an “unsolicited advertisement” under the TCPA. “Interpretations of statutes are pure questions of law, and we therefore review [them] *de novo*.”⁴

The TCPA as amended by the JFPA prohibits the use of “any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.”⁵ An “unsolicited advertisement” is defined by the statute as “any material advertising the commercial availability or quality of any property,

² *Austin v. Town of Farmington*, 826 F.3d 622, 626 (2d Cir. 2016).

³ *Id.* at 625.

⁴ *United States v. Williams*, 733 F.3d 448, 452 (2d Cir. 2013); *see also Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, 962 F.3d 882, 890 (6th Cir. 2020) (“Whether a fax constitutes an unsolicited advertisement is a question of law.”).

⁵ 47 U.S.C. § 227(b)(1)(C).

goods, or services which is transmitted to any person without that person's prior express invitation or permission."⁶ The regulations of the Federal Communications Commission ("FCC") implementing the TCPA contain an identical definition of "unsolicited advertisement."⁷

In 2006, the FCC also promulgated a rule (the "2006 Rule") that construes the TCPA as specifically proscribing any faxed surveys "that serve as a pretext to an advertisement."⁸ In *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*,⁹ we recognized this type of "pretext liability" in a slightly different context. There, we held that an unsolicited fax promoting a *free event* could serve as a pretext for an advertisement, but only where the event had "a commercial nexus to a firm's business, *i.e.*, its property, products, or services."¹⁰

Whether a fax inviting the recipient to take a survey in exchange for money constitutes an "advertisement" under the TCPA is a

⁶ *Id.* § 227(a)(5).

⁷ "[U]nsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services . . ." 47 C.F.R. § 64.1200(f)(16); *see also King v. Time Warner Cable Inc.*, 894 F.3d 473, 474 (2d Cir. 2018) ("The FCC has the authority to promulgate regulations implementing the TCPA.").

⁸ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25967, 25973 (May 3, 2006).

⁹ 847 F.3d 92 (2d Cir. 2017).

¹⁰ *Id.* at 96.

question that we have not answered explicitly before.¹¹ Confronted with this question in *Fischbein v. Olson Research Group*,¹² a split panel of the Third Circuit recently held that such faxes *are* advertisements, reasoning that “an offer of payment in exchange for participation in a market survey is a commercial transaction, so a fax highlighting the availability of that transaction is an advertisement under the TCPA.”¹³ Plaintiff urges us to adopt *Fischbein’s* reasoning and conclusion.¹⁴

Defendant relies on multiple district court decisions that essentially hold the opposite. In *Carolyn M. Machonis, O.T., PLLC v. Universal Survey Center, Inc.*,¹⁵ a case with facts similar to those in this appeal, the district court considered surveys faxed to “office managers” seeking their participation in a “[v]accines [s]tudy” and

¹¹ See Joint App’x 28 (the District Court below noting that “[t]he Second Circuit has yet to rule on this precise issue”); *Carolyn M. Machonis, O.T., PLLC v. Universal Surv. Ctr., Inc.*, No. 18-CV-10978, 2020 WL 9815183, at *5 (S.D.N.Y. Feb. 21, 2020) (Report and Recommendation) (“[N]either the Second Circuit nor any district courts within the Circuit have specifically addressed whether or when an unsolicited faxed invitation to participate in a paid survey can constitute an unsolicited ‘advertisement’ under the TCPA, as amended by the JFPA and interpreted by the FCC.”).

¹² 959 F.3d 559 (3d Cir. 2020).

¹³ *Id.* at 564; see also *Lyngaas v. J. Reckner Assocs., Inc.*, No. 2:17-CV-12867 (TGB), 2018 WL 3634309 (E.D. Mich. July 31, 2018) (reaching the same conclusion).

¹⁴ Appellant’s Br. 2-3.

¹⁵ No. 18-CV-10978, 2020 WL 9815183 (S.D.N.Y. Feb. 21, 2020) (Report and Recommendation).

stating that they would “be compensated \$100 for [their] time.”¹⁶ Magistrate Judge Debra Freeman examined the legislative history of the TCPA and the 2006 Rule and issued a Report and Recommendation concluding that “mere invitations to participate in a survey, without more to render them a pretext for advertising, should not themselves be viewed as prohibited advertisements under the TCPA.”¹⁷ A number of other district courts outside this Circuit have arrived at the same conclusion.¹⁸

In the instant case, the District Court—relying on a number of these cases—concluded that “the bulk of authority faithful to the statute’s text . . . hold[s] that the Faxes are not facially ‘advertisements’ under the TCPA.”¹⁹

¹⁶ *Id.* at *1 (internal quotation marks omitted).

¹⁷ *Id.* at *5. *Machonis* settled before Judge Alison Nathan ruled on adopting Magistrate Judge Freeman’s recommendation.

¹⁸ See, e.g., *Exclusively Cats Veterinary Hosp., P.C. v. M/A/R/C Rsch., L.L.C.*, 444 F. Supp. 3d 775, 780 (E.D. Mich. 2020) (“[T]he statutory and regulatory text of the TCPA demonstrates that surveys are not advertisements subject to liability.”); *Podiatry in Motion, Inc. v. Interviewing Servs. of Am., LLC*, No. 20-CV-3159, 2020 WL 5909063, at *3 (N.D. Ill. Oct. 5, 2020); *Phillips Randolph Enters., L.L.C. v. Adler-Weiner Research Chi., Inc.*, 526 F. Supp. 2d 851, 853 (N.D. Ill. 2007). See also *Robert W. Mauthe, M.D., P.C. v. Nat’l Imaging Assocs., Inc.*, No. 17-CV-1916, 2018 WL 1960945, at *2 (E.D. Pa. Apr. 25, 2018) (fax asking recipient to “fill out a survey to facilitate the efficient use of the defendant’s . . . services” is not an advertisement), *aff’d*, 767 F. App’x 246 (3d Cir. 2019) (non-precedential opinion).

¹⁹ Joint App’x 42.

We agree. In interpreting the TCPA, “[w]e begin with the language of the statute. If the statutory language is unambiguous, we construe the statute according to the plain meaning of its words.”²⁰ According to the statute, “unsolicited advertisements” are only those materials “advertising the commercial availability or quality of any property, goods, or services.”²¹ Faxes that seek a recipient’s participation in a survey plainly do not advertise the availability of any one of those three things, and therefore cannot be “advertisements” under the TCPA.

Neither party in this case suggests the faxes advertise the “availability” of \$150, and that this money is “property” under the statute. This is for good reason. “The text’s plain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute.”²² The word “property” does not appear to include money as the word is used in the TCPA. The word occurs twice: once in the definition of “unsolicited advertisement” and once in the definition of “telephonic solicitation.” A “telephone solicitation” is defined as “a telephone call

²⁰ *United States ex rel. Wood v. Allergan, Inc.*, 899 F.3d 163, 171 (2d Cir. 2018) (cleaned up).

²¹ 47 U.S.C. § 227(a)(5).

²² *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003); *see K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”); *see also Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 144 (2d Cir. 2002) (“[T]he preferred meaning of a statutory provision is one that is consonant with the rest of the statute.”).

or message for the purpose of encouraging *the purchase or rental of, or investment in*, property, goods, or services.”²³ It would be a strange for the statute to speak of the “purchase or rental of, or investment in” money. And while it is true that the “unsolicited advertisement” definition might allow a broader reading of the word “property” than the “telephone solicitation” definition, “identical words used in different parts of the same statute are generally presumed to have the same meaning.”²⁴

A meaning of property that excludes the money that might be used to purchase other “property, goods, or services” also accords more naturally with the Congressional findings of the TCPA, which note the harms caused by the “use of the telephone *to market goods and services* to the home and other businesses.”²⁵ The definitions of “telephone solicitation” and “unsolicited advertisement” should both be read in the context of these findings, which militate against defining “property” so expansively as to include offers of money to consumers.²⁶

²³ 47 U.S.C. § 227(a)(4) (emphasis added).

²⁴ *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005).

²⁵ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, 2394 § 2 (1991).

²⁶ The *Fischbein* majority and dissent agree on this point. See 959 F.3d at 562 (“In considering whether the sender of a fax has an intent to buy ‘property, goods, or services’ available commercially, the term used in the TCPA . . . means the property, goods or services being bought or sold, not the money offered to buy them.”) and *id.* at 566 (Jordan, *J.*, dissenting) (“[P]laintiffs argued at length that the

The notion that such faxes might advertise the availability of a “service” —*i.e.*, of the recipient’s participation in a survey²⁷—contorts the ordinary meaning of the statute too far. The faxes *seek* that participation from the fax recipient. The recipient may or may not participate—by definition, the fax sender does not know whether or not that participation is *available* to her.²⁸ The faxes therefore cannot reasonably be construed as advertising the availability of such a service.

We disagree with the majority opinion in *Fischbein* on precisely this point. That opinion relies on an encyclopedia definition of what constitutes a “commercial transaction” to argue that “an offer of payment . . . transforms the . . . market surveys into advertisements,” rather than focusing on the definition of “advertisement” that the

term ‘property’ in the TCPA includes money[.] . . . That reading strains the text to the breaking point, and the Majority correctly rejects it.”).

This is not to say that any communication that offers to pay the recipient money is thereby not an advertisement. One could imagine many examples of communications, including faxed surveys, offering the recipient both money and services, that might incur liability under the TCPA. Such communications are not before us, and as our holding makes clear, we are specifically addressed solely to faxed invitations to participate in market research surveys in exchange for money.

²⁷ Cf. Appellant’s Br. at 11 (arguing that “the Faxes call a service desired to the attention of the public and promote that service *to be bought* with profit as an aim,” and are therefore advertisements) (cleaned up).

²⁸ “Available” means “capable of use for the accomplishment of a purpose: immediately utilizable.” See *Webster’s Third New International Dictionary* 150 (1976).

TCPA and FCC regulations provide.²⁹ In doing so, the opinion “effectively rewrit[es]” the statute to prohibit communications that advertise “the availability of *an opportunity* . . . to exchange goods or services.”³⁰ But the statute does not prohibit communications advertising the availability of such “an opportunity.” Nor does it prohibit communications advertising the availability of transactions that are “commercial in character,” as the *Fischbein* majority suggests.³¹ It specifically prohibits communications advertising the “availability . . . of any *property, goods, or services*.”³² As the *Fischbein* dissenter explained, faxes seeking survey participation from a recipient “communicat[e] the exact opposite of availability— . . . stating a need for something not readily available to the sender.”³³

Moreover, Defendant’s position that the faxes are not advertisements finds persuasive support both in the legislative history of the TCPA and in the FCC’s implementation of that law.³⁴ Before the JFPA extended the TCPA to include faxes, the House Committee on

²⁹ See *Fischbein*, 959 F.3d at 562 (citing *Encyclopedia Britannica*).

³⁰ *Id.* at 565 (Jordan, J., dissenting) (quoting *id.* at 562 (majority opinion)) (emphasis added).

³¹ See *id.* at 562 (majority opinion).

³² 47 U.S.C. § 227(a)(5) (emphasis added).

³³ *Fischbein*, 959 F.3d at 566 (Jordan, J., dissenting).

³⁴ “[A]lthough we need not rely on legislative history because the statutory language and scheme are clear, the legislative history also undercuts [Plaintiff’s] position.” *Allergan*, 899 F.3d at 174.

Energy and Commerce, in its recommendation that the TCPA be enacted, noted that “the Committee does not intend the term ‘telephone solicitation’ to include public opinion polling, consumer or market surveys, or other survey research conducted by telephone,” and explained that “such research has generated relatively few complaints” from consumers.³⁵ In regulations implementing the TCPA the year after its enactment, the FCC excluded “research, market surveys, political polling or similar activities” from liability under the statute.³⁶

And as *Machonis* and other congruent district court opinions have noted, even the FCC’s 2006 Rule itself—by creating liability for “any surveys that serve as a pretext to an advertisement”—implies that not *all* surveys are pretexts for advertisements, and that therefore not all surveys are subject to liability under the TCPA.³⁷ Nothing about

³⁵ H.R. Rep. No. 102-317, at *13 (1991). See *Machonis*, 2020 WL 9815183, at *4.

³⁶ *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C. Rcd. 8752, 8774 (1992); see *Exclusively Cats*, 444 F. Supp. 3d at 782; see also *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 286 n.21 (2d Cir. 2020) (“We need not decide what degree of deference, if any, we owe to FCC Orders interpreting the TCPA Instead, we merely treat the FCC Orders as persuasive authority, providing further confirmation for the interpretation that . . . is commanded by the text of the statute.”), *cert. granted, judgment vacated*, 141 S. Ct. 2509 (2021), and *abrogated on other grounds by Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021).

³⁷ *Machonis*, 2020 WL 9815183, at *5; see also *Exclusively Cats*, 444 F. Supp. 3d at 782 (“[T]he FCC purposefully chose not to state that all surveys are advertisements under the TCPA and explicitly narrowed its analysis to surveys

the surveys in the instant case suggest that they serve as a “pretext” for some other advertisement, and Plaintiff neither pleaded that they do, nor argues as much on appeal.³⁸

In sum, the statutory text, legislative history, and FCC implementation of the TCPA all support the conclusion that invitations to participate in a survey, without more, are not advertisements under the statute.

III. CONCLUSION

To summarize, we hold that a faxed invitation to participate in a market research survey in exchange for money does not constitute an “advertisement” under the TCPA.

We have reviewed all of the arguments raised by Plaintiff on appeal and find them to be without merit. For the foregoing reasons, we **AFFIRM** the April 6, 2021 order and judgment of the District Court.

sitting in for commercial offers. Implicit in the FCC's analysis is the assumption that surveys generally are *not* advertisements under the TCPA.”).

³⁸ We do not require that Plaintiffs “plead specific facts alleging that specific products or services would be, or were, promoted,” just as we did not do so in the free-event context. *See Physicians Healthsource*, 847 F.3d at 96. We agree, however, with the District Court that upon review of the actual faxes at issue here, Plaintiff is left with “no basis for claiming pretext.” Joint App’x 43. *See Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) (“Documents that are attached to the complaint or incorporated in it by reference are deemed part of the pleading and may be considered.”).

APPENDIX A

09-12-2019 7:01

2153674102

2124219502

1/1



Date: September 11, 2019
From: Jack Thomas
Phone: 215.367.4000, X233
REF: NP619

ATTENTION: NURSE PRACTITIONERS

We are currently conducting a market research study amongst Nurse Practitioners and Physician Assistants working in Dermatology offices, regarding the prescription of topical products, and would like to include your opinions. We are particularly interested in speaking with those who work in Group Practices with Corporate Ownership or IDN.

In appreciation of the value of your time, we are offering an honorarium of **\$150** for your participation in a 30 minute telephone interview. Interviews are being scheduled between September 11th and 13th. As a medical professional with experience in this area, your point of view would be invaluable to our research.

Please call Jack at 215.367.4000 x233
to answer a few qualifying questions for this research.
Please reference project NP619.

The study will be conducted by a 30 minute phone interview.

Compensation for this study is an honorarium in the amount of \$150.

When you call, please reference study NP619.

If you have received this fax in error, we do apologize for the inconvenience.
Thank you for your consideration of this study!

To be removed from this list fax your number back with this document to 610.884.0345.

880 West Valley Road, Suite 2700
Wayne, PA 19087
215.387.4000 • Fax: 610.884.0345
www.focusfwd.com

APPENDIX B

10-26-2019 11:25

2153674100

7197202577

1/1



Date: October 26, 2019
From: Jack Thomas
Phone: 215.367.4000, X233
REF: NPA 736

ATTENTION: Nurses & Physician Assistants

We are currently conducting a market research study among Nurses and Physician Assistants who are currently working in a Urology practice of 15 or more practicing physicians, regarding experience treating patients with Non-Muscle Invasive Bladder Cancer, and would like to include your opinions.

In appreciation of the value of your time, we are offering an honorarium of \$150 for your participation in a 45 minute telephone interview, during which Internet access will be required on a laptop or desktop computer (No Tablets, No Macs). Interviews are being scheduled at your convenience between October 25th and November 1st. As a medical professional, your point of view would be invaluable to our research.

Please call Jack at 215.367.4000 x233
to answer a few qualifying questions for this research.
Please reference project NPA 736.

The study will be conducted through a 45 minute telephone interview.

Compensation for this study is an honorarium in the amount of \$150.

When you call, please reference study NPA 736.

If you have received this fax in error, we do apologize for the inconvenience.
Thank you for your consideration of this study!

To be removed from this list, please call 855-241-6661
or fax your number back with this document to 610.964.0346.

960 West Valley Road, Suite 2700
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