No. ________

In The
Supreme Court of the United States

GREGORY P. TURZA,

Petitioner,

v.

IRA HOLTZMAN, individually and as the representative of a class of similarly situated persons,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In an action certified as a class where only common questions of liability predominate and each class member sustained discrete injuries, is it proper to require a defendant against whom liability has been adjudicated to create a common fund by remitting to the court (or a fund administrator) the full amount of a judgment as if each class member had asserted a claim, but before any claims have been presented by any class member other than the named class representative?

2. Whether, and to what extent, should the rules and regulations promulgated by the Federal Communications Commission be considered in determining whether a fax constitutes an "advertisement" under the TCPA?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gregory P. Turza respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682 (7th Cir. 2013). The opinion is also reproduced in the Appendix at App. 1. The relevant decisions of the Northern District of Illinois are unreported and are reproduced in the Appendix at App. 16, 18, and 31.

JURISDICTION

The Seventh Circuit issued its opinion on August 26, 2013. On September 9, 2013, Petitioner petitioned the Seventh Circuit for rehearing. The Seventh Circuit denied the petition for rehearing on September 24, 2013. The order denying the petition for rehearing is unreported and reproduced in the Appendix at App. 46. This Court, thus, has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

47 U.S.C. § 227(a)(5) provides:

> The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

47 U.S.C. § 227(b)(1)(C) provides:

> (b) Restrictions on use of automated telephone equipment
>
> (1) Prohibitions
>
> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States –
>
> (C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless –
>
> **(i)** the unsolicited advertisement is from a sender with an established business relationship with the recipient;
>
> **(ii)** the sender obtained the number of the telephone facsimile machine through –
>
> **(I)** the voluntary communication of such number, within the context of such established

business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E).

47 U.S.C. § 227(b)(2) provides, in pertinent part:

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection.

The full text of 47 U.S.C. § 227 is reproduced in full in the Appendix at App. 47. The *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005* also provide, in pertinent part:

> [F]acsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the [statutory] rules. An incidental advertisement contained in such a newsletter does not convert the entire communication into an advertisement. (In determining whether an advertisement is incidental to an informational communication, the Commission will consider, among other factors, whether the advertisement is a bona fide "informational communication." In determining whether the advertisement is to [sic] a bona fide "informational communication," the Commission will consider whether the communication is issued on a regular schedule; whether the text of the communication changes from issue to issue; and whether the communication is directed to specific regular recipients, *i.e.*, to paid subscribers or to recipients who have initiated membership in the organization that sends the communication. The Commission may also consider the amount of space devoted to advertising versus the amount of space used for information or "transactional" messages and whether the advertising is on behalf of the sender of the communication, such as an announcement in a membership

> organization's monthly newsletter about an upcoming conference, or whether the advertising space is sold to and transmitted on behalf of entities other than the sender). Thus, a trade organization's newsletter sent via facsimile would not constitute an unsolicited advertisement, so long as the newsletter's primary purpose is informational, rather than to promote commercial products. The Commission emphasizes that a newsletter format used to advertise products or services will not protect a sender from liability for delivery of an unsolicited advertisement under the [statute] and the Commission's rules. The Commission will review such newsletters on a case-by-case basis.

71 Fed. Reg. 25967, 25973 (May 3, 2006).

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Seventh Circuit, which followed entry of judgment by the district court holding that a newsletter Petitioner distributed to members of the plaintiff class was an unsolicited advertisement under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* ("TCPA") (*See* App. 1). Holding that this disputed class action case did not involve a common fund, but rather only common issues of liability with respect to discrete injuries suffered by each individual who received the faxes in question, the Seventh Circuit vacated the district court's remedial order creating both a common fund and a so-called *cy pres* award (App. 14-15). The Seventh Circuit nevertheless provided instructions for the district court on remand to "enter a judgment requiring [Petitioner] to remit [the judgment amount of $4,215,000.00] to the registry or to a third-party administrator" even though no class members, other than the class representative, had yet submitted a claim (App. 15).

It is exceedingly rare for a class action lawsuit to proceed to actual judgment. *See Mirfasihi v. Fleet Mortg. Corp*., 356 F.3d 781, 784 (7th Cir. 2004) (noting it is a "rare case in which a class action goes to judgment"). Typically in TCPA cases, common fund settlements are reached from which attorneys' fees and distributions to claimants are deducted. However, no reported decisions exist involving the instant situation where a TCPA class action has proceeded to judgment – so there is no precedent for the Seventh Circuit's ruling. The Seventh Circuit's resolution of the issues below conflicts with the precedent set by this Court in *Boeing Company v. Van Gemert*, 444 U.S. 472 (1980). Therefore, direction from this Court on this largely unresolved, but important issue of federal law, is necessary to guide litigants and courts going forward. *See* S. Ct. R. 10(c).

This lawsuit arose when the class representative filed a class action against Petitioner in the Circuit Court of Cook County, Illinois, claiming that he and others had received a newsletter, called the "Daily Plan-It," from Petitioner that the class representative alleged was an unsolicited fax advertisement in violation of the TCPA. Petitioner timely removed the case to the district court pursuant to 28 U.S.C. § 1441. The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331.

In ruling on the parties' cross-motions for summary judgment, the district court considered regulations promulgated by the Federal Communications Commission ("FCC"), which explain that an "incidental advertisement" contained in a bona fide "informational communication" does not convert the communication into an advertisement. Those same regulations set out certain factors to be considered in determining whether an advertisement is "incidental." *See 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).

Based on the factors set forth in the FCC regulations cited above, which the district court noted had been used by other courts to evaluate the contents of fax advertisements, the district court found that the Daily Plan-It was not an informational communication but rather was an unsolicited advertisement (App. 41). Following additional discovery, the class representative filed a second motion for summary judgment on the issue of the number of faxes received by the class. The district court found that 11,945 faxes were sent, and that 8,430 of those faxes had been "successfully transmitted" to 221 unique fax numbers. As a result, the district court entered judgment against Petitioner and "in favor of the class" on August 29, 2011 in the amount of $4,215,000, consisting of $500 in statutory damages multiplied by each of the 8,430 times a Daily Plan-It purportedly was received by a class member (App. 25).

On November 9, 2011, the district court awarded class counsel out of the common fund it created more than $1.4 million in attorneys' fees premised upon the $4,215,000 judgment amount and further granted a *cy pres* award to the Legal Assistance Foundation of Metropolitan Chicago in the amount of any unclaimed funds (App. 16-17). No explanation was given as to what the district court's entry of judgment "in favor of the class" actually meant, nor was any direction given to Petitioner to make payment to anyone, let alone to fund a "class fund," and the district court imposed no requirement that class members submit claim forms.

Petitioner timely appealed the district court's judgment on September 26, 2011 and timely appealed the entry of the *cy pres* award on December 8, 2011 pursuant to Federal Rule of Appellate Procedure 4(a). The Seventh Circuit consolidated those appeals on December 13, 2011 and maintained jurisdiction pursuant to 28 U.S.C. § 1291.

The Seventh Circuit affirmed the district court's finding that the Daily Plan-It was an advertisement, but disregarded the FCC factors which the district court relied upon, finding them to be a "mysterious" piece of "untethered legislative history" (App. 10). The Seventh Circuit did, however, vacate the district court's remedial order, questioning the district court's use of a *cy pres* remedy and finding that this case did not involve a common fund as it did not consist of aggregate and undifferentiated injuries, but rather involved discrete injuries suffered by each recipient of the faxes (App. 12). Accordingly, the Court of Appeals held the district court's entry of judgment "in favor of the class" was improper (App. 11-12). Despite holding this was not a common fund case, the Seventh Circuit nevertheless ordered Petitioner to pay the full amount of the judgment into the district court registry (or to a third-party administrator) on remand (App. 15). The Seventh Circuit denied Petitioner's timely-filed motion to reconsider and motion to stay the mandate (App. 46).

Review by this Court is appropriate because the decision of the Seventh Circuit conflicts with this Court's holding in *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) and because there is confusion among the lower courts regarding both the proper method for distributing a class action judgment in a non-common fund case and the use and weight of regulations promulgated by the FCC to aid in interpreting the TCPA, a federal statute.

REASONS FOR GRANTING THE PETITION

This Petition for Writ of Certiorari should be granted because it will resolve critical questions involving federal law and confusion among the lower courts regarding (1) the proper method for distributing a class action judgment in a non-common fund case and (2) the use and weight of regulations promulgated by the FCC to aid in interpreting the TCPA, a federal statute.

I. Both Critical Questions Of Federal Law And Confusion Among The Lower Courts Exist Requiring Supreme Court Intervention

Certiorari is appropriate here because this case raises important and substantial issues regarding the correct interpretation of an act of Congress, the TCPA, which was most recently considered by this Court on other grounds in *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740 (U.S. 2012). In *Mims*, this Court granted certiorari to reconcile a split among the Circuit Courts of Appeals as to whether certain obscure language in the TCPA divested federal courts of jurisdiction.

While unlike *Mims*, there is no Circuit split as only one Circuit – the Seventh Circuit – has even considered the import of the FCC regulations upon the interpretation of the TCPA, the lack of authority on these issues combined with the astounding number of TCPA cases pending around the country, requires the Supreme Court's guidance. In addition, as cases under the TCPA are routinely pursued in federal courts as class actions, this case raises complex legal issues involving class actions generally which have broad implications beyond the narrow confines of the TCPA; specifically, whether the establishment of a common monetary fund is proper in a disputed non-common-fund case involving discrete injuries suffered by each individual member of a class prior to claims having been made by any members of the class other than the class representative.

A. The Creation Of A Common Payment Fund In A Disputed Class Action Involving Only Issues Of Common Liability Presents A Substantial Question Ripe for Consideration

This case presents an important issue of first impression requiring attention, that is: how a class action judgment should be distributed in a disputed non-common fund case. The Seventh Circuit correctly held that this was not a common fund case because it stems from "discrete injuries suffered by each recipient of the faxes." *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 688 (7th Cir. 2013) (*see also* App. 12). The Seventh Circuit proceeded to criticize the district court for not only prematurely entering judgment in favor of the class but also for *sua sponte* creating a so-called "*cy pres* award" to handle any unclaimed funds, the propriety of which Chief Justice Roberts of this Court recently questioned. *Id*. at 689 and App. 12-13; *see also Marek v. Lane*, 571 U.S. ___ (2013) (Roberts, C.J.) (noting the "fundamental concerns surrounding the use of such [*cy pres*] remedies in class action litigation" and finding that the "Court may need to clarify the limits on the use of such remedies"). The Seventh Circuit ultimately vacated the district court's remedial order, but nevertheless erroneously ordered Petitioner to make full payment of the maximum $4.215 million amount of the potential recovery by the entire class into a fund even before any class members (other than the class representative) had claimed funds. *Id.* at 690 and App. 15.

The Seventh Circuit's ruling raises the question of whether a common fund remedy, typically applied in a common fund settlement case, is appropriate in a case involving a disputed class action judgment, as here. The proper distribution model should obligate class members to claim their funds by submitting claims as part of the distribution process. Upon receipt of claim forms, Petitioner would then pay over only those funds necessary to satisfy claims *actually* submitted by individual class members. This proposal resolves any issues concerning *cy pres,* as no unclaimed funds would remain on account. This not only makes legal sense from a compensatory damages standpoint, it reduces administrative costs and eliminates the host of additional unintended consequences, the foremost of which are the litany of concerns raised by Chief Justice Roberts in *Marek v. Lane*, 571 U.S. ___ (2013). This proposal also alleviates even the appearance of impropriety that accompanies the imposition of enormous attorney fee awards where meager actual compensation to the class results.

The paradigm common fund case typically involves an aggregated or undifferentiated interest or injury shared by the class. *Gilman v. BHC Secs.*, 104 F.3d 1418, 1427 (2d Cir. 1997). Likewise, in the class action settlement context, the parties typically agree to create a collective "pot" of funds for distribution to the class. *See, e.g.*, *Reynolds v. Benefit Nat'l Bank*, 288 F.3d 277, 281 (7th Cir. 2002). In sharp contrast to these typical common fund scenarios, as the Seventh Circuit agreed, this disputed action stems from "discrete injuries suffered by each recipient of the faxes; it does not create a common fund." *Turza*, 728 F.3d at 688 (App. 12). Where the defendant does not agree pursuant to settlement to deposit money into a common fund for administration, the creation of such a common fund is at odds with the fundamental premise that each class member may only be compensated for the discrete injury which he actually claims.

These practical complications are also weighty. Numerous courts have questioned or criticized the use of *cy pres* awards even in the settlement context. Recently, the Chief Justice of this Court noted the fundamental concerns surrounding the use of such [*cy pres*] remedies in class action litigation, concluding that the "Court may need to clarify the limits on the use of such remedies." *Marek v. Lane*, 571 U.S. ___ (2013) (Roberts, C.J.). *See also Turza*, 728 F.3d at 689 (noting that "many courts have expressed skepticism about using the residue of class actions to make contributions to judges' favorite charities); *In Re Lupron Marketing & Sales Practices Litigation*, 677

F.3d 21, 37 (1st Cir. 2012) (holding that distribution of funds at the discretion of the court is not a traditional Article III function and creates the appearance of impropriety); *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011) (finding that it was improper for judge to approve as *cy pres* recipients charities that had nothing to do with underlying statutes because "the selection process may answer to the whims and self-interests of the parties, their counsel, or the court"); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 482 (5th Cir. 2011) (Jones, C.J. concurring) (suggesting that district courts should avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic organizations). The propriety of a *cy pres* award becomes even more tenuous in situations such as this involving a class action judgment where the defendant did not consent to the creation of the common fund nor the use of *cy pres* to distribute any remainder.

Other courts are in accord that creating a class fund would complicate the claims process and produce a substantial pool of unclaimed funds without providing any added benefit to the class – especially where, as here, a bond was posted by Petitioner pursuant to Fed. R. Civ. P. 62(d) in the full amount of the judgment which fully protected the interests of the class. *See Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248, 1257 (11th Cir. 2003). Indeed, courts have even held that a class recovery "fund" itself is a misnomer because the claims belong to each of the separate individuals in the class. *See Rock Drilling*

Local Union No. 17 v. Mason & Hanger Co., 217 F.2d 687 (2d Cir. 1954). That court explained:

> to call any recovery that a class might win a "fund" to which the class plaintiffs are jointly entitled is "merely added verbiage." There is no fund. The claim remains one on behalf of . . . separate individuals for the damage suffered by each due to the alleged . . . conduct of defendant. . . .

Id. at 695.

Accordingly, a writ of certiorari should be granted because the issue of how a class action judgment should be distributed in a non-common-fund case presents a substantial question ripe for this Court's guidance not only in the TCPA context but with regard to class actions generally.

B. The Consideration And Weight Of FCC Regulations In Interpreting The TCPA Presents A Substantial And Recurring Question

The second substantial issue raised by the Seventh Circuit's opinion in this case is whether, and to what extent, rules and regulations promulgated by the FCC should be considered in determining if a fax is an "advertisement" under the TCPA. The existing law on this issue is conflicting, likely because the statutory language itself is ambiguous. While the TCPA describes "advertisement" as "material advertising the commercial availability or quality of [his] services," this circular definition actually provides no assistance because it fails to define the term "advertising" – the very term it attempts to clarify. 47 U.S.C. § 227(a).

Thus, in attempting to reconcile this definition, some courts, as the Seventh Circuit did in this case, suggest that the statutory language alone is sufficient, while others rely on certain factors contained within this passage from the *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*:

> [F]acsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the [statutory] rules. An incidental advertisement contained in such a newsletter does not convert the entire communication into an advertisement. (In determining whether an advertisement is incidental to an informational communication, the Commission will consider, among other factors, whether the advertisement is a bona fide "informational communication." In determining whether the advertisement is to a bona fide "informational communication," the Commission will consider whether the communication is issued on a regular schedule; whether the text of the communication changes from issue to issue; and whether the communication is directed to specific regular recipients, *i.e.*, to paid subscribers or to recipients who have initiated membership in the organization that

> sends the communication. The Commission may also consider the amount of space devoted to advertising versus the amount of space used for information or "transactional" messages and whether the advertising is on behalf of the sender of the communication, such as an announcement in a membership organization's monthly newsletter about an upcoming conference, or whether the advertising space is sold to and transmitted on behalf of entities other than the sender). Thus, a trade organization's newsletter sent via facsimile would not constitute an unsolicited advertisement, so long as the newsletter's primary purpose is informational, rather than to promote commercial products. The Commission emphasizes that a newsletter format used to advertise products or services will not protect a sender from liability for delivery of an unsolicited advertisement under the [statute] and the Commission's rules. The Commission will review such newsletters on a case-by-case basis. 71 Fed. Reg. 25967, 25973 (May 3, 2006).

The Seventh Circuit concluded that the above passage was a "mysterious" "untethered legislative history," which could be ignored. *Turza*, 728 F.3d at 687 (App. 10). But having considered the passage anyway, the Seventh Circuit's opinion also raises the question of what weight, if any, to give the factors described in the passage. The Seventh Circuit's opinion does not, however, provide an answer. Nor do any other cases.

A review of precedent from other jurisdictions reveals considerable confusion regarding the applicability of this passage and a need for the Supreme Court's guidance. One set of district and state court precedent expressly considers FCC regulations, including the cited passage, as guidance for the TCPA. *See, e.g.*, *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012) (applying FCC regulation to determine if "dual purpose" calls are proscribed by TPCA); *N. Suburban Chiropractic Clinic, Ltd. v. Merck & Co., Inc.*, 13 C 3113, 2013 WL 5170754, *2 (N.D. Ill. Sept. 13, 2013) (holding that "courts within this district have accepted the Federal Communications Commission's construction of the statute"); *Addison Automatics, Inc. v. RTC Grp., Inc.*, 12 C 9869, 2013 WL 3771423, at *4 (N.D. Ill. July 16, 2013) (considering informational communication factors in FCC regulation); *Bais Yaakov of Spring Valley v. Alloy, Inc.*, 12-CV-581 CS, 2013 WL 1285408, at *7 (S.D.N.Y. Mar. 28, 2013) (same); *Physicians Healthsource, Inc. v. Janssen Pharm., Inc.*, CIV.A. 12-2132 FLW, 2013 WL 486207, at *3 (D.N.J. Feb. 6, 2013) (same); *Stern v. Bluestone*, 911 N.E.2d 844 (N.Y. 2009) (same).

Other courts, including the Seventh Circuit in this case, reject the FCC interpretation in favor of applying only the express language of the statute. *See, e.g.*, *Ameriguard, Inc. v. Univ. of Kan. Med. Ctr. Research Inst., Inc.*, 222 Fed. Appx. 530, 531 (8th Cir. 2007) (unreported) (resolving advertisement issue on statutory language alone without discussing FCC factors); *Lutz Appellate Servs. v. Curry*, 859 F. Supp. 180, 181 (E.D. Pa. 1994) (same); *Green v. Anthony Clark Int'l Ins. Brokers, Ltd.*, 09 C 1541, 2011 WL 221862, at *1 (N.D. Ill. Jan. 21, 2011) (same); *G.M. Sign, Inc. v. Grp. C Commc'ns, Inc.*, 08-CV-4521, 2011 WL 98825, at *1 (N.D. Ill. Jan. 10, 2011) (same); *Green v. Time Ins. Co.*, 629 F. Supp. 2d 834 (N.D. Ill. 2009) (same); *Sadowski v. OCO Biomedical, Inc.*, 08 C 3225, 2008 WL 5082992, at *3 (N.D. Ill. Nov. 25, 2008) (same); *Weitzner v. Iridex Corp.*, 05 CV 1254 (RJD), 2006 WL 1851441, at *8 (E.D.N.Y. June 29, 2006) (eschewing reliance on FCC interpretation).

While the Seventh Circuit acknowledged in this case that it was puzzled by the FCC's own explanation in its regulation implementing the statute, it nevertheless concluded that the language favorable to Petitioner's position on incidental advertising was a "species of untethered legislative history," "untied to an adopted text," which "must be ignored." *Turza*, 728 F.3d at 687 (App. 10). The Seventh Circuit then ultimately concluded that, even assuming it had to address the explanatory language from the FCC, "[t]he plug for Turza's services was not incidental to a message that would have been sent anyway: promotion or marketing was the reason these faxes were transmitted." *Id.* and App. 11. Thus, far from reconciling the conflicting views on the issue, the Seventh Circuit opinion seemingly abstained from deciding the question.

Accordingly, the lack of clarity exhibited in the Seventh Circuit's opinion and the confusion among other courts presents a substantial question ripe for Supreme Court intervention.

II. The Issues Addressed In The Seventh Circuit's Opinion Raise Substantial Questions Affecting The Public Interest

Providing additional impetus in favor of granting certiorari, the issues addressed in this petition raise substantial questions affecting the public interest and administration of the courts. First, the question of how to properly administer a disputed class action judgment involving individualized damage claims impacts not only TCPA cases, but all non-common-fund class actions. Delineating a proper procedure for courts to follow in such cases would save considerable judicial resources and avoid the appearance of impropriety that goes hand in hand with the distribution of surplus funds and the allocation of substantial attorneys' fees where only *de minimus* amounts are actually claimed by a class. *See, e.g.*, John Beisner, Jessica Miller & Jordan Schwartz, *Cy Pres*: A Not So Charitable Contribution to Class Action Practice 13 (2010) (explaining that, by divorcing attorneys' fees from clients' recovery, *cy pres* awards ensure that "class attorneys are able to reap exorbitant fees regardless of whether the absent class members are actually compensated").

A Supreme Court decision requiring the submission of actual claims by individual members of the class *prior* to distribution of a judgment and allocation of fees properly eliminates these unsavory issues. As the Seventh Circuit recognized, "many courts have expressed skepticism about using the residue of class actions to make contributions to judge's favorite charities." *Turza*, 728 F.3d at 689 (App. 14). *See also Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011) (recognizing tension between class counsel's fiduciary duties to a class and their interest as lawyers "who if successful will obtain a share of any judgment or settlement as compensation for their efforts"). Thus, this issue presents a question of national importance appropriate for review by the Supreme Court.

Additionally, the question of how to interpret the definition of "advertisement" under the TCPA is a substantial and recurring issue, especially given the cottage-industry of litigation that the TCPA has given rise to, resulting in a flood of lawsuits across the country seeking substantial damages. This Court has previously found such a presentation of factors sufficiently compelling to grant certiorari. *Cf. United States v. Constantine*, 296 U.S. 287, 288 (1935) (holding that even in the absence of a Circuit split, when many other cases were pending and involved large amounts of funds, review was appropriate).

As the Seventh Circuit has pointed out, and this case demonstrates, class certification under the TPCA can turn a relatively minor dispute into "bet-your-company litigation" for small businesses who likely never even heard of this "obscure statute." *Creative Montessori*, 662 F.3d at 915-16. And as the Sixth

Circuit recognized, because telemarketers (and in this case, "fax-blasters") "peddle their services nationally," "the volume of these lawsuits heightens the risk that individuals and companies will be subject to decisions pointing in opposite directions." *Charvat v. Echostar Satellite, LLC*, 630 F.3d 459, 466 (6th Cir. 2010). Due to the extensive number of TCPA class actions around the country, involving significant potential damages, this issue begs for review by the Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Dated: December 23, 2013

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

Nos. 11-3188 & 11-3746

IRA HOLTZMAN, C.P.A., & ASSOCIATES LIMITED, individually and as representative of a class,

Plaintiff-Appellee,

v.

GREGORY P. TURZA,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 08 C 2014 – **Robert W. Gettleman**, *Judge.*

ARGUED MAY 22, 2012 – DECIDED AUGUST 26, 2013

Before EASTERBROOK, *Chief Judge*, and WILLIAMS and TINDER, *Circuit Judges.*

EASTERBROOK, *Chief Judge.* Believing that CPAs would find his services attractive, attorney Gregory Turza sent more than 200 of them occasional fax sheets containing business advice. The faxes produced more business – but not for Turza. He became the defendant in this suit under the Telephone Consumer Protection Act of 1991, 47 U.S.C. §227, which prohibits any person from sending unsolicited fax advertisements. Even when the Act permits fax ads – as it does to persons who have consented to receive them, or to those who have established business relations with the sender – the fax must tell the recipient how to stop receiving future messages. 47 U.S.C. §227(b)(1)(C)(iii), (2)(D). Turza's faxes did not contain opt-out information, so if they are properly understood as advertising then they violate the Act whether or not the recipients were among Turza's clients.

The faxes bear the masthead The "Daily Plan-It", but they were not produced by Perry White's editorial staff and came every other week rather than daily. Although they carry Turza's byline, and a notice claiming copyright in his name, they had been written by employees of Top of Mind, a marketing firm, which sold the concept (and the copy) to anyone who wanted promotional material. Turza did not edit or even review the faxes before they were sent in his name. But Turza does not contend that Top of Mind is responsible as the "person" who sent the faxes. The district court held that the faxes are "unsolicited advertisements" and entered summary judgment against Turza. 2010 U.S. Dist. LEXIS 80756 (N.D. Ill. Aug. 3, 2010).

The court earlier had certified a class of the faxes' recipients. 2009 U.S. Dist. LEXIS 95620 (N.D. Ill. Oct. 14, 2009). In 2011 the court denied a motion to reconsider both the class certification and the decision on the merits. 2011 U.S. Dist. LEXIS 97666 (N.D. Ill. Aug. 29, 2011). The court ordered Turza to pay $500 in statutory damages for each of 8,430 faxes. The total comes to $4,215,000. In its final order, the district judge allocated this sum as follows: $7,500 to the representative plaintiff, which received 32 faxed editions of The "Daily Plan-It" (although the judge called this an "incentive award", it is less than the $16,000 entailed by 32 faxes at $500 a fax); $1,430,055.90 to class counsel for attorneys' fees and expenses; and any residue, after payments to class members, to the Legal Assistance Foundation of Metropolitan Chicago "as a *cy pres* award". Oddly, the judge did not say how much each recipient who submits a claim receives. Is it $500 per fax, on the assumption that enough would go unclaimed to cover the attorneys' fees? Or is it $330.72 per fax, the number appropriate if attorneys' fees (and the award to plaintiff) come off the top? The question may be academic, because Turza has not ponied up the fund and may be unable to do so. But we must reach the procedural and substantive questions before deciding how much Turza owes.

Class certification is normal in litigation under §227, because the main questions, such as whether a given fax is an advertisement, are common to all recipients. *See Brill v. Countrywide Home Loans, Inc.,* 427 F.3d 446 (7th Cir. 2005). There can be doubt about whether a particular person is a good representative of the class, and whether class counsel is suitable, *see Creative Montessori Learning Centers v. Ashford Gear LLC,* 662 F.3d 913 (7th Cir. 2011); *CE Design Ltd. v. King Architectural Metals, Inc.,* 637

F.3d 721 (7th Cir. 2011), but Turza does not question the adequacy of the class representative or its chosen counsel. Because Top of Mind omitted opt-out notices, it does not matter which recipients consented or had an established business relation with Turza. Contrast *Gene & Gene LLC v. BioPay LLC,* 541 F.3d 318 (5th Cir. 2008). Nonetheless, he contends, class certification is inappropriate because individual issues about who received how many faxes predominate over the common questions.

To the extent Turza contends that each recipient must prove that he printed the fax (wasting paper) or otherwise suffered monetary loss, he is wrong on the law. The statute provides a $500 penalty for the annoyance. 47 U.S.C. §227(b)(3)(B). Even a recipient who gets the fax on a computer and deletes it without printing suffers *some* loss: the value of the time necessary to realize that the inbox has been cluttered by junk. That loss, and the statutory remedy, are the same for all recipients; the sort of problem that prevented class certification in *Comcast Corp. v. Behrend,* 133 S. Ct. 1426 (2013), does not arise.

To the extent Turza contends that each recipient must prove that his fax machine or computer received the fax, he is right on the law but wrong on the facts. The record establishes which transmissions were received and which were not. Top of Mind hired MessageVision to send the faxes. It compiled information about which faxes were received, and by whom; no reasonable juror could conclude that these data are inaccurate.

Transmitting a fax requires a sending and a receiving machine to communicate using a standard protocol. If the transmission ends successfully, the receiving machine sends a code indicating this. MessageVision kept a log of the codes received during the process of sending Turza's faxes. This log shows that it tried to send a total of 11,945 faxes to 221 unique numbers; the receiving fax machines reported that 8,630 of these were delivered successfully. (Five persons, who collectively received 200 faxes, opted out of the class; that's why the district court used 8,430 faxes as the basis for calculating damages.) Turza has not offered any reason to think that MessageVision's fax machines recorded the codes inaccurately or that its software maintained the log incorrectly. There is accordingly no need for recipient-by-recipient adjudication, and the district court did not err in concluding "that the questions of law or fact common to class members predominate over any questions affecting only individual members". Fed. R. Civ. P. 23(b)(3).

Turza relies on *Laouini v. CLM Freight Lines, Inc.,* 586 F.3d 473 (7th Cir. 2009), for the proposition that electronic confirmation of a fax's receipt could be refuted by other evidence. That's true enough. The question in *Laouini* was whether a charge of discrimination had been received by the agency on the last date allowed for filing. Plaintiff produced a record of a successful fax transmission on that date – but perhaps plaintiff had faxed a document other than a charge of discrimination (none was in the agency's records), or perhaps the clock on the sender's fax machine was incorrect and the transmission was too late. We held in *Laouini* that in the absence of evidence on such matters, however, the electronic confirmation suffices. That's equally true here, because the record would not permit reasonable jurors to reject the fax log. Indeed, this case is easier, because there is no doubt *what* MessageVision sent out, and *when* each issue of The "Daily Plan-It" was sent does not matter.

That Ira Holtzman, the principal of the representative plaintiff, retained and remembers only one of the faxes does not call the logs into question. Holtzman testified by deposition that his secretary screened and deleted unwanted faxes. Turza has not demonstrated that even a single entry in MessageVision's log was inaccurate, and its corporate representative explained in detail how the logs were compiled. There is no material dispute requiring trial.

The only question on the merits is whether the faxes contained ads. "Unsolicited advertisement" is a defined term, meaning "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 faxes Top of Mind devised for Turza may not have touted the quality of his services, but they did declare their availability. Here is a copy of the first issue plaintiff received:

Deliver to: Ira Holtzman

The "Daily Plan-It™"

GREGORY P. TURZA, JD

Volume 9, Issue 22 11/1/2007

App. 7

You *Can* Take it With You: Tips for A Mobile Office

Computers have become such a part of the corporate world, it would be almost impossible to find an organization without one. These days, with people working from home and while traveling, laptops are outselling their larger and bulkier desktop brethren. Most executives have both, although many are using their laptops as their primary computers, thanks to their portability. Here are some practical tips for getting the most out of your laptop, whether you're at the office, at home, or on the road.

Buying tips

The portable computer is now available at very affordable prices, with low-end models beginning at around $500. The more expensive models are on a par with desktops as far as speed and storage are concerned. When purchasing a laptop, pay attention to the following:

- Stick to name brand manufacturers. Customer support will be more reliable.
- If you plan to use it a lot on the go, find one that's under 5 lbs.
- Look for a model with a spill-resistant keyboard and a shock resistant hard drive.
- Purchase an extended warranty, generally for three years. Even if you have just one problem, it will pay for itself.
- Make sure that the screen is not too small for your eyes, and that the keyboard fits comfortably under your fingertips.
- If you plan to use it at the office and on the go, set up a "docking station" at your desk which would include a keyboard, mouse, and monitor.

Printing on the go

If you're on the go and need to print important documents, it's not always convenient to find a Kinko's. Purchase a small travel printer which can easily fit in your computer bag. Both Hewlett Packard and Canon have a variety of models that are less than 5 lbs and sell for under $250.00

Protecting your stuff

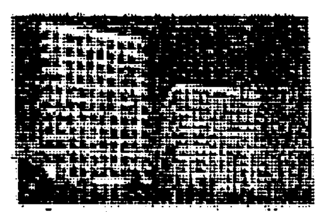
Whether you're stationary or on the road, you need to back up your stuff. Purchase a USB flash drive, which is the size of a thumb, and you'll be able to back up and print from any computer.

Take measures to protect your unit from theft. Carry it an inconspicuous case, and never leave it unattended, even for a moment. All information should be protected with a secure password. If you're using it in a hotel room, hide it before you leave. And always back up your data.

Thanks to those measures, you can now take your work anywhere you go. Just don't forget to take some time off, or you may burn out.

ESTATE PLANNING
POST MORTEM ADMINISTRATION
BUSINESS SUCCESSION PLANNING

Gregory P. Turza
ATTORNEY & COUNSELOR AT LAW



Concourse Plaza
4711 Golf Road
Suite 550
Skokie, Illinois 60076

Telephone: (847) 674-0200
Facsimile: (847) 674-9115
greg@myestateplan.net
www.myestateplan.net

Like the other issues, this one devotes about 75% of the space to mundane advice and the remainder to Turza's name, address, logo, and specialties. The district court thought it impossible for any reasonable juror to doubt that this fax plugs the commercial availability of Turza's services. Top of Mind told its clients, including Turza, that The "Daily Plan-It" is a "promotional" device, and Turza's own lawyer called it "marketing" in his brief and oral argument. That simply recognizes the obvious.

Turza contends that the 25% of the fax alerting potential clients to the availability of his services is "merely incidental" to the 75% that delivers business advice. But the statute does not ask whether a notice of availability is incidental to something else. If Macy's faxes potential customers a page from the *New York Times* that is devoted 75% to news about international relations and 25% to an ad for goods on sale at Macy's, it has sent an advertisement. That 75% of the page is *not* an ad does not detract from the fact that the fax contains an advertisement.

Section 227(b)(2) gives the Federal Communications Commission authority to issue regulations implementing the statute, and Turza maintains that the FCC has adopted a rule that incidental ads don't count under the Act. Turza does not cite to any such regulation, however. The FCC has defined "advertisement" in language that closely tracks the statute. "The term advertisement means any material advertising the commercial availability or quality of any property, goods, or services." 47 C.F.R. §64.1200(f)(1).

The "Daily Plan-It" satisfies that definition; we are tempted to ask what part of "any" Turza finds hard to understand. (We have quoted the current definition; the regulation in force when Turza sent his ads defined "unsolicited advertisement" in the statutory language. *See* 47 C.F.R. §64.1200(f)(13) (2007).)

The FCC's use of "incidental" appears not in the regulation but in the explanation the agency gave when adopting the regulation. The FCC wrote:

> [F]acsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the [statutory] rules. An incidental advertisement contained in such a newsletter does not convert the entire communication into an advertisement. (In determining whether an advertisement is incidental to an informational communication, the Commission will consider, among other factors, whether the advertisement is a bona fide "informational communication." In determining whether the advertisement is to a bona fide "informational communication," the Commission will consider whether the communication is issued on a regular schedule; whether the text of the communication changes from issue to issue; and whether the communication is directed to specific regular recipients, *i.e.,* to paid subscribers or to recipients who have initiated membership in the organization that sends the communication. The Commission may also consider the amount of space

> devoted to advertising versus the amount of space used for information or "transactional" messages and whether the advertising is on behalf of the sender of the communication, such as an announcement in a membership organization's monthly newsletter about an upcoming conference, or whether the advertising space is sold to and transmitted on behalf of entities other than the sender). Thus, a trade organization's newsletter sent via facsimile would not constitute an unsolicited advertisement, so long as the newsletter's primary purpose is informational, rather than to promote commercial products. The Commission emphasizes that a newsletter format used to advertise products or services will not protect a sender from liability for delivery of an unsolicited advertisement under the [statute] and the Commission's rules. The Commission will review such newsletters on a case-by-case basis.

71 Fed. Reg. 25967, 25973 (May 3, 2006).

This passage is mysterious. It does not elaborate on the meaning of the word "advertisement" in the statute or regulation. Instead it discusses the meaning of "informational communication", a phrase that does not appear in either §227 or the regulation. It seems to be a species of untethered legislative history – and the Supreme Court has told us that, although legislative history may assist in understanding an ambiguous text, a freestanding declaration untied to an adopted text must be ignored. *See, e.g., Puerto Rico Department of Consumer Affairs v. Isla Petroleum*

Corp., 485 U.S. 495, 501 (1988); *Lincoln v. Vigil,* 508 U.S. 182, 192 (1993).

Perhaps this passage is best understood as a declaration of the Commission's enforcement plans. Section 227 authorizes private litigation, however; recipients need not depend on the FCC. At all events, even the passage on which Turza so heavily relies declares that "a newsletter format used to advertise products or services will not protect a sender from liability for delivery of an unsolicited advertisement". The "Daily Plan-It" has a newsletter format, but it is not remotely like a trade association's newsletter to its members or a law firm's newsletter alerting clients to legal developments. The plug for Turza's services was not incidental to a message that would have been sent anyway; promotion or marketing was the reason these faxes were transmitted. Like the district court, we conclude that The "Daily Plan-It" is an advertisement as a matter of law.

Now for the remedy. The district judge ordered Turza to pay $4,215,000 but did not say to whom. To the court's registry? To plaintiff's lawyers, as agents for the class's members? To a third-party administrator? None of the individual class members is entitled to $4,215,000 or anything like that much – and it is the persons who got the faxes, not "the class" as a whole, who are entitled to damages under §227(b)(3). A class certified under Rule 23(b)(3) is not a juridical entity. Decisions such as *Zahn v. International Paper Co.,* 414 U.S. 291 (1973), and *Clark v. Paul Gray, Inc.,* 306 U.S. 583 (1939), which hold that class members' losses cannot be aggregated to reach the minimum required for diversity jurisdiction, demonstrate this principle. Each class member has an interest in his own damages. *See Gilman v. BHC Securities, Inc.,* 104 F.3d 1418, 1427 (2d Cir. 1997). Some class actions stem from aggregate and undifferentiated injuries; these create genuine common funds. But this action stems from discrete injuries suffered by each recipient of the faxes; it does not create a common fund. *Travelers Property Casualty v. Good,* 689 F.3d 714 (7th Cir. 2012), discusses how to identify genuine common-fund cases.

Because the district judge contemplated that Turza would pay a lump sum to (or for) the class as a whole, the judge had to decide what would happen if some of the money went unclaimed. Without soliciting the parties' views, the judge declared that any residue would be turned over to a charity rather than be returned to Turza. (Plaintiff contends that Turza forfeited any objection to this decision by not protesting it in the district court, but "[a] formal exception to a ruling or order is unnecessary." Fed. R. Civ. P. 46. Given the opportunity, parties must state their positions before the fact; they need not remonstrate with a judge who decides an issue without giving the litigants a chance to state their positions.) The judge did ask the parties which charity they preferred, and from their suggestions he selected the Legal Assistance Foundation of Metropolitan Chicago. He called this a "*cy pres* award", but as we explained in *Mirfasihi v. Fleet Mortgage Corp.,* 356 F.3d 781, 784

(7th Cir. 2004), this is a misnomer – though one common in the legal literature. *See* Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy,* 39 U. Chi. L. Rev. 448 (1972) (using the *cy pres* doctrine of trust law as an analogy).

Turza contends that any residue belongs to him. The district judge thought otherwise but did not say why – and, as it is far from clear that Turza has the money needed to pay the class members who submit claims, it is premature to decide whether and, if so, when, defendants are entitled to refunds of any surplus. The district judge may not have appreciated the difference between common-fund suits and those that arise from individual injuries. It may well make sense for the district judge to direct Turza to pay the damages into the court's registry, or to a third-party administrator, so that members of the class can receive pro rata distributions if it turns out that Turza cannot satisfy the full award. Only if Turza pays more than enough to satisfy all claims by class members will it be necessary to decide whether the residue goes back to him or is put to some other use.

This also means that it was premature for the district court to have directed that any remainder be turned over to a particular charity. It was doubly inappropriate to enter such an order without soliciting argument from the litigants and without discussing the difference between common-fund suits and those involving the use of the class device to vindicate individually held claims.

Charitable distribution of remainders in class actions originated when courts had to deal with nonreverter clauses in common-fund settlements. If the defendant settles a suit for a sum certain, and disclaims any right to whatever remains after claims from class members have been paid, then the court has to do something with what's left over. Escheat to the state is one possibility. Another is an augmented recovery for those class members who submitted claims. Still a third option, under the *cy pres* banner, is distribution to a group that will use the money for the benefit of class members. This third option is most useful when individual stakes are small, and the administrative costs of a second round of distributions to class members might exceed the amount than [sic] ends up in class members' pockets.

Our case did not end in settlement and is not a common-fund situation. Turza did not agree to give up his interest in money unclaimed by class members. The stakes per fax are large enough to make a second round of distribution feasible. And the Legal Assistance Foundation of Metropolitan Chicago does not directly or indirectly benefit certified public accountants, the victims of Turza's junk faxes. The Foundation is a worthy organization, but many courts have expressed skepticism about using the residue of class actions to make contributions to judges' favorite charities. *See, e.g., In re Lupron Marketing & Sales Practices Litigation,* 677 F.3d 21, 31-38 (1st Cir. 2012); *Klier v. Elf Atochem North America, Inc.,* 658 F.3d 468, 475-76 (5th Cir. 2011), and *id.* at 480-82

(Jones, C.J., concurring); *Nachshin v. AOL, LLC,* 663 F.3d 1034, 1038-39 (9th Cir. 2011).

Money not claimed by class members should be used for the class's benefit to the extent that is feasible. *See Six Mexican Workers v. Arizona Citrus Growers,* 904 F.2d 1301 (9th Cir. 1990); *Dennis v. Kellogg Co.,* 687 F.3d 1149 (9th Cir. 2012). *See also, e.g.*, ALI, *Principles of the Law of Aggregate Litigation* §3.07 (2010); Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis,* 62 Fla. L. Rev. 617 (2010). Perhaps that would not be feasible here, making other charities more suitable as recipients, but the absence of an adversarial presentation – and the considerable doubt that Turza will be able to pay enough to allow full payment to class members who submit claims – means that such a decision would be premature.

The district court's decision on the merits is affirmed, but the remedial order is vacated. The case is remanded with instructions to enter a judgment requiring Turza to remit to the registry or to a third-party administrator. Once the court knows what funds are available for distribution, it should (if necessary) reconsider how any remainder will be applied. It may also be necessary to reconsider the "incentive award" to the representative plaintiff (which appears to be a "disincentive award") and the way in which class counsel are compensated. *See Boeing Co. v. Van Gemert,* 444 U.S. 472 (1980).

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IRA HOLTZMAN, C.P.A., & ASSOCIATES LIMITED, individually and as the representative of a class of similarly-situated persons,	)	No. 08 CV 2014
Plaintiff,	)	Judge Gettleman
v.	)	
GREGORY P. TURZA,	)	
Defendant.	)	

ORDER AWARDING INCENTIVE PAYMENT, ATTORNEYS FEES AND EXPENSES, AND APPROVING *CY PRES* RECIPIENT

This matter coming before the Court on Plaintiff's Motion in Support of its Distribution Plan (Doc. 247), Plaintiff's Motion in Support of its Award of Attorney's Fees and Related Non-Taxable Expenses (Doc. 249), and Plaintiff's Supplemental Submission in Support of its Distribution Plan (Doc. 262), the Court having reviewed these and other submissions, the parties appearing through counsel, and the Court being fully advised in the premises, it is hereby ordered that:

1. On August 29, 2011, the Court entered judgment in favor of the plaintiff class in the total amount of $4,215,000.00 (the "plaintiff class fund"). (Doc. 230).

2. The Court awards $7,500.00 from the plaintiff class fund to plaintiff, IRA HOLTZMAN, C.P.A., & ASSOCIATES LIMITED, as an incentive award for serving as the class representative in this matter.

3. The Court awards $1,405,000.00 from the plaintiff class fund to the law firms OF BOCK & HATCH, LLC and ANDERSON + WANCA ("Class Counsel") as attorneys' fees for their work on behalf of the plaintiff class. That amount will compensate Class Counsel for all work performed and to be performed for the benefit of the plaintiff class in this matter, in the appeal pending before the Seventh Circuit, and in any and all collateral matters (including the state court declaratory judgment action regarding insurance coverage). No additional attorneys' fees will be awarded or authorized from the plaintiff class fund.

4. The Court awards $25,055.90 from the plaintiff class fund to Class Counsel to reimburse their out-of-pocket costs and expenses.

5. Finally, the Court grants Class Counsel's request that Legal Assistance Foundation of Metropolitan Chicago receive as a *cy pres* award any and all sums remaining in the plaintiff class fund after the payments to class members and the payments awarded in this Order.

ENTER:

Dated: /s/ Robert W. Gettleman
November 9, 2011 Judge Gettleman

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IRA HOLTZMAN, C.P.A, & ASSOCIATES LIMITED, individually and as the representative of a class of similarly situated persons,	)	No. 08 C 2014
Plaintiff,	)	Judge Robert W. Gettleman
v.	)	
GREGORY P. TURZA,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

(Filed Aug. 29, 2011)

Plaintiff Ira Holtzman C.P.A. & Associates Limited represents a certified class of individuals in an action against Gregory P. Turza, in which class plaintiffs claim that defendant violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, by faxing them unsolicited advertisements. The plaintiff class, as defined in the court's order dated October 14, 2009, and clarified on November 5, 2009, *Holtzman v. Turza,* 2009 WL 3334909 (N.D. Ill. Oct. 14, 2009), comprises:

> All persons who: (1) during the period September 2006 through March 2008; (2) received a "Daily Plan-It" fax identifying "Gregory P. Turza" and his telephone number (847-647-0200) or e-mail address

(greg@myestateplan.net); and (3) had not previously consented to receiving such advertisements.

On August 3, 2010, the court granted in part and denied in part the parties' cross-motions for summary judgment. Specifically, the court denied defendant's motion for summary judgment on the issue of mitigation, and granted plaintiff's motion on two issues, finding that: (1) the "Daily Plan-It" faxes are advertisements under the TCPA; and (2) defendant is liable for all faxes received by the target list. The remaining factual issue was the number of faxes plaintiffs received.

In an attempt to resolve that lone outstanding issue, plaintiff has filed a second motion for summary judgment. In responding to that motion, defendant offered the affidavit of David Canfield, which plaintiff promptly moved to strike as untimely. At that time, defendant also filed a motion to decertify the class. For the following reasons, the court grants plaintiff's second motion for summary judgment, denies as moot plaintiff's motion to strike, and denies defendant's motion to decertify the class.

DISCUSSION

Plaintiff's Second Motion for Summary Judgment and Plaintiff's Motion to Strike

The court will not repeat most of the undisputed facts, which it has discussed at length in its earlier opinion granting in part and denying in part the parties' previous cross-motions for summary judgment, *Holtzman v. Turza,* No. 08 C 2014, 2010 WL 4177150 (N.D. Ill. Oct. 19, 2010), and which in any event are largely irrelevant to the instant motions. One exception is that, as the court found in ruling on the parties' cross-motions for summary judgment, it is undisputed that MessageVision, a fax broadcasting service, was hired to fax defendant's "Daily Plan-It" advertisements using defendant's contact list. Other pertinent undisputed facts mentioned throughout the opinion are derived from the parties' L.R. 56.1 statements submitted in connection with plaintiff's second summary judgment motion.

As mentioned above, after the court ruled on the parties' previous cross-motions for summary judgment, the remaining factual question was receipt of the faxes. In support of its first summary judgment motion, plaintiff had offered MessageVision and Top of Mind transmission reports showing that 11,945 faxes were sent, and that 8,630 of these were successfully transmitted to 221 unique fax numbers. Defendant argued that plaintiff had failed to lay a proper foundation to establish the integrity of those fax transmission reports. At that time, the court declined to grant summary judgment for either party on the issue of whether the faxes were received.

To allow the parties to attempt to resolve that outstanding issue, the court reopened discovery and permitted limited additional depositions. Plaintiff deposed Michael Richard, the Chief Financial Officer ("CFO") of MessageVision's parent company,[1] whom MessageVision produced in response to plaintiff's Rule 30(b)(6) request for the person "most knowledgeable about . . . the fax broadcasting software used by MessageVision." Richard's resulting testimony describes in detail the technology (the T.30 protocol, the "industry standard technology . . . that's been around for 30 years"), the hardware (the Avaya APX 1000, also an industry standard product), and the software (MessageVision's proprietary software) that MessageVision used to send defendant's faxes. Richard testified that all of those elements were reliably functioning during the relevant time period.

Richard's testimony adequately establishes a foundation for his knowledge that the faxes were received. Specifically, Richard explained that "[o]nce the [fax] transaction is concluded, the APX 1000 then reports the transaction back to [MessageVision's] proprietary software," at which point it "goes into a database, and that's how [MessageVision] reports [its] billing." Richard testified that, as CFO, he was responsible for billing MessageVision's clients, and thus was in a position to know if there were any problems with fax transmission or billing – which he testified there were not. Finally, Richard testified that when the T.30 protocol is used, a fax cannot be reported as delivered unless the receiving machine reports back

[1] Michael Richard is the CFO of VillageEDocs, which has four subsidiaries, including MessageVision.

that the entire fax has been successfully received. This testimony supports plaintiff's factual contention that MessageVision's records of successful fax transmissions are accurate and reliable, thereby showing that the class members received the faxes at issue.

Defendant disagrees, despite the fact that defendant's transmitting service, and defendant himself, relied on the until-now unquestioned integrity of MessageVision's system to compute the number of successful fax receipts that resulted in the charges paid by defendant. He argues that because Richard's expertise is finance, not technology, his testimony regarding MessageVision's fax technology is untrustworthy and cannot be considered as evidence that the class members received the faxes. Although defendant questions Richard's lack of technical expertise, Richard is offered not as an expert witness, but as a fact witness who testified about standard operating procedure. Richard testified that he familiarized himself with the relevant hardware and software, including by speaking with MessageVision employees to acquire additional information and understanding of the hardware and software. As mentioned above, Richard also testified that, as CFO, he personally supervised the billing of clients, including defendant, based on successfully transmitted faxes. As plaintiff points out, Richard would have known if any clients complained of unsuccessful fax transmissions, which they did not. Because he was supervising the fax transmission business, his testimony that MessageVision's systems were working is competent.

Defendant further attacks Richard's credibility by claiming that his testimony reveals his failure to understand the intricacies of fax technology. These critiques are frivolous. For example, defendant claims Richard's credibility is undermined by his allegedly inaccurate testimony that: (1) MessageVision used only the T.30 protocol; and (2) a device such as MessageVision's that uses the T.38 protocol cannot use the T.30 protocol. Even if defendant is correct that Richard's testimony reflects his limited comprehension of fax technology – a proposition that appears to be dubious at best – defendant's argument is contradicted by the fact that his own expert admits that T.38 converts to T.30 when a fax is sent using APX 1000. Defendant also claims that "there are now additional, individual fact questions over whether the Newsletters were transmitted to class members as faxes in violation of the TCPA or whether they were transmitted as email, which is not covered by the Act." This argument, however, is contradicted by the undisputed fact that all the ads were sent to telephone numbers rather than email addresses.

Because plaintiff has met its burden of pointing out the absence of a disputed factual issue, it is defendant's burden to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(c). But defendant has presented no evidence that conflicts with Richard's testimony on whether the faxes were received, and defendant cannot satisfy his burden by asking the court to "evaluate the weight of the evidence" that plaintiff has offered in efforts to discredit Richard's technical expertise. *Doe v. R.R. Donnelly & Sons, Co.,* 42 F.3d 439, 443 (7th Cir. 1994).

In an unsuccessful attempt to manufacture a collateral disputed issue of material fact, defendant filed, along with his opposition to plaintiff's second motion for summary judgment, a new affidavit by his expert, David Canfield. This affidavit outlines Canfield's concerns regarding what defendant describes as "the continued lack of understanding by Richard as to how MessageVision's system functions." Plaintiff has moved to strike Canfield's affidavit, contending that it is untimely because it cannot be construed as a Rule 26 supplement or as a "harmless" or "substantially justified" submission under Rule 37. Defendant responds that plaintiff's arguments are irrelevant because the Canfield affidavit is properly submitted as a Rule 56(c) expert counter-affidavit to contradict the erroneous testimony of a Rule 30(b)(6) witness. Even if defendant is correct that the affidavit is not untimely, however, Canfield's affidavit does not offer any facts regarding whether the faxes at issue were received by the class members. It thus cannot help him avoid summary judgment on that question. Thus, because defendant has failed to offer evidence suggesting that the faxes were not received – for example, evidence that MessageVision's fax delivery system ever reported a false positive or was otherwise unreliable – defendant has failed to establish a disputed issue of material fact on whether the class members received the faxes.

Finally, defendant attempts to avoid summary judgment by claiming that plaintiff has failed to demonstrate the absence of disputed facts on two other issues: whether the class members consented to receiving the faxes, and whether they owned the machines to which the faxes were sent. But the court had good reason when it previously held that the only remaining factual issue was receipt of the faxes. First, there is no disputed material issue of fact as to whether some class members consented to receiving the faxes. Defendant has testified that he did not obtain consent to send any of the faxes at issue, and he has not provided any evidence that any class member gave him permission to send a fax or that he maintained an established business relationship with any class member. No evidence contradicts that testimony. Second, the issue of ownership of the fax machines does not affect the court's ruling – although, as plaintiff notes, it may require class members to offer proof of ownership before they can collect their share of the judgment.

For the foregoing reasons, the court grants plaintiff's motion for summary judgment, awarding plaintiff $500 in statutory damages for each of the 8,430 times defendant successfully sent the Daily Plan-It fax to one of the class member's fax machines, for a total of total of [sic] $4,215,000.

Defendant's Motion to Decertify the Class

Roughly concurrent with his response to plaintiff's second motion for summary judgment, defendant moved to decertify the class that the court certified on October 14, 2009, and clarified on November 5, 2009. Although he did not contest superiority at the class certification stage, defendant now contends that the class does not meet Rule 23(b)(3)'s requirement that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy" because 88 percent of the class has at least $10,000 in individual claims, giving them sufficient incentive to pursue their own lawsuits (which are easily handled in small claims court without need for counsel). Defendant further claims that the total amount of statutory damages he faces – $4.3 million – contravenes the due process clause because it would bankrupt him and exceed any actual harm he caused. Neither of these arguments is availing, and the court therefore declines to decertify the class.

The first prong of defendant's decertification argument – what defendant describes as his "main argument" – relies on a myopic reading of Rule 23(b)(3). Defendant claims that, in this case, the class action device is not superior to individual lawsuits because most of the class members have "sufficient incentive and means to bring viable individual actions." But, even if 88 percent of class members have claims for $10,000 or more, and even if the court concluded that this was a sufficient sum to encourage those class members to pursue their claims individually, that would not mean that a class action would be less fair or efficient than individual litigation. On the contrary, "suits seeking statutory damages are arguably *best* suited to the class device because individual proof of actual damages is unnecessary." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,* 130 S. Ct. 1431, 1465 (2010) (Ginsburg, J., dissenting) (emphasis in original). While class members' ability and incentive to pursue individual lawsuits is relevant to the superiority inquiry, it is not the only factor. Here, defendant does not argue – because he cannot argue – that a class action is not more efficient and fair than individual litigation.

Defendant's second, related argument fares no better. He protests that allowing a class action to proceed will result in the imposition of constitutionally excessive statutory damages, but that argument is, as plaintiff notes, precluded by *Murray v. GMAC Mortgage Corp.,* 434 F.3d 938, 953-54 (7th Cir. 2006), in which the Seventh Circuit held that it was improper to deny class certification because aggregated statutory damages might be excessive. Defendant attempts to distinguish *Murray* by arguing that it addressed a situation in which class members would recover only small sums, while the large majority of class members in the instant case are entitled to at least $10,000. But defendant fails to acknowledge that "[t]he Due Process clause does not require Congress 'to make illegal behavior affordable, particularly for multiple violations,'" *Centerline Equipment*

Corp. v. Banner Personnel Serv., Inc., 545 F. Supp. 2d 768, 777 (N.D. Ill. 2008) (*quoting Phillips Randolph Enters., LLC v. Rice Fields,* 06 C 4968, 2007 WL 129052, at **2-3 (N.D. Ill. Jan. 11, 2007), and advances no argument that the statutory damages at issue here are so far excessive as to be constitutionally impermissible. Regardless, even if defendant had presented a persuasive argument, class decertification would not be an appropriate remedy. *See Murray,* 434 F.3d at 954 (stating that, if a district court were concerned that a class action would impose unconstitutionally excessive damages, the only possible appropriate response was to reduce the award, not deny class certification).

Moreover, plaintiff makes another point, which defendant does not dispute, that casts doubt on a central premise of defendant's arguments in favor of decertification: that the size of the judgment in this case will force him to declare bankruptcy. As plaintiff explains, defendant has insurance policies covering the time period when his fax advertisements were sent to the class. The policies had annual, amended liability limits of $2,000,000, doubled to $4,000,000 for aggregate liability arising from advertising injuries or property damages caused by illegal faxes. Under Illinois law (which governs the insurance coverage), defendant's policies cover the TCPA claims at issue in this case. *Valley Forge Ins. Co. v. Swiderski Elec., Inc.,* 860 N.E.2d 307, 317-18 (Ill. 2006); *Ins. Corp. of Hanover v. Shelborne Assocs.,* 905 N.E.2d 976, 985 (Ill. App. Ct. 2009). Thus, it appears that at least most of the $4.3 million will not come from defendant's own pocket, making it unclear why defendant would be forced to declare bankruptcy. Because defendant has failed to deny that he has applicable insurance coverage, the court will assume that he concurs with plaintiff's analysis.

Finally, defendant requests that, if the court does not decertify the class, it preemptively limit statutory damages to "recoverable proceeds from Defendant's insurance policies." As plaintiff mentions, defendant has cited to no case in which a court has limited damages to insurance proceeds, and has advanced no persuasive argument for this court to forge new ground. The court therefore denies defendant's request.

CONCLUSION

For the reasons stated above, the court grants plaintiffs' second motion for summary judgment and enters summary judgment in favor of the class in the amount of $4,215,000: $500 in statutory damages for each of the 8,430 times defendant successfully sent the Daily Plan-It fax to one of the class member's fax machines. Defendant's motion to decertify the class is denied, and plaintiff's motion to strike the affidavit of David Canfield is denied as moot. This matter is set for a status report on September 12, 2011, at 9:30 a.m., at which time counsel for the plaintiff class is directed to inform the court concerning distribution to the class, their petition for attorneys' fees, and all other matters necessary to bring this action to a conclusion.

ENTER: August 29, 2011

/s/ **Robert W. Gettleman**
Robert W. Gettleman
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IRA HOLTZMAN, individually and as the representative of a class of similarly situated persons,	)	No. 08 C 2014
Plaintiff,	)	Judge Robert W. Gettleman
v.	)	
GREGORY P. TURZA,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, Ira Holtzman C.P.A. & Associates Limited ("Holtzman"), represents a certified class of individuals in an action against Gregory P. Turza ("Turza"), in which class plaintiffs claim that defendant violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, by sending them one or more unsolicited advertisements by fax. The plaintiff class as defined in the court's order of October 14, 2009, and clarified on November 5, 2009, *Holtzman v. Turza*, 2009 WL 3334909 (N.D. Ill. Oct. 14, 2009), is composed of:

> All persons who: (1) during the period September 2006 through March 2008; (2) received a "Daily Plan-It" fax identifying "Gregory P. Turza" and his telephone number (847-647-0200) or e-mail address (greg@

myestateplan.net); and (3) had not previously consented to receiving such advertisements.

The parties have filed cross-motions for summary judgment. For the reasons discussed below, the motions are granted in part and denied in part.

FACTUAL BACKGROUND

In considering a motion for summary judgment, the court draws "all reasonable inferences from undisputed facts in favor of the nonmoving party and [views] the disputed evidence in the light most favorable to the nonmoving party." *Harney v. Speedway SuperAmerica, LLC*, 526 F.3d 1099, 1104 (7th Cir. 2008). The following facts are taken from the complaint and from the parties' statements of facts and accompanying exhibits as to which there is no material dispute.

Defendant is an attorney who operates a law practice in Skokie, Illinois. In August 2006, he hired Top of Mind Solutions, LLC ("Top of Mind") to create and distribute by fax and email one-page documents titled the "Daily Plan-It" to a list of persons supplied by defendant. Defendant's target list included a combination of contact information he purchased from the Illinois CPA Society and numbers he obtained from business contacts and students.

Top of Mind issued 41 versions of the Daily Plan-It on defendant's behalf, every two weeks, from August 2006 to March 2008. All 41 versions include a masthead with the words "The 'Daily Plan-It'" in italicized, bolded, and underlined text. "Gregory P. Turza, JD" appears just below the masthead along with the date, volume and issue number of the document. Beneath this title, the page is divided into two columns that contain an editorial article offering advice about various topics. Each article runs the length of the left column of the page and concludes in the middle of the right column. A copy of a representative "Daily Plan-It" is attached to this court's June 19, 2008, opinion denying defendant's motion to dismiss.[1]

The content of each Daily Plan-It was created entirely by Steven Patrick Riley ("Riley"), Top of Mind's owner. Defendant did not contribute to the editorial content. At the end of each article, in the lower right corner, defendant's name is listed (in a font larger than any other type on the page, with the exception of "The 'Daily Plan-It'"). He is identified as an attorney and counselor at law, and the words "estate planning," "post mortem administration," and "business succession planning" appear before his name. Each fax also includes two or three graphic images: defendant's business logo, a photo of the building in which defendant has his office, or a head shot of defendant. Also included are his business address, telephone and fax numbers, e-mail address, and website address. At the bottom of the fax the

[1] *Holtzman v. Turza*, 2008 WL 2510182 (N.D. Ill. June 19, 2008).

document repeats defendant's name and phone number. This "identifying information" occupies approximately 20 to 25 percent of total area of the fax.

Plaintiffs seek summary judgement in the amount of $4,215,000 in statutory damages – $500 for each of the 8,430 times defendant successfully sent the Daily Plan-It to one of the class member's fax machines.

DISCUSSION

I. Legal Standard

The parties have filed cross motions for summary judgment pursuant to Fed. R. Civ. P. 56. Summary judgment is appropriate if the evidence demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Village Church v. Village of Long Grove*, 468 F.3d 975, 988 (7th Cir. 2006). The burden is on the moving party to identify portions of the pleadings, answers to interrogatories, and affidavits that demonstrate an absence of material fact. *See Celotex*, 477 U.S. at 323 (1986). The burden then shifts to the nonmoving party to "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). When reviewing a summary judgment motion, the court must read the facts in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The court's role "is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact." *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 443 (7th Cir. 1994).

II. TCPA

The TCPA prohibits the use of "any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C).[2] It also creates a private right of action whereby the recipient of an unsolicited fax may bring an action to "recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater." 47 U.S.C. § 227(b)(3)(B). To prevail on a claim under the TCPA, a plaintiff must show that defendant: "(1) used a telephone facsimile machine, computer or other device to send a facsimile; (2) the facsimile was unsolicited; and (3) the facsimile constituted an advertisement." *Hinman v. M and M Rental Center, Inc.*, 545 F. Supp. 2d 802, 805

[2] There are exceptions to this general prohibition. Under the TCPA, a sender may fax an unsolicited advertisement to a recipient with whom she has an established business relationship and to fax numbers that she obtained either voluntarily, within the context of an established business relationship, or from "a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution." 47 U.S.C. § 227(b)(1)(C).

(N.D. Ill. 2008). 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).

This court has previously found in its memorandum opinion and order of June 19, 2008 (the "June 19 Order"), that the quarter page of the Daily Plan-It that detailed defendant's identifying information is an advertisement under the TCPA.[3] At issue here is whether each Daily Plan-It sent on defendant's behalf, considered in its entirety, constituted an unsolicited advertisement for the purposes of the TCPA. The crucial question is whether the editorial, non-advertising content of the fax made the advertising content "incidental" to the rest of the document. Defendant argues that according to regulations promulgated by the Federal Communication Commission ("FCC"), the Daily Plan-It is not an "advertisement" within the meaning of the TCPA. He further argues that recent case law has found that documents comparable to the Daily Plan-It are not advertisements within the meaning of the TCPA. Plaintiffs counter that the faxes were advertisements under the plain language and the FCC's interpretation of the TCPA.

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[3] *Holtzman*, 2008 WL 2510182.

The FCC's interpretation of the TCPA, while not binding on the court, provides helpful guidance on determining the nature of a fax:

> [F]acsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules. An *incidental advertisement* contained in a newsletter does not convert the entire communication into an advertisement. Thus, a trade organization's newsletter sent via facsimile would not constitute an unsolicited advertisement, so long as the newsletter's primary purpose is informational, rather than to promote commercial products. [The Commission emphasizes] that a newsletter format used to advertise products or services will not protect a sender from liability for delivery of an unsolicited advertisement under the TCPA and the Commission's rules.

In re Matter of Rules & Regs. Implementing the Tel. Consumer Protection Act of 1991 and the Junk Fax Prevention Act of 2005, 2006 WL 901720, 21 F.C.C.R. 3787, at 3814-15 (Apr. 6, 2006) (emphasis added). With regard to what makes an advertisement "incidental," the FCC states in a footnote:

> In determining whether an advertisement is incidental to an informational communication, the Commission will consider, among other factors, whether the advertisement is to a bona fide "informational communication."

> In determining whether the advertisement is to a *bona fide* "informational communication," the Commission will consider whether the communication is issued on a regular schedule; whether the text of the communication changes from issue to issue; and whether the communication is directed to specific regular recipients, *i.e.,* to paid subscribers or to recipients who have initiated membership in the organization that sends the communication. We may also consider the amount of space devoted to advertising versus the amount of space used for information or "transactional" messages and whether the advertising is on behalf of the sender of the communication, such as an announcement in a membership organization's monthly newsletter about an upcoming conference, or whether the advertising space is sold to and transmitted on behalf of entities other than the sender.

Id. at 3814 n.187.

As the court noted in its June 19 Order denying defendant's motion to dismiss, the FCC does not suggest what weight each factor should be given in assessing whether a fax is a bona fide informational communication or what other factors should be considered in determining whether an advertisement is "incidental."

III. Analysis of Fax Communication

Analyzing the fax using the FCC's method, the court finds that each of the Daily Plan-Its sent on defendant's behalf were advertisements. Defendant does not dispute that Top of Mind specializes in referral based marketing, and the Daily Plan-It is a tool used to develop relationships and build Top of Mind's clients' law practices. Despite defendant's arguments to the contrary, the record is replete with evidence demonstrating that the primary purpose of defendant's agreement with Top of Mind was to generate awareness of defendant's services and build his client base. Defendant does not dispute that the fax was designed to portray the editorial content as being authored by him, whereas in fact it was stock text generated by Top of Mind for its clients, and defendant had no role in creating or editing the content. As the FCC has emphasized, the newsletter format of the Daily Plan-It does not insulate defendant from liability. If defendant's primary purpose was informational or educational, he has provided nothing to credibly support this fact.

It is of no moment that defendant and Riley deny that Top of Mind engaged in advertising as opposed to "marketing," that the topics covered in the Daily Plan-It may have been of interest to some of the recipients, or that defendant claimed his Top of Mind expenses as educational on his tax filings. The bottom-line is that defendant has provided no facts to show that his genuine, primary motivation in paying Top of Mind to distribute the Daily Plan-It was to educate CPAs and his business contacts on various industry-related topics rather than to build brand recognition and solicit business referrals for his law practice.

Even if there was a genuine material dispute about defendant's purpose in commissioning the faxes, additional analysis using the FCC's factors for evaluating the incidental nature of the advertising content of the faxes demonstrate that the Daily Plan-Its were not bonafide [sic] "informational communications." Two of the FCC's factors weigh in favor of defendant's position: (1) it is beyond dispute that the Daily Plan-Its were sent on a regular, twice monthly schedule; and (2) the editorial content changed from issue-to-issue. The remaining factors weigh in favor of plaintiffs. First, the fax recipients were not "specific regular recipients," because they were neither paid subscribers nor had they initiated membership with defendant to receive the faxes. Second, an examination of the 41 faxes shows that defendant's identifying information comprised slightly more than 25 percent of the page of each Daily Plan-It. The inclusion of graphics, the prominent font size, and the repetition of defendant's name, diminish the fact that the number of words in the remaining 75 percent of each page greatly exceed those in the portion of the page containing the identifying information. Finally, the faxes, although appearing to be sent by defendant on his own behalf, were sent by Top of Mind as part of a paid marketing campaign. As mentioned above, the FCC has not provided guidance on the relative weight to assign each of these factors or the other factors it considers in determining if a fax communication is incidental.[4] Considering the factors in their totality coupled with the defendant's commercial purpose, the court concludes that uncontested facts establish that the Daily Plan-It was not an "informational communication," but rather "an unsolicited advertisement" within the meaning of the TCPA. For these reasons, the court grants summary judgment in plaintiffs' favor on this issue.

IV. Opt-out Notice

Under the TCPA, a sender may fax an unsolicited advertisement to a recipient with whom she has an established business relationship and to fax numbers that she obtained either voluntarily, within the context of an established business relationship, or from "a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution."

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[4] Moreover, the case law cited by both parties is not particularly helpful. There is no binding precedent on this issue, and although other courts have used the FCC factors to evaluate the contents of fax communications, none of those communications closely resemble the Daily Plan-It. *See G.M. Sign, Inc. v. MFG.com, Inc.*, 2009 WL 1137751, *2 (N.D. Ill. Apr. 24, 2009); *Sadowski v. OCO Biomedical, Inc.*, 2008 WL 5082992, *2 (N.D. Ill. Nov. 25, 2008); *Green v. Time Ins. Co.*, 629 F. Supp. 2d 834, 837 (N.D. Ill. 2009); *Holmes v. Back Doctors, Ltd.*, 2010 U.S. Dist LEXIS 23887, *13-14 (S.D. Ill. Mar. 12, 2010); *Stern v. Bluestone*, 12 N.Y.3d 873, 876 (N.Y. 2009).

47 U.S.C. § 227(b)(1)(C). Defendant argues that there is a question of fact regarding whether some of the faxes were unsolicited because many of the potential recipients were his current and former business associates and students. Plaintiffs contend that because defendant failed to comply with the TCPA's "opt-out notice" requirement, all of the faxes qualify as unsolicited advertisements regardless of the nature of the relationship between defendant and each the [sic] recipient.

47 U.S.C. §§ 227(b)(1)(C)(iii) and (b)(2)(D) require that all fax advertisements include a clear and conspicuous opt-out notice informing a recipient that she can request that the sender not transmit any future unsolicited fax advertisements. Section 227(b)(1)(C)(iii) of the TCPA provides that:

> It shall be unlawful for a person within the United States, or any person outside of the United States if the recipient is within the United States . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless . . . the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D).

The notice must include a 24-hour toll free telephone number, and a request must be complied with within the shortest reasonable time.

It is undisputed that none of the 41 Daily Plan-Its, which the court has already found to be unsolicited advertisements, included such a notice. Consequently, defendant is liable for every fax received by the plaintiff class regardless of whether he had an established business relationship with any of the recipients. For these reasons, the court grants summary judgment in plaintiffs' favor on this issue.

V. Mitigation of Damages

Defendant argues that, despite having many opportunities and methods to contact him and request to be removed from his contact list, the uncontested facts show that plaintiffs failed to mitigate their damages, and that the court should bar class members from recovering damages for more than two faxes. Nonsense. Mitigation of damages is not a defense under the TCPA, and each instance of a violation is independently actionable. *See* Fed. Comm. Comm'n, *In re 21st Century Fax(es), Ltd.*, Enforcement Action Letter, Case No. EB-00-TC-)) (March 8, 2000) ("Faxing even an advertisement . . . constitutes a violation of the TCPA. . . . Recipients of unsolicited facsimile advertisements are not required to ask that senders stop transmitting such materials."); *see also State ex rel. Charvat v. Frye*, 114 Ohio St. 3d 76, 80 (Ohio 2007). Because defendant has offered no case law or FCC recommendations to support a contrary conclusion, the court rejects this argument as a matter of law and will not limit recovery to plaintiffs based on failure to mitigate damages.

VI. Proof of Receipt of Faxes

The outstanding issue that cannot be resolved on summary judgment is proof of receipt of the faxes. The definition of the class is limited to "persons who . . . received a Daily Plan-It' fax . . . ", and there are a host of disputed material facts related to this issue.

What is undisputed is that Top of Mind contracted with MessageVision ("MessageVision"), a fax broadcasting service, to fax the newsletters using defendant's contact list. MessageVision used a proprietary fax software program that was internally developed by the company. The record, however, does not describe who developed the fax software, how it worked, or whether and what kinds of quality control tests were ever conducted to determine the accuracy of the program.

Plaintiffs argue that the transmission reports provided by Top of Mind and MessageVision establish that 11,945 faxes were sent. Of these, 8,630 were successfully transmitted to 221 unique fax numbers. Defendant contends that not only does this data not establish receipt of the faxes, but that the data itself is fundamentally flawed because plaintiffs have failed to establish the integrity of the fax transmission reports or lay a proper foundation for establishing their accuracy. Both parties have submitted the reports of experts to support their positions. Because there is a genuine issue of material fact in dispute regarding proof of receipt of the fax transmissions, the court declines to grant summary judgment for either party on this issue.

CONCLUSION

For the reasons stated above, the court grants plaintiffs' motion for summary judgment finding that, (a) the 41 Daily Plan-It faxes are advertisements as defined under the TCPA, and (b) defendant is liable for all of the faxes received by the target list. Defendant's motion for summary judgment on the issue of mitigation of damages is denied. The court denies summary judgment for either party of the issue of how many faxes were actually received by plaintiffs.

This matter is set for a report on status August 25, 2010, at 9:00 a.m.

ENTER: August 3, 2010

/s/ Robert W. Gettleman
Robert W. Gettleman
United States District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 24, 2013

Before

FRANK H. EASTERBROOK, *Chief Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

Nos. 11-3188 & 11-3746 IRA HOLTZMAN, C.P.A., & ASSOCIATES LIMITED, individually and as representative of a class, *Plaintiff-Appellee*, *v.* GREGORY P. TURZA, *Defendant-Appellant*.	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 08 C 2014 Robert W. Gettleman, *Judge*.

Order

Defendant-appellant filed a petition for rehearing on September 9, 2013. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

47 U.S.C.A. § 227

Restrictions on use of telephone equipment

(a) Definitions

As used in this section –

(1) The term "automatic telephone dialing system" means equipment which has the capacity –

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i) of this section, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that –

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G))[5].

[5] So in original. The second closing parenthesis probably should not appear.

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(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) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States –

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice –

> **(i)** to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);
>
> **(ii)** to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or
>
> **(iii)** to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate 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);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless –

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through –

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution, except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission –

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe –

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines –

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if –

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes –

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d) of this section;

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if –

> **(i)** the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;
>
> **(ii)** the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and
>
> **(iii)** the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1) (C)(iii), except that the Commission may take action under this subparagraph only –

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall –

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State –

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall –

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall –

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall –

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and –

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State –

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States –

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that –

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Prohibition on provision of inaccurate caller identification information

(1) In general

It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).

(2) Protection for blocking caller identification information

Nothing in this subsection may be construed to prevent or restrict any person from blocking the capability of any caller identification service to transmit caller identification information.

(3) Regulations

(A) In general

Not later than 6 months after December 22, 2010, the Commission shall prescribe regulations to implement this subsection.

(B) Content of regulations

(i) In general

The regulations required under subparagraph (A) shall include such exemptions from the prohibition under paragraph (1) as the Commission determines is appropriate.

(ii) Specific exemption for law enforcement agencies or court orders

The regulations required under subparagraph (A) shall exempt from the prohibition under paragraph (1) transmissions in connection with –

(I) any authorized activity of a law enforcement agency; or

(II) a court order that specifically authorizes the use of caller identification manipulation.

(4) Report

Not later than 6 months after December 22, 2010, the Commission shall report to Congress whether additional legislation is necessary to prohibit the provision of inaccurate caller identification information in technologies that are successor or replacement technologies to telecommunications service or IP-enabled voice service.

(5) Penalties

(A) Civil forfeiture

(i) In general

Any person that is determined by the Commission, in accordance with paragraphs (3) and (4) of section 503(b) of this title, to have violated this subsection shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this paragraph shall be in addition to any other penalty provided for by this Act. The amount of the forfeiture penalty determined under this paragraph shall not exceed $10,000 for each violation, or 3 times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act.

(ii) Recovery

Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) of this title.

(iii) Procedure

No forfeiture liability shall be determined under clause (i) against any person unless such person receives the notice required by section 503(b)(3)of this title or section 503(b)(4) of this title.

(iv) 2-year statute of limitations

No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 2 years prior to the date of issuance of the required notice or notice or apparent liability.

(B) Criminal fine

Any person who willfully and knowingly violates this subsection shall upon conviction thereof be fined not more than $10,000 for each violation, or 3 times that amount for each day of a continuing violation, in lieu of the fine provided by section 501 of this title for such a violation. This subparagraph does not supersede the provisions of section 501 of this title relating to imprisonment or the imposition of a penalty of both fine and imprisonment.

(6) Enforcement by States

(A) In general

The chief legal officer of a State, or any other State officer authorized by law to bring actions on behalf of the residents of a State, may bring a civil action, as parens patriae, on behalf of the residents of that State in an appropriate district court of the United States to enforce this subsection or to impose the civil penalties for violation of this subsection, whenever the chief legal officer or other State officer has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of this subsection or a regulation under this subsection.

(B) Notice

The chief legal officer or other State officer shall serve written notice on the Commission of any civil action under subparagraph (A) prior to initiating such civil action. The notice shall include a copy of the complaint to be filed to initiate such civil action, except that if it is not feasible for the State to provide such prior notice, the State shall provide such notice immediately upon instituting such civil action.

(C) Authority to intervene

Upon receiving the notice required by subparagraph (B), the Commission shall have the right –

(i) to intervene in the action;

(ii) upon so intervening, to be heard on all matters arising therein; and

(iii) to file petitions for appeal.

(D) Construction

For purposes of bringing any civil action under subparagraph (A), nothing in this paragraph shall prevent the chief legal officer or other State officer from exercising the powers conferred on that officer by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(E) Venue; service or process

(i) Venue

An action brought under subparagraph (A) shall be brought in a district court of the United States that meets applicable requirements relating to venue under section 1391 of Title 28.

(ii) Service of process

In an action brought under subparagraph (A) –

(I) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(II) a person who participated in an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person.

(7) Effect on other laws

This subsection does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(8) Definitions

For purposes of this subsection:

(A) Caller identification information

The term "caller identification information" means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service.

(B) Caller identification service

The term "caller identification service" means any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service. Such term includes automatic number identification services.

(C) IP-enabled voice service

The term "IP-enabled voice service" has the meaning given that term by section 9.3 of the Commission's regulations (47 C.F.R. 9.3), as those regulations may be amended by the Commission from time to time.

(9) Limitation

Notwithstanding any other provision of this section, subsection (f) shall not apply to this subsection or to the regulations under this subsection.

(f) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits –

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(g) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(h) Junk Fax Enforcement report

The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include –

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3) –

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5) –

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery –

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.