Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Rules and Regulations Implementing the Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	

Eric B. Fromer Chiropractic, Inc.'s Comments on
Petition for Expedited Declaratory Ruling of Inovalon, Inc.

Commenter, Eric B. Fromer Chiropractic, Inc. ("Fromer"), submits these comments in opposition to the Petition for Declaratory Ruling filed by Inovalon, Inc.[1] Fromer is the plaintiff in a private action against Inovalon under the Telephone Consumer Protection Act of 1991 ("TCPA"), pending in the United States District Court for the District of Maryland.[2] The Consumer & Governmental Affairs Bureau sought comments on the Inovalon Petition on February 23, 2018.[3] As argued below, the Commission should deny the Petition.

I. The Petition presents no "controversy" or "uncertainty" to be resolved because the Commission has unambiguously ruled that offers of "free goods or services" are "advertisements" under the TCPA.

Inovalon's Petition raises no "controversy" or "uncertainty" for the Commission to resolve, as required by Commission Rule 1.2.[4] As the Public Notice observes, the Petition seeks a ruling that an unknown number of facsimiles Inovalon sent from 2013–17 offering "free" and

[1] *Petition for Expedited Declaratory Ruling Clarifying Unsolicited Advertisement Provision of Telephone Consumer Protection Act and Junk Fax Prevention Act*, CG Docket No. 02-278 (Feb. 19, 2018) ("Pet.").

[2] *Eric B. Fromer Chiropractic, Inc. v. Inovalon, Inc.*, No. 17-cv-03801-GJH (D. Md.).

[3] *Consumer & Governmental Affairs Bureau Seeks Comment on Inovalon, Inc. Petition for Declaratory Ruling Under the Telephone Consumer Protection Act and Junk Fax Prevention Act*, CG Docket No. 02-278 (Feb. 23, 2018).

[4] 47 C.F.R. § 1.2.

"no cost" EHR "services" to health-care providers like Fromer are not "advertisements" under the TCPA.[5]

The Commission rejected this argument over a decade ago, issuing a final order interpreting the definition of "advertisement" in 47 U.S.C. § 227(a)(5) to mean that "facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition."[6] This ruling is "clear and unambiguous," and "if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written."[7] The "natural reading" of the 2006 Order leads to "this simple rule: faxes that offer free goods and services are advertisements under the TCPA."[8]

Inovalon does not demonstrate any ambiguity in the free-goods-or-services rule.[9] The Petition barely mentions it—notwithstanding that the whole point of the Petition is to undermine the rule—instead mischaracterizing the rule as stating that faxes offering free good or services are advertisements *only if* "they (1) are mere pretext, or (2) form part of an overall marketing campaign."[10] That is not what the 2006 Order says. It says faxes offering free goods or services "are" advertisements because they are "presume[d]" to be advertisements, and they are

[5] Public Notice at 1.

[6] *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report & Order & Third Order on Reconsideration, 21 FCC Rcd. 3787, 3814, ¶ 52 (Apr. 6, 2006) (hereinafter "2006 Order").

[7] *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459, 466 (4th Cir. 2018).

[8] *Id.* at 467.

[9] Pet. at 7.

[10] Pet. at 7.

"presume[d]" to be advertisements because they are "often" or "in many instances" a "pretext" or part of an "overall marketing campaign."[11]

Inovalon mischaracterizes the next paragraph of the 2006 Order, paragraph 53, as stating that "[b]y contrast, purely informational communications, *or those whose primary purpose is to communicate information* (even in the presence of incidental advertising) are not considered advertisements."[12] That is not what Paragraph 53 says. It states: "By contrast, facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules." The "contrast" between the two paragraphs is the contrast between faxes that offer free goods or services, which are "presume[d]" to be advertisements, and faxes that are "purely informational communications," which are not.

The "primary purpose" language Inovalon attempts to smuggle into the standard states that *if* a fax newsletter meets the criteria for a "bona fide informational communication," then "incidental advertising" in the fax will not convert the entire communication into an advertisement, "*so long as* the newsletter's primary purpose is informational, rather than to promote commercial products."[13] Inovalon is trying to skip the multi-factor test for a "bona fide informational communication" and go straight to the "primary purpose" language, treating that single factor as an independent test for whether a fax is an advertisement, when that is not what Paragraphs 52 and 53 of the 2006 Order say.

[11] 2006 Order ¶ 52.

[12] Pet. at 7–8 (citing 2006 Order ¶ 53).

[13] 2006 Order ¶ 53 & n.187.

In sum, there is no ambiguity to "clarify" in the free-goods-or-services rule, and so the petition for declaratory ruling should be denied.

II. The free-goods-or-services rule is reasonable and appropriate to prevent fax advertisers from evading the TCPA, as the Fourth Circuit held in *Carlton & Harris*.

The Fourth Circuit recognized in *Carlton & Harris* that, although the free-goods-or-services rule "may be overinclusive" in practice is some cases, "prophylactic rules are neither uncommon nor unlawful," and since such rules "cannot, and need not, operate with mathematical precision," the "mere fact that a regulation operates overbroadly does not render it invalid."[14] The Fourth Circuit held the Commission's decision to treat "all unsolicited offers for free goods or services" as advertisements is "a reasonable one."[15] The Fourth Circuit held that "[a] per se rule advances the purpose of the underlying statute by protecting consumers from junk faxes," and at the same time "helps would-be violators avoid inadvertent liability by eliminating the need for a case-by-case determination of whether a fax is indeed a free offer, or merely a pretext for something more."[16]

The Fourth Circuit's decision in *Carlton & Harris* is binding in Fromer's private TCPA action pending against Inovalon in the Maryland district court,[17] so its claim of unfairness is irrelevant. But the Commission should note that Inovalon is careful to state in its Petition only that it "receives no compensation *from providers* for using EHR," but nowhere denies that it

[14] *Carlton & Harris*, 883 F.3d at 467–68 (quoting *Friedman v. Heckler*, 765 F.2d 383, 388 (2d Cir. 1985)).

[15] *Id.* at 468.

[16] *Id.*

[17] The defendant in *Carlton & Harris* filed a petition for rehearing en banc on March 9, 2018. On March 23, 2018, the Fourth Circuit denied the petition with no judge calling for a vote. Ex. A, Order Denying Rehearing, *Carlton & Harris Chiropractic, Inc. v. PDR Network*, No. 16-2185 (4th Cir. Mar. 23, 2018).

receives compensation from others for performing its "free" service.[18] In fact, it admits that it "offers free, 'no cost' collection and digitization services *paid for by the health plans*."[19]

Since there has been no discovery conducted in the underlying TCPA litigation, Fromer has no information on how Inovalon is compensated by the health plans (or anyone else). However, the Commission should conclude that the mere fact that Inovalon admits that the "free services" faxes it sent Fromer and an unknown number of other health-care providers are part of an ongoing, for-profit, commercial enterprise means that this is not one of those cases in which the prophylactic free-goods-or-services rule in Paragraph 52 of the 2006 Order might be deemed to be "overinclusive" or unfair in any way.

Conclusion

For the foregoing reasons, the Commission should deny the Inovalon Petition for Declaratory Ruling.

Dated: March 26, 2018

Respectfully submitted,

By: s/Glenn L. Hara

Anderson + Wanca
3701 Algonquin Road, Suite 500
Rolling Meadows, IL 60008
Telephone: (847) 368-1500

[18] Pet. at 4.

[19] Pet. at i–ii.

EXHIBIT A

FILED: March 23, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2185
(3:15-cv-14887)

CARLTON & HARRIS CHIROPRACTIC, INC., a West Virginia Corporation, individually and as the representative of a class of similarly-situated persons

Plaintiff - Appellant

v.

PDR NETWORK, LLC; PDR DISTRIBUTION, LLC; PDR EQUITY, LLC; JOHN DOES 1-10

Defendants - Appellees

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk