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

AMBASSADOR ANIMAL HOPSITAL, LTD. individually and as the representative of a class of similarly situated persons,	Case No. 20-cv-2886
Plaintiff,	Judge Mary M. Rowland
v.	
ELANCO ANIMAL HEALTH, INCORPORATED and ELI LILLY AND COMPANY,	
Defendants.	

MEMORANDUM OPINION AND ORDER

Plaintiff Ambassador Animal Hospital brings this putative class action against Defendants Elanco Animal Health, Inc. and Eli Lilly and Company alleging violations of the Telephone Consumer Protection Act (TCPA) and Illinois common law. The defendants move to dismiss the complaint for failing to state a claim. Eli Lilly also moves to strike part of the proposed class, and Ambassador moves to cite supplemental authority related to that motion. For reasons stated herein, the defendants' Motion to Dismiss [23] is granted without prejudice, and the motions to strike and cite supplemental authority [25, 44] are dismissed as moot.

I. Background

The following factual allegations are taken from the Complaint (Dkt. 1-1) and are accepted as true for the purposes of the motion to dismiss. *See W. Bend Mut. Ins. Co. v. Schumacher*, 844 F.3d 670, 675 (7th Cir. 2016).

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Ambassador brings this suit against Elanco and Eli Lilly alleging violations of the TCPA and Illinois common law arising from fax messages sent by Elanco to Ambassador. Ambassador is a veterinary hospital based in Oak Park. Dkt. 1-1 ¶ 9. Elanco is an animal health products and services company incorporated in Delaware and based in Greenfield, Indiana. *Id.* at ¶¶ 9, 13. Eli Lilly is a global pharmaceuticals company incorporated in Delaware and headquartered in Indianapolis, Indiana. *Id.* at ¶¶ 11, 14. Elanco was a division of Eli Lilly until September 2018, when Elanco was made public. *Id.* at ¶ 13. Eli Lilly sold its last shares in the company in March 2019. *Id.*

In April 2018, defendant sent Ambassador two unsolicited faxes. *Id.* at ¶ 15. Ambassador believes these faxes were part of a larger broadcast to thousands of veterinary institutions. *Id.* The faxes invited the recipient veterinary professionals to attend presentations hosted by Elanco in Buffalo Grove on the topics of "Rethinking Management of Osteoarthritis" and "Canine and Feline Disease Prevention Hot Topics." *Id.* at ¶¶ 17-18; Ex. A, Fax Messages. The faxes prominently feature Elanco's name and logo and state that the lectures had been approved for continuing education credit. *Id.* at Ex. A, Fax Messages. Interested individuals were requested to RSVP by phone. *Id.*

Ambassador never gave Elanco permission to send it advertisements by fax, and the faxes did not contain any opt-out notice. *Id.* at ¶¶ 20-21. Ambassador alleges that the advertised presentations were used by Elanco to market its animal health products and services. *Id.* at ¶ 17. However, Ambassador does not state that any

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employee actually attended the programs or attempted to register for them. Receipt of the faxes consumed Ambassador's paper, toner, and employee time. *Id.* at ¶ 46.

In response, Ambassador filed this suit in the Circuit Court of Cook County on April 10, 2020. On May 13, the defendants removed the case to federal court.

II. Standard

A motion to dismiss tests the sufficiency of a complaint, not the merits of the case. *Gibson v. City of Chi.,* 910 F.2d 1510, 1520 (7th Cir. 1990). "To survive a motion to dismiss under Rule 12(b)(6), the complaint must provide enough factual information to state a claim to relief that is plausible on its face and raise a right to relief above the speculative level." *Haywood v. Massage Envy Franchising, LLC*, 887 F.3d 329, 333 (7th Cir. 2018) (quotations and citation omitted). *See also* Fed. R. Civ. P. 8(a)(2) (requiring a complaint to contain a "short and plain statement of the claim showing that the pleader is entitled to relief."). A court deciding a Rule 12(b)(6) motion accepts plaintiff's well-pleaded factual allegations as true and draws all permissible inferences in plaintiff's favor. *Fortres Grand Corp. v. Warner Bros. Entm't Inc.,* 763 F.3d 696, 700 (7th Cir. 2014).

A plaintiff need not plead "detailed factual allegations", but "still must provide more than mere labels and conclusions or a formulaic recitation of the elements of a cause of action for her complaint to be considered adequate under Federal Rule of Civil Procedure 8." *Bell v. City of Chi.*, 835 F.3d 736, 738 (7th Cir. 2016) (citation and internal quotation marks omitted). When ruling on motions to dismiss, courts may also consider documents attached to the pleadings without converting the motion to

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dismiss into a motion for summary judgment, so long as the documents are referred to in the complaint and central to the plaintiff's claims. *See Adams v. City of Indianapolis*, 742 F.3d 720, 729 (7th Cir. 2014); Fed. R. Civ. P. 10(c).

Dismissal for failure to state a claim is proper "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558, 127 S. Ct. 1955, 1966 (2007). Deciding the plausibility of the claim is "'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *McCauley v. City of Chi.*, 671 F.3d 611, 616 (7th Cir. 2011) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (2009)).

III. Analysis

In its complaint, Ambassador raised two counts against the defendants: (1) violations of the TCPA, and (2) conversion in violation of Illinois law. We consider the counts in turn.

A. Ambassador Has Not Shown That the Faxes Were an Unsolicited Advertisement

1. Applying the TCPA

The TCPA generally 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). An "unsolicited advertisement" is in turn defined 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." *Id.* at § 227(a)(5).

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The meaning of "commercial availability and quality" is contestable, especially if the fax advertises items offered for free. "Congress has not spoken directly on the issue of whether an advertisement for free services [is an] unsolicited advertisements under the TCPA." *GM Sign, Inc. v. MFG.com, Inc.*, No. 08 C 7106, 2009 WL 1137751, at *2 (N.D. Ill. Apr. 24, 2009). In such situations, the fax is not an "overt advertisement." *Orrington v. Scion Dental, Inc.*, No. 17-CV-00884, 2017 WL 2880900, at *5 (N.D. Ill. July 6, 2017).

For guidance in these situations, courts in this district have looked to the FCC's construction of the statute. *Orrington*, 2017 WL 2880900, at *3. Because, "[i]n many instances, 'free' seminars serve as a pretext to advertise commercial products or services" faxes "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." *In re Rules and Regs. Implementing the Tel. Consumer Protection Act of 1991 and the Junk Fax Prevention Act of 2005*, 21 F.C.C.R. 3787, 3814 (Apr. 6, 2006).[1] In applying this principle, courts have required plaintiffs to show that the free offering described in the fax was a pretext for some other commercial motive. *Orrington*, 2017 WL 2880900, at *3;[2] *see Physicians*

[1] The defendants argue that the Court is not bound by the FCC's interpretation of the TCPA. We do not reach this issue today, however, because the outcome is same in either case.

[2] The plaintiff in *Orrington* failed to show a commercial motive in his initial complaint. Ambassador asserts that his amended complaint survived a motion to dismiss. That is true but does not help Ambassador here because Orrington's amended complaint detailed how the free seminar advertised was integral to the defendant's business model. *Orrington v. Scion Dental, Inc.*, No. 17-CV-00884, 2017 WL 5569741 (N.D. Ill. Nov. 20, 2017).

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