16-1133 16-1425

United States Court of Appeals for the Second Circuit

MARK LEYSE, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff-Appellant-Cross-Appellee,

v.

LIFETIME ENTERTAINMENT SERVICES, LLC,

Defendant-Appellee-Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY AND RESPONSE BRIEF

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SUMMARY OF ARGUMENT

Point I

Plaintiff-Appellant-Cross-Appellee, Mark Leyse ("Leyse"), has Article III standing because he sustained the very type of harms that induced Congress to ban unsolicited robocall advertisements. The unlawful robocall by Defendant-Appellee-Cross-Appellant, Lifetime Entertainment Services, LLC ("Lifetime"), invaded Leyse's privacy, tied up his telephone line, took up space on his voicemail system, and caused him to waste his time by having to listen to the message, whose contents he did not know in advance (thus showing that Lifetime's argument that Leyse "chose" to listen to the message is plainly frivolous).

Point II

A finding that Lifetime's willful blindness regarding records that identify the victims of its unlawful conduct, *i.e.*, records that Lifetime was required to obtain and keep, should not, and does not, defeat ascertainability. Leyse's proposed method of identifying class members, *i.e.*, by inviting them, by publication of notice, to submit telephone records showing that they had a New York City residential telephone at the time that the calls at issue (the "Lifetime Robocall") were made, and by submitting affidavits attesting to their receipt a Lifetime Robocall, satisfies the ascertainability requirement and abides by this Court's general preference for granting rather than denying class certification. When compared to consumer-product class actions, some

of which have been found to satisfy ascertainability and some of which have not, the identification of class member is much less prone to difficulty. This case involved one robocall made to people over a two-day period. The robocalls were made using the voice of a well-known celebrity and were the only robocalls made with his voice, such that class members would not need to distinguish between different calls using the same person's voice, which would be akin to asking consumers to remember which of a company's similar products they had purchased. Although many class members would likely not remember having received one of the Lifetime Robocall, it is clear that at least some class members would remember and should thus be able to recover that to which the law entitles them.

If Lifetime were able to overcome this Court's preference in favor of class certification based on its unlawful failure to maintain records that identify the victims of its unlawful robocalls, it is simply an inescapable fact that such a ruling would encourage those who wish to engage in mass-scale wrongdoing to avoid keeping records so that, as Lifetime attempts to do here, they will able to defeat class certification.

Point III

Lifetime's only response to Leyse's arguments regarding the District Court's issuance of judgment in favor of Leyse on his individual claims is to cite cases that pre-date the watershed ruling in, and were abrogated by, *Campbell-Ewald Company v.*

Gomez, --- U.S. ---, 136 S. Ct. 663 (2016).

Point IV

Although Lifetime complains that it was unfair of the Federal Communications Commission ("FCC") to exempt program-promoting robocalls made by free over-the-air radio and television stations while not exempting program-promoting robocalls made by paid-for stations, the only relief that the District Court would be able to provide if Lifetime were to prevail would be *not* in the form of forcing the FCC to exempt *paid-for-station calls* but, rather, to *decline* to enforce the exemption for *over-the-air-station* calls. Thus, the District Court could, under any circumstance, grant Lifetime the relief that Lifetime seeks. In any event, every circuit court that has addressed the question of whether a district court may entertain the type of challenge to an agency action that Lifetime asked the District Court to entertain has held that doing so is barred by the Hobbs Act.

Point V

Lifetime was clearly not entitled to summary judgment, the basis of Lifetime's request for such relief having been that the FCC was obligated to exempt program-promoting paid-for-station robocalls. The FCC, on multiple occasions over well over a decade, has ruled that such calls are not exempt from the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA").

Lifetime's argument that it does not sell its services directly to consumers falls

flat, as it rests on the flawed notion that only direct sellers are bound by the TCPA. Perhaps recognizing that the TCPA applies to businesses like Lifetime, Lifetime argues that Time Warner Cable customers consent to receiving robocalls. In fact, they do consent to receiving robocalls . . . from Time Warner Cable, not from every station that airs on Time Warner Cable.

Point VI

Lifetime's argument in favor of the doctrine of primary jurisdiction is fatally flawed, as the application of that doctrine is not supported by any of the factors that are to be considered in determining whether to apply it. First, the issue of whether the Lifetime Robocalls should have been exempted by the FCC is not a technical or particularly complex issue.

Second, the FCC has ruled multiple times on the issue at hand, and Lifetime has not offered this Court any reason to believe that Lifetime's belated FCC petition will likely lead to a different result than that which the FCC has already reached consistently and over more than a decade.

Third, Lifetime did not even bother taking the one action that might have helped its cause, *i.e.*, filing a petition with the FCC and arguing that doing so favored application of the doctrine of primary jurisdiction. Indeed, Lifetime oddly, and repeatedly, asked the District Court to apply the doctrine based on Lifetime's representation that it was "prepared" to file a petition *after* the District Court applied

the doctrine (such promise having apparently been a matter of gamesmanship, as Lifetime ended up filing its petition after the District Court had properly *declined* to apply the doctrine).

Point VII

Lifetime's argument in favor of the doctrine of Constitutional avoidance fails because it is based on a false premise, *i.e.*, that the FCC's decision to exempt broadcast-station calls but not paid-for-station calls is based on the identity of the speaker. On the contrary, it is based on the type of service being promoted. Thus, Time Warner Cable, for example, could make robocalls concerning broadcast stations that are aired on its network but not subscription-only stations. Likewise, Lifetime would be able to make robocalls concerning its programming to the extent that such programming airs on broadcast stations.

Point VIII

Leyse has statutory standing. First, Lifetime admits that it was only trying to reach "households" rather than any particular person within a household; and the notion that it was trying to reach only a household's named telephone-service subscriber (not even the cable-television subscriber if one existed), would be peculiar by itself (as it would mean that Lifetime wanted only such individuals to watch its programming) but is plainly nonsensical given that Lifetime never bothered to learn who the recipients of its calls were. Moreover, the term "called party" does not mean "intended recipient";

and, furthermore, statutory standing under the TCPA is not limited to a "called party" in any event, but applies to a person who, like Leyse, uses a telephone line as his residential line.

ARGUMENT

POINT I

PLAINTIFF HAS ARTICLE III STANDING

A. Plaintiff Suffered Harm

In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the Supreme Court addressed the injury-in-fact requirement of Article III standing. The Court's decision did not change the law of standing. Instead, it confirmed the long established principle that "standing consists of three elements." *Id.* at 1547, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id*. The Court further confirmed that a plaintiff must "allege an injury that is both 'concrete' *and* 'particularized.'" *Id.* at 1545, citing *Friends of the Earth, Inc. v. Laidlaw Envt'l. Svcs. (TOC), Inc.*, 528 U.S. 167, 180-181 (2000) (emphasis added in *Spokeo*).

As the Supreme Court reiterated, a "particularized" injury "must affect th[e] plaintiff in a personal and individual way." *Id.* at 1548. The Court agreed with the Ninth Circuit that the *Spokeo* plaintiff had suffered a particularized injury because he

claimed that the defendant had "'violated [the plaintiff's] statutory rights,'" and that the plaintiff's "'interests in the handling of his credit information are individualized rather than collective,'" *id.*, quoting *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (9th Cir. 2014) (emphasis in original); *see also id.* at 1554 (Ginsburg, *J.*, dissenting) ("[the plaintiff], the Court holds, meets the particularity requirement for standing under Article III. *See ante*, at 1548, 1550 (remanding only for concreteness inquiry).").

Spokeo also confirmed that a "concrete" injury "must actually exist," *id.* at 1548, although it may be "intangible." *Id.* at 1549.

(i) Plaintiff Suffered "Particularized" Injuries

Spokeo confirmed that "injury in fact" must be "particularized" in that it "must affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548. In other words, standing requires that the plaintiff "has suffered some actual or threatened injury." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). Here, the call at issue was placed to Leyse's telephone in violation of the TCPA. *See* Compl., ¶¶ 7-10 (A-18). The unlawful call was received by Leyse on his voicemail system, thereby taking up space on the system and forcing Leyse to spend his time listening to the message. *See* Deposition Transcript of Mark Leyse ("Leyse Tr."(, p. 51, line 24 - p.53, line 18) (SA-16 - SA-17). As a result, any injuries that followed were particularized.

(ii) Plaintiff Suffered "Concrete" Injuries

Even if Leyse's harms were viewed as intangible, those harms would have been "concrete." In *Spokeo*, the Court provided several tools for courts to use in determining whether an intangible harm is "concrete"; and, "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Spokeo*, 136 S. Ct. at 1549. First, courts may look to common law to determine whether a type of harm "has a close relationship to a harm that has been traditionally regarded as providing a basis for a lawsuit." *Id.*, citing *Vermont Agency of Nat'l Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 775-777 (2000). That is, a plaintiff may demonstrate that he suffered a concrete injury by showing that his injury is analogous to a harm traditionally recognized at common law.

Second, Congress may identify and "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law," *id.* (citation and quotation marks omitted), because Congress "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," *id.* (citation and quotation marks omitted), and "is well positioned to identify intangible harms that meet minimum Article III requirements." *Id*. Although the Court noted that merely asserting a "bare procedural violation, divorced from any concrete harm," will not satisfy the concreteness requirement, *id.*, this observation has little application to TCPA claims. Such claims are not based on "bare procedural

violations," but rather on substantive statutory prohibitions on certain actions that are directed at the plaintiff and cause harm. Thus: "the violation of a procedural right granted by statute *can be sufficient in some circumstances to constitute injury in fact*. In other words, a plaintiff in such a case *need not allege any additional harm* beyond the one Congress has identified." *Id.* (emphases in original).

In *Spokeo*, the defendant sought a ruling that would have changed the law and eviscerated causes of action seeking statutory damages. However, the Court, far from complying, issued a narrow ruling remanding the case solely on the basis that the Ninth Circuit had not addressed whether the plaintiff's injuries were "concrete," but had, instead, addressed only the "particularization" element. *See id.* at 1545. The Supreme Court explicitly took no position on whether the plaintiff's injuries were, in fact, "concrete." *See id.* at 1550. *Spokeo* thus created no new law, and merely noted, instead that "[w]e have made it clear time and time again that an injury in fact must be both concrete and particularized." *Id.* at 1548 (emphasis in original).

Here, Leyse has suffered concrete harm under either approach. First, Leyse has suffered harm in the form of invasion of privacy, intrusion upon his telephone line and voicemail system, waste of time, and nuisance. Each of these harms has a "close relationship" to a harm traditionally recognized at common law. Second, Congress sought to "elevate to the status of legally cognizable injuries" the harms that the TCPA seeks to prevent. Under each factor, the harms that Leyse sustained conferred Article

III standing upon him.

(a) The Invasion of Privacy Caused by Defendant's Unlawful Call Gave Plaintiff Article III Standing

The first type of harm that Leyse suffered is invasion of his privacy rights. Invasion of privacy is an intangible harm that is recognized by the common law. American courts have long recognized that "[o]ne who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other." *Restatement (Second) Torts*, § 652A (1977). Nearly every state currently recognizes invasion of privacy in its tort law. *See* Eli A. Meltz, *No Harm, No Foul? Attempted Invasion of Privacy and the Tort of Intrusion Upon Seclusion*, 83 Fordham L. Rev. 3431, 3440 (May, 2015) ("[c]urrently, the vast majority of states recognize the intrusion strand of invasion of privacy either under common law or by statute").

Courts have recognized that the interests protected by the TCPA are encompassed by the term "right to privacy." *See Owens Ins. Co. v. European Auto Works, Inc.*, 695 F.3d 814, 819-820 (8th Cir. 2012) ("the ordinary meaning of the term 'right of privacy' easily includes violations of the type of privacy interest protected by the TCPA."). Indeed, the TCPA can be seen as merely liberalizing and codifying the application of this common-law tort to particular types of unwanted telephone calls. While the common-law tort might require different elements than does the TCPA, the Supreme Court's focus in *Spokeo* was not on the elements of a cause of action, but

rather on whether the harm is of a type that traditionally provides a basis for a common-law claim. Invasion of privacy is such a harm.

The Congressional findings accompanying the TCPA repeatedly stressed Congress's purpose of protecting privacy rights:

> (5) Unrestricted telemarketing, however, can be an *intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized*, a risk to public safety.
>
> (6) Many consumers are outraged over the proliferation of *intrusive, nuisance calls* to their homes from telemarketers. ***
>
> (9) Individuals' *privacy rights*, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that *protects the privacy of individuals* and permits legitimate telemarketing practices.
>
> (10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a *nuisance and an invasion of privacy*. ***
>
> (12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this *nuisance and privacy invasion*.
>
> (13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a *nuisance and an invasion of privacy*, regardless of the type of call, the Federal Communications Commission should have the

> flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.
>
> (14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls *are a nuisance, are an invasion of privacy*, and interfere with interstate commerce.

Pub. L. 102-243, § 2, 105 Stat. 2394 (1991) (emphases added); *see also In re Rules & Regulations Implementing the [TCPA] of 1991*, 30 FCC Rcd. 7961, 7967, ¶ 4 (July 10, 2015) ("Congress enacted the TCPA in 1991 to address certain practices thought to be an invasion of consumer privacy and a risk to public safety."); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012) (observing that the TCPA "bans certain practices invasive of privacy"); *id.* at 745 ("[m]onth after month, *unwanted robocalls* and texts, both telemarketing *and informational*, top the list of consumer complaints received by the [Federal Communications] Commission." (emphases added)). The TCPA is designed to protect consumer privacy by, among other things, prohibiting the making of autodialed voice calls to cellular telephones, prerecorded voice calls to cellular or residential telephone numbers, and calls to telephone numbers registered with the national Do Not Call Registry. *See* 47 U.S.C. § 227(b)(1); 47 C.F.R. § 64.1200(c)(2). In addition, the Act's sponsor, Senator Hollings, stated: "[c]omputerized calls are the scourge of modern civilization. They wake us up in the morning; they

interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall." 137 Cong. Rec. 30821-30822 (1991).

The FCC has explained that "[i]t is clear that automated telephone calls that deliver an artificial or prerecorded voice message are *more of a nuisance* and a *greater invasion of privacy* than calls placed by *'live' persons*." *In re Rules & Regulations Implementing the [TCPA] of 1991*, 7 FCC Rcd. 2736, 2740, ¶ 25 (Apr. 17, 1992) (emphases added). Because the invasion-of-privacy harm caused by these calls is both traditionally recognized at common law and is the very harm that Congress sought to prevent in enacting the TCPA, Leyse easily satisfies the concrete-injury requirement of Article III standing.

(b) The Intrusion Upon, and Occupation of, Plaintiff's Telephone Line Caused by Defendant's Unlawful Call Gave Plaintiff Article III Standing

The second type of harm that Leyse suffered is intrusion upon, and occupation of, his telephone line. The harm recognized by the ancient common-law claim of trespass to chattels, *i.e.*, the intentional dispossession of a chattel, or the use of or intermeddling with a chattel that is in the possession of another, is a close analog to the harm caused by the unlawful telephone call that Leyse received. *See Restatement (Second) of Torts*, § 217 (1965). Common-law courts recognized an action for trespass to chattels for temporary dispossession of personal objects "although there has been no

impairment of the condition, quality, or value of the chattel, and no other harm to any interest of the possessor," and although the possessor was "not deprived of the use of the chattel for any substantial length of time." *Restatement (Second) of Torts*, § 218, cmt. D (1965). This is similar to the more widely familiar concept of trespass, which requires nothing more than "plac[ing a] foot on another's property" to constitute harm and thus confer standing on the property owner to bring a claim. *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring).

The harm caused by unwanted telephone calls has a close relationship to the harm recognized by the common-law tort of trespass to chattels, a tort that protects fundamental property rights. The TCPA merely applies this common-law tort to a modern form of personal property (a telephone line) and a modern method of intrusion (complete occupation of that telephone line through unlawful methods).

Multiple courts have held that temporary electronic intrusion upon another person's electronic equipment constitutes trespass to chattels. *See*, *e.g.*, *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 249 (S.D.N.Y. 2000), *aff'd*, 356 F.3d 393 (2d Cir. 2004) (finding that intruding electronically into a business's database system caused harm by reducing the system's capacity and that "mere possessory interference is sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels"); *Microsoft Corp. v. Does 1-18*, No. 13-cv-139, 2014 WL 1338677, *9-10 (E.D. Va. Apr. 2, 2014) ("[t]he unauthorized intrusion into an

individual's computer system through … unwanted communications supports [a claim for trespass to chattels]."). Courts have also found this tort theory applicable to unwanted telephone calls. *See Czech v. Wall St. on Demand*, 674 F. Supp. 2d 1102, 1122 (D. Minn. 2009) (declining to dismiss cell-phone owner's trespass-to-chattels claim against the sender of unwanted text messages).

Courts have also recognized that one purpose of the TCPA is to "keep[] telephone lines from being tied up." *American States Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 392 F.3d 939, 942 (7th Cir. 2004). In addition, the Eleventh Circuit has recognized that "the occupation of the recipient's telephone line and fax machine" is a sufficient "injury in fact" for a TCPA claim asserting violations under the statute's junk-fax provision, 47 U.S.C. § 227(b)(1)(C). *See Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1250-1251 (11th Cir. 2015).

Leyse has suffered harms analogous to the interference with property recognized in the common-law claim for trespass to chattels. During the call, Leyse's telephone line was tied up, and he therefore could not place outgoing calls or receive other incoming calls due to Lifetime's interference with his possessory interest in his telephone line. In addition, Lifetime's unlawful message took up space on Leyse's voicemail system. As a result, Leyse suffered concrete harm of a type traditionally recognized at common law and recognized by Congress and courts as a harm the TCPA sought to address. Leyse therefore has standing to pursue his TCPA claims.

(c) The Nuisance, Interruption, and Waste of Time Caused by Unlawful Calls Gave Plaintiff Article III Standing

Leyse also suffered a third type of injury in the form of nuisance, interruption, and waste of time. Answering prerecorded telephone calls ("robocalls") or listening to robocall messages on an answering machine is wasteful of the precious resource of time and constitutes a nuisance. The first post-*Spokeo* decision to address whether an allegation of receipt of a robocall in violation of the TCPA satisfies Article III's requirement of "injury in fact" holds that wasting the recipient's time is a concrete injury that satisfies Article III:

> Here, the court is satisfied that [the] [p]laintiffs' allegations demonstrate "concrete injury" as elucidated in *Spokeo*. In *Spokeo*, the "injury" [the] [p]laintiffs incurred was arguably merely procedural and thus non-concrete. In contrast, the TCPA . . . violations alleged here, if proven, required [the] [p]laintiffs to waste time answering or otherwise addressing widespread robocalls. . . . Congress . . . agreed [that] such an injury is sufficiently concrete to confer standing.

Booth v. Appstack, Inc., No. 13-cv-1533, 2016 WL 3030256, *5 (W.D. Wash. May 25, 2016). This decision is consistent with pre-*Spokeo* decisions recognizing that lost time is an injury-in-fact in TCPA and other cases. *See Leung v. XPO Logistics, Inc.*, 164 F.Supp.3d 1032, 1037 (N.D. Ill. Dec. 9, 2015) ("[the plaintiff] alleges that he lost time in responding to [the defendant]'s call. . . . That is enough, so [the defendant]'s motion [to dismiss the TCPA claims] must be denied."); *Martin v. Leading Edge Recovery Solutions, LLC*, No. 11-cv-5886, 2012 WL 3292838, *3 (N.D. Ill. Aug. 10,

2012) (finding that plaintiffs suffered injury under the TCPA in part "because they had to spend time tending to unwanted calls"); *Rex v. Chase Home Fin. LLC*, 905 F. Supp. 2d 1111, 1146 (C.D. Cal. 2012) ("a plaintiff suffers an injury sufficient to establish Article III standing where she alleges that she lost time spent responding to the defendant's wrongful conduct and the lost time is at least indirectly attributable to the defendant's actions.").

Congress, when enacting the TCPA, emphasized the nuisance aspect of robocalls, showing that it considered the interruptions they cause and the time they waste to be among the harms that the TCPA sought to remedy. As detailed in Point I(A)(ii)(a), *supra*, Congress repeatedly identified such calls as a "nuisance." Senator Hollings' colorful comments illustrate this harm: "[t]hey wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed." 137 Cong. Rec. 30,821-22 (1991). Congress was also mindful of protecting consumers from the burdens of dealing with unwanted calls, finding that "[t]echnologies that might allow consumers to avoid receiving such calls . . . place an inordinate burden on the consumer." Pub. L. 102-243, § 2, 105 Stat. 2394 (1991).

As a result of Lifetime's call, Leyse suffered the very nuisance, interruption, and waste-of-time harms that Congress identified and that courts have found sufficient to support Article III standing. The call was a nuisance and interruption, and forced Leyse

to listen to the message and thereby waste his time.[1]

Several courts have, since *Spokeo*, held that the type of harms discussed herein are sufficient for Article III standing to assert a TCPA claim. *See Mey v. Got Warranty, Inc.*, No. 15-cv-101, --- F. Supp. 3d ---, 2016 WL 3645195, *3 (D. W. Va. June 30, 2016) (finding, in a cell-phone-robocall case, that "[t]he main types of intangible harm that unlawful calls cause are (1) invasion of privacy, (2) intrusion upon and occupation of the capacity of the consumer's cell phone, and (3) wasting the consumer's time or causing the risk of personal injury due to interruption and distraction"); *see also id.* at *7 ("[a] large number of pre-*Spokeo* cases, applying the principles outlined above, have held that unwanted robocalls cause particularized and concrete harm, so that a plaintiff asserting a TCPA claim has Article III standing."); *Rogers v. Capital One Bank (USA), N.A.*, No. 15-cv-4016, 2016 WL 3162592, *2 (N.D. Ga. June 7, 2016) ("[b]ecause the [p]laintiffs allege that the calls were made to their personal cell[-]phone numbers, they have suffered particularized injuries because their cell[-]phone lines were unavailable

[1] Given Leyse's position that Lifetime's violation of the TCPA fell within those statutory violations that are "*sufficient . . . to constitute injury in fact* . . . [,] [such that] a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified," *Spokeo*, 136 S. Ct. at 1549, Leyse did not further delineate his injuries in the Complaint. This was in accord with *Booth*, which addressed the post-*Spokeo* standing issue *sua sponte* and concluded that the plaintiffs had standing to bring TCPA claims. *See Booth*, 2016 WL 3030256 at *5. The court looked not at whether the plaintiffs had explicitly alleged each underlying harm, but rather at whether the factual allegations regarding the TCPA violations demonstrated that the plaintiffs had suffered a concrete harm. *See id.* Should this Court, however, find that such injuries must be delineated, leave to amend the Complaint should be granted.

for legitimate use during the unwanted calls.").

(iii) The Cases Upon Which Defendant Relies Do Not Support Defendant's Arguments Concerning the Question of Whether Plaintiff Had a Concrete Injury

Lifetime relies on three outlier cases: *Romero v. Dep't Stores Nat'l Bank*, No. 15-cv-193, 2016 WL 4184099 (S.D. Calif. Aug. 5, 2016), *Smith v. Aitima Med. Equip. Inc.*, No. 16-cv-00339, 2016 WL 4618780 (C.D. Cal. July 29, 2016), and *Sartin v. EKF Diagnostics, Inc.*, No. 16-cv-1816, 2016 WL 3598297 (E.D. La. July 5, 2016). *See* Def. Br. at 17-18.

In *Romero*, the court found that "[the] [p]laintiff does not offer any evidence of a concrete injury caused by the use of an ATDS [*i.e.*, automatic telephone-dialing system] as opposed to a manually dialed call," *Romero,* 2016 WL 4184099 at *3; *see also id.* at *5 ("[the] [p]laintiff does not offer any evidence demonstrating that [the] [d]efendants' use of an ATDS to dial her number caused her greater lost time, aggravation, and distress than she would have suffered had the calls she answered been dialed manually, which would not have violated the TCPA."). In the present case, Lifetime's violation is not based upon *how* it dialed Leyse's telephone number, but upon the nature of the call itself, *i.e.*, that it was a prerecorded call. Thus, Lifetime's contention that "the TCPA makes the Telephone Message actionable only because OnCall's contractor followed a different procedure, i.e., it used an automated telephone dialing system ('ATDS') instead of dialing manually," Def. Br. at 20, n.4, is pure

fiction that is apparently offered in order to make the present case match the facts in *Romero*. Indeed, the Complaint does not even refer to the question of how telephone numbers were dialed.

In *Smith*, the court substituted its judgment (which itself was erroneous) for the judgment of Congress by finding that the receipt of one telephone call could have caused only *de minimis* injury, and that such injuries were insufficient to confer Article III standing. *See Smith*, 2016 WL 4618780 at *4.

As in *Romero*, the court in *Sartin*, which concerned the plaintiff's receipt of a junk fax in violation of Section 227(b)(1)(C) of the TCPA, explained as follows:

> [The] [d]efendants ask the Court to dismiss [the plaintiff]'s TCPA claims with prejudice because [the plaintiff] opposed [the] defendants' motion instead of requesting leave to file an amended complaint. The Court denies this request. [The plaintiff]'s failure to adequately allege a concrete injury in fact may reflect mere pleading defect, rather than a more fundamental problem with his claims. Moreover, while [the] defendants' motion to dismiss was pending before this Court, the Supreme Court issued its decision in *Spokeo*, which further clarified the requirements for pleading Article III standing to assert a statutory violation. The Court therefore dismisses [the plaintiff]'s claim without prejudice and with leave to amend within twenty-one (21) days of entry of this order.

Sartin, 2016 WL 3598297 at *4. Thus, even if this Court were to find that the Complaint should have more specifically addressed the nature of Leyse's injuries, the granting of leave to replead, not summary judgment for Lifetime, would be the proper

result.

More recently, the court in *Juarez v. Citibank, N.A.*, No. 16-cv-01984, 2016 WL 4547914 (N.D. Calif. Sept. 1, 2016), found in favor of Article III standing and expressly disagreed with the holding in *Romero*. *See id.* at *2, *3. Another more recent case has held that a TCPA plaintiff, in a junk-fax case, had Article III standing because, among other reasons, the plaintiff sustained "loss of use of his telephone line and fax machine during receipt of the unsolicited fax, and loss of time receiving, reviewing, and disposing of the fax." *Fauley v. Drug Depot, Inc.*, No. 15-cv-10735, 2016 WL 4591831, *3 (N.D. Ill. Aug. 31, 2016); *see also id.* (noting that, in *American Copper & Brass, Inc. v. Lake City Indus. Products, Inc.*, 757 F.3d 540 (6th Cir. 2014), the court "reject[ed] [a] motion to dismiss on standing grounds and [held] that 'unsolicited fax advertisements impose costs on all recipients, irrespective of ownership and the cost of paper and ink, because such advertisements *waste the recipients' time* and impede the free flow of commerce,'" quoting *American Copper & Brass*, 757 F.3d at 544 (emphasis added)).

In yet another recent case, *Aranda v. Caribbean Cruise Line, Inc.*, No. 12-cv-4069, 2016 WL 4439935 (N.D. Ill. Aug. 23, 2016), the court found that robocalls made in violation of the TCPA give rise to Article III standing:

> Unlike the statute at issue in *Spokeo* . . ., the TCPA section at issue does not require the adoption of procedures to decrease congressionally-identified risks. Rather, section

> 227 of the TCPA *prohibits making certain kinds of telephonic contact with consumers without first obtaining their consent*. It *directly forbids activities that by their nature infringe the privacy-related interests that Congress sought to protect by enacting the TCPA*. There is no gap—*there are not some kinds of violations of section 227 that do not result in the harm Congress intended to curb, namely, the receipt of unsolicited telemarketing calls that by their nature invade the privacy and disturb the solitude of their recipients*.
>
> In any event, section 227 establishes *substantive, not procedural, rights to be free from telemarketing calls consumers have not consented to receive*. *Both history and the judgment of Congress suggest that violation of this substantive right is sufficient to constitute a concrete, de facto injury*. As other courts have observed, American and English courts have long heard cases in which plaintiffs alleged that defendants affirmatively directed their conduct at plaintiffs to invade their privacy and disturb their solitude. *See*, *e.g.*, *Mey v. Got Warranty, Inc.*, —— F.Supp.3d ——, ——, 2016 WL 3645195, at *3 (N.D.W.V.2016) ("[T]he TCPA can be seen as merely liberalizing and codifying the application of [a] common law tort to a particularly intrusive type of unwanted telephone call."); *Caudill v. Wells Fargo Home Mort., Inc.*, No. 5:16–066–DCR, 2016 WL 3820195, at *2 (E.D.Ky. July 11, 2016) ("[The] alleged harms, such as invasion of privacy, have traditionally been regarded as providing a basis for a lawsuit in the United States."). And *Congress enacted the TCPA to protect consumers from the annoyance, irritation, and unwanted nuisance of telemarketing phone calls, granting protection to consumers' identifiable concrete interests in preserving their rights to privacy and seclusion*.

Id. at *5-*6 (emphases added). *Accord*, *Dolemba v. Illinois Farmers Ins. Co.*, No. 15-cv-643, 2016 WL 5720377, *3 (N.D. Ill. Sept. 30, 2016).

Lifetime makes the frivolous and self-serving contention that, "[f]ar from having his seclusion invaded, he chose whether and when to listen to the Telephone Message," Def. Br. at 21, as though Leyse knew what the message was before he listened to it but listened to it anyway, and as though the TCPA contains an exemption for robocalls that leave messages on answering machines. Of course, if Leyse had answered the call, Lifetime would surely claim that he chose to answer it and therefore lacks standing.

POINT II

THE CLASS IS ASCERTAINABLE

Lifetime contends that "Leyse failed to propose any method for determining whether residential lines (as required by the class definition), and not business numbers or cell phones, received [Lifetime's] message in 2009." Def. Br. at 24. On the contrary, Leyse proposed that class members could submit a copy of a telephone bill showing that they had a New York City residential telephone number at the time that the Lifetime Robocalls were made (and an affidavit attesting to the receipt of one of the calls). *See* Pl. Br. at 25-26. *Accord*, Plaintiff's Reply Brief in support of motion for class certification, pp. 5-6, n.4 (Dkt. No. 83).

Lifetime cites several TCPA and other cases in support of its argument regarding ascertainability, *see* Def. Br. at 25-27, but these cases do not support a finding of a lack of ascertainability here.

In *Brey Corp. v. LQ Mgmt. LLC*, No. 11-cv-718, 2014 WL 943445 (D. Md. Jan.

29, 2014), the court found that "the recollection of a putative class member that he, she, or it had received a particular unsolicited fax would be somewhat suspect," *id.* at *1; but, again, the type of telephone call at issue here was clearly more memorable than a random junk fax. Furthermore, the court noted: "this is not a case involving a case of particularly vulnerable consumers. Although [the] plaintiff refers to the putative class members as 'consumers,' it appears that they include many businesses." *Id.* at *2. Here, by contrast, Lifetime specifically made its calls to households.

Finally, the *Brey* court also reasoned: "it must be remembered that Rule 23 [of the Federal Rules of Civil Porcedure] is a procedural rule designed to assist courts in serving their fundamental function of resolving actual disputes in a fair, efficient, and effective manner. It is not intended to convert courts into vehicles for effecting legislatively declared policy absent the existence of a genuine underlying dispute. Whether such a dispute exists is manifested by the institution of a law suit by a party who believes herself, himself, or itself to be aggrieved by the conduct of someone else." *Id.* This disposition against class actions, however, contrasts with "the Second Circuit's general preference [] for granting rather than denying class certification." *Jackson v. Bloomberg, L.P.*, No.13-cv-2001, 2014 WL 1088001, *4 (S.D.N.Y. Mar. 19, 2014) (citation and quotation marks omitted). Moreover, it is in the refusal to certify the class that the *Brey* court thwarted, rather than upheld, legislative policy.

Unlike in *Ruffo v. Adidas America Inc.*, No. 15-cv-5989, 2016 WL 4581344

(S.D.N.Y. Sept. 2, 2016), which did not consider notice by publication, Leyse has proposed such notice, as Lifetime acknowledges. *See* Def. Br. at 7.

In *In re Avon Anti-Aging Skincare Creams & Prod. Mktg. & Sales Practices Litig.*, No. 13-cv-150, 2015 WL 5730022 (S.D.N.Y. Sept. 30, 2015), the court found that "putative class members are unlikely to remember accurately every ... purchase during the class period, much less whether they received the allegedly false statements prior to purchase," *id.* at *5 (citation and quotation marks omitted); and, moreover, "the false statements [at issue] may not have been made to the individual consumer. Determining whether an affiant is in fact a class member would require an individualized mini-trial." *Id.* By contrast, each of Lifetime's phone calls made to residential lines, not just some of those calls, was equally unlawful.

In re Clorox Consumer Litig., 301 F.R.D. 436 (N.D. Cal. 2014), also does not support Lifetime's position. There, the court reasoned that "the class includes only persons who purchased [the defendant's product] between October 2010 and the present," *In re Clorox*, 301 F.R.D. at 441, and, thus, "affidavits from consumers are insufficient to identify the class." *Id.* By contrast, the Lifetime Robocalls were a one-time event and thus do not present concerns about exact dates. In addition, whereas the only proposed basis of asserting class membership in *In re Clorox* was the submission of affidavits, Leyse has also proposed that class members submit telephone records in addition to sworn statements.

In *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), which had been "the high-water mark of the Third Circuit's developing ascertainability doctrine," *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 662 (7th Cir. 2015), "a class of consumers who purchased Bayer's One-A-Day WeightSmart diet supplement in Florida." *Carrera*, 727 F.3d at 303. The court, having noted that "class members are unlikely to have documentary proof of purchase, such as packaging or receipts[,] [a]nd Bayer has no list of purchasers," *id.* at 304, found that claims based *solely* upon an affidavit were insufficient to satisfy the ascertainability requirement. *See id.* at 309-312. However, in *Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015), the Third Circuit clarified that records concerning class membership are not required in order for a class to be ascertainable:

> We were careful to specify in *Carrera* that "[a]lthough some evidence used to satisfy ascertainability, such as corporate records, will actually identify class members at the certification stage, ascertainability only requires the plaintiff to show that class members *can be identified*." *Id.* at 308 n.2 (emphasis added). Accordingly, *there is no records requirement*. *Carrera* stands for the proposition that a party cannot merely provide assurances to the district court that it will later meet Rule 23's requirements. *Id.* at 306.

Id. at 164 (emphases in original). Indeed, as *Byrd* further noted, "[i]n *Carrera*, we concluded that the plaintiffs' proposed reliance on affidavits *alone*, without *any objective records* to identify class members or a method to weed out unreliable

affidavits, could not satisfy the ascertainability requirement." *Carrera*, 727 F.3d at 170 (emphases added). Thus, although a defendant's records that enable the identification of class members are obviously beneficial, the fact that Lifetime failed to produce the once-existing the list of phone numbers that were called (the "Phone-Number List") does not defeat ascertainability, for, again, the class members could submit affidavits *along with* telephone-service-provider records.[2]

In *Ault v. J.M. Smucker Co.*, No. 13-cv-3409, 2015 WL 4692454 (S.D.N.Y. Aug. 6, 2015), the defendant was a seller of nine different brands of cooking oil, but only four of those brands contained a certain label and were thus the only brands that were part of the class. Even among these four brands, there were two class periods, and the first such period was immediately followed by the second. *See id.* at *6. Given these facts, the court asked, "[w]ho could possibly recall that level of detail six years (or more) later?" *Id.* The court further noted that, "[i]ndeed, [the] [p]laintiff herself could not recall the number of bottles of [the defendant's] cooking oil she had

[2] The *Byrd* court also found that "[n]or may a party 'merely propose a method of ascertaining a class without any evidentiary support that the method will be successful.'" *Id.*, quoting *Carrera*, 727 F.3d at 306. On the other hand, the efficacy of the method that Leyse has proposed, *i.e.*, the provision of affidavits and corroborating documentary evidence in the form of telephone-service-provider records, is entitled to judicial notice. However, if the Court finds that additional evidence is needed, an opportunity to submit such evidence should be given to Leyse, both because *Brecher v. Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015), was decided after the completion of the briefing on Leyse's certification motion and because this Court has not stated that a finding of ascertainability requires evidentiary support.

purchased during the class period." *Id.*[3]

Unlike in *Ault*, there is uniformity with respect to the Lifetime Robocalls, and thus the present case, rather than being analogous to *Ault*, is analogous to cases in which such uniformity was found to favor a finding of ascertainability. *See* App. Br. at 20-222 (discussing *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561 (S.D.N.Y. 2014)); *see also id.* at 15 (discussing *Belfiore v. Procter & Gamble Co.*, 311 F.R.D. 29 (E.D.N.Y. 2015)).

In *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075 (N.D. Calif. 2011), the putative class was of people who had smoked a certain number of Marlboro cigarettes, potentially over a period of decades. Ascertainability was found lacking because (1) the defendant, which was the cigarettes' manufacturer, lacked data on individual smokers, (2) the plaintiffs merely offered broad demographic data on smoking, (3) one's smoking habits were likely to change over such a long time period, and (4) asking individual class members to submit affidavits attesting to their belief that they had smoked 146,000 Marlboro cigarettes asked too much of potential class members' memories. *See Xavier*, 787 F. Supp. 2d at 1090.

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[3] The court's finding of a lack of ascertainability did not end its Rule 23 analysis: "[the] [p]laintiff has not demonstrated that the class is ascertainable. But because the Second Circuit has instructed that failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule, the Court will also consider [the] [p]laintiff's arguments regarding commonality and predominance." *Id.* (citations and quotation marks omitted).

In *Werdebaugh v. Blue Diamond Growers*, No. 12-cv-2724, 2014 WL 2191901 (N.D. Calif. May 23, 2014), on the other hand, the court found that "[t]he class period here is also far shorter than in *Xavier*, and *inviting plaintiffs to submit affidavits* attesting to their belief that they have purchased a carton of Blue Diamond almond milk in the past several years is much likelier to elicit reliable affidavits than asking potential class members to recall whether they had smoked 146,000 of a certain cigarette over the course of several decades. *Id.* at *11 (emphasis added). A finding of ascertainability is even more warranted in the present case, for the submission of affidavits would be used to *supplement records* rather than serve as the sole basis for one's claim of class membership.

Lifetime contends that "[t]he only TCPA case on which Leyse relies, *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240 (N.D. Ill. 2014), involved a class limited to those 'whose (i) telephone number appears in [the] [d]efendants' records of those calls and/or the records of their third[-]party telephone carriers or the third[-]party telephone carriers of their call centers or (ii) own records prove that they received the calls—such as their telephone records, bills, and/or recordings of the calls.'" Def. Br. at 25, n.7 (citation omitted). Lifetime's description of *Birchmeier* as involving only records that show that a class member received a call from the defendants is false. Instead, the court found that, "[s]hould a putative class member's records *fail to indicate that she received a political survey call with a free[-]cruise incentive*, she

may *in addition to her records* provide a *sworn statement* at an appropriate point during the litigation." *Birchmeier*, 302 F.R.D. at 250 (emphases added). Furthermore, Lifetime's self-serving assertion that the calls at issue in *Birchmeier* were "far more memorable than the twenty-second message here, and thus far more susceptible to self-identification," Def. Br. at 26, n.7, is nonsensical.

Finally, Lifetime again seeks to have this Court issue an instruction manual for businesses to avoid TCPA liability by positing that "[n]othing in the record or the law suggests the District Court abused its discretion by declining to rely on recollections of such an inconsequential event so long ago." Def. Br. at 27, n.8. Thus, in addition to Lifetime's hoping that this Court will encourage businesses that violate the law on a mass scale to make sure that they do not keep records that identify their victims, Lifetime also asks this Court to encourage such businesses, when sued, to litigate as long as possible in order to bolster their arguments about the memories of the class members. In any event, it is clear that at least some class members would remember their having received a Lifetime call.

Lifetime argues that "not even Leyse contends Lifetime had any obligation to maintain records showing the numbers a third party called in August 2009." Def. Br. at 28. Lifetime is wrong. Where unsolicited robocall advertisements are placed, the party on whose behalf they are made is obligated to maintain records showing compliance with the statute. *See Gottlieb v. Carnival Corp.*, 595 F. Supp. 2d 212, 220

(E.D.N.Y. 2009); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 7998, ¶ 70 (July 10, 2015). Given that compliance requires such a call to have been made with consent, the caller would obviously have to know who it called in order to show such compliance. Instead, Lifetime argues that it is now insulated from liability because it was "two steps removed from the unidentified entity that OnCall hired to place the calls, and Lifetime never received a list of numbers the vendor called." Def. Br. at 28. How convenient!

POINT III

THE DISTRICT COURT'S ISSUANCE OF JUDGMENT IN FAVOR OF PLAINTIFF ON HIS INDIVIDUAL CLAIMS WAS ERRONEOUS

Lifetime's contention that "[t]he District Court's decision to enter judgment hewed closely to this Court's precedent," Def. Br. at 34, ignores the fact that much of such precedent was abrogated by *Campbell-Ewald Company v. Gomez*, --- U.S. ---, 136 S. Ct. 663 (2016). Instead of acknowledging this plain fact, Lifetime proceeds to claim that "[t]he Supreme Court in *Campbell-Ewald* expressly 'endorsed Second Circuit precedent' on this point." *Id.* at 34-35 (citation omitted). In *Campbell-Ewald*'s first citation to *Tanasi v. New Alliance Bank*, 786 F.3d 195 (2d Cir. 2015), the Court cited it along with several other circuit opinions as "holding that an unaccepted offer does not render a plaintiff's claim moot." *Campbell-Ewald*, 2016 WL 228345 at *5. In *Campbell-Ewald*'s second citation to *Tanasi*, the Court cited *Tanasi* and several

other circuit opinions in a footnote to the following: "[w]e now adopt Justice KAGAN's analysis, as has every Court of Appeals ruling on the issue post *Genesis HealthCare* [*Corp. v. Symczyk*, 569 U.S. ---, 133 S .Ct. 1523 (2013)]. Accordingly, we hold that [the plaintiff']s complaint [in *Campbell-Ewald*] was not effaced by [the defendant]'s unaccepted offer to satisfy his individual claim." *Id.* (footnote omitted).

Insofar as *Tanasi* held that "an unaccepted Rule 68 [of the Federal Rules of Civil Procedure] offer alone does not render a plaintiff's individual claims moot before the entry of judgment against the defendants," *Tanasi*, 786 F.3d at 197, *Tanasi* remains valid. However, *Tanasi* proceeded to state: "[i]f the parties agree that a judgment should be entered against the defendant, then the district court should enter such a judgment. Then, *after* [emphasis in original] judgment is entered, the plaintiff's individual claims will become moot for purposes of Article III. . . . Absent such agreement, however, the district court should not enter judgment against the defendant *if it does not provide complete relief*." *Id.* at 200 (citation omitted; emphasis added). Insofar as it is unclear whether *Tanasi* held, or merely suggested, that an unaccepted offer for a plaintiff's complete relief would authorize the entry of judgment (thereby mooting the plaintiff's claims), this Court subsequently held in the affirmative. *See Bank v. Caribbean Cruise Line, Inc.*, 606 F. Appx. 30, 31 (2d Cir. 2015). *Campbell-Ewald*, on the contrary, held that a court may *not* enter a judgment based upon an unaccepted offer of judgment, and, thus, *Tanasi* and *Bank* have been abrogated to the

extent that they suggested or held otherwise.

Lifetime's attempt to distinguish *Chen v. Allstate Ins. Co.*, 819 F.3d 1136 (9th Cir. 2016), *see* Def. Br. at 36-37, ignores the fact that *Chen*'s reasoning was not based solely on the court's concern that the defendant had tried to "pick off" the named plaintiff; rather, the court explained, in addition, that "*even if* [the defendant] could moot the entire action by getting the district court to enter judgment in favor of [the named plaintiff] on his individual claims before he has had a fair opportunity to move for certification, we would decline [the defendant]'s invitation to direct the district court to take that action." *Chen*, 819 F.3d at 1144 (emphasis added). Thus, the court then provided an independent, *i.e.*, *non-class-related* explanation for declining to enter judgment upon the unaccepted offer of judgment. *See id.* at 1144-1146.

POINT IV

EVERY CIRCUIT COURT THAT HAS ADDRESSED THE QUESTION OF WHETHER THE HOBBS ACT IS APPLICABLE IN PRIVATE LITIGATION HAS HELD THAT IT IS

Lifetime glosses over of a critical issue, *i.e.*, whether the Hobbs Act, 28 U.S.C. §§ 2341-2351, precludes Lifetime's request that this Court force the FCC to add an exemption to the agency's current exemptions in order to preclude Lifetime from being liability in this case. *See* Def. Br. at 57, n.21. In any event, those circuit courts that have addressed the issue are unanimous in holding that the Hobbs Act is applicable in private litigation. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119-1121

(11th Cir. 2014); *Leyse v. Clear Channel Broad., Inc.*, 545 F. Appx. 444, 459 (6th Cir. 2013); *Nack v. Walburg*, 715 F.3d 680, 685-686 (8th Cir. 2013); *CE Design, Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443, 448-449 (7th Cir. 2010).

In *Leyse v. Clear Channel*, the plaintiff "argue[ed] that th[e] court should consider and reject the [same] FCC exemption rulemaking [as the one that Lifetime challenges] because it is neither binding nor persuasive authority under the familiar *Chevron* [*U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)] two-step framework for considering 'an agency's construction of the statute which it administers.'" *Id.* at 451-452, quoting *Chevron*, 467 U.S. at 842. The court held that the Hobbs Act precluded the plaintiff's arguments from being considered:

> [The plaintiff's]'s argument is a facial attack on the TCPA exemption, in which he argues that the rule is *invalid or should be set aside because of procedural deficiencies in its promulgation*. The claim is an attempt to re-hash the arguments made by [another petitioner] throughout the process of his petition and the subsequent rulemaking. Attacks such as these—on the "*procedural genesis of administrative rules*"—are *exactly* the kind of facial attacks on the validity of FCC orders that the Hobbs Act meant to confine. *See Florilli Corp. v. Pena*, 118 F.3d 1212, 1214 (8th Cir.1997) (citing *JEM Broad. Co. v. FCC*, 22 F.3d 320, 324 (D.C.Cir.1994)); *cf. NLRB Union* [*v. FLRA*], 834 F.2d [191] at 195 [(D.C. Cir. 1987)] ("[T]his court has repeatedly distinguished indirect attacks on the substantive validity of regulations ... from like attacks on their procedural lineage."); *Hire Order Ltd. v. Marianos*, 698 F.3d 168, 170 (4th Cir.2012) (noting that Hobbs Act caselaw supporting the possibility of as-applied challenges after the expiration of a statutory limitations period did not support the

possibility of a facial challenge).

Leyse v. Clear Channel, 545 F. App'x. a 458 (emphases added).

POINT V

THE DISTRICT COURT PROPERLY DENIED SUMMARY JUDGMENT TO DEFENDANT

A. The FCC Has Repeatedly Chosen Not to Exempt the Type of Prerecorded Telephone Calls Made by Defendant

The TCPA authorizes the Federal Communications Commission ("FCC") to make the following exemptions to the statutory general prohibition against unsolicited robocalls:

> (i) calls that are not made for a commercial purpose; and
>
> (ii) such classes or categories of calls made for commercial purposes as the [FCC] 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.

47 U.S.C. § 227(b)(2)(B).

In 1992, the FCC "propose[d] to exempt[,] from the prohibitions of Section 227[,] commercial messages that do not include the transmission of any unsolicited advertisement." *Notice of Proposed Rulemaking and Memorandum and Order*, 7 FCC Rcd. 2,736, ¶ 9 (Apr. 10, 1992) ("1992 NPRM"). Thereafter, the FCC announced, it

its *Report and Order In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C. Rcd. 8752, 1992 WL 690928 (Sept. 17, 1992) ("1992 Report & Order"), the enactment of a regulation that exempted calls "not made for commercial purposes; made for commercial purposes which do not transmit an unsolicited advertisement; made to a party with whom the caller has an established business relationship; and non-commercial calls by tax-exempt nonprofit organizations." *Id.* at *24, ¶ 5. These exemptions are codified at 47 C.F.R. § 64.1200(a)(2)(ii)-(v).

In 2002, the FCC issued a Notice of Proposed Rulemaking inviting public comments on "messages sent by radio stations or television broadcasters that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity." *Notice of Proposed Rulemaking and Memorandum and Order*, 17 FCC Rcd. 17459, ¶ 32 (Sept. 12, 2002) ("2002 NPRM").

In 2003, the FCC issued its *Report and Order In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 68 Fed. Reg. 44144 (July 3, 2003) ("2003 Report & Order"), which stated:

> We conclude that if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted under the current rules as a commercial call that "does not include the transmission of any unsolicited advertisement" and under the amended rules as "a commercial call that does not include or introduce an unsolicited advertisement or constitute a telephone

> solicitation." *See* amended 47 CFR 64.1200(a)(2)(iii). However, *messages that encourage consumers to listen to or watch programming, including programming that is retransmitted broadcast programming for which consumers must pay (e.g., cable, digital satellite, etc.), would be considered advertisements for purposes of our rules*. The Commission reiterates, however, that messages that are part of an overall marketing campaign to encourage the purchase of goods or services or that describe the commercial availability or quality of any goods or services, are "advertisements" as defined by the TCPA. *Messages need not contain a solicitation of a sale during the call to* constitute an advertisement.

Id. at 44163, ¶ 105 (emphasis added). In 2005, the FCC affirmed its position:

> In the *2003 TCPA Order*, . . . [w]e concluded that if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted under the rules as a commercial call that "does not include or introduce an unsolicited advertisement or constitute a telephone solicitation." *We also noted, however, that if the message encourages consumers to listen to or watch programming that is retransmitted broadcast programming for which consumers must pay (e.g., cable, digital satellite, etc.), such messages would be considered "unsolicited advertisements" for purposes of our rules*. Such messages would be part of an overall marketing campaign to encourage the purchase of goods or services or that describe the commercial availability *or quality* or any goods or services and would be considered "unsolicited advertisements" as defined by the TCPA.

Final Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC Rules and Regulations, 70 Fed. Reg. 19330, 19335-19336 (Apr. 13, 2005) ("2005 Final Rules") (emphasis added). Further addressing the distinction

between calls that concern broadcast stations and calls that concern paid-for stations, the FCC again maintained its position:

> Petitioner [Robert] Biggerstaff requests that the Commission reconsider its determination that certain radio and television broadcast messages are not considered "unsolicited advertisements" under the restrictions on prerecorded messages. Biggerstaff contends specifically that radio and television broadcasts are entertainment and news "services," as well as "advertisement delivery services." *Biggerstaff further maintains that there is no basis for treating such broadcasters differently from others providing similar services, such as cable networks, web sites, newspapers or publishers*.
>
> *We decline to reverse our conclusion regarding radio station and television broadcaster messages*. As explained in the *2003 TCPA Order*, if the purpose of the message is merely to invite a consumer to listen to or view a broadcast, such message is permitted under the current rules as "a commercial call that does not include or introduce an unsolicited advertisement or constitute a telephone solicitation."

Id. at 19336 (emphases added).

In 2007, the FCC's general counsel maintained the FCC's position in a letter to Thomas Asreen, Acting Clerk of Court, United States Court of Appeals for the Second Circuit, dated April 11, 2007 ("FCC Letter") (SA-118). As the FCC Letter explained:

> The Commission *distinguished calls placed by over-the-air broadcasters - whose service is free of charge to the listener - from similar calls placed by a paid-for service*, such as satellite or *cable* television. Prerecorded messages "that encourage consumers to listen to or watch programming . . . for which consumers *must pay . . . would*

> *be considered advertisements for purposes of our rules*." 18 FCC Rcd at l4101 n.499. . . .
>
> . . . [I]f a broadcaster call were combined with a promotion for a commercially available good or service (*including paid programming*), it would be prohibited, but a call restricted only to a free over-the-air broadcast station's programming is not prohibited.

Id. at 4-5 (SA-121- SA-122) (additional citations omitted; emphases added). Several pages later, the FCC Letter again addressed the distinction between calls pertaining to broadcast stations and calls pertaining to paid-for stations:

> Immediately after declaring that broadcaster calls were exempt from restriction, the Commission warned that telephone messages "that encourage consumers to listen to or watch programming, including programming that is retransmitted broadcast programming **for which consumers must pay** (*e.g.*, cable, digital satellite, etc.), would be considered advertisements for purposes of our rules." [2003 Report & Order,] 18 FCC Rcd 14101 n.499 (emphasis added). The Commission then "reiterate[d] that messages that are part of an overall marketing campaign to encourage the purchase of goods or services or that describe the commercial availability or quality of any goods or services are 'advertisements' as defined by the TCPA." *Id.* at 14101 ¶145. The 2005 TCPA Reconsideration Order [*i.e.*, the 2005 Final Rules] repeated that rationale to justify retention of the new rule (and indeed, it moved the discussion of paid-for programming from a footnote into the text). 20 FCC Rcd at 3805 ¶42. The reconsideration order also reiterated the Commission's previous statement that messages from broadcasters that are "part of an overall marketing campaign to encourage the purchase of goods or services or that describe the commercial availability or quality of any goods or services, are advertisements," 2005 TCPA Reconsideration Ordcr, 20 FCC Rcd at 3805 ¶42, citing

2003 TCPA Order, l8 FCC Rcd at 14101 ¶145.

Id. at 8 (SA-125) (bold in original). As the FCC Letter explained yet further:

> The distinction between *over-the-air broadcast and a paid-for service thus was the linchpin of the Commission's decision*. And it is the only rationale that explains why the Commission treated differently two telephone messages concerning the same programming: a telemarketing message that promotes a free broadcast show is deemed not to address the commercial availability or quality of the programming (and is within the Commission's statutory discretion to exempt it from TCPA restrictions), *but a promotion for programming - even the very same programming- provided by a paid-for service is deemed a commercial advertisement that is barred under the statute*. . . . [The Commission] relied solely on the *distinction between free and paid-for methods of delivery*. In light of that rationale, it follows directly that the exemption covers both specific and general promotions for broadcast programming provided *without charge to the listener*.

Id. (emphases added).

Lifetime contends that, "in applying [the FCC's] rulings to this case, the District Court ignored their conceptual underpinnings. The court read them broadly as barring *any message* from a network that is available on cable (and not broadcast), regardless of whether that message encourages or even contemplates a commercial transaction." Def. Br. at 49 (emphasis added; footnote omitted). On the contrary, as Lifetime knows, the FCC was concerned, as the District Court understood, only with messages about programming. There has been no suggestion, either by the FCC or the District Court, that political robocalls, for example, are barred. Indeed, in the omitted footnote,

Lifetime notes that the FCC explained that "'a promotion for *programming* provided by a paid-for service is deemed a commercial advertisement that is barred under the statute.'" Def. Br. at 49, n.17, quoting FCC Letter at 8 (SA-125) (emphasis added).

Lifetime contends that the FCC's rulings are not entitled to deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), because those rulings are "mere interpretive rulings." Def. Br. at 52. However, in *Leyse v. Clear Channel Broadcasting, Inc.*, 545 F. Appx. 444 (6th Cir. 2013), the court explained as follows with respect to those rulings: "the key inquiry is whether Congress delegated the necessary authority, not whether the rule is termed interpretive or legislative. The necessary authority was unquestionably delegated here." *Id.* at 453.

Lifetime's reliance upon *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015), is misplaced, as shown by the context of Lifetime's quotation from that case, in which the Court makes clear that rule that, like the ones at issue here, that result from a notice-and-comment procedure are not interpretive rules:

> Not all "rules" must be issued through the *notice-and-comment* process. Section 4(b)(A) of the APA provides that unless another statute states otherwise, the n*otice-and-comment* requirement "does not apply" to "*interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice*." 5 U.S.C. § 553(b)(A). The term "interpretative rule," or "interpretive rule," is not further defined by the APA, and its precise meaning is the source of *much scholarly and judicial debate*. We need not, and do not, wade into that debate here. For our purposes, it suffices to say that *the critical*

> *feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers*. The *absence of a notice-and-comment obligation* makes the process of issuing interpretive rules *comparatively easier* for agencies than issuing *legislative* rules. But that convenience comes at a price: *Interpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process*."

Perez, 135 S. Ct. at 1203-1204 (emphases added; footnote, citations, and quotation marks omitted).

B. Defendant's Reliance on Faxes That Have Been Found to Be Permissible Undermine, Rather Than Support, Defendant's Position That Its Calls Were Exempt

Lifetime erroneously seeks to compare its telephone calls to the faxes that were ruled, in *Stern v. Bluestone*, 12 N.Y.3d 873 (N.Y. 2009), not to contain advertising material. *See* Def. Br. at 42. First, whereas the *Stern* court found that "[the defendant]'s 'Attorney Malpractice Report[s]' fit[] the FCC's framework for . . . 'informational message[s],'" and were thus found to be exempt, Def. Br. at 42, quoting *Stern*, 12 N.Y.3d 876 (additional quotation marks omitted), the FCC had explicitly found that the type of calls that Lifetime made are not exempt. *See* Point IV(A), *supra*.

Second, in *Stern*, the court explained: "[e]ach fax was entitled 'Attorney Malpractice Report,' and included [the defendant]'s contact information and web site addresses. The body of each fax consisted of a short essay about various topics related to attorney malpractice: fee disputes with clients, the elements of professional

malpractice, liens, common causes of attorney malpractice litigation, and unexpected circumstances in which claims of attorney malpractice arise." *Stern*, 12 N.Y.3d at 874. Accordingly, the court found that the faxes fell within an FCC exemption, which the court quoted: "'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. An *incidental advertisement* contained in such 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.'" *Stern*, 12 N.Y.3d at 875-876, quoting *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 71 Fed. Reg. 25967, 25973 (May 3, 2006) ("2006 Report & Order") (emphasis added; ellipsis in original).

Regarding the term "incidental advertisement," the *Stern* court explained: "[t]o the extent that [the defendant] may have devised the reports as a way to impress other attorneys with his legal expertise and gain referrals, the faxes may be said to contain, at most, '[a]n incidental advertisement' of his services, which 'does not convert the entire communication into an advertisement." *Stern*, 12 N.Y.3d at 876, quoting 2006 Report & Order, 71 Fed. Reg. 25973. It is clear that Lifetime's messages did not contain a mere "incidental advertisement," as, again, the FCC has recognized multiple

times.

Lifetime's reliance upon *Ameriguard, Inc. v. Univ. of Kansas Med. Ctr. Research Inst., Inc.*, No. 06-cv-0369, 2006 WL 1766812 (W.D. Mo. June 23, 2006), *aff'd*, 222 F. Appx. 530 (8th Cir. 2007), *see* Def. Br. at 42, is misplaced. There, the court explained: "[t]he fax discusse[d] general information about diabetes and 'Pre-Diabetes,' announce[d] [a] clinical research trial, and state[d] that '[p]articipants who qualify receive study related medical care, study medication and diet and exercise counseling at no cost. Participants will also receive compensation for their time and travel.' Then, above a section for the recipient to provide contact information, the fax advise[d] '[i]f you or a loved one could benefit from participating in this trial or you would like additional information about diabetes information, please call ... or fill out the form below....'" *Ameriguard*, 2006 WL 1766812 at *1 (ellipses in original). Accordingly, the court found that the fax was not an advertisement because: "[it] announce[d] the existence of a clinical drug trial and the [d]efendant's need for individuals willing to serve as test subjects and [did] not announce [that the] [d]efendant is providing or otherwise has available goods, services, or property. . . . Moreover, regardless of how one views the fax, it does not suggest anything 'commercial.'" *Id.* at *1. Thus, a recipient of the fax would have had no way of knowing whether the sender provides any commercial goods or services, whereas that is obviously not the case with respect to the Lifetime Robocalls.

Lifetime contends that "Lifetime does not sell programming directly to individual cable television subscribers; instead, its revenues derive from charging carriage fees to distributors (such as cable, satellite, and telephone companies) for the right to distribute Lifetime's signal to subscribers and by selling air time to advertisers." Def. Br. at 43-44, n.16. Of course, many providers of goods or services do not sell directly to customers, yet such providers are, of course, not exempt from the TCPA. Moreover, Lifetime's assertion that "'the sale of goods or services is not described or even contemplated' by the Telephone Message, and the fact that 'Project Runway' would contain advertisements when it aired 'does not change the call's facial character,'" Def. Br. at 46, quoting *Alleman v. Yellowbook*, No. 12-cv-1300, 2013 WL 4782217, *6 (S.D. Ill. Sept. 6, 2013), also does not exempt the Lifetime Robocalls.

Lifetime also contends that "a recipient such as Leyse—who was not a subscriber—could not have signed up for services in time to see the program mentioned in the message." Def. Br. at 45. However, this assertion is not supported by a reference to the record, and is, in any event, irrelevant because a person could, if unable to obtain such services in one day, sign up in time for to see future episodes of "Project Runway."

Lifetime erroneously contends that *Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218 (6th Cir. 2015), supports its position. *See* Def. Br. at 41-42, 44-45. In *Sandusky*, the plaintiff was a chiropractic office, and the defendant

rendered services to providers of third-party healthcare plans ("plan providers," or what the court referred to as "sponsors"). Typically, the defendant's client was an employer, and a plan's members were the employer's employees. Among the defendant's services was the maintenance of a list, or "formulary," of medicines that are available through a particular healthcare plan. The defendant, in addition to sending those lists to its plan-provider clients in order to assist them in choosing which prescription-drug plans to provide to their members, also sent the lists to medical offices whose patients used a healthcare plan that was provided by one of the defendant's clients, thus enabling a medical office to know which prescription drugs would be paid for by the healthcare plan of a patient who the office was treating.

The plaintiff brought an action based upon two faxes. The court described the first fax as follows:

> Th[e] fax, entitled "Formulary Notification[,]" . . . , informed [the plaintiff] that "[t]he health plans of many of your patients have adopted" [the defendant]'s formulary. The fax asked [the plaintiff] to "consider prescribing plan-preferred drugs" to "help lower medication costs for [the plaintiff's] patients," and it listed some of those drugs. It also told [the plaintiff] where [the plaintiff] could find a complete list of the formulary. Other than listing [the defendant]'s name and number, the fax did not promote [the defendant]'s services and did not solicit business from [the plaintiff].

Id. at 220. The second fax, "entitled 'Formulary Update[,]' . . . , informed [the plaintiff] that a certain respiratory[-]drug brand was preferred over another brand, and that using

the preferred brand could save patients money." *Id.* at 220-221.

Regarding the two faxes, the court found: "[n]either . . . fax . . . contained pricing, ordering, or other sales information. Nor did either fax ask [the plaintiff], directly or indirectly, to consider purchasing [the defendant]'s services. The undisputed facts in the record instead show that each merely informed [the plaintiff] which drugs its patients might prefer, irrespective of [the defendant]'s financial considerations." *Id.* at 221. Upon these facts, the court detailed its view that the faxes were not advertisements:

> [The faxes] call items (medications) and services ([the defendant]'s formulary) to [the plaintiff]'s attention, yes. But no record evidence shows that they do so because the drugs or [the defendant]'s services are for sale by [the defendant], now or in the future. In fact, the record shows that [the defendant] has no interest whatsoever in soliciting business from [the plaintiff]. And no record evidence shows that the faxes promote the drugs or services in a commercial sense—they're not sent with hopes to make a profit, directly or indirectly, from [the plaintiff] or the others similarly situated. Nor does any record evidence show that [the defendant] hopes to attract clients or customers by sending the faxes. The record instead shows that the faxes list the drugs in a purely informational, non-pecuniary sense: to inform [the plaintiff] what drugs its patients might prefer, based on [the defendant]'s formulary—a paid service already rendered *not to* [*the plaintiff*] *but to* [*the defendant*]*'s clients*. Under the Act's definition, and in everyday speak, these faxes are therefore not advertisements: They lack the commercial components inherent in ads.

Id. at 222 (emphasis added).

A key distinction between the *Sandusky* faxes and Lifetime's robocalls is that, as the court explained in the above quotation, the recipients of the faxes were not even in a position to pay for anything that the faxes concerned, whether directly or indirectly (such as through an analog to a cable-television provider). Obviously, that is not the case with respect to The Lifetime Robocalls. Thus, Lifetime's attempt to analogize the faxes in *Sandusky* to The Lifetime Robocalls is misplaced.

C. The FCC Was Not Required to Exempt The Type of Calls That Defendant Made

A party that challenges the validity of an agency ruling bears the burden of proof of overcoming the ruling's presumption of regularity. *See Bellevue Hosp. Center v. Leavitt*, 443 F.3d 163, 176-177 (2d Cir. 2006); *Barahona v. Napolitano*, No. 10-cv-1574, 2011 WL 4840716, *4 (S.D.N.Y. Oct. 11, 2011); *see also Village of Bensenville v. FAA*, 457 F.3d 52, 70 (D.C. Cir. 2006) ("[a] party seeking to have a court declare an agency action to be arbitrary and capricious carries a heavy burden indeed" (citation and quotation marks omitted)). For the reasons set forth below, Lifetime has not met its burden.

Lifetime argues, in essence, that the FCC's exempting of prerecorded calls for broadcast stations but not for cable stations was arbitrary and capricious because most people received broadcast stations through subscription-television packages both in 2003 and do so currently. *See* Def. Br. at 32-33. In support of it argument, Lifetime

claims that, "this Court recognized in *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010), *vacated and remanded on other grounds*, 132 S. Ct. 2307 (2012), [that] distinctions between broadcast and non-broadcast television, such as cable, no longer make sense" Def. Br. at 50-51 (footnote omitted). However, *Fox* addressed a First Amendment challenge to the FCC's rules concerning indecency on broadcast stations, whereas the TCPA has nothing to do with the regulation of indecent speech. As such, *Fox* does not support the notion that the FCC, in applying a statute that deals with unsolicited commercial advertising, was required to exempt subscription-television service.

Lifetime's charge that the FCC should have considered cable-station statistics (*see also* Def. Br. at 51, n.18) overlooks the fact that the FCC's rationale has never been based on such statistics, bur, rather, on the *qualitative* difference between broadcast stations (available for free) and cable stations (available only for pay).

Lifetime notes that "[c]able, as opposed to broadcast, was not mentioned in the [2002 NPRM]." Def. Br. at 53, n.19. However, not only did the FCC reaffirm its resulting 2003 Report and Order in the 2005 Final Rule, but *even if* there were a complaint to be had, it would be that the FCC *exempted* broadcast-station telephone calls, *not that it decided not to exempt cable-station calls*. The FCC's distinction, moreover, was entirely permissible because the FCC is authorized to exempt calls only if they "will not adversely affect the privacy rights that [the TCPA] is intended to

protect *and* do not include the transmission of any unsolicited advertisement." 47 U.S.C. § 227(b)(2)(B)(ii)((I) and (II) (emphasis added). Thus, as reflected in the FCC's repeated explanations, the finding that messages that pertain to programming on subscription-only stations constitute advertisements *required* that such calls not be exempt regardless of whether such calls "adversely affect the privacy rights that [the TCPA] is intended to protect."

In sum, the FCC's exemption of broadcast stations did not require the FCC to also exempt paid-for stations, and its lack of doing so was not arbitrary and capricious Moreover, even if Lifetime had met every burden it would have had to meet in challenging the FCC in the District Court, the only relief that could then have been granted would be the striking of the exemption for *broadcast* stations, not the forcing of the FCC to *add an exemption for paid-for stations*, the latter of which no court has the authority to do.

D. Defendant's Calls Are Not Exempt from the Statutory Prohibition

Lifetime asserts: "[t]he message did not propose a commercial transaction, either immediately or in the future. It did not urge listeners to sign up for any cable service (much less Time Warner) or purchase any other product or service. Nor did it ask subscribers to take action, let alone one with a pecuniary component." Def. Br. at 43. However, the statute defines "unsolicited advertisement" as "any material advertising

the *commercial* availability *or quality* of any property, goods, or services . . . without th[e] [recipient]'s prior express invitation or permission." 47 U.S.C. § 227(a)(5) (emphases added).

Lifetime, again overlooking the fact that a message that refers to the "commercial *quality*" of goods or service is an "advertisement" regardless of whether the message also refers to the "commercial *availability*" of the goods or service, contends that "no one would have purchased a Time Warner subscription based solely on the information that a television series had moved from one cable channel to another[,] [a]nd if the message had been intended to stimulate new Time Warner subscriptions that included Lifetime by touting one particular episode of this popular television program, it would have made no sense, as a practical matter, to deliver it . . . the night before the 'Project Runway' season premiere." Def. Br. at 44. However, it is indisputable that the message referred to the quality of Lifetime's television programming, as the message urged recipients to "[t]une in to Lifetime on Channel 62 tomorrow at 10 p.m. and see me [Time Gunn] and Heidi Klum in the exciting Season 6 premiere of Project Runway"; included the show's catch phrase, "[b]e there and make it work"; and told recipients that Project Runway begins after another Lifetime program, "The All-Star Challenge," which was a two-hour special episode of "Project Runway." *See Lifetime reveals 'Project Runway' all-stars, special to air August 20*, July 22, 2009 (available at: www.realitytvworld.com/news/Lifetime-reveals-project-runway-all-stars-special-air-

august-20-9311.php (last checked October 14, 2016)).

Lifetime's reliance upon *Alleman v. Yellowbook*, No. 12-cv-1300, 2013 WL 4782217 (S.D. Ill. Sept. 6, 2013), *see* Def. Br. at 45-46, is misplaced. There, the plaintiff claimed that a prerecorded call that sought to confirm his receipt of a free yellow-pages telephone book violated the TCPA. However, the court noted that the defendants "do not even sell products or services to consumers." *Id.* at *3. By contrast, the Lifetime channel is sold to consumers. Indeed, *Alleman* noted that "the FCC distinguished messages that invite a consumer to listen or view a free broadcast from those that encourage programming for which a consumer must pay (*e.g.* cable, digital satellite, etc.)." *Id.* at *5.

Lifetime's reliance upon *Friedman v. Torchmark Corp.*, No. 12-cv-2837, 2013 WL 4102201 (S.D. Cal. Aug. 13, 2013), *see* Def. Br. at 42, is also misplaced. In *Friedman*, the call concerned a "recruiting webinar" that would inform attendees "about the opportunity for an independent[-]contractor position with [the] [d]efendant, in order to sell its products." *Id.* at *6. Thus, the fees that were charged to an attendee would be charged only in connection with the attendee's role as a seller of the defendant's products, not a buyer of the products. *See id.* at *5, *6.[4]

[4] Just as Lifetime did with respect to *Alleman*, Lifetime again fails to note that the *Friedman* court relied upon the very distinction at issue in the present case: "[t]he 2005 Rules and Regulations distinguish between messages that encourage consumers to listen to free broadcasts and messages and those that encourage them to listen to (continued...)

Finally, Lifetime also seeks to compare its calls to the faxes at issue in *Physicians Healthsource, Inc. v. Janssen Pharmaceuticals, Inc.*, No. 12-cv-2132, 2013 WL 486207 (D.N.J. Feb. 6, 2013), *see* Def. Br. at 40, but the faxes there, which informed physicians about the legal status of a prescription drug, are clearly not akin to the calls that Lifetime made.

POINT VI

APPLICATION OF THE DOCTRINE OF PRIMARY JURISDICTION IS NOT WARRANTED

Lifetime's attempt to invoke the doctrine of primary jurisdiction, *see* Def. Br. at 57-59, should be rejected. The fatal flaw in Lifetime's argument is that the FCC has already decided the issue at hand multiple times. Moreover, with respect to the one factor over which Lifetime had control, *i.e.*, whether a prior application to the agency had been made, Lifetime knew of the relevance of the FCC's rulings at least since Lifetime made its first dismissal motion. *See* Lifetime's memorandum of law dated Oct. 31, 2013, at 14-26 (Dkt. No. 8). Indeed, Lifetime stated that "although Lifetime [] has not yet submitted to the FCC a petition seeking review of the 2003 and 2005 Reports and Orders and the 2003 and 2005 Final Rules as applied to cable programming, it is

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(...continued)
programming for which they must pay, and state that only the latter constitute unsolicited advertisements. Because [the] [p]laintiff does not allege that he must pay to listen to the webinar, the messages are not unsolicited advertisements under the 2005 Rules and Regulations." *Friedman*, 2013 WL 4102201 at *4.

fully prepared to do so should this Court apply the primary[-]jurisdiction doctrine and dismiss or stay this case." *Id.* at 30; *see also* Lifetime's memorandum of law in support of its motion for summary judgment dated May 15, 2015, at 42 ("Def. S.J. Mem.") (Dkt. No. 68) (same).

Lifetime relies upon three cases to support its position, *see* Def. Br. at 58, n.22, but each of these cases supports the opposite result than what Lifetime advocates.

In *Wahl v. Stellar Recovery, Inc.*, No. 14-cv-6002, 2014 WL 4678043 (W.D.N.Y. Sept. 18, 2014), the stay concerned several issues, each of which were more complex than the issue that Lifetime has raised; multiple petitions were pending, dating back two and a half years; and, again unlike the District Court found, the FCC had not sufficiently resolved the issues. *See id.* at *1-*2.

In *Passero v. Diversified Consultants, Inc.*, No. 13-cv-338, 2014 WL 2257185 (W.D.N.Y. May 28, 2014), in which there were pending petitions before the FCC dating back two years, *see id.* at *1, the issue was a technical one regarding automatic dialing equipment, *see id.*, and, "[i]ndeed, the FCC ha[d] previously addressed . . . and ha[d] revisited the issue several times in recognition of the 'need to consider changes in technologies.'" *See id.* at *2 (citation omitted). None of these factors is present here; and, to be sure, Lifetime's description of the issue here as requiring the FCC's "technical [] expertise," Def. S.J. Mem. at 9, is obviously absurd on its face. At most, it is a policy issue (albeit one that the FCC has, again, addressed multiple times).

In *Gusman v. Comcast Corp.*, No. 13-cv-1049, 2014 WL 2115472 (S.D. Cal. May 21, 2014), there were pending petitions before the FCC regarding the issue in question, *see id.* at *1-*2, and the issue had not already been addressed by the FCC. *See id.* at *3.

Additional cases also undermine Lifetime's position. In *Fried v. Sensia Salon, Inc.*, No. 13-cv-00313, 2013 WL 6195483 (S.D. Tex. Nov. 27, 2013), the court invoked the doctrine with respect to a technical issue that, again, had not yet been addressed by the FCC. *See id.* at *3, *4. Moreover, the court contrasted its decision with the decision by another court *not* to invoke the doctrine; and that latter decision further weighs against the doctrine's application here. The court explained that, in *Griffith v. Consumer Portfolio Serv., Inc.*, 838 F. Supp. 2d 723 (N.D. Ill. 2011), the court recognized that, as in the present case, the FCC had already decided the issue over which the defendant sought to invoke the doctrine. *See id.* at *5.

Lifetime cites *Allnet Commc'n Serv., Inc. v. Nat'l Exch. Carrier Ass'n*, 965 F.2d 1118 (D.C. Cir. 1992), as having applied the doctrine "where judicial resolution would preempt an agency 'from implementing what amount to policy decisions.'" Def. Br. at 59, quoting *Allnet*, 965 F.2d at 1121. However, whereas, in *Allnet*, the FCC had issued conflicting viewpoints that the court did not believe should be judicially settled, *see id.*, no such conflict exists in the present case. Indeed, the FCC has been consistent multiple times, and over approximately 14 years, with respect to the legality of the Lifetime

Robocalls.

Finally, Lifetime contends that its "pending Petition creates a danger of inconsistent rulings between the agency and the Court, i.e., if the FCC were to grant Lifetime's Petition while this case proceeds to trial on a theory that TCPA applies to the message." Def. Br. at 59. However, Lifetime has given no reason to anticipate that such inconsistent rulings would occur.

POINT VII

THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE IS INAPPLICABLE

Lifetime contends that "[t]he Court should decline to defer to any FCC ruling that would make TCPA liability turn on the identity of the defendant as a broadcast or cable provider, as it would create serious First Amendment problems." Def. Br. at 53. On the contrary, the FCC's distinction does not rest on the identity of the speaker, but on the *type of station*, *i.e.*, available for free versus available only commercially, being promoted. Thus, if *Time Warner Cable* made a robocall promoting a *broadcast* station, that call would be *exempt*, whereas if Time Warner Cable promoted its *cable* stations, such call would be prohibited. Likewise, if Lifetime promoted a broadcast station, such as if, for example, re-runs of "Project Runway" aired on a broadcast station, that call would be exempt. In short, the FCC's distinction does not hinge upon the identity of the speaker.

Lifetime describes its messages as "not commercial speech." Def. Br. at 55, n.20. Lifetime is wrong. As this Court has explained, "[w]hile the core notion of commercial speech is speech which does no more than propose a commercial transaction," *Connecticut Bar Assn. v. United States*, 620 F.3d 81, 93 (2d Cir. 2010) (citation and quotation marks omitted), "the Supreme Court explained that a court's 'lodestars' in distinguishing commercial from noncommercial speech must be *the nature of the speech taken as a whole*." *Id.* at 94 (emphasis added; citation and quotation marks omitted). Here, it is indisputable that Lifetime's telephone calls were commercial in nature. Indeed "[commercial] speech does not [even] cease to be commercial merely because it alludes to a matter of public debate." *Id.*

POINT VIII

PLAINTIFF HAS STATUTORY STANDING

A. Plaintiff Was a "Called Party"

(i) Defendant's Argument That Only Plaintiff's Roommate Was a "Called Party" is Not Only Unsupported by the Record, But is Contradicted By It

Assuming, *arguendo*, that, as Lifetime argues, only an "'intended recipient'" could be a "called party," and that only a "called party" could have statutory standing, *see* Def. Br. at 59, Lifetime failed, in any event, to present *any* evidence, much less evidence that entitled Lifetime to summary judgment, to support its contention that

Leyse was not an "intended recipient" of its call.[5]

Lifetime submitted no evidence that suggests that it was specifically, and only, trying to reach Leyse's roommate, Genevieve Dutriaux. In fact, the record does not show that Lifetime was trying to reach anyone in particular. Indeed, how could it be otherwise, given that Lifetime never had any knowledge of any identifying information regarding the calls or the source of the numbers that were called (a point that Lifetime eagerly emphasizes in its attempt to avoid class certification)? The notion that underpins Lifetime's argument is that Lifetime had hoped that only those people whose name appeared on the telephone bill (not even the cable bill!) would watch Project Runway and the All-Star Challenge. Common sense, not to mention the fact that the calls were described as having been made to "households," betrays the risibility of that notion.

To the extent that evidence does exist, including evidence that Lifetimes describes in a manner that, at best, could be called misleading, such evidence, to which Leyse now turns, belies Lifetime's contention.

Lifetime stated that it "reached out to . . . OnCall Interactive, a third-party company, to execute [Lifetime's] voice broadcast [*i.e*, Lifetime's telephone calls]," Def. Rule 56.1 Statement, ¶ 41 (SA-276), and that Lifetime "provided the zip[-]code

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[5] The legal aspects of that which Leyse assumes, *arguendo*, in this sub-point are addressed in Point VIII(B), *infra*.

list obtained from Time Warner Cable to [Todd] Hatley at OnCall Interactive and directed OnCall to obtain an appropriate list of telephone numbers for cable households located within the specified zip codes." *Id.*, ¶ 55 (SA-277 - SA-278). Thus, "OnCall Interactive was responsible for obtaining a list of telephone numbers." *Id.*, ¶ 56 (SA-278). Accordingly, "[o]n August 11, 2009, OnCall Interactive informed Lifetime that it had purchased a list of telephone numbers," *id.*, ¶ 57 (SA-278), but "Lifetime was never provided with the list of telephone numbers," *id.*, ¶ 58 (SA-278) *see also* Def. Br. at 1 ("Lifetime never had a list of the numbers); *id.* at 5 ("Lifetime never knew the numbers dialed by OnCall's vendor."); *id.* at 28 ("Lifetime never received a list of numbers the vendor called."). Indeed, "Lifetime does not, and did not, know the name of the vendor that OnCall Interactive contacted to purchase the list of telephone numbers." Def. Rule 56.1 Statement, ¶ 60 (SA-278). In fact, "[n]either [of OnCall's two deposition witnesses] recalls from whom the list of telephone numbers was purchased." *Id.*, ¶ 61 (SA-278).

As Lifetime's Rule 30(b)(6) witness explained, the zip codes gave no indication of who, in those zip codes, were Time Warner Cable customers, but instead were merely "ZIP codes where Time Warner Cable has service." Transcript of Deposition of Tracy Powell ("Powell Tr."), p.66, lines 19-20 (Dkt. No. 74-2, p.7). In addition, Ms. Powell stated that she had no idea where the numbers originated from, be it from Time Warner Cable or any other source: "Q: Was it your understanding that the list vendor

obtained the telephone numbers from Time Warner? . . . A: I have no knowledge of where the list vendor gets its list." Powell Tr., p.69, lines 12-14 (Dkt. No. 74-2, p.8), p.70, lines 6-7 (Dkt. No. 74-2, p.9); *see also id.*, p.70, lines 8-22 (Dkt. No. 74-2, p.9) ("Q: Did you have an understanding of whether the telephone numbers originated from Time Warner? In other words, for example, just to clarify my question, perhaps Time Warner gave those numbers or sold those numbers to one particular person who sold it to someone else and so on and so forth, until it finally got to the list vendor and then to [OnCall]; that's just an example to explain my question. MS. SCHNEIER: Objection to the form. Q: My question is: Do you know what the ultimate source of the telephone numbers was? MS. SCHNEIER: Objection. A: No.").[6]

As the foregoing makes clear, Lifetime itself has acknowledged that it never knew a single thing about the telephone numbers being called other that they were

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[6] Ms. Powell also stated that "Time Warner Cable is the *dominant provider* in New York City and in all these ZIP codes," Powell Tr., p.74, line 25 - p.75, line 3 (SA-56 - SA-57) (emphasis added), but then stated that Time Warner Cable was "the *only* cable company," *id.*, p.75, line 7 (SA-57) (emphasis added), before acknowledging that she simply did not know whether that was the case. *See id.*, p.75, line 14 - p.76, line 21 (SA-57); p.78, lines 4-11 (Dkt. No. 74-2, p.14). In addition, Ms. Powell did not recall whether she, or anyone at Lifetime, had ever tried to find out whether "cable households" were limited to Time Warner Cable customers. *See id.*, p.78, line 22 (Dkt. No. 74-2, p.14) - p.79, line 8 (Dkt. No. 74-2, p.15). Indeed, in response to the question "[s]o is it fair to say that, as far as you knew, in August of 2009 there might have been other cable providers in the New York City area besides Time Warner and there might not have been?," *id.*, p.79, lines 9-13 (Dkt. No. 74-2, p.15), Ms. Powell answered "[i]t's possible," *id.*, p.79, line 16 (Dkt. No. 74-2, p.15); *see also id.*, p.80, lines 7-17 (Dkt. No. 74-2, p.16) (wherein Ms. Powell, responding to the same question, answered "[s]o yes" and "[m]ay or may not have been.").

presumably located in zip codes in which Time Warner Cable's service was available.

Lifetime has also conceded that it was not trying to reach anyone in particular but was merely trying to reach "households" that were located in Time Warner Cable's service area. *See* Def. Rule 56.1 Statement, ¶¶ 38, 55 (SA-275, SA-277 - SA-278); Declaration of Tracy Barrett Powell, ¶¶ 8, 10 (SA-263); Powell Tr., p.145, line 23 - p.146, line 2 (Dkt. No. 74-2, p.27), in which Ms. Powell stated that "you can only [make] so many calls in a day; so that there were two separate days to be able to reach the *households* [(emphasis added)] that we wanted to reach"; indeed, the agreement between Lifetime and Time Warner states that OnCall "will secure phone numbers, then program and execute a voice broadcast campaign to 500,000 cable households in the following Time Warner zip codes [which are then listed]," (SA-175). Thus, the evidence that Lifetime has submitted shows that Lifetime was trying to reach "households" rather than specific individuals.

Finally, there is no evidence (other than, arguably, the script of the Telephone Message) that Lifetime had targeted its telephone calls to Time Warner Cable customers, much less those who received the Lifetime channel.

Notwithstanding the clarity of the evidence, Lifetime contended that it was trying to contact Ms. Dutriaux, and *only* Ms. Dutriaux, because "[i]t is undisputed that Dutriaux – and not Plaintiff – was the only telephone subscriber for the telephone number that received the Telephone Message, and the person to whom telephone bills

for the number were sent." Def. S.J. Mem. at 7. Lifetime further claimed that "[Leyse] testified that, during 2009, he used his cellphone, and not Dutriaux's telephone, for work-related calls and provided his cellphone number as his contact information," *id.*, citing Leyse Tr., p.45, line 7 - p.49, line 13 (SA-15 - SA-16) (*accord*, Def. Br. at 61), and that "there is no evidence to support a finding, nor could there be, that a call to Dutriaux's telephone number was intended to reach any one other than the person to whom that number was assigned," *id.* at 7-8; *see also* Def. Br. at 5 ("Dutriaux, not Leyse, was the only person assigned the number to which the Telephone Message was directed; bills for that number went to Dutriaux, not Leyse."); Def. S.J. Mem. at 3 ("[a]lthough Plaintiff lived in and, at times, worked out of Dutriaux's apartment in 2009, he provided his cellphone number as his contact information," citing Leyse Tr., p.34, line 16 - p.35, line 10 (SA-13); p.45, line 17 - p.48, line 23) (SA-15); *id.* at 10 ("[Leyse] testified that his cellphone number was the one he provided as his contact number."). Upon analysis, to which Leyse turns in the next paragraph, Lifetime's argument collapses.

Lifetime's attempt to portray Leyse as a *de facto* bystander who answered Ms. Dutriaux's telephone as though he were merely the equivalent of a houseguest fails. First, the portions of Leyse's deposition transcript cited by Lifetime show that Leyse did not testify as Lifetime describes. Rather, the cited portions concerned *only work*, and only to Leyse's use of his cell phone *in connection* with work. On the other hand,

lengthy portions of the transcript that Lifetime conveniently fails to acknowledge show that Leyse used the telephone number as his residential number, *see* Leyse Tr., p.48, line 25 - p.49, line 3 (SA-15 - SA-16), and that during the 13-year period in which he had been living at his address, he had always used that telephone number as his residential number. *See id.*, p.43, lines 11-18 (SA-14); p.45, lines 7-10 (SA-15). Lifetime's gross mischaracterization of Leyse's testimony is frivolous at best.[7]

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[7] This is just one of several ways in which Lifetime's memorandum (in addition to its Rule 56.1 Statement) mischaracterized the record. Another instance is Lifetime's contention that "Barbara Kelly, Senior Vice President/General Manager at Time Warner Cable, provided a list of zip codes for the areas that would be affected by the channel change so that an appropriate list of telephone numbers could be secured for a voice broadcast," Def. S.J. Mem. at 5, citing Declaration of Sara Edwards Hinzman, ¶ 16 (SA-269), and Declaration of Tracy Barrett Powell, ¶ 8 (SA-263); *see also* Def. Br. at 4 ("Lifetime had long been found at Time Warner's Channel 12, but was moving to Channel 62. After considering various options, they decided to proceed with, *inter alia*, a pre-recorded telephone message to subscribers. Time Warner's customers had consented in their subscription agreements to receive information, including pre-recorded calls, about Time Warner programs. Time Warner provided Lifetime with a list of zip codes for the areas affected by the change to facilitate a targeted message.").

Lifetime's representations that Time Warner Cable knew that Lifetime had requested the zip codes in order to make robocalls (or any type of telephone calls for that matter) are not only irrelevant, as set forth below, but are blatantly fabricated. Neither paragraph 16 of Ms. Hinzman's declaration (*see also* Plaintiff's Response to Number 46 of Defendant's Rule 56.1 Statement (Dkt. No. 79, pp.4-5)), nor paragraph 8 of Ms. Powell's declaration, nor the exhibit cited by the latter (Exhibit "EE"), provide any support for the notion that Time Warner Cable had known in advance, much less approved, of The Lifetime Robocalls (the absence of support for Lifetime's contention is also addressed Plaintiff's Response to Number 40 of Defendant's Rule 56.1 Statement (Dkt. No. 79, pp.3-4)).

As for the consent that Time Warner Cable's customers had given regarding

(continued...)

In sum, Lifetime's contention that it was specifically trying to reach, and only reach, Ms. Dutriaux rather than the members of the household that Lifetime called, is devoid of any merit whatsoever.

(ii) Plaintiff's Previous Litigation Upon Which Defendant Relies in Order to Show that Plaintiff Was Not a "Called Party" Not Only Lacks Merit But Actually Supports Plaintiff's Position

As in Point VIII(A)(i), *supra*, Leyse, for purposes of this sub-point, assumes, *arguendo*, that only an "intended recipient" could be a "called party," and that only a "called party" could have standing. Even with these assumptions, however, Lifetime, in attempting to buttress its implied claim that it was specifically trying to reach Ms. Dutriaux, misplaces its reliance upon *Leyse v. Bank of America, N.A.*, No. 09-cv-7654, 2010 WL 2382400 (S.D.N.Y. June 14, 2010) ("*Leyse I*") (which was followed by *Leyse v. Bank of America, N.A.*, No. 11-cv-7128, 2014 WL 4426325 (D.N.J. Sept. 8, 2014) ("*Leyse II*").[8] Moreover, *Leyse II* was reversed in *Leyse v. Bank of America, N.A.*, 804 F.3d 316 (3d Cir. 2015) ("*Leyse III*").

(...continued)
robocalls, such consent concerned only calls *from* Time Warner Cable, not from every individual station that aired on Time Warner Cable. *See Time Warner Cable Residential Services Subscriber Agreement*, ¶ 13 (SA-96), and ¶ 15(t) (SA-98 (definition of "TWC"); *see also* Plaintiff's Response to Number 40 of Defendant's Rule 56.1 Statement (Dkt. No. 79, pp.3-4) (addressing same).

[8] *Leyse II* adopted the factual bases of *Leyse I*, but did not make any additional factual findings. As a result, Leyse, like Lifetime, focuses on *Leyse I*. Therefore, all citations to *Leyse* refer to *Leyse I*.

Under *Leyse I*'s reasoning, Leyse *is* a "called party" in the present case. In *Leyse I*, the court noted that a third-party telemarketer "placed a prerecorded telemarketing call on behalf of [the defendant] to a phone number that was associated with Dutriaux in [the telemarketer]'s records," *Leyse I* , 2010 WL 2382400 at *2, and that the telemarketer "did not associate the phone number with Leyse." *Id.* Accordingly, the court found that Ms. Dutriaux "was the intended recipient of the call," *id.* at *4, and that, therefore, "[t]o the extent that Leyse picked up the phone, he was an unintended and incidental recipient of the call." *Id.* at *6.

Leyse I supports Leyse's standing here because, as discussed in Point VIII(A)(i), *supra*, the evidence does not show that Lifetime was trying to reach a specific individual, but that it was trying to reach "households." Of course, given that Lifetime never even saw the numbers that were called, and had no idea of their source, the notion that Lifetime had intended to call Ms. Dutriaux, and only her, and not, as the evidence makes clear, the entire household where the telephone number was located, simply lacks credibility.

B. The Term "Called Party" is not Synonymous with "Intended Recipient"

In *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012), the court observed: "[t]he phrase 'intended recipient' does not appear anywhere in § 227, so what justification could there be for equating 'called party' with 'intended recipient of the call'?" *Id.* at 640. Instead, the court found that the term "called party" means

"current subscriber," *id.*, but not merely in the sense of being the person whose name appears on the telephone bill. Rather the court used the term "current subscriber" as "the person who *pays the bills* or *needs the line in order to receive other calls*." *Id.* (emphases added).[9] By way of example, the court posited the following: "[s]uppose Smith, trying to reach Jones, dials the number with a typo and reaches Perkins, who says 'you have the wrong number.' No colloquial user of English would call Jones rather than Perkins the 'called party.' So too if Jones used to be the subscriber of a number later reassigned to Perkins, and Smith's contacts file is out of date." *Id.* at 641.[10]

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[9] The Court reasoned as follows:

> [The TCPA] uses the phrase "called party" seven times all told. Four unmistakably denote the current subscriber (the person who pays the bills or needs the line in order to receive other calls); one denotes whoever answers the call (usually the subscriber); and the others (the two that deal with consent) have a referent that cannot be pinned down by context. [The] [d]efendant] asks us to conclude that, despite the presumption of uniform usage within a single statutory section, those two uses, and those two alone, denote the person [that the caller] is trying to reach — in other words, [the caller's] [c]ustomer, who [the defendant] dubs the "intended recipient of the call."

Id.

[10] Lifetime's description of *Soppet* as holding that a "called party" is limited to a subscriber in the sense of being the person whose name appears on the telephone bill, *see* Def. Br. at 60, is plainly misleading, as is Lifetime's same description with respect

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With respect to the telephone line that received the call that gave rise to Leyse's claims, Leyse testified that he both paid the bills for that line *and* needed it in order to receive other calls, and thus met each of the alternative criteria described in *Soppet*. *See* Leyse Tr., p.56, lines 12-21 (SA-17), wherein Leyse states that he paid the telephone bill "most of the time," including in 2009, over the 13-year period that he had been living at the same address with the same telephone number. *See id.*, p.43, lines 16 - p.44, line 2 (SA-14); p.45, lines 7-10 (SA-15); p.48, line 25 - p.49, line 3 (SA-15).

Lifetime states that, "despite claiming he paid the phone bill 'most of the time,' he was not able to produce a single document to support this assertion," Def. Br. at 61; *see also id.* ("Leyse failed to point to any evidence raising a genuine issue of fact suggesting he was a 'customary user' of a line included as part of a 'family or business calling plan.'"). However, it is axiomatic that one may testify to facts and have his credibility be weighed by the trier of fact. The same is true with respect to Lifetime's assertion that Leyse's name did not appear on his apartment's lease. *See id.* Of course, Lifetime could have deposed Ms. Dutriuax. In fact, Lifetime spent considerable time pursuing such deposition, *see* Dkt. Nos. 104-108, 112-115, but decided not to bother taking it. Again, Lifetime would have been free at trial to argue that Leyse's testimony

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(...continued)
to the Eleventh Circuit's ruling on the meaning of "called party," *see id.* (as revealed below). Although Lifetime unsuccessfully made the same misleading assertion in its memorandum of law before the District Court, *see* Def. S.J. Mem. at 10, it apparently believes that it might as well insult the intelligence of this Court, too.

was not credible. Moreover, to the extent that Lifetime's arguments concern statutory standing, as opposed to Article III standing, such arguments are moot because they were waived when Lifetime agreed to have judgment entered in favor of Leyse's individual claims.

In *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014), the court reached the same conclusion as did *Soppet*, noting that, "as [*Soppet*] explained: '[t]he presumption that a statute uses a single phrase consistently, at least over so short a span, implies that the consent must come from the current subscriber,'" *id.* at 1251, quoting *Soppet*, 679 F.3d at 639-640 (internal citation omitted); that is, "'the person who pays the bills *or needs the line* in order to receive other calls.'" *Id.*, quoting *Soppet*, 679 F.3d at 640 (emphasis added). In *Breslow v. Wells Fargo Bank, N.A.*, 755 F.3d 1265 (11th Cir. 2014), the court applied the reasoning of *Osorio* to find that both a mother and her minor child, neither of whom were the defendant's "intended recipient," were "called parties" because "[the mother] was the named account holder for the cell phone number, . . . [and]] [t]he cell phone was used exclusively by her minor child." *Id.* at 1266.

As made perfectly clear by *Soppet*, *Osorio*, and *Breslow*, Lifetime's claim that "[b]oth the Seventh and the Eleventh Circuits have held the 'called party' is the *actual telephone subscriber* at the time of the call, . . . [whereas] *[o]thers* have interpreted the term to permit a claim from a plaintiff who is a '*customary user*' of the phone line,"

Def. Br. at 60, citing *Leyse v. Bank of America, N.A.*, 804 F.3d 316 (3d Cir. 2015) ("*Leyse III*") (emphases added), is remarkable for its flagrant dishonesty.

Numerous district courts have found, as did *Soppet* and *Osorio*, that the term "called party" is not a synonym for "intended recipient." *See*, *e.g.*, *Moore v. DISH Network LLC*, 57 F. Supp. 3d 639, 649 (N.D. W. Va. 2014) ("[n]o portion of § 227 states that only the intended recipient of a call can recover under it. Neither 'intended recipient' nor a similar term appear anywhere in § 227," citing *Soppet*, 679 F.3d at 640 (7th Cir. 2012)); *see also id.* (noting that the TCPA "contains no language indicating that one must be the individual the caller intended to reach to sue under it [and that] [a] vast majority of the courts that have addressed th[e] issue have interpreted 'called party' in this manner and allowed unintended recipients of calls, like [the plaintiff in *Moore*], to recover for violations of § 227(b)(1)(A)(iii).").

C. As a Regular User of the Telephone Line That Defendant Called, Plaintiff Has Standing Regardless of Whether He Was a "Called Party"

The private right of action for claims that arise under Section (b) of the TCPA is conferred upon "[a] person or entity"; 47 U.S.C. § 227(b)(3), not a "called party," much less an "intended recipient." Reflecting this broad conferral, the court in *Leyse III* explained as follows:

> *There are good reasons to doubt the equation of "intended recipient" with "called party," but the parties did not brief the issue*, and we need not decide it here. This is because . . . Congress made several findings in the [TCPA] that allow

> us to trace the contours of the *protected zone of interests*. The zone protected by § 227(b)(1)(B) may well be coextensive with the scope of the term "called party." But given the existence of relevant congressional findings, we may determine whether Leyse has statutory standing *without first concluding that he is a "called party."*

Leyse III, 804 F.3d at 325 (emphasis added; footnote omitted). *Accord*, *Danehy v. Time Warner Cable Enterprises*, No. 14-cv-133, 2015 WL 5534094, *4-*5 (E.D.N.C. Aug. 6, 2015).

The Third Circuit further noted that, "[i] passing the [TCPA], Congress was animated by 'outrage[ ] over the proliferation' of prerecorded telemarketing calls to *private residences*, which consumers regarded as 'an intrusive invasion of privacy' and 'a nuisance.' The congressional findings describe the persons aggrieved by these calls using a variety of labels: 'consumers,' 'residential telephone subscribers,' and 'receiving part[ies].'" *Id.* at 325-326 (emphasis added; citations omitted).

Further addressing the notion of protecting people in their residences regardless of whose name appears on a household telephone bill, the court explained:

> As was forcefully stated by Senator Hollings, the Act's sponsor, "Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall." 137 Cong. Rec. 30,821–22 (1991). Although his views are not controlling, they are *consistent with the findings that appear in the text of the Act*, and it is relevant that he *emphasized* the potential of robocalls to harass the *occupants of private residences*. *See also Osorio*

> *v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1258 (11th Cir.2014) (noting that a purpose of the Act is to protect "*residential privacy*").

Id. at 326 (emphases added; additional citation omitted). Accordingly, the court found that the zone of interests extended to Leyse:

> From this evidence, it is clear that the Act's zone of interests encompasses *more than just the intended recipients* of prerecorded telemarketing calls. It is the actual recipient, *intended or not*, who suffers the nuisance and invasion of privacy. This does not mean that all those within earshot of an unwanted robocall are entitled to make a federal case out of it. Congress's repeated references to privacy convince us that *a mere houseguest or visitor* who picks up the phone would likely fall outside the protected zone of interests. On the other hand, a *regular user of the phone line who occupies the residence being called undoubtedly has the sort of interest in privacy, peace, and quiet that Congress intended to protect*.

Id. at 326 (emphases added; footnote omitted).

Lifetime contends that, if a person other than the intended recipient may bring an action, then "'when a business calls a person with a prerecorded message, that business could be liable to any individual who answers the phone despite the fact that the business only intended to call one person.'" Def. Br. at 60, quoting *Leyse I*, 2010 WL 2382400, at *5. However, the Third Circuit exposed the faulty logic of this reasoning, explaining that the question of whether a caller is liable does not depend on who answers the call; *i.e.*, if the caller had consent to make the call, then it would be protected from liability *regardless* of who answered the call:

> [*Leyse*'s] concerns are misplaced. The caller may invoke the consent of the "called party" as a defense even if the plaintiff is someone other than the "called party." Thus, if Dutriaux were the "called party" by virtue of being the intended recipient of the call, her consent to receive robocalls would *shield Bank of America from any suit brought by Leyse*. We would *not need to deny statutory standing to Leyse* in order to *protect Bank of America from unanticipated liability*.

Leyse III, 804 F.3d at 327 (emphases added).

CONCLUSION

That part of the Order of the District Court, dated, and entered with the clerk on, September 22, 2015, that denied class certification should be vacated; the Judgment should be vacated in the event that this Court finds that its issuance precludes Plaintiff-Appellant from appealing the District Court's denial of class certification; and Plaintiff-Appellant should be granted such other and further relief as authorized by law.

Dated: October 20, 2016

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 18,854 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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s/ *Todd C. Bank*
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Dated: October 20, 2016

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2016, a true and accurate copy of the foregoing brief was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic-filing system and copies will be mailed to those parties, if any, by certified mail who are not served via the Court's electronic-filing system.

s/ *Todd C. Bank*
Todd C. Bank
Dated: October 20, 2016