IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

ETHAN RADVANSKY, on behalf of himself and those similarly situated, Plaintiff, v. KENDO HOLDINGS, INC., d/b/a Fenty Beauty, Defendant.	CIVIL ACTION FILE NUMBER 3:23-cv-214-TCB

O R D E R

This case comes before the Court on Defendant Kendo Holdings, Inc.'s motion [16] to dismiss.[1]

I. Background

This case proves true that what is simple is not always easy. The facts below are straightforward, yet they implicate dynamic questions of statutory interpretation and administrative law.

[1] Kendo requested a hearing on this motion. Upon consideration, the Court finds that it is not necessary to hold a hearing. This request is denied.

Plaintiff Ethan Radvansky owns and uses a cell phone. He alleges that he uses the phone as his personal residential number and does not use it for business or commercial purposes. In April 2023, Radvansky registered his cell phone number with the National Do-Not-Call ("DNC") registry, a system created by the Federal Communications Commission ("FCC") to prohibit telemarketers from reaching out to registered numbers.

Radvansky alleges that Kendo sent at least seventeen advertisement/marketing text messages to his number after he registered his number on the DNC registry. He brings this suit as a putative class action, seeking treble damages under the Telephone Consumer Protection Act ("TCPA"). 47 U.S.C. § 227(c)(5).

Kendo has moved to dismiss, claiming that Radvansky fails to state a claim because the statute does not apply to Radvansky's situation.

II. Legal Standard

To survive a Federal Rule of Civil Procedure 12(b)(6) motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570

(2007); *see also Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012) (quoting *id.*). The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted) (quoting *Twombly*, 550 U.S. at 556); *see also Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324–25 (11th Cir. 2012).

Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555–56 (citations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citation omitted). While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not accept as true the plaintiff's legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

Accordingly, evaluating a motion to dismiss requires two steps: (1) eliminate any allegations in the pleading that are merely legal conclusions, and (2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679.

III. Discussion

A. Relevant Statutes and Regulations

There are several statutes and regulations at issue: introductions are in order.

First, the TCPA. Congress passed the TCPA in an effort "to address the proliferation of intrusive, nuisance calls to consumers and businesses from telemarketers." *Facebook, Inc. v. Duguid*, 592 U.S. 395, 399 (2021) (quotation omitted). Congress intended for this to be a joint effort, as the TCPA specifically charges the FCC to "implement methods and procedures for protecting . . . privacy rights . . . in an efficient, effective, and economic manner." 47 U.S.C. § 227(c)(2). The TCPA also creates a private right of action for "[a] person who has received more than one telephone call within any 12-month period by or on behalf of

the same entity in violation of the regulations prescribed under this subsection." *Id.* § 227(c)(5).

Next up: the implementing regulation. The TCPA instructs that the FCC may establish "a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase." *Id.* § 227(c)(3). Pursuant to this authority, the FCC established the national DNC registry and issued a regulation prohibiting any "person or entity" from "initiat[ing] any telephone solicitation to . . . [a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government." 47 C.F.R. § 64.1200(c)(2).

Third, the FCC Order. In 2003, the FCC issued an order ruling that wireless telephone numbers may participate in the national DNC registry and held that "wireless subscribers who ask to be put on the national do-not-call list [are to be considered] 'residential subscribers.'" *Rules and Regulations Implementing the Telephone Consumer*

Protection Act of 1991, Memorandum Opinion and Order, 18 FCC Rcd. 14014, 14039, para. 36 (2003) ("2003 FCC Order"). The 2003 FCC order notes that this presumption applies only to section 227 of the TCPA. *See id.* at 14039 n.139 ("This presumption is only for the purposes of section 227 and is not in any way indicative of any attempt to classify or regulate wireless carriers for purposes of other parts of Title II."). The FCC reiterated its position in a 2023 rule. *See* Targeting and Eliminating Unlawful Text Messages Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991 Advanced Methods to Target and Eliminate Unlawful Robocalls, 60 Fed. Reg. 5098, 5099 (Jan. 26, 2024) (stating that the FCC "previously concluded that the national database should allow for the registration of wireless telephone numbers and that such action will further the objectives of the TCPA and the Do-Not-Call Act. Our action is consistent with federal court opinions and will deter both illegal texts and make DNC enforcement easier.").

The final statute is unrelated to regulating telephone communications, but it makes all the difference: the Administrative Orders Review Act (the "Hobbs Act"). The Hobbs Act grants courts of

appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1).

The Eleventh Circuit has established a strict view of district courts' power under the Hobbs Act: "the Act's grant of 'exclusive jurisdiction' to the courts of appeals . . . bar[s] district courts from so much as considering any argument—by any party, in any case—that an agency order misinterpreted the law, 'no matter how wrong the agency's interpretation might be.'" *Gorss Motels, Inc. v. Safemark Sys., LP*, 931 F.3d 1094, 1106 (11th Cir. 2019) (Pryor, J., concurring) (quoting *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 588 U.S. 1, 11 (2019) (Kavanaugh, J., concurring)).

B. Application to this Case

Now, it's time to put all the pieces together. Kendo premises its motion to dismiss on the statutory language of section 227(c) of the TCPA that applies its provision to "residential telephone subscribers." It argues that Radvansky fails to state a claim because as a cellphone user, he cannot bring a claim under this provision of the TCPA.

Radvansky disagrees. He asserts that not only does he properly plead that his telephone number is a residential line but also that the 2003 FCC order mandates that the term "residential phone number" include wireless phone numbers. He also disputes Kendo's statutory interpretation of the TCPA.

At first glance, this case seems to turn on how the Court interprets the term "residential telephone." Not so fast—remember, the Hobbs Act applies. The Eleventh Circuit has strictly held that "[d]istrict courts may not determine the validity of FCC orders, including by refusing to enforce an FCC interpretation, because 'deeming agency action invalid or ineffective is precisely the sort of review the Hobbs Act delegates to the courts of appeals in cases challenging final FCC orders.'" *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1307 (11th Cir. 2015) (alteration omitted) (quoting *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1120–21 (11th Cir. 2014)). This standard is binding law that the Court must follow unless and until the Eleventh Circuit decides to revisit this issue en banc.[2]

[2] Judge William Pryor, joined by Judges Newsom and Branch, penned a compelling concurrence urging the Eleventh Circuit to revisit this issue en banc in *Gorss Motels*. *See Gorss Motels*, 931 F.3d at 1105. Judge Pryor posits that the correct interpretation of the Hobbs Act "does not require district courts adjudicating

So, there is not much for this Court to do. The FCC has ruled that wireless telephone numbers on the DNC registry are presumed to be residential telephone numbers. Radvansky's telephone number is on the DNC registry, and he alleges that he uses his phone as his personal residential number and has not used it for business or commercial purposes. Because the Court cannot "refuse to enforce an FCC interpretation," it must consider Radvansky's number to be a residential number. *Id.*

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cases within their ordinary jurisdiction to treat agency orders that interpret federal statutes as binding precedent" and urges the Eleventh Circuit to overrule its "incorrect—and probably unconstitutional—interpretation of the Hobbs Act." *Id.* at 1106, 1111. He argues that the circuit's interpretation presents Due Process Clause concerns and threatens the separation of powers framework because "our interpretation requires not 'mere ... deference' to agency interpretations but absolute 'abdication' of the judicial power to determine the law that governs a case." *Id.* at 1111 (quoting *PDR Network*, 588 U.S. at 27 (Kavanaugh, J., concurring)).

Several United States Supreme Court justices are also ready to adopt this standard. *See PDR Network*, 588 U.S. at 27 (arguing that the Hobbs Act properly construed does not bar a party from arguing that the FCC's interpretation is incorrect because "[t]he District Court is not bound by the FCC's interpretation. . . . [T]he district court should interpret the statute as courts traditionally do under the usual principles of statutory interpretation, affording appropriate respect to the agency's interpretation.").

This Court joins Judge Pryor's call for the Eleventh Circuit to reconsider this issue and let district courts do their job—the "interpretation of the law" guided by "neither FORCE nor WILL but merely judgment." THE FEDERALIST NO. 78, at 379, 381 (Alexander Hamilton) (Dover Thrift ed. 2014).

Kendo disputes this, arguing that that the 2003 FCC order is an interpretive rule that is not binding on the Court. This is incorrect under Eleventh Circuit law and is a mischaracterization of Supreme Court precedent. The Supreme Court has mused that FCC orders that are interpretive rules may not be binding on a court under the Hobbs Act. But it has not decided the issue yet. *See PDR Network,* 588 U.S. at 7 (remanding case to district court to determine whether relevant FCC order was a legislative or interpretive rule, noting that "[i]f the relevant portion of the 2006 Order is the equivalent of an 'interpretive rule,' it may not be binding on a district court, and a district court therefore may not be required to adhere to it" while also cautioning that "[w]e say 'may' because we do not definitively resolve these issues here").

The Eleventh Circuit has clearly held that "an agency's interpretation of federal law in a final order is subject to only a single 60-day window for judicial review in a single circuit-court proceeding, outside of which no party to any proceeding in any court may question the agency's interpretation." *Gorss*, 931 F.3d at 1106 (Pryor, J., concurring). The 2003 FCC order is a final order, and thus the Court cannot review it under the Eleventh Circuit's interpretation of the

Hobbs Act, regardless of whether it is legislative or interpretive. *See Correll v. Iconic Mortg. Corp.*, No. 20-24858-CIV, 2021 WL 5014122, at *5 n.5 (S.D. Fla. Feb. 8, 2021) ("The Supreme Court . . . expressly avoided answering whether a district court is bound by the FCC's interpretative rules or may consider Administrative Procedures Act review of the FCC's legislative rules. . . . The Eleventh Circuit has already answered these questions— yes and no, respectively." (citations omitted)); *Turizo v. Subway Franchisee Advert. Fund Tr. Ltd.*, 603 F. Supp. 3d 1334, 1341 (S.D. Fla. 2022) ("However, the Court lacks jurisdiction to review a final order of the FCC, including the 2003 Order." (citation omitted)).

The FCC also prohibits telephone solicitations to residential telephone numbers on the DNC registry. Radvansky alleges that he has received at least seventeen texts from Kendo thirty-one or more days after placing his number on the DNC registry.

Lastly, the TCPA provides a private cause of action for violations of the FCC's regulations. Radvansky appropriately brings his case under this provision.

Kendo contests this point. It argues that the Hobbs Act does not restrain the Court because the 2003 FCC order does not apply. Kendo's argument is as follows: the 2003 FCC order does not affect whether consumers can bring a private right of action under 47 U.S.C. § 227(c)(5) because the order was created pursuant to 47 U.S.C. § 227(b)(1)(A)(iii). According to Kendo's reasoning, because the order was enacted under a different provision, it does not bear on the meaning of any term in section 227(c)(5), and thus the Court is not obligated to follow the 2003 FCC order's interpretation under the Hobbs Act. *See* [23] at 13 ("Whether Congress created a private claim for the alleged violation, regardless of the validity of the FCC order, is a separate issue and does not (directly or indirectly) require this Court 'to enjoin, set aside, suspend . . . or to determine the validity of' the 2003 order." (quoting 28 U.S.C. § 2342)).

The Court is sympathetic to the sentiment that the 2003 FCC order may violate separation of powers by going further than the authority Congress vested the FCC with. *See Turizo*, 603 F. Supp. 3d at 1341 ("But by presuming that any wireless number on the DNC Registry qualifies as 'residential,' the FCC expands section 227(c)(5)'s

right of action to cellular telephone subscribers—without any congressional grant of authority to do so.").

That said, the Court disagrees with Kendo's framing of the interplay between the TCPA and the 2003 FCC order. First, the FCC cites to § 227(b) in the order as statutory support for its proposition that Congress intended to provide protection to wireless subscribers; it in no way suggests that its ruling's application is limited to that section. Quite the opposite. The order clearly states that the presumption regarding wireless numbers applies to section 227 and not other parts of Title II. *See 2003 FCC Order*, 18 FCC Rcd. at 14039 n.139 ("This presumption is only for the purposes of section 227 and is not in any way indicative of any attempt to classify or regulate wireless carriers for purposes of other parts of Title II."). This demonstrates what sections the FCC wanted the interpretation applied to, and it knew how to limit it.

Further, throughout the order's discussion of expanding the definition of "residential subscribers," the FCC discusses section 227 as a whole. *See, e.g.*, *id.* at 14039, para. 35 ("Specifically, there is nothing in section 227 to suggest that only a customer's 'primary residential

telephone service' was all that Congress sought to protect through the TCPA."). The Court will not read into two citations to a specific section and conclude that the FCC order excludes all other sections, especially when the Commission explicitly states that the order applies to the whole of section 227.

All this to say, the Hobbs Act still applies. The 2003 FCC order does apply to the term "residential subscriber" in section 227(c)(5), and therefore the Court must abide by its interpretation. Contrary to Kendo's argument, this is not akin to creating a new private right of action. In its 2003 order, the FCC changed the definition of "residential subscriber" throughout section 227 of the statute.[3] This alteration *expands* the private cause of action in section 227(c), but it does not *create* a new one.[4] *See Alexander v. Sandoval*, 532 U.S. 275, 284 (2001)

[3] This quashes Kendo's other argument—that Radvansky may not bring a claim under section 227(c)(5) because that provision provides a cause of action for an "alleged violation of 47 C.F.R. § 64.1200(c)(2), but not the separate rule created by the FCC under § 64.1200(e)." [16] at 15 n.9. The 2003 FCC order changes the definition of residential subscriber throughout section 227, and that includes 47 C.F.R. § 64.1200(c)(2). Therefore, Radvansky may bring a case for a violation of 47 C.F.R. § 64.1200(c)(2).

[4] The cases Kendo cites are inapposite, as they primarily consider whether there is an implied right of action. *See, e.g.*, *Love v. Delta Air Lines*, 310 F.3d 1347, 1351 (11th Cir. 2002) ("The issue of whether a statute creates by implication a private right of action is a question of statutory construction which we review *de novo*." (citation and quotation omitted)); *Alabama v. PCI Gaming Auth.*, 801 F.3d

("A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.").

Because the 2003 FCC order applies to section 227(c), the Court must defer to the FCC's interpretation of "residential subscribers." Many other courts are in accord. *See Correll*, 2021 WL 5014122, at *5 ("Given the Eleventh Circuit's express prohibition on a district court determining the validity of an FCC order, [Kendo's] reasoning does not support the conclusion that Plaintiff fails to state claims for relief."); *Turizo*, 603 F. Supp. 3d at 1342 (holding that the plaintiff stated a claim for relief because "[d]espite an unauthorized expansion of the private right of action for violations of the TCPA's do-not-call provision,

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1278, 1294–1300 (11th Cir. 2015); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). That is not the issue here, as the Court holds that an express right of action applies, and regulations may affect who is included in a private right of action. *See Sandoval*, 532 U.S. at 284 ("We do not doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section. Such regulations, if valid and reasonable, authoritatively construe the statute itself." (citations omitted)); *Sch. Bd. of Nassau Cnty.. v. Arline*, 480 U.S. 273, 279 (1987) (noting that "[i]n determining whether a particular individual is handicapped as defined by the Act, the regulations promulgated by the Department of Health and Human Services are of significant assistance").

the Court must enforce the rules and regulations set forth by the FCC"); *Tessu v. AdaptHealth, LLC*, No. CV SAG-23-0364, 2023 WL 5337121, at *5 (D. Md. Aug. 17, 2023) ("Given the Hobbs Act's provisions, this Court lacks jurisdiction to review the 2003 FCC Order. This Court therefore joins the majority of courts throughout the country who have held that cell phones like [the plaintiff's] are entitled to the TCPA's protection as residential telephones.").

IV. Conclusion

For the foregoing reasons, Kendo's motion [16] to dismiss is denied.

IT IS SO ORDERED this 13th day of August, 2024.

Timothy C. Batten, Sr.
Chief United States District Judge