

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of Best Doctors, Inc.'s)	
Petition for Declaratory Ruling)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telecommunications Consumer Protection)	
Act of 1991)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338

REPLY COMMENTS OF BEST DOCTORS, INC.

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SUMMARY

Best Doctors, Inc. (“Best Doctors”), files these Reply Comments in support of its Petition for Declaratory Ruling in which it requested the Commission to clarify that a request sent to a telephone facsimile machine asking the recipient to verify the contact information and operational status of a medical practice for inclusion in a database when the request does not state the commercial availability or quality of property, goods, or services is not an “advertisement” under the Telephone Consumer Protection Act, as modified by the Junk Fax Protection Act (“TCPA”). In the Petition, Best Doctors further asked the Commission to find that only the face of a fax should be considered when determining whether the fax is an advertisement governed by the TCPA.

Kenneth A. Thomas MD, LLC (“KAT, LLC”), one of only two commenters and the plaintiff in an ongoing federal district court litigation against Best Doctors, asserts that the Commission’s *Junk Fax Order*, Commission precedent, and federal court decisions support a “fax-as-pretext” principle whereby the Commission can consider facts beyond the fax itself to determine whether a fax is an advertisement subject to the TCPA. KAT, LLC’s position is inconsistent with the plain language of the TCPA, which prohibits the sending of advertisements to a facsimile machine, not the sending of informational faxes that do not promote any good or service. KAT, LLC’s position also misconstrues language in the *Junk Fax Order* and Commission precedent. Nevertheless, even if facts other than the content of the fax sent by Best Doctors to KAT, LLC are considered, Best Doctors’ fax is not an advertisement subject to the TCPA.

Enclarity, Inc. (“Enclarity”), a company that provides healthcare organizations with a database of verified medical provider information, supports Best Doctors’ Petition and urges the Commission to clarify that the TCPA does not permit the courts to look beyond the four corners

of a fax when determining whether the fax is an advertisement. Best Doctors agrees with Enclarity that, consistent with the plain language of the TCPA, a fax which on its face only solicits information, such as requests to practicing physicians to update or verify practice status or contact information, but that neither proposes nor promotes the purchase of a commercially available good or service is not an advertisement. Enclarity also correctly states that Best Doctors' requested clarification is necessary because federal courts disagree about what information should be considered to determine if a fax is an advertisement subject to the TCPA. Moreover, the proliferation of TCPA litigation calls out for the Commission to clarify that faxes which only request information and which do not promote the commercial availability of any good or service are not advertisements subject to the TCPA.

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REPLY COMMENTS OF BEST DOCTORS, INC.

Best Doctors, Inc. (“Best Doctors”), by its attorneys, hereby files its Reply Comments regarding its Petition for Declaratory Ruling (“Petition”) in which it requested that the Commission clarify the scope of the term “advertisement” as contained in the Telephone Consumer Protection Act, as modified by the Junk Fax Protection Act (“TCPA”).¹ Specifically, Best Doctors’ Petition asked the Commission to clarify that a request sent via facsimile asking the recipient to verify the contact information and operational status of a medical practice for inclusion in a database of currently practicing physicians when the request does not state the commercial availability or quality of property, goods, or services is not an “advertisement” under the TCPA and the Commission’s implementing regulations.

¹ 47 U.S.C. § 227; *see also* 47 C.F.R. § 64.1200, the Commission’s regulations implementing the TCPA.

INTRODUCTION

Only two comments were filed in response to Best Doctors' Petition. Kenneth A. Thomas MD, LLC ("KAT, LLC"), the plaintiff in an ongoing lawsuit filed against Best Doctors in the United States District Court for the District of Massachusetts,² filed comments asserting that Best Doctors' faxes are unsolicited advertisements prohibited by the TCPA or, in the alternative, that the Commission should dismiss Best Doctors' Petition for failing to raise a justiciable issue. As described in these Reply Comments, KAT, LLC incorrectly posits that Best Doctors' faxes, which contain no assertions regarding the commercial availability or quality of any property, goods, or services, are unsolicited advertisements under the TCPA. Furthermore, KAT, LLC ignores the serious disagreement among federal courts as to how to evaluate whether a faxed document may be deemed to be a pretext to advertise commercial products and services.

Enclarity, Inc. ("Enclarity"), a company that provides healthcare organizations with a database of verified medical provider information, filed comments urging the Commission to issue a declaratory ruling clarifying that the TCPA does not permit the courts to look beyond the four corners of a fax when determining whether the fax is an advertisement and that a faxed request to practicing physicians to confirm or update contact information is not an advertisement under the TCPA. Enclarity cogently explains how the clarification requested by Best Doctors is supported by the plain language of the TCPA and is necessary given the conflict among federal courts regarding the appropriate scope of analysis when determining whether a fax is an advertisement under the TCPA.

² *Kenneth A. Thomas MD, LLC v. Best Doctors, Inc.*, No. 1:18-cv-10957-DPW (D. Mass. 2018). On December 31, 2018, Best Doctors filed a Motion to Stay Proceedings (Dkt. Nos. 28 and 29), and on January 28, 2019, KAT, LLC filed its response in opposition to the motion to stay (Dkt. No. 33). On February 5, 2019, Best Doctors filed a reply responding to KAT, LLC's opposition to the motion to stay (Dkt. No. 37). As of the date of these Reply Comments, the court has not issued a decision on the motion to stay.

I. The TCPA and Commission Precedent Compel a Conclusion That Only the Fax Itself Should Be Examined to Determine Whether It Is an Advertisement Subject to the TCPA's Restrictions.

The TCPA prohibits the use of a “device to send, to a telephone facsimile machine, an unsolicited advertisement” unless certain requirements are met.³ The TCPA further defines “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.”⁴ As Best Doctors stated in its Petition, an advertisement must be sent to a facsimile machine for the TCPA to be applicable and communications sent by other means have no bearing on whether a faxed communication constitutes an advertisement under the TCPA. Enclarity similarly focuses on the language of the TCPA in its comments to support its position that the plain language of the TCPA limits the “advertisement” analysis to the face of the fax. Enclarity correctly explains that the TCPA only prohibits unsolicited faxes that advertise (*i.e.*, draw attention to or induce the purchase of) the sender’s goods or services.⁵ Best Doctors agrees with Enclarity that a fax which only solicits information, such as requests to practicing physicians to update or verify practice status or contact information but that neither proposes nor promotes the purchase of a commercially available good or service is not an advertisement for purposes of the TCPA.

³ 47 C.F.R. § 227(b)(1)(C); *see* 47 C.F.R. § 64.1200(a)(4).

⁴ 47 C.F.R. § 227(a)(5); *see* 47 C.F.R. § 64.1200(f)(1).

⁵ *See* Enclarity Comments, at 4-5.

KAT, LLC does not focus on the actual language of the TCPA in its comments. Rather, KAT, LLC misconstrues language taken out of context from the Commission’s 2006 *Junk Fax Order*⁶ and misinterprets Commission precedent regarding that order to support its position that a fax containing no offering, promotional, or solicitation language whatsoever can somehow be deemed to be a “pretext” to advertising. Specifically, KAT, LLC describes a “fax-as-pretext” rule as follows: “faxes that may appear to be informational constitute unsolicited advertisements if (1) they are sent as a prelude to a subsequent solicitation to the fax recipient *or* (2) if they are sent primarily for a commercial purpose, even if they are not preludes to further solicitations.”⁷ However, as described below, a more accurate reading of the *Junk Fax Order* is that: (1) a fax that does not promote any good or service on its face (*i.e.*, an informational fax or a request for updated database information) is not an advertisement subject to the TCPA and (2) a fax must contain some advertisement material to warrant further review regarding the purpose for including that material in the fax.

The *Junk Fax Order* refers to “pretext” in two contexts, neither of which supports KAT, LLC’s description of a “fax-as-pretext” principle nor is applicable to Best Doctors. First, the *Junk Fax Order* states that facsimile messages that promote goods or services even at no cost are unsolicited advertisements. The Commission lists free magazine subscriptions, catalogs, consultations, and seminars as examples of goods and services whose availability to the fax recipient could be promoted in a fax. The Commission then notes that “[i]n many instances, ‘free’ seminars serve as a pretext to advertise commercial products and goods.”⁸ KAT, LLC

⁶ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report and Order and Third Order on Reconsideration, 21 FCC Red 2787, ¶ 53 (2006) (“*Junk Fax Order*”).

⁷ KAT, LLC Comments, at 9.

⁸ *Junk Fax Order*, ¶ 52.

improperly relies on this statement for its conclusion that “[f]axes that are a prelude or precursor to an advertisement similarly constitute unsolicited advertisements... .”⁹ The Commission does not conclude that all faxes that are followed by an advertisement (that is not sent to a facsimile machine) are themselves unsolicited advertisements. The Commission states that faxes that “*promote goods or services*” are unsolicited advertisements.¹⁰ The Commission’s discussion of faxes that promote a free seminar that itself serves as a pretext to advertising does not encompass faxes that omit any promotion of goods and services, such as the fax sent by Best Doctors only requesting the recipient to verify or update database information. As explained in detail in the Petition, the fax sent by Best Doctors to Dr. Thomas does not promote any goods or services that are commercially available.¹¹ Indeed, in the fax sent to Dr. Thomas, Best Doctors only seeks to

⁹ See KAT, LLC Comments, at 8.

¹⁰ Best Doctors observed in its Petition that courts disagree about whether the Commission created a *per se* rule or a rebuttable presumption that a fax promoting a free good or service is an unsolicited advertisement under the TCPA. See Best Doctors Petition, n.17 (citing *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC et al.*, 883 F.3d 459 (4th Cir. 2018) and *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92 (2d Cir. 2017)). Since the fax sent by Best Doctors to Dr. Thomas did not offer, promote, or announce the availability of any product or service, the Commission’s conclusions regarding unsolicited faxes which do offer, promote, or announce the availability of products or services and whether the *Junk Fax Order* established a *per se* rule or a rebuttable presumption are irrelevant to Best Doctors’ Petition.

¹¹ See Best Doctors Petition, at 4, 16-17. KAT, LLC incorrectly claims that the faxes are advertisements because they refer to Best Doctors’ programs and services available to members (*i.e.*, individuals who can access Best Doctors’ services through their employer or insurer) such as the access to a network of physicians. Dr. Thomas is not a member – he is a doctor who was nominated, reviewed, and selected as a “Best Doctor” for inclusion in the Best Doctors’ network. Even if Dr. Thomas happened to be a member through his personal employer or insurer, the services mentioned in the fax (Find a Best DoctorTM and Interconsultation[®]) are not being offered for sale to the fax recipient. Moreover, the fact that doctors participating in the Interconsultation[®] service (through which specialists review members’ medical cases and provide opinions) can receive a fee does not make a reference to that service an advertisement. The opportunity to participate in the Interconsultation[®] service as a specialist is not commercially available to anyone.

confirm information to support Dr. Thomas's selection as a "Best Doctor," which selection and designation are not for sale. As such, the fax is not an unsolicited advertisement.

The second reference to pretext in the *Junk Fax Order* relates to facsimile communications that contain informational messages. The Commission states that an "incidental advertisement" contained in a fax does not convert an informational fax into an unsolicited advertisement. The Commission further explains that the incidental nature of advertising in a fax depends on various factors including the text of the fax and the amount of space devoted to advertising.¹² Regarding surveys, the Commission states that "surveys that serve as a pretext to an advertisement are subject to the TCPA's facsimile advertising rules."¹³ Significantly, the Commission advises that the TCPA's definition of unsolicited advertisement "applies to *any communication that advertises* the commercial availability or quality of property, goods or services, even if the message purports to be conducting a survey."¹⁴ Thus, even if a sender labels or formats a faxed communication as a survey, the survey is a pretext to an advertisement (and the communication is an advertisement under the TCPA) only if *the communication advertises* a good or service. The Commission does not indicate that it will look at anything beyond the four corners of the fax, even when a fax purports to be a survey, to determine whether the fax is an advertisement.¹⁵

In summary, the *Junk Fax Order*, consistent with the codified language of the TCPA, compels a conclusion that a faxed communication must promote or advertise a good or service

¹² See *Junk Fax Order*, ¶ 53 & n.187; see also Enclarity Comments, at 6.

¹³ *Junk Fax Order*, ¶ 54.

¹⁴ *Id.* (emphasis added).

¹⁵ Similarly, the Commission states that "a newsletter format used to advertise products or services will not protect a sender from liability for delivery of an unsolicited advertisement under the TCPA and the Commission's rules." *Junk Fax Order*, ¶ 53. The Commission further states that it will "review such newsletters on a case-by-case basis... ." *Id.*

on its face to be subject to the TCPA prohibition against unsolicited fax advertisements. Furthermore, purely informational faxes containing no such promotional language are not subject to the TCPA. However, KAT, LLC espouses a divergent position that non-faxed communications prior to or after any faxed communication can somehow convert a non-promotional fax into an advertisement, which, if unsolicited, would violate the TCPA. The Commission should use this opportunity to clarify that the scope of the TCPA prohibition against unsolicited fax advertisements is limited to those faxes which contain promotional material.

Commission decisions issued after the *Junk Fax Order* do not specifically address whether a determination that a fax is an advertisement subject to the TCPA is to be based solely on information on the face of the faxed communication or whether additional information, such as subsequent non-faxed communications, should be considered. However, a review of those decisions indicates that there must be some advertisement material on the face of the fax for the Commission to even consider whether the faxed communication violates the TCPA. In the Petition, Best Doctors discusses notices of apparent liability and a forfeiture order issued against Presidential Who's Who, Inc. related to consumer complaints alleging that the company faxed unsolicited advertisements for entry in and sale of the publication "Presidential Who's Who."¹⁶ Best Doctors explains that the faxes contained overt advertisements to purchase a publication so the Commission did not need to rely on subsequent interactions with the fax recipients for a finding that the faxes were unsolicited advertisements.¹⁷

¹⁶ See Best Doctors Petition, at 9-11 (citing *Presidential Who's Who, Inc.*, Notice of Apparent Liability, 25 FCC Rcd 13759 (2010); *Presidential Who's Who, Inc.*, Notice of Apparent Liability, 26 FCC Rcd 8989 (2011); *Presidential Who's Who, Inc.*, Forfeiture Order, 29 FCC Rcd 3451 (2014)).

¹⁷ See Best Doctors Petition, at 10-11 (referencing statements in the notices of apparent liability and the forfeiture order that the faxes offered the opportunity to purchase the publication).

KAT, LLC asserts that “[s]ome or all of the faxes did not include any advertisement whatsoever for the commemorative products that the company intended to later sell to fax recipients that accepted the company’s offer for a free directory listing” and that the Commission relied on faxes that did not include any advertisement for commemorative products for its finding that the faxes were unsolicited advertisements.¹⁸ KAT, LLC supports its claim that the Commission relied on faxes that did not include advertisements by pointing to the Commission’s response to a Freedom of Information Act (“FOIA”) request that included two faxes that were included in the Commission’s files, but that did not include any advertisements regarding commemorative products.¹⁹ KAT, LLC, however, overlooks the fact that the Commission provides only “representative” faxes in the response to the FOIA request.²⁰ As explained above and in the Petition, the Commission relied on faxes that contained explicit solicitations to purchase products as the basis for its finding that the faxed communications were unsolicited advertisements.²¹ In contrast, the fax sent by Best Doctors contained no advertisement or solicitation to purchase anything.

¹⁸ KAT, LLC Comments, at 9-11.

¹⁹ *See id.* at 9-10 & n.17 (“Based on the FOIA response, it does not appear that the Commission reviewed any Presidential Who’s Who faxes offering free directory listings that also included a solicitation to purchase commemorative products before concluding that the faxes were precursors to further commercial solicitations, and therefore constituted unsolicited advertisements.”).

²⁰ *See id.* Exhibit 4.

²¹ Notably, the representative faxes in the FOIA response are dated February 23, 2010 and July 15, 2010. However, in the notice of apparent liability issued in 2010, the Commission references two complaints from 2009 to support its statement that “the faxes also offered the opportunity to purchase the publication.” *Presidential Who’s Who, Inc.*, Notice of Apparent Liability, 25 FCC Rcd 13759, ¶ 7 & n.18 (2010).

KAT, LLC also refers to two cases in which the Commission looked at facts beyond the faxed communications to determine the primary purpose for sending the faxes.²² In both of those cases, portions of the relevant faxes contained advertisement material. For example, the fax at issue in *Kohll's Pharmacy* included the offering of a service (flu shots) and the price for that service (\$16-\$20 per vaccination).²³ The fax considered in *iHire* included step-by-step instructions on how to review resumes on the sender's website and register on the website.²⁴ The Commission only examined the primary purpose of the fax by looking at facts beyond the face of the fax after it concluded that the fax itself contained advertisement material.²⁵ Unlike the faxes in *iHire* and *Kohll's Pharmacy*, Best Doctors' faxes did not contain any advertisement material, and therefore, there is no basis under applicable Commission precedent for the Commission to look beyond the face of the fax to determine whether the fax is an unsolicited advertisement.

Finally, KAT, LLC's claim that the existence of Best Doctors' Petition "effectively concedes" that application of a "fax-as-pretext" rule would lead to a conclusion that the faxes at issue are unsolicited advertisements is unfounded.²⁶ Although Best Doctors asserts that neither the TCPA nor Commission precedent require the Commission to examine facts beyond the content of the faxes themselves, such an examination would not result in a finding that the faxes are unsolicited advertisements. Contrary to KAT, LLC's unsupported allegations about Best

²² See KAT, LLC Comments at 11-12.

²³ See *Kohll's Pharmacy & Homecare, Inc.*, 31 FCC Rcd 13289, ¶ 6 (2016).

²⁴ See *iHire, LLC*, 30 FCC Rcd 8628, ¶ 8 (2015).

²⁵ See *Kohll's Pharmacy & Homecare, Inc.*, ¶ 8 (finding that the primary purpose of the faxes is to sell flu vaccines and thus "the advertisement is not merely a *de minimis* or incidental portion of these faxes."); *iHire, LLC*, ¶ 9 (finding that the primary purpose of the faxes is to sell iHire's services and thus, "the advertisement is this not merely a *de minimis* or incidental portion of these faxes.").

²⁶ KAT, LLC Comments, at 1.

Doctors' faxes being "pretexts" to advertisements, the inclusion of a website address in a fax otherwise devoid of any promotional or solicitation language whatsoever does not render the fax an advertisement subject to the TCPA.²⁷ In fact, the webpage listed on the faxes contains no language announcing the commercial availability of any product or service, and therefore, cannot reasonably be deemed to be an advertisement for any commercial property, goods, or services.

Furthermore, the 18-page information packet sent only to those fax recipient doctors who respond to the fax and that includes only one page that offers the option of purchasing a plaque to physicians who are selected as a Best Doctor physician does not make the initial fax an advertisement, as alleged by KAT, LLC. Purchase of the plaque is not required for doctors included in the Best Doctors in America[®] List to access any associated benefits, such as use of the logo, or other available resources. At most, information about how to purchase an optional plaque is incidental to the information packet as a whole.²⁸ KAT, LLC's assertion that the faxes sent by Best Doctors are advertisements because they are part of an overall marketing plan also fails. KAT, LLC alleges that the faxes are advertisements because if more doctors are part of the Best Doctors' directory of providers, then Best Doctors' brand will become more renowned, resulting in Best Doctors' health plans and branded plaques being more desirable to consumers.²⁹ However, the possibility that Best Doctors could eventually receive a commercial benefit from a

²⁷ See, e.g., *N.B. Indus., Inc. v. Wells Fargo & Co.* 465 Fed. Appx. 640, 643 (9th Cir. 2012) (website, even if advertising, was too incidental to turn facsimile into TCPA advertisement).

²⁸ KAT, LLC's statements at page 6 of its Comments that press releases or registration forms for Best Doctors events mention the availability of plaques do not support its position that a prior faxed communication that does not mention the commercial availability of any good or service somehow is retroactively converted into an advertisement long after the fax has been sent and perhaps received and read by the recipient.

²⁹ See KAT, LLC Comments, at 7.

doctor accepting an invitation to be included in the Best Doctors' directory, does not convert an informational fax into an advertisement subject to the TCPA.³⁰

II. Federal Courts Disagree About How to Determine Whether a Faxed Communication Is an Advertisement.

KAT, LLC wrongly claims that federal courts consistently approach the fax-as-pretext inquiry “by evaluating facts beyond the faxes themselves.”³¹ KAT, LLC overlooks the extensive disagreement among federal courts as to how to evaluate whether a faxed document is a pretext to advertise commercial products and services. Instead, KAT, LLC primarily relies on a single decision in the Sixth Circuit which held that it could not resolve a claim that a fax was pretextual by looking only at the fax itself.³² While Best Doctors does not dispute KAT, LLC’s description of the *Fulton* case, that case does not represent all federal courts’ decisions. In addition to cases cited or referenced in the Petition that support a position that a fax itself must advertise something to qualify as an advertisement under the TCPA, there is an Eleventh Circuit decision holding that faxes which only request information from fax recipients are not advertisements.³³ The Eleventh Circuit explained that “[t]o fall within the [TCPA], the fax must draw attention to the ‘commercial availability or quality’ of [the sender’s] products or promote their sale.”³⁴ Thus,

³⁰ See *Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218 (6th Cir. 2015) (an “ancillary, remote, and hypothetical economic benefit later on does not convert a noncommercial, informational communication into a commercial solicitation.”).

³¹ KAT, LLC Comments, at 12.

³² *Id.* at 12 & n.28 (citing *Fulton v. Enclarity, Inc. et al.*, 907 F.3d 948 (6th Cir. 2018)).

³³ See *Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362 (11th Cir. 2017); see also Enclarity Comments, at 8.

³⁴ *Florence Endocrine Clinic, PLLC*, 858 F.3d at 1366-67 (emphasis added).

as described by Enclarity, there is sufficient conflict among the federal courts to warrant referral to the Commission.³⁵

Best Doctors also agrees with Enclarity that the proliferation of TCPA litigation underscores the need for the Commission to clarify that faxes which only request information and which do not promote the commercial availability of any good or service (such as the faxes sent by Best Doctors) are not advertisements subject to the TCPA. Indeed, KAT, LLC is an example of a serial putative class representative in cases brought under the TCPA.³⁶ As explained by Enclarity, decisions in several federal circuits effectively presume that all faxes sent by a business are advertisements irrespective of their content, and therefore, preclude the dismissal of any complaint involving a faxed communication at the pleading stage. Such a presumption is not supported by the TCPA, and as stated by Enclarity, “only embolden[s] unnecessary and wasteful litigation.”³⁷

³⁵ See Enclarity Comments, at 6-10.

³⁶ See *Kenneth A. Thomas MD, LLC v. The iRemedy Healthcare Companies, Inc.*, Civil Action No. 2:17-CV-14120, (S.D. Fla. 2017); *Kenneth A. Thomas MD, LLC v. Bariatrix Nutrition Corp.*, Civil Action No. 3:17-cv-00136 (D. Conn. 2017); *Kenneth A. Thomas MD, LLC v. Hospital Media Network, LLC*, Civil Action No. 3:17-cv-00137 (D. Conn. 2017); *Kenneth A. Thomas MD, LLC v. Practice Builders, LLC*, Civil Action No. 3:17-cv-00138 (D. Conn. 2017); *Kenneth A. Thomas MD, LLC v. Cover My Meds, LLC, LLC*, Civil Action No. 3:18-cv-02038 (D. Conn. 2018). Each of these cases has been dismissed pursuant to a stipulation or notice of voluntary dismissal filed by KAT, LLC.

³⁷ Enclarity Comments, at 13.

CONCLUSION

Accordingly, for the reasons stated in its Petition and these Reply Comments, Best Doctors respectfully requests that the Commission grant its request for a declaratory ruling clarifying that a faxed request to verify the contact information and operational status of a medical practice for inclusion in a database of practicing physicians when the request does not state the commercial availability or quality of property, goods, or services is not an “advertisement” under the TCPA.

Respectfully submitted,

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