

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
Petition for Expedited Declaratory Ruling of the Insights Association)	

PETITION FOR DECLARATORY RULING

Stuart L. Pardau
LAW OFFICES OF STUART L. PARDAU & ASSOCIATES
11500 W. Olympic Blvd., Suite 340
Los Angeles, CA 90064
stuart@pardaulaw.com

Howard Fienberg
Director of Government Affairs
THE INSIGHTS ASSOCIATION
1156 15th Street NW, Suite 302
Washington, D.C. 20005

Counsel to the Insights Association and AAPOR

Date: October 30, 2017

Timothy P. Johnson
President
THE AMERICAN ASSOCIATION FOR
PUBLIC OPINION RESEARCH
(AAPOR)
One Parkview Plaza, Suite 800
Oakbrook Terrace, IL 60181

EXECUTIVE SUMMARY

The Insights Association, Inc. (“Insights Association”) and the American Association for Public Opinion Research (“AAPOR”) (collectively, “Petitioners”) are leading trade associations for the survey, opinion and market research industry. In that role, Petitioners are leaders in establishing industry best practices and enforcing professional standards, including the industries’ governing ethics codes. Petitioners believe their work is critical, not only to the market research and data analytics industry, but to the efficient functioning of the economy and our democracy in general. Researchers serve as an essential link between businesses and consumers by providing important data about consumer preferences, through surveys, analytics, and other qualitative and quantitative research.

To that end, Petitioners’ respective ethics codes forbid “sugging,” which is the term for sales under the guise of research. Respondents cannot — and will not — trust researchers if they believe researchers are engaged in direct sales or marketing: they simply will not share any more information, and the business model for market research will collapse. In addition to bans on sugging in the ethics codes, the market research industry was active in lobbying for the Federal Trade Commission’s Telemarketing Sales Rule, which also bans sugging.

Likewise, consistent with an accurate understanding of how the survey, opinion, and market research business model works — that is, an understanding that market research firms market and provide services to clients, *not* to respondents — the Commission has, for almost 30 years, consistently reiterated the distinction between marketing and research under the Telephone Consumer Protection Act (the “TCPA”). As multiple courts have noted, this distinction is consistent with the express intent of the TCPA’s drafters, who clearly stated they did “not intend

the term ‘telephone solicitation’ to include . . . consumer or market surveys, or other survey research conducted by telephone.”

Because the TCPA has higher consent requirements for “telemarketing” calls — requiring prior express written consent if an autodialed or prerecorded call “includes or introduces an advertisement” or “constitutes telemarketing,” and requiring prior consent for “unsolicited advertisements” to fax machines — this distinction has been critical to allowing survey, opinion, and market research firms and practitioners to do their work without the threat of litigation.

In spite of this entrenched distinction between marketing and research, the plaintiffs’ bar, and some courts, have increasingly conflated the two. Occasionally, this conflation has been rooted in the notion that all businesses ultimately seek a profit, so any communication from a business to a consumer is presumptively a form of direct sales or marketing. In other words, without citing the Commission’s guidance (or, apparently, even considering it), courts have adopted conclusory rulings premised on the notion that businesses do not communicate with consumers except for the purpose of turning a profit.

In applying this reasoning to survey, opinion, and market research firms, courts fail to note how incredibly inefficient market research is as a vehicle for sales and advertising. Research samples sizes are considerably smaller than contact lists for a typical telemarketing campaign, and market research calls last considerably longer. The “game” in sales calls is dialing massive amounts of numbers, discerning quickly whether each call recipient is interested, and moving onto the next caller. In contrast, survey, opinion, and market research firms aim for longer, more informative interactions with a focused group of respondents in order to deliver quality insights to their clients.

While it is true that for-profit businesses exist to make money, it is not always the case that businesses communicate to sell, market, or advertise. For example, businesses routinely communicate with consumers for purposes related to customer service, technical support, informational alerts, and, of course, market research. Indeed, market research communications in particular often actively *mask* the identity of the identity of the sponsoring entity, so that respondents do not even know who is “behind” a study or survey.

Confusion on this question of how the profit motive should inform a TCPA analysis is pronounced. Most notably, decisions from the Sixth and Second Circuits have involved starkly different explanations: In *Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.*, the Sixth Circuit noted, correctly, that “[t]he fact that the sender might gain an ancillary, remote, and hypothetical economic benefit later on does not convert a noncommercial, informational communication into a commercial solicitation,” whereas, on the other hand, in *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, the Second Circuit premised its conclusion on the simplistic notion that “[b]usinesses are always eager to promote their wares.”

Courts have also adopted rulings that stretch the Commission’s previous guidance on two additional topics which are distinct from but related to the line between marketing and research: “dual-purpose” communications and vicarious liability. In *Comprehensive Health Care Systems of the Palm Beaches, Inc. v. M3 USA Corporation*, for example, the district court found that the defendant’s fax was an advertisement, even though there were no goods or services advertised on the fax, and the fax stated that the recipient would “not be solicited because of [his or her] participation in this study.” Citing statements in the defendant’s website terms of use and privacy policies — which disclosed that respondents’ information could be shared with third parties who

might, in the future, advertise to them — the court found that the faxes were mere “pretexts” to advertisements. This is, to put it lightly, a stretch of the Commission’s guidance on “dual-purpose” communications. Many businesses, including survey, opinion, and market research firms, share information with third parties who may be advertisers. The fact that they do so, or the fact that the survey includes some marginal element which might, theoretically, be considered advertising, does not mean the “purpose” of a research communication is to advertise.

Likewise, additional guidance is necessary from the Commission regarding vicarious liability outside of the telemarketing context. In its *Dish Network* decision in 2013, the Commission held that “while a seller does not generally ‘initiate’ calls made through a third-party telemarketer within the meaning of the TCPA, it nonetheless may be held vicariously liable . . . for violations . . . committed by third party telemarketers.” Despite the Commission’s order in *Dish Network* being clearly limited to telemarketing calls, various courts have held that, under *Dish Network*, vicarious liability also applies to non-sellers and non-telemarketers, including survey, opinion, and market research firms.

More general guidance from the Commission on the nature of the survey, opinion, and market research model would also be helpful. Market research in particular, as the FCC has repeatedly said, is not “telemarketing” under the TCPA because research communications do not, in the words of the TCPA text, “encourage[] the purchase or rental of, or investment in, property, goods, or services.” Likewise, survey, opinion, and market research studies do not constitute property, goods, or services *vis-à-vis* the persons taking the surveys. These studies (and the results) are services provided to clients, not consumers.

Clarity on these points is urgently needed to reduce significant and unjustified waste of resources in the marketplace. As the Commission is aware, several important questions raised by

its July 10, 2015 Order are presently before the U.S. Court of Appeals for the D.C. Circuit. These questions are distinct from, but closely related to, those addressed in this petition. Regardless of the outcome of that litigation, Petitioners feel that greater clarity and continued practical guidance from the Commission is critical to restoring a measure of sanity to TCPA litigation. To be clear, Petitioners are *not* asking for a carve-out for market research. Petitioners merely request additional clarity consistent with the Commission's previous rulings.

To that end, Petitioners respectfully request a declaratory ruling from the Commission that: (1) communications are not presumptively "advertisements" or "telemarketing" under the TCPA simply because they are sent by a for-profit company, or might be for an ultimate purpose of improving sales or customer relations; (2) the presence in a communication, or some other ancillary document or webpage, of a marginal element that might arguably be considered advertising does not convert the communication into a "dual-purpose" communication; (3) survey, opinion, and market research firms are not subject to the Commission's vicarious liability regime as articulated in *Dish Network*; and (4) survey, opinion, and market research studies do not constitute goods or services *vis-à-vis* the survey respondent, and are not transformed into goods or services merely because they include some nominal inducement to participate.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	2
II. “ADVERTISEMENTS” AND “TELEMARKETING” UNDER THE TCPA, AND APPLICABLE FCC RULINGS	5
III. A DECLARATORY RULING IS NECESSARY TO CORRECT THE INCREASINGLY POPULAR “ARGUMENT FROM THE PROFIT MOTIVE”	8
A. <i>Samuel Katz v. American Honda Motor Co., Inc.</i>	9
B. <i>Physicians Healthsource, Inc. v. Stryker Sales Corp.</i>	11
C. <i>Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.</i>	12
D. A Better Way: <i>Medco, Dukes, and Enclarity</i>	15
IV. A DECLARATORY RULING IS NECESSARY TO CLARIFY PREVIOUS GUIDANCE ON “DUAL-PURPOSE” COMMUNICATIONS AND VICARIOUS LIABILITY	19
A. <i>Comprehensive Health Care Systems of the Palm Beaches, Inc. v. M3 USA Corporation</i>	21
B. <i>Mey v. Venture Data, LLC</i>	23
V. A DECLARATORY RULING IS NECESSARY TO CLARIFY COURTS’ UNDERSTANDING OF MARKET RESEARCH UNDER THE TCPA	25
VI. CONCLUSION	28

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
Petition for Expedited Declaratory Ruling of the Insights Association)	

PETITION FOR DECLARATORY RULING

Pursuant to 47 C.F.R. § 1.2, the Insights Association, Inc. (“Insights Association”) and the American Association for Public Opinion Research (“AAPOR”) (collectively, “Petitioners”) respectfully petition the Federal Communications Commission (the “Commission” or “FCC”) to issue a declaratory ruling stating that, under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”), (1) communications are not presumptively “advertisements” or “telemarketing” under the TCPA simply because they are sent by a for-profit company, or might be for an ultimate purpose of improving sales or customer relations; (2) the presence in a communication, or some other ancillary document or webpage, of a marginal element that might arguably be considered advertising does not convert the communication into a “dual-purpose” communication; (3) survey, opinion, and market research firms are not subject to the Commission’s vicarious liability regime as articulated in *Dish Network*; and (4) survey, opinion, and market research studies do not constitute goods or services *vis-à-vis* the respondent (the participant in a research study), and are not transformed into goods or services merely because they include some nominal inducement to participate. To be clear, Petitioners are not asking for a

carve-out from the TCPA for researchers. The requested ruling would merely help bring courts in line with the text and legislative history of the TCPA, as well as the Commission's prior rulings. Because of confusion in the courts regarding the difference between marketing and research, and in light of related questions regarding the TCPA's July 10, 2015, ruling¹ now before the U.S. Court of Appeals for the D.C. Circuit,² Commission guidance is urgently needed to help curb abusive TCPA litigation.

I. INTRODUCTION

The Insights Association was formed through the merger of two trade organizations with long, respected histories of servicing the market research and data analytics industry: the Marketing Research Association ("MRA"), founded in 1957, and the Council of American Survey Research Organizations ("CASRO"), founded 1975.³ Representing more than 4,000 members across the United States, the Insights Association is the leading nonprofit trade association for the market research and data analytics industry, and the leader in establishing industry best practices and enforcing professional standards. The Insights Association's membership includes both research and analytics companies and organizations, as well as the researchers and research departments inside of non-research companies and organizations.

¹ *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (2015) ("2015 Order").

² See Joint Brief for Intervenors MRS BPO LLC, et al., *ACA International, et al. v. Federal Communications Commission and United States*, No. 15-211 (D.C. Cir., Dec. 2, 2015) ("D.C. Circuit Brief") (challenging, among other things, the Commission's "autodialer" and "called party" definitions and guidance on reassigned numbers, revocation of consent, and healthcare related communications). The Insights Association's predecessor organizations, CASRO and the MRA, are signatories to the brief.

³ More information can be found at <http://www.insightsassociation.org>.

Founded in 1947, AAPOR is the leading professional organization of public opinion and survey research professionals in the U.S. The AAPOR community includes producers and users of survey data from a variety of disciplines. Members span a range of interests including election polling, market research, statistics, research methodology, health related data collection and education. AAPOR members embrace the principle that public opinion research is essential to a healthy democracy, providing information crucial to informed policymaking and giving voice to the nation's beliefs, attitudes, and desires. It promotes a better public understanding of this role, as well as the sound and ethical conduct and use of public opinion research.

Together, Petitioners help empower intelligent business and political decisions as a voice, resource, and network for the companies and individuals engaged in this important work. Petitioners' work is critical, not only to the survey, opinion, and market research industry, but to the efficient functioning of the economy and our democracy. Researchers serve as an essential link between businesses and consumers, and between political leaders and constituents, by providing important insights about consumer preferences through surveys, analytics, and other qualitative and quantitative research. On behalf of their clients — including the government, media, political campaigns, and commercial and non-profit entities — researchers design studies and collect and analyze data from small but statistically-balanced samples⁴ of the public. Researchers seek to determine the public's opinion and behavior regarding products, services, issues, candidates, and other topics. Such information is used to develop new products, improve services, and inform policy. In this context, research itself does not intend to affect purchase behavior or cause even so much as the expenditure of a dime.

⁴ A "sample" is a subset of a population from which data is collected to be used in estimating parameters of the total population.

To that end, guarding consumer trust is critical. If, for example, respondents cannot tell the difference between researchers and telemarketers, the survey, opinion, and market research business model collapses. Accordingly, “sales under the guise of research” (known as “sugging”), is banned by the research and analytics industry’s primary ethics codes.⁵ MRA’s code, which applies to individual professional members, states specifically:

Conducting commercial or political activities under the guise of opinion and marketing research undermines public trust in the profession and erodes the goodwill that makes research possible. Our industry works hard to guard its reputation. These non-research activities include, but are not limited to . . . [s]ales or promotional approaches to the respondent.⁶

Likewise, CASRO’s code, which applies to company and organizational members, provides that “[d]eceptive practices and misrepresentation, such as using research as a guise for sales or solicitation purposes, are expressly prohibited,”⁷ and AAPOR’s Code of Ethics asserts that members “will not misrepresent our research or conduct other activities (such as sales, fundraising, or political campaigning) under the guise of conducting research.”⁸ In keeping with these proscriptions, Petitioners not only expel members who are caught sugging, but also encourage members to report violating non-members to the public and relevant authorities.⁹

⁵ Until the Insights Association publishes a new code of ethics, expected in late 2017, the MRA code applies to individual members and the CASRO code applies to company members.

⁶ *MRA Code of Marketing Research Standards*, THE MARKETING RESEARCH ASSOCIATION, 3, ¶ 10 (October 2013), available at http://www.insightsassociation.org/sites/default/files/misc_files/mra_code.pdf.

⁷ *Code of Standards and Ethics for Market, Opinion, and Social Research*, COUNCIL OF AMERICAN SURVEY RESEARCH ORGANIZATIONS, 8, ¶ 2(b) (September 2013), available at http://www.insightsassociation.org/sites/default/files/misc_files/casro_code_of_standards.pdf.

⁸ *AAPOR Code of Ethics*, AMERICAN ASSOCIATION FOR PUBLIC OPINION RESEARCH, § I.A.2 (November 2015), available at <http://www.aapor.org/Standards-Ethics/AAPOR-Code-of-Ethics.aspx>.

⁹ See LaToya Lang, *Sugging by Caribbean Cruise Line*, INSIGHTS ASSOCIATION (Mar. 20, 2013), available at <http://www.insightsassociation.org/article/sugging-caribbean-cruise-line>.

This distinction between market research and marketing is not only enshrined in industry codes: The Federal Trade Commission's ("FTC") Telemarketing Sales Rule¹⁰ also forbids sugging, a ban for which the survey, opinion, and market research industry actively lobbied.¹¹

These sugging prohibitions are rooted in the widely accepted difference between "sales" (or "marketing") and legitimate research, and the need to treat these two activities differently. This distinction is not a creation of any federal agency or trade association. Indeed in 1991, the TCPA's drafters drew this line clearly in the House Report accompanying the bill: "the Committee does not intend the term 'telephone solicitation' to include . . . consumer or market surveys, or other survey research conducted by telephone."¹²

II. "ADVERTISEMENTS" AND "TELEMARKETING" UNDER THE TCPA, AND APPLICABLE FCC RULINGS

Among other activities, the TCPA and attendant FCC regulations require prior express consent from call recipients before making telemarketing calls using an artificial or prerecorded voice to residential telephones,¹³ or before making any non-emergency calls using an automatic telephone dialing system (an "autodialer") or an artificial or prerecorded voice to a wireless telephone number.¹⁴ If a call "introduces an advertisement" or "constitutes telemarketing," such

¹⁰ The Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq.*

¹¹ See Diane K. Bowers, *Sugging Banned at Last*, *MARKETING RESEARCH*, Vol. 7 No. 4, 40 (Fall 1995) ("With support from the Direct Marketing Association and the National Association of Attorneys General, the Council for Marketing and Opinion Research (CMOR) succeeded in having an amendment approved to prevent 'sugging' (selling under the guise of research).").

¹² H.R. Rep. No. 102-317 at 13 ("*House Report*").

¹³ 47 U.S.C. § 227(b); 47 C.F.R. § 64.1200(a)(3).

¹⁴ 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1).

prior express consent must be in writing.¹⁵ The TCPA also imposes liability for sending an “unsolicited advertisement” to a telephone facsimile machine.¹⁶

The TCPA text and corresponding regulations define an “advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services,”¹⁷ and “telemarketing” or “telephone solicitation” as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.”¹⁸

In determining whether a communication constitutes telemarketing or telephone solicitation, or includes an advertisement, the Commission has explained that “the application of the prerecorded message rule should turn, not on the caller’s characterization of the call, but on the purpose of the message.”¹⁹ The Commission has also said that calls may be “dual-purpose” — i.e., calls which are made for both marketing and non-marketing purposes may constitute telemarketing under the TCPA.²⁰

The distinction between “advertisements” or “telemarketing” on one hand, and market research on the other, has been recognized explicitly and repeatedly by the Commission:

¹⁵ *Id.*

¹⁶ 47 U.S.C. § 227(b)(1)(C); *see also* *Arkin v. Innocutis Holdings, LLC*, No. 8:16-cv-0321, 2016 WL 3042483, at *2 (M.D. Fla. May 26, 2016) (“[I]f the [f]ax is not an advertisement, Plaintiff has no claim under the TCPA.”).

¹⁷ 47 U.S.C. § 227(a)(5).

¹⁸ 47 C.F.R. § 64.1200(f)(12); 47 C.F.R. § 64.1200(f)(14).

¹⁹ *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14098, ¶ 141 (2003) (“2003 Order”).

²⁰ *Id.* at 14098, ¶ 142; *see also* *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd. 1830, 1843, ¶ 30 (2012) (“2012 Order”).

- in 1992, for example, the Commission ruled that “the exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, [or] market surveys;”²¹
- in 2002, the Commission reiterated that “calls conducting research, market surveys, political polling, or similar activities which do not involve solicitation as defined by the rules are exempt from the prohibition on prerecorded messages;”²²
- in 2003, the Commission stated that “calls that do not fall within the definition of ‘telephone solicitation’ . . . may include calls regarding surveys [and] market research;”²³
- in 2012, the Commission explained that “research or survey calls” made with an autodialer, “to the extent that they do not contain telemarketing messages, would not require any consent when made to residential wirelines consumers;”²⁴
- and most recently, in 2015, the Commission concluded that “survey, opinion and marketing research” is distinct from telemarketing as it relates to robocalls.²⁵

Additionally, the Commission has recognized that “surveys [and] market research” are not subject to the national “Do Not Call” list;²⁶ that responding to a survey invitation does not

²¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752, ¶ 41 (1992) (“1992 Order”).

²² *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd. 17459, 17479, ¶ 30 (2002) (“2002 Notice”).

²³ *2003 Order*, 18 FCC Rcd. at 14089, ¶ 41, n. 414.

²⁴ *2012 Order*, 27 FCC Rcd. at 1842, ¶ 28.

²⁵ *2015 Order*, 30 FCC Rcd. at 8038, ¶ 160, n. 543 (“We recognize the concern of MRA that consumers who use blocking technology will not only block unlawful robocalls but ‘will potentially block all manner of non-telemarketing telephone calls, including calls for survey, opinion and marketing research purposes.’”).

²⁶ *2003 Order*, 18 FCC Rcd. at 14039, ¶ 37.

form the basis for an established business relationship;²⁷ that neither company logos nor incidental advertising are sufficient to convert a fax into an advertisement;²⁸ that purely informational faxes sent by for-profit companies are not actionable under the TCPA;²⁹ and that surveys, whether by fax or by telephone, are not advertisements unless they are mere “pretext.”³⁰

In sum, the Commission has, for more than two decades, and from many different angles, reinforced the notion that market research and marketing are distinct activities, and market research does not constitute an “advertisement” or “telemarketing” under the TCPA.³¹

III. A DECLARATORY RULING IS NECESSARY TO CORRECT THE INCREASINGLY POPULAR “ARGUMENT FROM THE PROFIT MOTIVE”

Despite this distinction, reiterated for 25 years by the Commission, courts have recently begun conflating telemarketing and research or other non-marketing communications, apparently based on the notion (offered without citation to the TCPA, or the Commission’s regulations or prior rulings) that any communication which bears some distant, attenuated relationship to the profit motive is presumptively a form of “telemarketing” or an “advertisement.”

²⁷ *Id.* at 14039, ¶ 47, n. 141.

²⁸ *In the Matter of Rules & 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 Rcd. 3787, ¶ 51 (2006) (“*Junk Fax Order*”).

²⁹ *Id.* at 3814, ¶ 53.

³⁰ *Id.* at 3815, ¶ 54.

³¹ Indeed, there is a legal definition of bona fide research: “the collection and analysis of data regarding opinions, needs, awareness, knowledge, views, experiences and behaviors of a population, through the development and administration of surveys, interviews, focus groups, polls, observation, or other research methodologies, in which no sales, promotional or marketing efforts are involved and through which there is no attempt to influence a participant’s attitudes or behavior.” This definition has been used at the federal level in the Research Fairness Act (H.R. 5915, proposed in 2012), *available at* <https://www.congress.gov/bill/112th-congress/house-bill/5915>, and in amendments passed to a New Hampshire statute in 2014 on push polling. *See* Title LXIII, Section 664:2 (XVII and XVIII), *available at* <http://www.gencourt.state.nh.us/rsa/html/LXIII/664/664-2.htm>.

A. *Samuel Katz v. American Honda Motor Co., Inc.*

For example, in *Samuel Katz v. American Honda Motor Co., Inc.*, a class action against Honda's North American subsidiary and J.D. Power and Associates³² (an Insights Association member), a California federal judge ruled in May 2017 that, for pleading purposes, customer service calls placed with an autodialer to the plaintiff's cell phone were subject to the same heightened consent requirements as a telemarketing call.³³ The plaintiff did not allege that the calls contained an advertisement, or even that the calls were pretexts to advertisements, but instead pinned its lawsuit on the notion that market research studies are in themselves a form of marketing, since the market research firm and its client ultimately hope to improve the client's business.

Specifically, the plaintiff argued: "Honda then works with its agent, J.D. Power, to make automated telephone calls to Honda's customers and Honda dealers' customers to conduct surveys and solicit feedback *with the ultimate purpose of building clientele and repeat customers.*"³⁴

In rejecting the defendants' motion for summary judgment, the court offered only the following cursory explanation: "The evidence demonstrates the calls to Plaintiff were advertising because they were made for customer service purposes *and to increase future sales and revenue.*"³⁵ In support for this conclusion, the court cited, without explanation, the Commission's

³² Since the case was filed, the company's name has been shortened to "J.D. Power."

³³ Order Re: Defendants' Joint Motion for Summary Judgment, No. 2:15-cv-04410 (C.D. Cal. May 12, 2017) ("*Katz MSJ Denial*").

³⁴ First Amended Class Action Complaint, *Samuel Katz v. American Honda Motor Co., Inc.*, No. 2:15-cv-04410 (C.D. Cal. Aug 19, 2016) ("*Katz Complaint*") (emphasis added).

³⁵ *Katz MSJ Denial* at *4 (emphasis added).

guidance on “dual-purpose” calls.³⁶ In other words, the court apparently concluded that, because the calls were, on one hand, customer service calls, but on the other hand, made by a for-profit company with a larger intent to improve customer relations, the calls were dual-purpose calls subject to heightened consent requirements.

This conclusion is in conflict with the Commission’s guidance. In 2002, the Commission specifically requested comment about customer service calls,³⁷ and in 2003 stated the following:

The Commission explained in the *2002 Notice* that [customer service calls] may inquire about a customer’s satisfaction with a product already purchased, but are motivated in part by the desire to ultimately sell additional goods or services. If the call is intended to offer property, goods, or services for sale either during the call, or in the future (*such as in response to a message that provides a toll-free number*), that call is an advertisement. *Similarly, a message that seeks people to help sell or market a business’ products* constitutes an advertisement if the individuals called are encouraged to purchase, rent, or invest in property, goods, or services, during or after the call.³⁸

In other words, the Commission has explained that certain kinds of customer service calls may constitute telemarketing *if they also incorporate a direct link to marketing or sales efforts*, and has highlighted as illustrative examples: (1) calls that include a phone number where a company plans to offer products and services, and (2) recruiting calls from direct sales companies.

³⁶ See *id.* Specifically, the court cited the Commission’s rules as explicated in *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 917-18 (9th Cir. 2012). However, the Ninth Circuit’s discussion of the “dual-purpose” rule in *Chesbro* merely reiterated the Commission’s position as discussed above, and did not offer any support for the court’s specific conclusion in *Katz* that customer service calls are a type of sales call. See *id.* (citing *2003 Order*, 18 FCC Rcd. at 14097-98 ¶¶ 140-142).

³⁷ See *2002 Notice*, 17 FCC Rcd. 17479, ¶ 31. “Such calls arguably have a dual purpose, as in the case when a business calls to inquire about a customer’s satisfaction with a product or service already purchased, but is nevertheless motivated in part by the desire to ultimately sell additional goods or services. The Commission therefore seeks comment on whether our rules would better serve consumers and businesses if they more explicitly addressed those calls that include information about a product or service but do not immediately solicit a purchase.” *Id.*

³⁸ *2003 Order*, 18 FCC Rcd. at 14099, ¶ 142 (emphasis added); see also *2002 Notice*, 17 FCC Rcd. at 17479, ¶ 31 (“We note that, while these calls do not purport to sell something, they often contain messages advertising the quality of certain goods or services and are intended to generate future business. *Such messages usually include phone numbers that consumers can call to obtain further information, at which time the seller offers additional goods or services for purchase.*” (emphasis added)).

These are hardly standard customer service calls of the kind that were at issue in *Katz*. By concluding that the calls were made “to increase future sales and revenue” simply because they were customer service calls, the *Katz* court either misinterpreted or ignored altogether the Commission’s guidance on this topic, assuming instead that a communication from a for profit business *must be* a form of telemarketing. The thought underlying the court’s conclusion — that any call from a for-profit business is necessarily for a “sales and revenue” purpose — applies to any number of communications long-exempted from the “advertisement” and “telemarketing” definitions in the TCPA. Alerts from banks about fraudulent account activity, or flight updates from airline companies, for example, are communications not for a direct marketing purpose, but which, nevertheless, are inarguably part of a larger effort to run a successful, profitable business.³⁹

B. *Physicians Healthsource, Inc. v. Stryker Sales Corp.*

Likewise, in *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, a district court in Michigan held in 2015 that a defendant’s seminar invitation could be an advertisement under the TCPA.⁴⁰ In rejecting the parties’ cross-motions for summary judgment, the court leaned, in part, on a similar theory to that put forward in *Katz*: “It stands to reason that the information referenced on the fax could have led primary care physicians to refer more patients or discuss orthopedic products more frequently, *and this in turn could stimulate demand for Defendants’ products.*”⁴¹

³⁹ *2012 Order*, 27 FCC Rcd. at 1839, ¶ 21 (“For instance, bank account balance, credit card fraud alert, package delivery, and school closing information are types of information calls that we do not want to unnecessarily impede.”).

⁴⁰ 65 F.Supp.3d 482 (W.D. Mich. 2015).

⁴¹ *Id.* at 493 (emphasis added).

This nebulous extrapolation from the profit-motive is inconsistent with the text and legislative history of the TCPA and was, tellingly, offered by the court without citation to any FCC guidance or prior cases. In fact, the above-quoted language from the *Stryker Sales* court has almost unlimited applications. In *almost any case* where a for-profit business communicates with someone for informational purposes (by sending a fraud alert, for example, or forwarding a receipt), the communication could lead to increased discussion or consciousness of a business's products, "and this in turn could stimulate demand."

Both the *Katz* and *Stryker Sales* courts fail to note how inefficient market research is as a vehicle for sales and advertising. Market research samples sizes are considerably smaller than contact lists for a typical telemarketing campaign, and market research calls last considerably longer.⁴² The "game" in sales calls is dialing massive amounts of numbers, discerning quickly whether each call recipient is interested, and moving onto the next caller. In contrast, market research firms aim for longer, more informative interactions with a focused group of respondents in order to deliver quality insights to their clients.

C. *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*

Perhaps most importantly, a decision all the way up at the Circuit Court level has seemed to suggest, as the courts in *Katz* and *Stryker Sales* did, that a communication may be treated as telemarketing under the TCPA solely on the grounds that the communicating party is, ultimately,

⁴² A similar distinction, between legitimate political surveys and "push polling," is instructive. Generally, push polling refers to the practice of conducting political polls designed to sway the respondent's opinion by skewing questions in favor of particular candidates or views. In regulating push polling, a number of states have included numerical aspects to their "push polling" definitions, finding that higher numbers of calls with shorter call times suggest that a survey is a push poll, rather than a legitimate political survey. *See, e.g.*, NH Rev Stat § 664:2(XVII)(a) (implementing total call number and call length into push polling definition); Fla. Stat. Ch. 106.147 ("This provision applies only to calls that are part of a series of like telephone calls consisting of 1,000 or more completed calls and averaging 2 minutes or less in duration.").

out for a profit. In *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, the Second Circuit was asked to consider whether a seminar invitation constituted an advertisement under the TCPA, even though the invitation did not advertise any products or services, or suggest products or services would be advertised at the seminar.⁴³ In holding that the invitation was an advertisement, the court reasoned as follows:

The district court interpreted the Rule as “requir[ing] plaintiffs to show that the fax has a commercial pretext—i.e., ‘that the defendant advertised, or planned to advertise, its products or services at the seminar.’” . . . We do not disagree. But, at the pleading stage, where it is alleged that a firm sent an unsolicited fax promoting a free seminar discussing a subject that relates to the firm’s products or services, there is a plausible conclusion that the fax had the commercial purpose of promoting those products or services. *Businesses are always eager to promote their wares and usually do not fund presentations for no business purpose.* The defendant can rebut such an inference by showing that it did not or would not advertise its products or services at the seminar, but only after discovery⁴⁴

Citing Third Circuit’s decision in *Gager v. Dell Financial Services, LLC*,⁴⁵ the court opined that “requiring plaintiffs to plead specific facts alleging that specific products or services would be, or were, promoted at the free seminar would impede the purposes of the TCPA.”⁴⁶ In other words, the *Boehringer* court appears to have endorsed a presumption, at the pleading stage, that because “[b]usinesses are always eager to promote their wares,” communications from for-profit companies are pretexts to advertisements.

⁴³ 847 F.3d 92 (2d Cir. 2017). Petitioners note that the plaintiff in *Boehringer* is the same as in *Stryker*. See note 62, *infra*.

⁴⁴ *Id.* at 95-96 (emphasis added).

⁴⁵ 727 F.3d 265 (2013).

⁴⁶ *Id.* at 96 (citing *Dell*, 727 F.3d at 271 (“Because the TCPA is a remedial statute, it should be construed to benefit consumers . . .”). In *Dell*, the court was faced with the question of whether a call recipient, and whether the TCPA’s silence on the question cut in favor of the plaintiff or the defendant. 727 F.3d at 270 (“Dell’s principal argument is that the TCPA’s silence as to whether a consumer may revoke her prior express consent to be contacted via an autodialing system supports the conclusion that the right does not exist.”)).

In fact, requiring plaintiffs to show that a communication was made “for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services,” rather than hooking a lawsuit to the broad and unhelpful (if undoubtedly true) notion that the aim of all for-profit businesses is to boost sales, is precisely in line with the purposes of the TCPA, a statute designed to balance “[i]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade.”⁴⁷

In any event, this decision of the Second Circuit, along with the district courts’ rulings against Honda, J.D. Power, and Stryker Sales Corp., illustrate the confusion that has cropped up in federal courts in recent years. Further guidance from the Commission is necessary to correct this wrongheaded notion that courts can assume any communications from for-profit businesses are made with the ultimate goal of “promot[ing] their wares,” and bring federal jurisprudence back in line with prior FCC rulings. It is also necessary to align case law with the express intent of the TCPA’s drafters, who made it clear they “[did] not intend the term ‘telephone solicitation’ to include . . . consumer or market surveys.”⁴⁸

In light of the additional questions raised by the Commission’s 2015 Order, including for example questions related to the “automatic telephone dialing system” and “called party” definitions, and rules regarding reassigned numbers,⁴⁹ Petitioners feel strongly that greater clarity

⁴⁷ 2015 Order, 30 FCC Rcd. at 7964, ¶ 2; see also 2012 Order, 27 FCC Rcd. at 1844, ¶ 24 (“[I]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals yet permits legitimate telemarketing practices.”).

⁴⁸ H.R. Rep. No. 102-317 at 13 (“House Report”).

⁴⁹ See, e.g., D.C. Circuit Brief at *20-21 (D.C. Cir., Dec. 2, 2015) (discussing the wide range of technologies potentially included in the Commission’s autodialer definition); *id.* at *34 (“The resulting confusion will invariably lead to businesses unwittingly failing to record revocation of consent, again resulting in TCPA lawsuits for innocent mistakes.”).

and continued practical guidance from the Commission is critical to restoring a measure of sanity to TCPA litigation.

D. A Better Way: *Medco, Dukes, and Enclarity*

In 2015, the Sixth Circuit discussed at length the TCPA’s “advertisement” definition and its relationship to the profit motive in *Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.*⁵⁰ The court’s commonsense explanation, unlike the foregoing from *Sandusky*, is consistent with the Commission’s guidance and offers a helpful framework for the Commission to suggest to other courts. In *Medco*, the defendant sent a fax listing medications available through a particular health plan.⁵¹ In finding that the fax did not constitute an advertisement, the court explained as follows:

We can glean a few things from [the TCPA’s] definition. For one thing, we know the fax must advertise something. Advertising is “[t]he action of drawing the public’s attention to something to promote its sale,” or “the action of calling something (as a commodity for sale, a service offered or desired) to the attention of the public.” So material that advertises something promotes it to the public as for sale. For another thing, we know that what’s advertised — here, the “availability or quality of any property, goods, or services” — must be commercial in nature. Commercial means “of, in, or relating to commerce”; “from the point of view of profit: having profit as the primary aim.” It’s something that relates to “buying and selling.” So to be an ad, the fax must promote goods or services to be bought or sold⁵²

Rejecting the argument (increasingly popular with the plaintiff’s bar) that any communications which bear some relationship to the profit motive are necessarily a form of marketing, the Court explained that “[t]he fact that the sender might gain an ancillary, remote, and hypothetical economic benefit later on does not convert a noncommercial, informational communication into a commercial solicitation.”⁵³

⁵⁰ 788 F.3d 218 (6th Cir. 2015).

⁵¹ *Id.* at 220.

⁵² *Id.* at 221-22 (emphasis added).

⁵³ *Id.* at 225 (emphasis added).

Other courts have, like the Sixth Circuit, seen through this increasingly popular “argument from the profit motive.” In *Dukes v. DirecTV LLC*, the plaintiffs, customers of DirecTV, received debt collection calls without their consent, but argued for TCPA liability because the calls were also made for a more general business purpose related to sales, “contend[ing] that DirectTV solicited them because of DirectTV’s customary business practice — satellite television subscription sales.”⁵⁴ In rejecting the plaintiffs’ argument, the court reasoned as follows:

[T]he plaintiffs did not cite any authority supporting their argument that a customary business practice automatically results in a violation of § 64.1200(d). DirecTV properly points out that the plaintiffs never dispute that § 227(c) and § 64.1200(d) apply only to calls *initiated for telemarketing purposes*. The plaintiffs did not plead that DirecTV tried to solicit business from them *during the call*.⁵⁵

Similarly, in *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc., et al.*, a federal court in Michigan dismissed an argument that a fax “was sent to Plaintiff with the goal of ultimately making profit,” noting that “[t]he Fax does not offer — or even mention — any product, good, or service to Plaintiff, nor does it not offer or solicit any product, good, or service for sale.”⁵⁶ As the court explained, this reasoning is consistent with the Commission’s own definition of “advertisement,” which contemplates “facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars.”⁵⁷

⁵⁴ No. 3:16-CV-1418-G, *5 (N.D. Texas, Nov. 7, 2016).

⁵⁵ *Id.* at *6 (emphasis added).

⁵⁶ No. 16-cv-13777, 2017 WL 783499 (E.D. Mich. Mar. 1, 2017).

⁵⁷ *Id.* at *5 (quoting *Junk Fax Order*, 21 FCC Rcd. at 3814, ¶ 52); *see also Medco*, 788 F.3d at 222 (“Under the Act’s definition, and in everyday speak, these faxes are therefore not advertisements: They lack the commercial components inherent in ads.”); *Smith v. Blue Shield of California Life & Health Ins. Co.*, SACV 16-00108, 2017 WL 167451, at *9 (C.D. Cal. Jan. 13, 2017); *Daniel v. Five Stars Loyalty, Inc.*, No. 15-cv-3546, 2015 WL 7454260, at *4 (N.D. Cal. Nov. 24, 2015) (“To the extent that it could be reasonably inferred based on the context or otherwise that the text’s purpose was also to ‘encourage future purchasers at Flame Broiler,’ that purpose is simply too attenuated to make the text telemarketing.”).

These decisions, which contemplate the larger business picture without losing the focus on the purpose of the call (and what transpired during the communication), are consistent with Congress’s guidance at the TCPA’s inception, which also focuses on the actions of *the caller during the call*: “To come within the definition [of ‘telephone solicitation’], a *caller* must encourage a commercial transaction. . . . A *call* encouraging a purchase, rental or investment would fall within the definition, however, even though the caller purports to be taking a poll or conducting a survey.”⁵⁸

Petitioners respectfully request that the Commission point other courts in the same direction as *Medco, Dukes, and Enclarity*.⁵⁹ To that end, Petitioners suggest a simple, common-sense directive that communications are not presumptively “advertisements” or “telemarketing” under the TCPA simply because they are sent by a for-profit company, or might be for an ultimate purpose of improving sales or customer relations.

⁵⁸ *House Report* at 13 (emphasis added).

⁵⁹ For additional examples of federal court rulings finding survey communications were not advertisements as a matter of law, see, e.g., *PS Printing LLC v. Tubelite Inc.*, 2015 U.S. Dist. LEXIS 93060, *10 (D. Conn. July 17, 2015) (“In other words, the relevant inquiry under the TCPA is whether the content of the message is advertising, so allegations about future economic benefit that result from a fax do not transform it into advertising without more.”); *Physicians Healthsource Inc. v. Janssen Pharms. Inc.*, 2013 U.S. Dist. LEXIS 15952, *14 (D. N.J. Feb 6, 2013) (“Indeed, the potential to gain some benefit from sending information, without the presence of additional commercial statement in the message, is insufficient to transform an informational message to an advertisement. The appropriate inquiry under the TCPA is not whether there is some ancillary commercial benefit to either party, but whether the message is an advertisement which tends to propose a commercial transaction.”); *ARcare v. IMS Health Inc.*, 2016 U.S. Dist. LEXIS 125262, *9-10 (E.D. Ark. Sept. 15 2016) (citing *Janssen Pharms.*) (“ARcare argues that considering the different components of fax together — the prominence of the logo, address, and phone number, the description of Healthcare Data Solutions, and the offer to verify the fax number and practice information — the fax “inform[s] the recipient that Defendant’s pharmacy compliance services are commercially available.” But ARcare does not allege, nor does the fax indicate where or how this category of services is available for purchase by the fax recipient.” (citations omitted)); *Orrington v. Scion Dental Inc.*, 2017 U.S. Dist. LEXIS 104101, *11-12 (N.D. Ill. July 6, 2017) (citing *Sandusky*) (“Plaintiff’s conclusory allegation that Scion ‘derived economic benefit’ from the fax is insufficient”).

The need for guidance from the commission is urgent. As reported by the U.S. Chamber of Commerce’s Institute for Legal Reform, TCPA litigation nearly doubled between 2013 and 2015.⁶⁰ This trend has shown no signs of slowing.⁶¹ Both *Boehringer* and *Stryker Sales* were brought by the same plaintiff, who has filed no fewer than *thirty* TCPA cases in total.⁶² The case against M3, discussed below, was one of at least *fourteen* different TCPA class actions filed by that particular plaintiff.⁶³ This deluge of abusive litigation, often from such serial plaintiffs, has chilled legitimate research — work which is designed to benefit both businesses and consumers. In large part because of the confusion discussed in this petition, the plaintiff’s bar is increasingly willing (and able) to focus on legitimate survey, opinion, and market research of the kind distinguished from marketing for almost 30 years by the Commission, and hold market research and analytics firms hostage to exorbitant demands. Guidance from the FCC would also prevent a bad situation from becoming worse: misguided law in the TCPA context could open up market

⁶⁰ *Analysis: TCPA Litigation Skyrockets Since 2007; Almost Doubles Since 2013*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, Feb. 5, 2016, <http://www.instituteforlegalreform.com/resource/analysis-tcpa-litigation-skyrockets-since-2007-almost-doubles-since-2013>.

⁶¹ *Year in Review: Consumer Litigation Filings End 2016 with Surge in TCPA Cases*, ACA INTERNATIONAL, Jan. 26, 2017, <https://www.acainternational.org/news/year-in-review-consumer-litigation-filings-end-2016-with-surge-in-tcpa-cases>. See also *D.C. Circuit Brief* at *12 (D.C. Cir., Dec. 2, 2015) (“As a result of this expansive interpretation . . . Intervenor may be exposed to potentially crippling liability from class action lawsuits for good faith errors.”).

⁶² See, e.g., *Physicians Healthsource, Inc. v. Addison Health Systems, Inc.*, No. 1:17-CV-00466, (S.D. Ohio, Jul. 11, 2017); *Physicians Healthsource, Inc. v. The Massachusetts Medical Society*, No. 1:17-CV-00225 (S.D. Ohio, Apr. 6, 2017); *Physicians Healthsource, Inc. v. Express Dental Holdings, LLC et al.*, No. 6:16-CV-02021 (M.D. Fla., Nov. 18, 2016); *Physicians Healthsource, Inc. v. Advanced Data Systems International, LLC, et al.*, No. 2:16-CV-03620 (D.N.J., June 21, 2016); *Physicians Healthsource, Inc. v. Nipro Healthcare Systems, LLC et al.*, 0:16-CV-61195 (S.D. Fla., June 6, 2016); *Physicians Healthsource, Inc. v. Vertex Pharmaceuticals Inc.*, No. 1:15-CV-11517 (D. Mass., Apr. 6, 2015); *Physicians Healthsource Inc. v. Express Scripts, Inc. et al.*, No. 4:15-CV-00664 (E.D. Mo., Apr. 21, 2015).

⁶³ The thirteen other cases were all filed in the Southern District of Florida: Nos. 16-cv-80872, 16-cv-80873, 16-cv-80875, 16-cv-80877, 16-cv-80878, 16-cv-80888, 16-cv-80889, 16-cv-80958, 16-cv-80959, 16-cv-80965, 16-cv-80966, 16-cv-80967 and 16-cv-80968. The complaints filed in these cases are copy-and-paste pleadings, materially identical except for the defendant.

research and analytics firms and practitioners to frivolous litigation under other statutes and regulations, including, for example, the Do Not Call registry and the CAN-SPAM Act.

The consequences of this abusive litigation are not limited to the market research and analytics industry, either. There are very few industries in the U.S. economy that do not, at least from time to time, rely on outside market research and analytics firms, or internal market research and analytics practitioners, to learn more about their consumers. Additionally, the simplistic view of the profit motive discussed above also threatens other non-research activities, like informational communications traditionally exempted from telemarketing: communications which, in the words of former Commission Chairman Genachowski, “consumers may have come to rely on.”⁶⁴ If the simplistic view of the profit motive adopted by the Second Circuit and peddled cynically by the plaintiff’s bar are allowed to become the *starting point* in any TCPA litigation, an already out-of-control situation will be made even worse.

IV. A DECLARATORY RULING IS NECESSARY TO CLARIFY PREVIOUS PROVIDE GUIDANCE ON “DUAL-PURPOSE” COMMUNICATIONS AND VICARIOUS LIABILITY

Also implicated by some courts’ conflation of marketing and research activities, is the Commission’s previous guidance on “dual-purpose” communications and vicarious liability. Additional clarity is necessary in these areas as well.

As discussed above, in determining whether a communication constitutes telemarketing the Commission has explained that “the application of the prerecorded message rule should turn,

⁶⁴ See *2012 Order*, 27 FCC Rcd. at 1876 (remarks of Chairman Julius Genachowski) (“[W]e leave unchanged our rules for robocalls that are informational and that consumers may have come to rely on. Some of these informational robocalls include automated calls that update consumers on airline flights, provide school notifications, or even warn them about fraudulent activity in their bank accounts.”).

not on the caller’s characterization of the call, but on the purpose of the message.”⁶⁵ The Commission has also said that calls may be “dual-purpose” — i.e., calls which are made for both marketing and non-marketing purposes may constitute telemarketing under the TCPA.⁶⁶

The Commission’s framework, which requires asking whether a research communication includes an advertisement, regardless of whether the communication is made primarily for a non-marketing purpose, is in line with the intentions of the TCPA’s drafters, who recognized that “[a] call encouraging a purchase, rental or investment would fall within the definition [of telephone solicitation], however, even though the caller purports to taking a poll or conducting a survey.”⁶⁷

Congress’ and the Commission’s rationale appears to be the same rationale behind the bans on “sugging” in the market research and analytics industry’s ethics codes: callers should not be allowed to circumvent consent requirements and engage in telemarketing by masquerading as researchers. Petitioners could not agree more. While there may be “bad actors” hiding out in the market research industry, as discussed above, Petitioners work actively to police and expel these bad actors. Indeed, it is in Petitioners’ interest to do so.

That said, additional guidance on the Commission’s dual-purpose framework is needed. As with the “argument from the profit motive,” the plaintiffs’ bar and some courts have begun using a loose interpretation of the Commission’s guidance to find a second “purpose” where there is no evidence that such a “purpose” exists.

⁶⁵ 2003 Order at 14098, ¶ 141.

⁶⁶ *Id.* at 14098, ¶ 142; see also *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd. 1830, 1843, ¶ 30 (2012) (“2012 Order”).

⁶⁷ *House Report* at 13 (“To come within the definition [of ‘telephone solicitation’], a caller must encourage a commercial transaction”). See also *Orea v. Nielsen Audio, Inc.*, 14-CV-04235-JCS, 2015 WL 1885936, at *7 (N.D. Cal. Apr. 24, 2015) (“Here, there is nothing arbitrary, capricious, or statutorily inconsistent about the FCC’s interpretation. In fact, the FCC’s interpretation practically mirrors the House Report’s paragraph excluding market surveys from telephone solicitations absent evidence of a prohibited solicitation.”).

A. *Comprehensive Health Care Systems of the Palm Beaches, Inc. v. M3 USA Corporation*

For example, in 2016, Comprehensive Health Care Systems Of The Palm Beaches, Inc. (“Comprehensive”), a chiropractic clinic West Palm Beach, Florida, filed a TCPA class action case against market research firm (and Insights Association member) M3 USA Corporation (“M3”) in the Southern District of Florida.⁶⁸ Comprehensive’s lawsuit was based on the receipt of a single survey invitation, sent by fax message, which Comprehensive alleged constituted an advertisement, even though the fax did not market goods or services. Indeed, the fax stated that the recipient “will not be solicited because of your participation in this study. There are NO sales or endorsements associated with this study.”⁶⁹

After twice granting Comprehensive leave to amend its complaint, the court denied M3’s motion, concluding that because M3’s terms of use and privacy policy informed respondents their information could be shared with third parties who may advertise to the respondents, the survey invitations were therefore mere “pretexts” to advertisements under the relevant FCC rules.⁷⁰ This was, at least, a liberal reading of the Commission’s prior rulings. In reality, these types of activities are routinely conducted by legitimate market research and analytics firms of the kind traditionally protected by the Commission. For example, surveys may include a reference to a corporate client in a survey question, or market research firms may share

⁶⁸ See Complaint, *Comprehensive Health Care Systems of the Palm Beaches, Inc. v. M3 USA Corporation*, No. 16-cv-80967 (S.D. Fla. June 10, 2016) (“*Comprehensive Complaint*”). The case was originally filed on May 31, 2016, captioned *Comprehensive Health Services, Inc. v. M3 USA Corporation*, No. 16-cv-80874 (S.D. Fla.).

⁶⁹ See *Comprehensive Complaint*, Exhibit A.

⁷⁰ See Order on Defendants’ Motion to Dismiss and Motion to Stay, *Comprehensive Health Care Sys. of the Palm Beaches, Inc. v. M3 USA Corp.*, No. 16-cv- 80967, 2017 WL 108029 (S.D. Fla. Jan. 11, 2017).

respondents' information (provided that the respondents give consent) with parties who might, in the future, advertise to the respondents.

To be clear, Petitioners are *not* asking for a rule that courts can only look within the “four corners” of a communication to determine whether it constitutes telemarketing. Although the TCPA’s “advertisements” and “telemarketing” definitions *do* imply a contemporaneousness element — that is, they appear, on their face, to contemplate advertising goods and services, or encouraging the purchase or rental of goods and services, *during the communication* — the Commission has recognized that certain communications which are followed by future promotion may be advertisements under the TCPA. Aside from the dual-purpose customer service calls, the Commission has also explained, for example, that “[o]ffers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services constitute [advertisements],”⁷¹ and that, in the context of facsimile messages, “any surveys that serve as a pretext to an advertisement are subject to the TCPA’s facsimile advertising rules.”⁷²

Nevertheless, by allowing plaintiffs to comb through a defendant’s ancillary documents and web pages for some link to advertising, the *M3* court’s ruling goes a step further than anything the Commission has allowed.⁷³ This kind of thinking should be corrected. To that end, Petitioners request a ruling by the Commission that the presence in a research communication, or in some other ancillary document or webpage (like website terms or a privacy policy), of a

⁷¹ *2003 Order*, 18 FCC Rcd. at 14098, ¶ 140.

⁷² *Junk Fax Order*, 21 FCC Rcd. at 3810, ¶ 140.

⁷³ On March 20, 2017, M3 filed a petition for declaratory ruling with the Commission seeking clarification on the Commission’s junk fax rules. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (March 20, 2017). On October 6, 2017, the district court granted M3 a stay in the above-referenced case pending the Commission’s decision on the petition.

marginal element that might arguably be considered advertising does not create a second “purpose” for the communication.

B. *Mey v. Venture Data, LLC*

Clarity is also needed regarding vicarious liability outside of the context of telemarketing or debt collection. In the *Dish Network* decision, the Commission held that “while a seller does not generally ‘initiate’ calls made through a third-party telemarketer within the meaning of the TCPA, it nonetheless may be held vicariously liable . . . for violations . . . committed by third party telemarketers.”⁷⁴ The Commission recognized that federal statutory actions, “such as those authorized under the TCPA,” customarily incorporate “principles of vicarious liability where such a construction would advance statutory purposes and not conflict with the statutory text” and reasoned that the TCPA should “incorporate baseline agency principles of vicarious liability with respect to violations of section 227(b) to further the statute’s primary purpose of protecting consumers “from unwanted *telemarketing* invasions.”⁷⁵ *Dish Network*’s discussion of vicarious liability pervasively references “sellers” and “telemarketers,” defined terms under Commission regulations, as being the affected entities.⁷⁶

Despite the Commission’s order in *Dish Network* being clearly limited to telemarketing calls, various courts have held that, under *Dish Network*, vicarious liability extends to non-sellers and non-telemarketers.⁷⁷ For example, in *Mey v. Venture Data, LLC*,

⁷⁴ *In re Joint Petition filed by Dish Network, LLC*, 28 FCC Rcd. 6574, 6593 (2013) (emphasis added). *Id.* at 6593.

⁷⁵ *Id.* at 6586-87 (emphasis added).

⁷⁶ 47 C.F.R. § 64.1200(f)(9)-(12).

⁷⁷ *See Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 878 n.6 (9th Cir. 2014); *Mey v. Venture Data, LLC*, No. 5:14-CV-123, Dkt. No. 271 (N.D. W.Va. July 6, 2017); *but see Aranda v. Caribbean Cruise Line, Inc.*, 179 F. Supp.3d 817 (N.D. Ill. Apr. 18, 2016) (denying summary judgment because the evidence

the court held that, despite the text of *Dish Network* being limited to “sellers” and “telemarketers,” the Commission’s “reasoning in *Dish Network* applies equally to non-telemarketing violations of the TCPA, and the FCC never expressly limited its ruling to telemarketing calls.”⁷⁸ Despite the Commission’s rejection of the view that the TCPA “necessarily provides for a single standard of third-party liability[,]”⁷⁹ the court held that it would be “absurd . . . should some TCPA violators be held vicariously liable for their TCPA violations, while others skate.”⁸⁰

The decision in *Mey* is squarely at odds with both the text of the *Dish Network* decision and the Commission’s prior rulings that provide for different vicarious liability regimes for different types of entities. As early as 1995, the Commission stated that its “rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations. Calls placed by an agent of the telemarketer are treated as if the telemarketer itself placed the call.”⁸¹ The Commission reiterated this understanding in 2005.⁸² Addressing vicarious liability with respect to debt collectors and creditors in 2008, the Commission stated that “[c]alls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call.”⁸³

would permit the jury to find that the defendants were “‘sellers’ who are vicariously liable for their agents’ violations of the TCPA”).

⁷⁸ *Mey*, No. 5:14-CV-123 at 11 (slip op.).

⁷⁹ *Dish Network*, 28 FCC Rcd. at 6586.

⁸⁰ *Mey*, No. 5:14-CV-123 at 11 (slip op.).

⁸¹ 10 FCC Rcd. 12391, 12397 (1995) (emphasis added).

⁸² See 20 FCC Rcd. 13664, 13667 (2005) (“We take this opportunity to reiterate that a company on whose behalf a *telephone solicitation* is made bears the responsibility for any violation of our *telemarketing* rules and calls placed by a third party on behalf of that company are treated as if the company itself placed the call.”) (emphasis added).

⁸³ See 23 FCC Rcd. 559, 565 (2008).

In any of these decisions, the Commission could have simply stated that vicarious liability applies to all principal-agent relationships, but it did not do so. The Commission declined to impose vicarious liability outside of the telemarketing and debt-collection context. Accordingly, Petitioners respectfully request that the Commission issue a ruling that survey, opinion, and market research firms are not subject to the Commission's vicarious liability regime established in *Dish Network*. Alternatively, should the Commission decide to explicitly extend vicarious liability to survey, opinion, and market research firms, Petitioners respectfully request that this rule only apply prospectively.

V. A DECLARATORY RULING IS NECESSARY TO CLARIFY COURTS' UNDERSTANDING OF MARKET RESEARCH UNDER THE TCPA

Some of the confusion in the courts illustrated above may be grounded in a fundamental misunderstanding of the relationships between market research and analytics firms, the firms' clients, and respondents. It is true, as the Second Circuit has noted, that all businesses seek a profit, and like all businesses market research and analytics firms do, of course, advertise and market their services, but these "sales" functions are *not* directed at individual consumers; they are directed at the *clients* on whose behalf the research is conducted. Indeed, market research communications often actively *mask* the identity of the identity of the sponsoring entity (the market research firm's client), so that respondents do not even know who is "behind" a study or survey. In contrast to the Second Circuit's reasoning in *Boehringer*, the Sixth Circuit's decision in *Sandusky* offers a more accurate examination of the profit motive, applicable to survey, opinion, and market research firms: "[T]he record instead shows that the faxes list the drugs in a purely informational, non-pecuniary sense: to inform Sandusky what drugs its patients might

prefer, based on Medco’s formulary—a *paid service already rendered not to Sandusky but to Medco’s clients.*”⁸⁴

While researchers frequently offer inducements to participate in surveys in the form of cash or other “prizes,” this is done only to ensure robust participation. Such prizes do not constitute goods or services for TCPA purposes, a fact also recognized by courts. In *Phillips Randolph Enters., LLC v. Adler-Weiner Research Chi., Inc.*, a federal court in Illinois declined to construe a survey invitation as an advertisement under the TCPA, despite the defendant market research firm offering a \$200 incentive for participating.⁸⁵ Although the fax in *Phillips Randolph* informed recipients of the honorarium in all capital letters, and set off by asterisks, the court explicitly rejected the plaintiff’s argument that a fax can advertise a “service” in the form of a “research discussion,” concluding that, “on its face, the fax does not promote a ‘commercially available service,’ but a research study.”⁸⁶

Likewise, in *Orea v. Nielsen Audio, Inc.*, a federal court rejected the argument that a survey constitutes a commercial transaction in which the respondent is offering his or her services to the market research company, and that, even if the plaintiff had been compensated, such a transaction would be cognizable under the TCPA.⁸⁷ The court explained as follows:

Plaintiff argues that the calls are telephone solicitations because Defendants called with the intent of buying something from Plaintiff: “Defendant called Plaintiff in order to purchase his labor and information.” Plaintiff does not actually allege any offers by Defendant to compensate him. However, even if he did, Plaintiff’s claim would fail. The only sensible reading of the statute is that the “purchase” of “property,” “goods,” or “services” that is intended by the call is the purchase by the consumer, not by the caller. . . . Here, Plaintiff has alleged nothing more than a market research survey. There are no allegations indicating that Defendant’s calls also encouraged a purchase, rental, or

⁸⁴ See *Sandusky*, 788 F.3d at 222.

⁸⁵ See 526 F. Supp. 2d 851 (N.D. Ill. 2007).

⁸⁶ *Id.* at 853.

⁸⁷ *Orea*, 2015 WL 1885936, at *4-5.

investment. Therefore, as pure market survey calls, Defendant's calls are not telephone solicitations.⁸⁸

And yet, in similar cases against survey, opinion, and market research firms the plaintiffs' bar has frequently glossed over this basic fact: although survey invitations do serve a "business purpose," legitimate market research and analytics firms are rendering services to the client, *not* the survey-taker. Respectfully, Petitioners would like to reiterate that, consistent with industry codes of ethics, legitimate market research communications do not include, *and do not at any later point in time result in*, direct sales or marketing by the market research firm to respondents.⁸⁹

Not only is a *context-less* presumption like the one implied in *M3* and *Boehringer* in conflict with the realities of the market research and analytics business model, it also, for the reasons discussed above, subverts the Commission's guidance on market research communications. Regarding the market research surveys at issue in *Orea*, the court held, "[u]nder the FCC's interpretation, Defendant's calls are not telephone solicitations for the same reason that they are not telephone solicitations under the plain language and legislative history of the TCPA: nothing indicates they intended to encourage any purchase, rental, or investment in any goods, services, or property."⁹⁰

Accordingly, Petitioners ask that the Commission issue a ruling that survey, opinion, and market research studies do not constitute goods or services *vis-à-vis* the survey

⁸⁸ *Id.* at *4-7 (citations omitted).

⁸⁹ *See id.* at *6 ("Here, nothing in the [first amended complaint] suggests an indirect encouragement of a purchase. There is no allegation that Nielsen encouraged Plaintiff to purchase its customers' products or services during the call. Likewise, there is no indication that Plaintiff's survey responses will be used by Nielsen or its customers to make a future sale to Plaintiff.").

⁹⁰ *Orea*, 2015 WL 1885936, at *7-8.

respondent, and are not transformed into goods or services merely because they include some nominal inducement to participate.

VI. CONCLUSION

For the foregoing reasons, Petitioners respectfully request a declaratory ruling from the Commission stating: (1) that communications are not presumptively “advertisements” or “telemarketing” under the TCPA simply because they are sent by a for-profit company, or might be for an ultimate purpose of improving sales or customer relations; (2) the presence in a communication, or some other ancillary document or webpage, of a marginal element that might arguably be considered advertising does not convert the communication into a “dual-purpose” communication; (3) survey, opinion, and market research firms are not subject to the Commission’s vicarious liability regime as articulated in *Dish Network*; and (4) survey, opinion, and market research studies do not constitute goods or services *vis-à-vis* the survey respondent, and are not transformed into goods or services merely because they include some nominal inducement to participate. Petitioners are *not* asking for a carve-out from the TCPA for researchers. The requested ruling would merely, for the reasons listed above, help bring courts in line with the text and legislative history of the TCPA, as well as the Commission’s prior rulings. Additional guidance on these questions, together with broader reform related to the questions presently before the D.C. Circuit, is also urgently needed to clear up confusion in the courts, curb abusive TCPA litigation, and prevent the large-scale waste of resources.

Respectfully submitted,

Stuart Pardau

Date: 10/30/17

Stuart L. Pardau
LAW OFFICES OF STUART L. PARDAU & ASSOCIATES
11500 W. Olympic Blvd., Suite 340
Los Angeles, CA 90064
stuart@pardaulaw.com
310-948-0861

Counsel to the Insights Association and AAPOR