

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

In the Matter of Assurance IQ, LLC's)
Petition for Expedited Declaratory Ruling)
)
)
)
)
Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)
)

CG Docket No. 02-278

**PETITION FOR EXPEDITED DECLARATORY RULING
REGARDING THE APPLICATION OF 47 U.S.C. § 227(b)(1) OF
THE TELEPHONE CONSUMER PROTECTION ACT**

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EXECUTIVE SUMMARY

Assurance IQ, LLC (“Assurance”) provides an online portal for consumers to request information about the potential cost of life, health, Medicare Advantage, Medigap, auto and homeowner’s insurance and, if interested, to purchase such insurance digitally or during a telephone call with an independent licensed insurance agent. Assurance utilizes a robust process to obtain and confirm the written consent of each person it calls. Consumers who access the Assurance website to request a quote are presented with a Telephone Consumer Protection Act (“TCPA”)-compliant disclosure, and are required to consent using a button located adjacent to the field for launching a request. Assurance does not create a lead in its system, and cannot contact an individual through its proprietary platform, unless a consumer provides the requisite prior express written consent. Assurance subscribes to well-known third party services such as TrustedForm to witness and preserve a record of the customer’s grant of consent and provision of customer information.

Assurance employs live “guides” on each call that is connected to a consenting consumer. When the call is connected, a short 8-10 second introduction, unique to the individual guide, advises that the call is being recorded and introduces the guide by name. The guide is directly connected to the call once it is determined that an individual has answered the telephone. No call consists solely of an uninterruptable artificial or prerecorded voice message of the type the TCPA was intended to restrict.

Assurance respectfully seeks a declaratory ruling from the Federal Communications Commission (“FCC” or “Commission”) concerning the applicability of the TCPA to its business, as follows:

- (1) Where it is determined that a calling party has sufficient information to establish a “reasonable basis to believe that they have valid consent to make the call” the caller may rely on that consent for TCPA purposes until the caller is informed otherwise; and
- (2) A prerecorded introductory message on an otherwise live call does not convert the entire call into a prerecorded or artificial call within the scope of the TCPA.

The Commission has previously articulated and followed a “reasonable basis” standard in assessing whether a caller may rely on the fact that it has obtained a valid consent. The need for the Commission to promptly confirm applicability of its “reasonable reliance” standard here derives from recent Assurance experience. An individual accessed Assurance’s website via a Tor Exit Router – a router intended to create anonymity for the accessing party by disguising their IP address – and entered the name James Shelton and an address, email, and telephone number. The individual provided prior express written consent by agreeing to Assurance’s TCPA-compliant form. This process was captured by TrustedForm and a lead was created in Assurance’s system. As expected, Assurance called Mr. Shelton at the telephone number provided, introduced the guide with a short recording, and continued a conversation with Mr. Shelton to determine whether he was interested in purchasing an insurance product. Mr. Shelton subsequently filed a class action complaint alleging that he did not consent to the call, and that Assurance violated the TCPA’s delivery restrictions by using an 8 to 10 second recording that introduced the individual guide and identified the call was being recorded, and by not identifying Assurance as the calling party therein.

When, as in the case of Mr. Shelton, an individual utilizes a company website and enters accurate information (including a name and telephone number), the Commission should declare

that the company can reasonably rely on the prior express written consent until such point as the consumer informs the company otherwise. Assurance respectfully submits that this declaration is absolutely critical because—in the absence of the relief sought, callers cannot safely call numbers obtained via only webform submissions. The identity of the supplier of information on such webforms will always be impossible to discern due to the anonymity permitted by the Internet—IP addresses only provide limited information — and as Assurance’s experience demonstrates, are not always available.

Second, the Commission, in briefing and statements, has repeatedly suggested that the phrase “prerecorded voice...message” refers to “autodialed and prerecorded voice message calls”—that is, with reference to calls and messages that were *entirely prerecorded*—and not merely the use of a prerecorded voice segment as part of an otherwise live call. For this reason, an 8 to 10 second recording introducing the individual on the call and identifying that the call will be recorded – on an otherwise completely live call with a guide – should not be deemed a prerecorded or artificial call within the scope of the TCPA.

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THE TELEPHONE CONSUMER PROTECTION ACT**

Pursuant to Section 1.2 of the Rules of the Federal Communications Commission (“FCC” or “Commission”),¹ Assurance IQ, LLC (“Assurance”) respectfully petitions the Commission for an expedited declaratory ruling (1) confirming that where it is determined that a calling party has sufficient information to establish a “reasonable basis to believe that they have valid express consent of the called party to make the call”² the caller may rely on that consent for TCPA purposes until such time as the called party claims to the caller that he or she did not provide the consent; and (2) the playing of a brief, prerecorded introductory message on an otherwise live call does not convert the entire call into a prerecorded or artificial call within the scope of the TCPA. A declaratory ruling from the Commission is necessary in part to confirm that fraudulent or “spoofed” consents cannot become the basis for a new category of multi-million dollar TCPA lawsuits against legitimate businesses seeking to place calls in compliance with the TCPA. Indeed, Assurance is already the subject of a TCPA class action lawsuit in which a repeat TCPA

¹ 47 C.F.R. § 1.2.

² *In the Matter of Rules and Regulations to Implement the Telephone Consumer Protection Act*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961, 8000, ¶72 (2015) (“*Omnibus Order*”).

plaintiff contends that, despite certified third-party records, including a TCPA-compliant consent submitted in his name with his address and telephone number, he did not consent to be called.³ Assurance respectfully submits that the Commission’s prompt declaration is absolutely critical because—in the absence of the relief sought, callers cannot safely call numbers obtained via only webform submissions. The identity of the supplier of information on such webforms will always be impossible to discern due to the anonymity permitted by the internet—IP addresses only provide limited information—and as Assurance’s experience demonstrates, are not always available.

I. ASSURANCE’S SERVICES, TCPA CONSENT, AND COMPLIANCE PROCESS

Assurance provides an online portal for consumers to obtain, at their specific request, information about the potential cost of life, health, Medicare Advantage, Medigap, auto and homeowner’s insurance. Its services are highly valued by consumers as reflected in the fact that Assurance has provided insurance protection products to hundreds of thousands of consumers to date.

Consumers seeking quotes through one of the company’s web sites (including www.assurance.com) are first required to answer questions to provide information relevant to the formulation of a needs assessment. This information includes the customer’s name, telephone number at which they wish to be contacted, address, and other data⁴ relevant to curating the best

³ *James Everett Shelton et al. v. Lumico Life Insurance Company and Assurance IQ, Inc.*, Civ. Action File No. 7:19-cv-6494, United States District Court for the Southern District of New York, filed July 12, 2019. As Judge Joshua Wilson of the United States District Court for the Eastern District of Pennsylvania recently observed, “James Everett Shelton can fairly be called a serial plaintiff,” and an individual who “has made litigation his advocacy.” *Shelton v. FCS Capital, LLC*, 2019 U.S. Dist. LEXIS 213179, *1 (E.D. Pa., Dec. 11, 2019). In keeping with this reputation, Mr. Shelton has been a plaintiff in at least fifty-one (51) TCPA cases in various courts since June of 2016. See Exhibit 1. In one case, Mr. Shelton has reportedly been sued under the RICO statute as a result of his actions. See <https://legalnewsline.com/stories/523453962-phoney-lawsuits-prolific-tcpa-filer-faces-rico-claims-over-alleged-lawsuit-generating-scheme>; *Jacovetti v. Shelton*, 2020 U.S. Dist. LEXIS 73204, *7 (E.D. Pa. Apr. 27, 2020).

⁴ The relevant originating IP- address is automatically collected.

insurance product for the inquiring consumer (e.g., age, height, and weight for a life insurance quote). At the final step, in order to receive an online quote, the consumer sees, immediately above the submit or “get my quote” button, the statement “By Clicking View My Quote, I agree to the below consents.” Adjacent to that button the consumer sees the following:

By clicking 'View My Quote', I expressly consent by electronic signature to receive marketing communication, including via calls using an automatic telephone dialing system and artificial or pre-recorded messages, emails, and text messages (SMS), from insurance companies or their agents, the owner of this website and its agents, representatives and affiliates, and [partner companies](#) to the phone number provided (including any wireless numbers). I understand that my consent to receive communications in this manner is not required as a condition of purchasing any goods or services, my telephone company may impose charges for these contacts, and I can revoke my consent at any time. If you are Medicare-eligible a representative may call you about a Medicare Advantage plan, Medicare Prescription Drug plan, Medicare Supplement plan or other Medicare plans. Not affiliated with the United States Government or the federal Medicare program.

By clicking 'View My Quote', I further agree to receive SMS notifications from Assurance short code 71953. Message and data rates may apply. Message frequency varies. You may receive alerts until you choose to opt out of this service by texting “Stop” to 71953 or replying “Stop” to any of our messages. Text “Help” to 71953 for assistance. [Terms and Conditions](#) and [Privacy Policy](#) and [Do Not Sell My Personal Information](#)

After the consumer provides TCPA consent, Assurance captures the identifying information and a unique identifier is assigned to that particular consumer’s inquiry and information. If a customer does not provide the requisite consent online, which Assurance submits fully complies with the requirement for “clear and conspicuous consent” as required under the Commission’s TCPA rules,⁵ the consumer is not entered into Assurance’s system to be called.⁶ Absent consent,

⁵ See 47 C.F.R. §64.1200(f)(8).

⁶ If a consumer were to make an inbound call to Assurance, Assurance would capture the phone number, but that number would not be entered into Assurance’s system to be called.

no lead is created, no unique identifier is created for the consumer, and Assurance's system will not call the person.

To record and verify receipt of a consumer's consent to be called, Assurance contracts with reputable third-party providers, such as TrustedForm, used by many companies to further their TCPA compliance. Assurance uses such services out of an abundance of caution to confirm that there is always third-party verification of a consumer's prior express written consent. TrustedForm is a lead certification service that is used by Assurance to verify the origin and authenticity of Internet leads. Today, TrustedForm certifies millions of leads per month, providing marketers valuable insight and legal compliance confirmation.⁷

Assurance employs the following additional policies and requirements to ensure compliance with the TCPA:

- Has a written policy for and maintains an internal Do Not Call ("DNC") list.
Consumers can be placed on a DNC list by calling Assurance, asking on a telephone call from Assurance, or emailing Assurance.
- Call auditing to determine whether calls are being properly placed on the DNC list.
- DNC training for independent guides and agents who communicate with consumers.

All of these efforts are designed to ensure that Assurance reaches out only to those consumers who have provided consent and duly records that consent.

II. ASSURANCE'S CALLING TECHNOLOGY AND PROCESS

⁷ See <https://activeprospect.com/products/trustedform/>.

When reaching out to consenting consumers, Assurance initially employs a live calling technology to contact consumers who provided their consent. The company employs independent contractors, called guides, to reach out to the consenting parties. The guides are immediately joined to the call when Assurance determines that a person has answered the call. Each guide is involved in only one telephone call at a time (i.e., he or she is not simultaneously handling multiple calls).

For most calls, when the call is connected, a short prerecorded introduction (generally lasting 8-10 seconds) is played. The recording, which is made by each guide in his or her own voice, generally includes the guide's name, the purpose of the call (e.g., "I am here to help you with your insurance needs") and disclosure that the call is being made on a recorded line. The guide is available on the call upon the calling system's determination that an individual has answered and the recording has played.⁸ After confirming the customer's information and interest in speaking with a licensed agent, the guide may pass off the live call to an insurance agent who can address the consumer's questions or needs in detail.

III. THE SHELTON CONSENT AND CASE

Because it is directly relevant to the "reasonable reliance" component of Assurance's Petition, the company outlines the background of the consent and lawsuit by Mr. Shelton.

A. The Shelton Consent

On May 11, 2019, a consumer requested an insurance quote through the Assurance website via a Tor Exit Router. The individual entered, and the Assurance system captured, the name James Shelton, and Mr. Shelton's telephone number, address, and email, plus other information relevant to the consumer's request for a quote. The TrustedForm record created in connection with this entry

⁸ If voicemail "answers," no message is left.

confirms the information entered. This Shelton lead could only have been captured and entered into Assurance's system if the individual seeking the quote provided the requisite TCPA consent as described above.

Based on the foregoing, Assurance had no reason to question the authenticity of the consent provided by the individual identified as Mr. Shelton. Nor did it have any basis for investigating further the validity of the consent.

B. The Shelton Case Against Assurance

Nevertheless, on July 23, 2019, Mr. Shelton filed a putative class action complaint in the United States District Court for the Southern District of New York against Assurance and Lumico Life Insurance Company. The complaint alleges that, on May 11, 2019, and without his prior consent, Mr. Shelton received a call on his wireless phone that used a series of prerecorded scripts to deliver a telemarketing message. Mr. Shelton contends that he did not provide his consent to the call, suggesting that someone else must have accessed Assurance's website and entered his correct personal identifying information, using a TOR Exit Router to hide his or her IP address. Assuming that Mr. Shelton did not himself access the Assurance website as he contends, the company faces potential liability in a putative nationwide TCPA class action lawsuit for calls made based on a reasonable and good faith belief that a valid consent had been obtained.

IV. ARGUMENT

A. The Commission Should Declare That It Is Reasonable For A Party To Rely On A Facially Valid and Compliant TCPA Consent

Assurance maintains rigorous practices to ensure that it calls only individuals for whom it has valid, express written consent. Yet, through no fault of its own, it faces potentially

significant litigation brought at the hands of a prolific, repeat-litigator in the TCPA space who claims that his contact information was supplied to Assurance by an unknown third party. Without question, Assurance is the victim of a targeted assault—i.e., someone fraudulently supplied accurate contact information for a TCPA litigant onto its website with the apparent intention of providing Mr. Shelton with ammunition to sue Assurance. The question is, should any company be held accountable for telephone calls made under this factual scenario? The answer is surely “no.”

The Commission has consistently applied a “reasonable reliance” standard when construing the term “prior express consent” under the TCPA. As the Commission stated in 2015 in discussing the problem of reassigned wireless numbers, “in construing the term ‘prior express consent’ in Section 227(b)(1)(A), we consider the caller’s reasonableness in relying on consent.”⁹ As further explained, “the TCPA anticipates the caller’s ability to rely on ‘prior express consent,’ 47 U.S.C. 227(b)(1), and we interpret that to mean reasonable reliance....”¹⁰ Underlying this standard is the requirement that the caller be able to demonstrate “a reasonable basis” for believing that he had consent to make the call and the absence of information that would make such reliance unreasonable.¹¹

As now Chairman Pai observed at the time, it is “a flawed and unreasonable construction of any statute to read it in a manner that demands the impossible.”¹² He was joined at the time by Commissioner O’Rielly, observing that callers cannot be expected “to divine from mere

⁹ *Omnibus Order*, at 8002, ¶75; *see id.* (caller cannot be expected to divine that the consenting person is not the subscriber).

¹⁰ *Id.*, at 8009, ¶90 n. 312.

¹¹ *See id.*, at 8007, ¶85.

¹² *Id.*, Dissenting Statement of Commissioner Ajit Pai, at 8078.

silence the current status of a telephone number.” That would be to read the statute to ‘demand the impossible.’”¹³

The United States Court of Appeals for the District of Columbia Circuit echoed and approved of the FCC’s use of the “reasonable reliance” standard: “The Commission thus consistently adopted a ‘reasonable reliance’ approach when interpreting the TCPA’s approval of calls based on ‘prior express consent.’”¹⁴ Moreover, the Court noted, in the reassigned number context, that there was no guarantee that a single call would provide the caller with any knowledge that the called party had not provided consent (i.e., that reliance on the consent provided was now unreasonable).¹⁵ It then went on to note that a safe harbor based on “consulting the most recently updated information” would have “greater potential to give full effect to the Commission’s principle of reasonable reliance.”¹⁶

To be clear, the Commission is not required to adjudicate the *Shelton* case to resolve this Petition. Assurance is not asking it to do so. The truth of the factual assertions made by the parties—and the subjective good faith and objective reasonableness of Assurance’s conduct—will be assessed and resolved by the court. Rather, in the aftermath of *ACA International*, the Commission should reaffirm that, where it is determined that a calling party has sufficient information to establish a “reasonable basis to believe that they have valid consent to make the

¹³ *Id.*, Dissenting Statement of Commissioner Michael O’Rielly, at 8090. Most recently, in *Sandoe v. Boston Scientific Corp.*, 2020 U.S. Dist. LEXIS 2800, *12 (D. Mass., Jan. 8, 2020), the District Court applied the “reasonable reliance” standard, noting that it found “persuasive the FCC’s order emphasizing that the TCPA does not require the impossible of callers.”

¹⁴ *ACA International et al. v. F.C.C.*, 885 F.3d 687, 707 (D.C. Cir. 2018) (“*ACA International*”). Subsequent court decisions have applied this standard as well. See *Sandoe v. Boston Scientific Corp.*, 2020 U.S. Dist. LEXIS 2800 (D. Mass., Jan. 8, 2020); *AMP Automotive, LLC v. B.F.T. L.P.* 2019 U.S. DIST Lexis 53793 (E.D. La., March 28, 2019); *Stewart L. Roark v. Credit One Bank, N.A.*, No. 16-173, 2018 WL 5921652 (D. Minn., Nov. 13, 2018); see also *In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Second Report and Order, 33 FCC Rcd 12024, 12045 ¶58 (2018).

¹⁵ See *ACA International*, at 707.

¹⁶ *Id.*, at 709; see *id.*, at 708

call,” the caller may rely on that consent for TCPA purposes until the caller is informed otherwise.

For the Commission to deny Assurance the relief sought would, in effect, leave callers subject to arbitrary TCPA liability whenever a number is supplied over the Internet, despite taking all reasonable and diligent steps to ensure compliance. Just as in the setting of “reassigned numbers,” therefore, the “fraudulent Internet lead” scenario calls out for application of the Commission’s previously-articulated “reasonable reliance” approach to consent allowing a caller to make calls to numbers supplied online.

It is important, not just for Assurance, that the Commission reaffirm the “reasonable reliance” standard in this context.¹⁷ With FCC guidance on Automatic Telephone Dialing Systems (“ATDS”) and other key issues still under consideration by the agency, there well may be a trend for the entry of consents posing as others. Therefore, the Commission should issue the requested declaratory ruling, lest license be given to those who would seek to generate TCPA litigation by “spoofing” fraudulent consents.

B. The Commission Should Declare That Assurance’s Practice Of Playing A Prerecorded Message At The Outset Of Live-Dialed Calls Does Not Constitute A Prerecorded Call For TCPA Purposes.

The TCPA restricts initiation of calls that, without the prior consent of the called party, use an “artificial or prerecorded voice” to deliver a message.¹⁸ A call is “initiated” when a person or entity “takes the steps necessary to physically place a telephone call...”¹⁹

Since the Commission’s implementation of that provision in 1992, it has repeatedly

¹⁷ It would be consistent with the rationale behind that Commission’s “one-call” safe harbor for reassigned number calls. Moreover, the consent captured is generally proximate to the placement of the call, unlike a reassigned number situation where the consent may have been acquired years before.

¹⁸ 47 U.S.C. §§ 227(b)(1)(A) and (b)(1)(B).

¹⁹ *In the Matter of Joint Petition Filed by DISH Network, LLC et al.*, CG Docket No. 11-50, Declaratory Ruling, 28 FCC Rcd 6574, 6583 ¶26 (2013) (“*Dish Declaratory Ruling*”).

suggested that the phrase “prerecorded voice...message” refers to “autodialed and prerecorded voice message calls”—that is, with reference to calls and messages that were *entirely prerecorded*—and not merely the use of a prerecorded voice segment as part of an otherwise live call.²⁰ Indeed, Assurance respectfully submits that the FCC statements have consistently suggested the phrase “using an artificial or prerecorded voice to deliver a message” refers to calls that are entirely prerecorded and fully automated for more than 25 years.

Further examples abound. The Commission’s 2012 TCPA Report and Order refers to calls forbidden by the TCPA as either “prerecorded calls” or “robocalls.”²¹ Every example of such calls given by the FCC, whether proscribed or not, assumes a fully automated call like a notification of “a workplace or school closing” or mass “emergency messages.”²² Similarly, its 2003 TCPA Report and Order²³ exclusively uses examples of TCPA messages *as fully automated calls*.²⁴ Similar references are contained in the Commission’s 2015 *Omnibus Order*.²⁵

In addition, the FCC’s regulations, 47 C.F.R. § 64.1200(b)(2), place disclosure obligations on “artificial or prerecorded telephone messages” requiring disclosure of a number “other than that of the artificial or prerecorded message player that placed the call”—language that assumes that the

²⁰ See, e.g., *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8753, ¶2 (1992) (TCPA prohibits use of autodialers and prerecorded messages to place calls); *id.*, at ¶8 (FCC had requested comment on whether there is inherent difference in nuisance factor “between artificial or prerecorded voice calls as opposed to live solicitations”); *id.*, at ¶9 (“Calls placed by recorded message players can be more difficult for the consumers to reject or avoid”); *id.*, at ¶28 (TCPA allows autodialed and prerecorded message calls if called party expressly consents).

²¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, ¶¶2, 4, 9, 18-19, 20-21, 30, 41, 45-47 (2012); see *id.*, at ¶2, n.5 (“Throughout this Report and Order, we use the term ‘prerecorded’ message or call to refer to ‘artificial or prerecorded voice’ messages or calls.”).

²² *Id.* at ¶17.

²³ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

²⁴ See e.g., *id.*, at ¶127 n.410, ¶137 n. 462, ¶138 n.469; see also *id.*, at ¶8 (explaining that “[a]utodialers can deliver prerecorded messages to thousands of potential customers every day”).

²⁵ *Omnibus Order*, at ¶1, n.1 (“In this Declaratory Ruling and Order, we refer to calls that require consumer consent under the TCPA as ‘robocalls’ ... Unless otherwise indicated, the term ‘robocalls’ includes calls made either with an automatic telephone dialing system (‘autodialer’) or with a prerecorded or artificial voice. We may also refer to prerecorded-voice and artificial-voice calls collectively as ‘prerecorded calls.’”).

TCPA only applies to fully automated robocalls. For example, there is no reason to provide a consumer with a number to call to be added to a DNC list if the consumer is already connected with a live operator that can easily and efficiently add them to that list. The FCC also interprets the TCPA's language regarding automation narrowly to avoid including technologies outside of robocalls.²⁶

The Commission's perspective that the statute was intended to address calls that were *entirely prerecorded*—and not merely the use of a prerecorded voice in an otherwise live call—is fully consistent with what the U.S. Court of Appeals for the Ninth Circuit held in 1995.²⁷ The Court cited the Congressional finding about the ““nuisance and greater invasion of privacy”” of calls that ““cannot interact with the customer except in preprogrammed ways.””²⁸ The Court went on to note that the statute did not ban prerecorded messages introduced by a live operator.²⁹

The Commission in its own Brief in the *Moser* case conceded that Congress had granted greater latitude where there were interactions between humans than machine-generated messages.³⁰ The FCC noted that “the demarcation drawn by the statute, which gives greater protection to human exchange than prerecorded announcements,” was further supported by state experiences, favorably citing a finding that “the distinction between live and prerecorded calls ‘addresses the inescapable fact that machines cannot ascertain the propriety of proceeding with a message.’”³¹

Finally, for seven years, the Staff of the Federal Trade Commission, which cooperates with

²⁶ See *DISH Declaratory Ruling*, at 6583, ¶26 (“We conclude that a person or entity ‘initiates’ a telephone call when it takes the steps necessary to physically place a telephone call, and generally does not include persons or entities, such as third-party retailers, that might merely have some role, however minor, in the causal chain that results in the making of a telephone call.”).

²⁷ *Moser v. F.C.C.*, 46 F.3d 970 (9th Cir. 1995) (“*Moser*”).

²⁸ *Id.*, 46 F.3d at 972; see also *id.*, 46 F.3d at 974.

²⁹ *Id.*

³⁰ *Moser*, Brief for the Appellants Federal Communications Commission 1993 WL 13101270, p. 10.

³¹ *Id.*, pp. 10-11, citing *State of Minnesota v. Casino Marketing Group, Inc.* 491 N.W. 2d 882, 890 (1992), *cert. den.*, 113 S. Ct. 1648 (1993); see also Reply Brief for Appellants Federal Communications Commission, 1994 WL 16014724, p. 4 (“In contrast, . . . , an automated message, ‘cannot interact with the customer except in preprogrammed ways’ and does ‘not allow the caller to’ . . . ask questions, register complaints, or ask not to be called again.”).

the FCC in combatting illegal robocalls, held that its Telemarketing Sales Rule on use of prerecorded telemarketing calls did not apply to the use of prerecorded messages as part of what is called soundboard calling technology, where “a single agent stays with a call from beginning to end.”³² When the FTC Staff changed its position in 2016 regarding use of that technology for telemarketing calling, it made clear that it was not opining on the TCPA’s applicability.³³ The FCC’s repeated statements thus still stand.

As outlined above, Assurance’s calling technology involves a live guide on every call that is connected with a consumer, who is available to interact with the called party. An 8-10 second message is played only if the Assurance system determines that the called party, who has executed the requisite consent to be called, picks up. No call consists solely of an uninterruptable artificial or prerecorded voice message of the type the TCPA was intended to restrict. For the foregoing reasons, Assurance respectfully requests that the Commission, consistent with its lengthy string of statements referring to such uninterruptable prerecorded calls, formally declare that the playing of an introductory prerecorded message at the outset of an otherwise live call does not constitute a prerecorded call for TCPA purposes.

V. CONCLUSION

For the reasons expressed above, Assurance respectfully asks that the Commission issue a declaratory ruling holding that:

1. Where it is determined that a calling party has sufficient information to establish a “reasonable basis to believe that they have valid consent to make the call” the calling party may

³² A copy of the September 11, 2009 FTC staff opinion letter can be found at http://www.ftc.gov/sites/default/files/documents/advisory_opinions/opinion-09-1/opinion0901_1.pdf

³³ A copy of the revised FTC Staff advice can be found at https://www.ftc.gov/system/files/documents/advisory_opinions/letter-lois-greisman-associate-director-division-marketing-practices-michael-bills/161110staffopsoundboarding.pdf.

rely on the consent for TCPA purposes until the caller is informed otherwise. In particular, the caller can “reasonably rely” on a confirmed TCPA-compliant consent, identifying the name, phone number and address of the consumer, until such time as the called party claims to the caller that he or she did not provide the consent.

2. A short, introductory prerecorded message on an otherwise live call does not convert the entire call into a prerecorded or artificial call within the scope of the TCPA.

Respectfully submitted,

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EXHIBIT 1

EXHIBIT 1

List Of James E. Shelton TCPA Cases Since June of 2016

This list of fifty-one cases was compiled from information provided by Mr. Shelton himself to the United States District Court for the Eastern District of Pennsylvania¹ and a search of publicly-available online records of Mr. Shelton's TCPA court filings. It reflects cases in which he was the lead plaintiff and other cases in which he participated as a plaintiff.

1. Shelton v. Capital Advance Solutions, LLC et al – Magisterial District Court 38-1-25, Case No. MJ-38125-CV-0000067-2016 – filed June 7, 2016.
2. Shelton v. Western Capital Financial Services, LLC DBA Western Capital Funding & Joshua Hamrell – Magisterial District Court 38-1-25, Case No. MJ-38125-CV-0000080-2016 – filed June 29, 2016.
3. Shelton v. Doan Solutions, LLC & Thai Doan – Magisterial District Court 38-1-25, Case No. MJ-38125-CV-0000092-2016 – filed August 3, 2016.
4. Shelton v. Endurance Warranty Services LLC – Cleveland Municipal Court, Case No. 2016 CVI 15320 – filed October 24, 2016.
5. Shelton v. Seafront Marketing LLC D/B/A Market Capital Funding LLC & Joseph J. Mullin – Magisterial District Court 38-1-25, Case No. MJ-38125-CV-0000074-2017 – filed May 16, 2017.
6. Shelton v. First Standard Financial Company, LLC D/B/A First Standard Finance Company LLC & Carmine Berardi – Magisterial District Court 38-1-25, Case No. MJ-38125-CV-0000075-2017 – May 16, 2017.
7. Shelton v. Creditors Relief, LLC – Magisterial District Court 38-1-25, Case No. MJ-38125-CV-0000076-2017 – filed May 16, 2017.
8. Shelton v. Mark D. Guidubaldi & Associates LLC, Mark D. Guidubaldi, Sanford J. Feder, Corporate Bailout, LLC – United States District Court for the Eastern District of Pennsylvania, Case No. 2:17-cv-02367 – filed May 24, 2017.
9. Shelton v. Doan Solutions, LLC & Thai Doan – United States District Court for the Eastern District of Pennsylvania, Case No. 2:17-cv-02368 – filed May 24, 2017.

¹ Notice In Response To Court Order (ECF NO. 5), James Everett Shelton v. Capital Advances LLC, et al, CA No. 2:18-cv-02186, United States District Court for the Eastern District of Pennsylvania, filed July 2, 2018.

10. Shelton v. ICapital Cash Group, Inc., ICapital Cash, Inc., Last Chance Funding Inc., LCF Group, Inc., Ed Ore, Edward Samways, Gary Damico – United States District Court for the Eastern District of Pennsylvania, Case No. 2:17-cv-02620 – filed June 9, 2017.
11. Shelton v. Merchant Source Inc., George M. Greco, Jr. & Anthony DeLillo – United States District Court for the Eastern District of Pennsylvania, Case No. 2:17-cv-02851 – filed June 23, 2017.
12. Shelton v. Insurance Resource Group & Brandon Wayne Elias– Magisterial District Court 38-1-25, Case No. MJ-38125-CV-0000118-2017 – filed June 30, 2017.
13. Shelton v. Thurman M. Smith – Magisterial District Court 38-1-25, Case No. MJ-38125-CV-0000128-2017 – filed July 21, 2017.
14. Shelton v. Student Loan Assistance Foundation, LLC, Michele R. Lear, & Lonny Lear – Magisterial District Court 38-1-25, Case No. MJ-38125-CV-0000131-2017 – filed July 24, 2017.
15. Shelton v. Fundbox, Inc., Rapid Response Marketing, LLC, & Kevin De Vincenzi – United States District Court for the Eastern District of Pennsylvania, Case No. 2:17-cv-03301 – filed July 24, 2017.
16. Shelton v. LIG International, LLC, Yuri Lima, John Paul Elias, Danny Jimenez, Carlos Maloff & Marco Josh Torres – United States District Court for the Northern District of Ohio, Case No. 1:17-cv-01868 – filed September 6, 2017.
17. Shelton v. National Gas & Electric, LLC – United States District Court for the Eastern District of Pennsylvania, Case No, 2:17-cv-04063 – filed September 11, 2017.
18. Shelton v. One Way Funding, LLC & Joseph Reinhardt – Court of Common Pleas of Montgomery County, Pennsylvania, Case No. 2017-27226 – filed November 20, 2017.
19. Shelton v. Green Star Capital Solutions LLC & Alexander Silverman – Court of Common Pleas of Montgomery County, Pennsylvania, Case No. 2018-00009 – filed January 1, 2018.
20. Shelton v. Centerpointe Lending Student Loan Service, Jeffrey R. Silhanek, & Scott E. Shaller – United States District Court for the Eastern District of Pennsylvania, Case No. 2:18-cv-01655 – filed April 19, 2018.
21. Shelton v. Target Advance LLC – United States District Court for the Eastern District of Pennsylvania, Case No. 2:18-cv-02070 – filed May 17, 2018.
22. Shelton v. Fast Advance Funding, LLC – United States District Court for the Eastern District of Pennsylvania, Case No. 2-18-cv-02071- filed May 17, 2018.

23. Shelton v. Paramount Holding Company LLC d/b/a Paramount Payment Status – United States District Court for the Eastern District of Pennsylvania, Case No. 2:18-cv-02072 – filed May 17, 2018.
24. Shelton v. Capital Advance LLC, Carmela Morelli, & Vincenzo Morelli a/k/a Vincent Morelli – United States District Court for the Eastern District of Pennsylvania, Case No. 2:18-cv-02186 – filed May 24, 2018.
25. Shelton v. Arete Financial Group, Shunmin Hsu, & Phu Loc – United States District Court for the Eastern District of Pennsylvania, Case No. 2:18-cv-02187 – filed May 24, 2018.
26. Shelton v. RFR Capital, LLC, Roberts A. Signore, Ryan M. Cola, & Randall Richards – United States District Court for the Eastern District of Pennsylvania, Case No. 2:18-cv-02259 – filed May 30, 2018.
27. Shelton v. Pivotal Payment Systems, Inc. & Bruce Breunig, Jr. d/b/a Swipe for Zero – United States District Court for the District of New Jersey, Case No. 1:18-cv-09915-NLH-JS – filed May 30, 2018.
28. Shelton v. National Student Assist LLC, Nir J. Goldin, Liberty Financial USA, LLC & Brian M. Rouche – United States District Court for the Eastern District of Pennsylvania, Case No. 2:18-cv-02545 – filed June 15, 2018.
29. Shelton v. Merchant Flow Financial Corporation et al. – United States District Court for the District of New Jersey, Case No. 2:2018-cv-11294. – filed June 25, 2018.
30. Shelton v. IVEST 360, LLC d/b/a Fast Capital 360 & IVEST Syndication Group, Inc. – United States District Court for the Eastern District of Pennsylvania, Case No. 2:2018-cv-02759 – filed June 28, 2018.
31. Shelton v. Paramount Holding Company LLC – United State District Court for the District of Idaho, Case No. 1:2018-cv-00313 – filed July 16, 2018.
32. Shelton v. Nest Planner LLC et al – United States District Court for Eastern District Court of New York, Case No. 2:2018-cv-04413 – filed August 3, 2018.
33. Shelton v. CSG Solutions Consulting LW et al. – United States District Court for the Middle District of Florida, Case No. 6:2018-cv-01335 – filed August 15, 2018.
34. Shelton v. Gallant Ventures LLC et al. – United States District Court for the District of New Jersey, Case No. 3:2018-cv-13404 – filed August 30, 2018.
35. Shelton et al v. Direct Energy, LP, et al. – United States District Court for the Eastern District of Pennsylvania, Case No. 2:2018-cv-04375 – filed October 9, 2018.

36. Shelton v. Post University Inc. – United States District Court for the District of Connecticut, Case No. 3:2018-cv-01801 – filed November 1, 2018.
37. Shelton, et al v. Direct Energy, LP, et al – United States District Court for the Northern District of Ohio, Case No. 1:2019-cv-00081 – filed January 11, 2019.
38. Perrong v. Sperian Energy Corp – United States District Court for the District of Nevada, Case No. 2:2019-cv-00115 – filed January 21, 2019
39. Newell et al v. Gohealth LLC – United States District Court for the Northern District of Illinois, Case No. 1:2019-cv-01983 – filed March 22, 2019.
40. Cunningham v. Penn L.L.C. – United States District Court for the Northern District of Illinois, Case No. 1:2019-cv-02547 – filed April 15, 2019.
41. Shelton v. Quake Energy LLC – Court of Common Pleas, Cuyahoga County, Ohio, Case No. CV 19-914241 – filed April 22, 2019.
42. Shelton v. Energy 95, LLC – United States District Court for the Northern District of Ohio, Case No. 1:2019-cv-01024 – filed May 7, 2019.
43. Shelton v. Health Insurance Innovations, Inc. – United States District Court for the Northern District of Ohio, Case No. 1:2019-cv-01026 – filed May 7, 2019.
44. Shelton v. Eluma Financial, Inc. et al. - Court of Common Pleas, Cuyahoga County, Ohio, Case No. CV 19-916187 – filed June 3, 2019.
45. Shelton v. Trifecta Solar LLC et al. – United States District Court for the Eastern District of Pennsylvania, Case No. 5:2019-cv-02466 – filed June 6, 2019.
46. Shelton v. Resortcom International, LLC. – United States District Court for the Northern District of Ohio, Case No. 1:2019-cv-01378 – filed June 14, 2019.
47. Shelton v. Lumico Life Insurance Company et al. – United States District Court for the Southern District of New York, Case No. 7:2019—cv-06494 – filed July 12, 2019.
48. Shelton v. Rapid Response Monitoring Services Incorporated et al. – United States District Court for the Southern District of Florida, Case No. 0:2019-cv-01983 – filed July 17, 2019.
49. Shelton v. FCS Capital LLC et al. – United States District Court for the Eastern District of Pennsylvania, Case No. 2:2018-cv-03723 – filed August 30, 2019.
50. Perrong et al. v. Team Integrity Energy Group, LLC – United States District Court for the Middle District of Florida, Case No. 8:2019-mc-00112 – filed November 1, 2019.

51. Shelton v. Realgy, LLC– United States District Court for the District of Connecticut, Case No. 3:2019—cv-01999 – filed December 22, 2019.