

**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)	
Under the Telephone Consumer Protection Act)	
Of Insights Association, Inc. and the American)	
Association for Public Opinion Research)	

REPLY COMMENTS OF AKIN GUMP STRAUSS HAUER & FELD LLP

Akin Gump Strauss Hauer & Feld LLP (“Akin Gump”) hereby replies to the comments of Anderson + Wanca (“A+W”)¹ in response to the Petition for Declaratory Ruling (“Petition”) filed by Insights Association, Inc. and the American Association for Public Opinion Research (collectively, the “Petitioners”) in the above-captioned proceeding.² Akin Gump is a law firm that represents clients on Telephone Consumer Protection Act of 1991 (“TCPA”) matters.

The comments of A+W related to vicarious liability and fax broadcasting are not germane to the relief sought in the Petition and should be disregarded. Moreover, the Commission should be aware that A+W’s characterization of the *Sarris Letter Brief*,³ and how courts are handling sender liability in fax broadcasting cases, is not complete and could be viewed as misleading. In these reply comments, Akin Gump provides a more fulsome picture of the confusion created in the court system by the *Sarris Letter Brief*.

¹ Anderson + Wanca’s Comments on Petition for Declaratory Ruling of Insights Association and AAPOR, CG Docket No. 02-278 (filed June 22, 2018) (“A+W Comments”).

² Petition for Expedited Declaratory Ruling of the Insights Association, CG Docket No. 02-278 (filed Oct. 30, 2017) (“Petition”).

³ See *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S.*, 781 F.3d 1245 (11th Cir. 2015) (“*Sarris*”); Commission Letter Brief, 2014 WL 3962595 (11th Cir. July 17, 2014) (“*Sarris Letter Brief*”).

I. DISCUSSION

A. The Commission Should Disregard the Comments of A+W Related to Vicarious Liability and Fax Broadcasting as Not Germane to This Proceeding.

Among the relief requested, Petitioners ask for clarity about applying vicarious liability standards in TCPA cases outside of the telemarketing or debt collection contexts.⁴ They specifically seek a ruling that vicarious liability standards should not apply to survey, opinion and market research firms.⁵ A+W opposes this request because it could be read to seek a ruling about application of vicarious liability in the fax-advertising context.⁶ Contrary to A+W's concerns, Petitioners clearly seek a ruling regarding application of vicarious liability standards to survey, opinion and market research firms. The comments of A+W with respect to vicarious liability and fax advertising are not germane, are not within the scope of the public notice seeking comment on the Petition, and should not be addressed by the Commission.⁷

B. The Commission Should Be Aware That A+W's Characterization of the *Sarris Letter Brief*, and How Courts Are Handling Sender Liability in Fax Broadcasting Cases, is Not Complete and Could Be Misleading.

In its comments, A+W quotes a passage from a letter brief submitted by the Commission's Office of General Counsel in the *Sarris* case and suggests that it is the Commission's view that strict liability for unsolicited fax advertising attaches to the advertiser and not the fax broadcaster in fax advertising cases. A+W offers the following quote: "direct

⁴ See Petition at 1, 19-25.

⁵ *Id.* at 1.

⁶ A+W Comments at 7.

⁷ See Consumer and Governmental Affairs Bureau Seeks Comment on Insights Association, Inc. and American Association for Public Opinion Research Petition for Declaratory Ruling Under the Telephone Consumer Protection Act, Public Notice, DA 18-548, CG Docket No. 02-278 (CGB rel. May 23, 2018). In prior declaratory rulings concerning TCPA matters, the Commission has declined to address issues raised by commenters as "beyond the scope" of a petition for declaratory ruling when such issues were not raised in the petition. See *GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling*, Declaratory Ruling, 29 FCC Rcd. 3442, 3447 n.33 (2014).

liability for sending an unsolicited facsimile advertisement attaches to the entity (defined as the ‘sender’) whose goods or services are being promoted, and not generally to the entity that physically transmits the facsimile.”⁸ Taking this one quote from a letter brief out of context, a quote that is arguably at odds with the Commission’s rule and the relevant Commission orders, and suggesting that the Commission intends to create a new strict liability standard for advertisers in fax advertising cases, misrepresents the law and what the Commission has said about the law.

The Commission’s rules regarding unsolicited fax advertisements (the “Junk Fax Rules”)⁹ under the TCPA make the “sender” of the fax liable for violations of the Junk Fax Rules. The Commission defines the “sender” of an unsolicited fax advertisement in two parts: “the person or entity *on whose behalf* a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.”¹⁰ The reference in the definition to an “entity whose product or service is advertised or promoted in the message” is a means to determine “on whose behalf” a message was sent.¹¹ It was not meant to justify a sole basis of liability or impose an inflexible, strict liability rule.

In fact, if the “sender” definition that the Commission adopted in 2006 was meant to extend TCPA liability to a new group of persons and entities (an advertiser, for example, that did not authorize the facsimiles), as opposed to merely codifying the pre-existing Commission interpretation of “sender”, then the Commission wholly failed to meet the basic requirements of

⁸ A+W Comments at 7 (quoting *Sarris Letter Brief* at *2).

⁹ 47 C.F.R. § 64.1200(a)(4), (f).

¹⁰ 47 C.F.R. § 64.1200(f)(10) (emphasis added).

¹¹ See RingCentral, Inc., Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 14 (filed July 6, 2016) (“RingCentral Petition”); Reply Comments of Akin Gump Strauss Hauer & Feld, CG Docket No. 02-278, at 3 (filed Sept. 13, 2016).

the Administrative Procedures Act (“APA”) in adopting that definition.¹² No notice was given during the rulemaking process that the Commission was considering expanding the scope of sender liability under the TCPA, nor did the Commission seek comment on a modification to its pre-existing interpretation of “sender” under the TCPA, or give any other indication that it was considering adopting an expanded definition.¹³

Further, the Commission’s own statements since the adoption of the rule give no indication that the intended purpose of the codified definition was to supplant or expand the scope of the Commission’s pre-existing interpretation of sender liability. For example, as stated in the *Sarris Letter Brief*, a fact not discussed by A+W, the Commission said “[the 2006] codification is consistent with the Commission’s pre-existing uncodified interpretation that ‘the entity or entities *on whose behalf* facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements.’”¹⁴

The Commission could not have intended in the *Sarris Letter Brief* to cut off the first half of its definition of “sender,” imposing direct and sole liability in fax broadcasting cases on advertisers. After all, to disregard the first half of the sender definition is to impose strict liability on an advertiser even when advertisements are sent either without the advertiser’s knowledge or in a manner not approved by the advertiser. Advertiser liability for such violations

¹² Under the APA, agencies are required to provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the rule’s content. 5 U.S.C. § 553(b)-(c). Further, once the comment period has closed, the APA directs the agency to consider the “relevant matter presented” and incorporate into the adopted rule a “concise general statement” of the “basis and purpose” of the final rule. 5 U.S.C. § 553(c). The general statement of basis and purpose should “enable the public to obtain a general idea of the purpose of, and a statement of the basic justification for, the rules.” Administrative Procedure Act: Legislative History, S. Doc. No. 248, at 225 (1946).

¹³ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Notice of Proposed Rulemaking and Order, 20 FCC Rcd. 19758 (2005).

¹⁴ *Sarris letter Brief* at *4 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; Memorandum Opinion and Order, 10 FCC Rcd. 12391, 12407 para. 35 (1995)).

would be a form of “sabotage liability,” not in keeping with the intent or plain language of the Commission’s rules.

Moreover, contrary to A+W’s statement, not all courts “that have applied Rule 64.1200(f)(10) in private TCPA litigation have applied ‘direct liability’ for the sender, with no ‘vicarious liability’ analysis.”¹⁵ In fact, there is conflict among the First, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits regarding issues of liability in fax broadcasting cases, which stems from the confusion caused by the *Sarris Letter Brief*.

The Seventh Circuit has held that “agency principles are properly applied” to determine if a party is the directly liable sender of a fax advertisement.¹⁶ On the opposite side of the spectrum, the Sixth Circuit has held that, for faxes sent after the Commission codified the “sender” definition in 2006, any party whose goods or services are advertised in a fax advertisement is strictly liable for TCPA violations.¹⁷ The Eleventh Circuit, in *Sarris*, landed somewhere in between by adopting a multifactor test focused on placing liability at the source of the offending behavior.¹⁸

District courts in the First, Eighth, Ninth and Eleventh Circuits also have adopted divergent standards for “sender” liability that fall somewhere between the Seventh Circuit’s agency approach and the Sixth Circuit’s strict liability approach.¹⁹ A number of courts have

¹⁵ A+W Comments at 7-8.

¹⁶ *Bridgeview Healthcare Ctr., Ltd. v. Clark*, 816 F.3d 935, 937 (7th Cir. 2016).

¹⁷ See *Siding & Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886, 891-96 (6th Cir. 2016) (“*Siding*”).

¹⁸ See *Sarris*, 781 F.3d at 1257-58; see also *Cin-Q Automobiles, Inc. v. Buccaneers Limited Partnership*, No. 8:13-CV-1592, 2014 U.S. Dist. LEXIS 174134, at *19 (M.D. Fla. Dec. 17, 2014) (interpreting *Sarris* to adopt a totality test that aimed at establishing the origin of the offending behavior) (“*Cin-Q Automobiles*”).

¹⁹ See *Physician's Healthscore, Inc. v. Vertex Pharms., Inc.*, 247 F. Supp. 3d 138 (D. Mass. Mar. 28, 2017) (citing to *Sarris* and *Imhoff Investment, L.L.C. v. Alfocchino, Inc.*, 792 F.3d 627, 636 (6th Cir. 2015) (“*Imhoff*”) in holding that “the only relevant consideration” in determining sender liability is whether “the defendant has hired an independent contractor to transmit facsimiles advertising the defendant's goods or services.”); *Bais Yaakov v. Varitronics, LLC*, Civil No. 14-5008, 2015 U.S. Dist. LEXIS 44016 (D. Minn. Apr. 3, 2015) (following *Sarris* and *Cin-Q Automobiles* in rejecting strict advertiser liability); *Supply Pro Sorbents*, 2016 U.S. Dist LEXIS 140033

rejected the strict liability analysis of the Sixth Circuit as absurd and have developed various multi-factor tests to apply the exception, in an effort to assign sender liability between the advertiser and the fax broadcaster.²⁰ A+W's characterization of the Commission's intent with respect to the *Sarris Letter Brief*, and how courts are addressing sender liability in fax advertising cases, citing only to one Sixth Circuit case, misinforms the Commission about the state of the law in this area.

II. CONCLUSION

The issue of 'sender' liability in the context of fax advertisements is complicated, unsettled, and should not be addressed in response to a Petition for Declaratory Ruling that does not touch on that issue. A+W's characterization of the *Sarris Letter Brief* and how courts are addressing sender liability with respect to fax broadcasting presents an incomplete picture, could be misleading, and does not reflect the intent of the Commission, nor the split among the First, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits on this issue. A+W's comments regarding fax broadcasting do not go to the merits of the Petitioners' request, nor are in any way germane to that request, and should be disregarded.

(generally following *Siding* to hold that fax advertisers are strictly liable under the Commission's "sender" definition).

²⁰ *E.g.*, *Cin-Q Automobiles*, 2014 U.S. Dist. LEXIS 174134 at *11-12.

Respectfully submitted,

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