Developments in Advertising and Consumer Protection

*By Richik Sarkar**

I. Introduction

Even before the country's COVID-19 confinement forced many of us to become "at home consumers," regulators and courts were in the habit of scrutinizing online transactions, endorsements, and marketing tactics. During the survey period, courts addressed several issues under the Telephone Consumer Protection Act ("TCPA") (Part II), including vicarious liability, what constitutes injury for the purpose of Article III standing, and the definition of an "automatic telephone dialing system" ("ATDS"). The TCPA also survived numerous attacks, with the U.S. Supreme Court ruling that an unconstitutional provision could be struck without invalidating the entire statute. The Seventh Circuit addressed third-party liability under the Telemarketing Sales Rule ("TSR") (Part III). The Federal Trade Commission ("FTC") applied the Consumer Review Fairness Act of 2016 ("CRFA") (Part IV) and held Cambridge Analytica liable for its consumer data harvesting (Part V). The National Advertising Division ("NAD") of the Better Business Bureau required a cosmetics company to clarify when it authored makeup-advice content on "independent" websites (Part VI). Finally, the FTC brought several enforcement actions and issued new guidance about the application of its Endorsement Guides to social media influencers (Part VII).

II. Cases Under the TCPA

A. Vicarious Liability

During the survey period, numerous courts weighed in on the scope and effect of the TCPA. In *Warciak v. Subway Restaurants, Inc.*,[1] a T-Mobile customer filed a TCPA claim (and related state claim) alleging that a text message advertising a deal at Subway, received as part of a T-Mobile marketing campaign, violated the statute. The customer claimed that Subway was in a common-law agency relationship with T-Mobile, and that Subway was vicariously liable for T-Mobile's

* Richik Sarkar is a partner in Dinsmore & Shohl's Cleveland, Ohio, office, serves as co-chair of the Cyberspace Law Committee's Cyber Insurance Subcommittee, and is a nationally recognized class action and cybersecurity litigator.

1. 949 F.3d 354 (7th Cir. 2020).

alleged violation of the TCPA.[2] The district court dismissed the TCPA claim, and the Seventh Circuit affirmed. The appellate court held that, to be vicariously liable under the TCPA, an agent must have express or apparent authority.[3] In this case, the customer did not plead sufficient facts to state a plausible claim for relief under the theory of vicarious liability. The customer only alleged that Subway entered into a contractual relationship with T-Mobile, and the customer's evidence focused on T-Mobile's conduct, rather than Subway's conduct.[4] Furthermore, the court ruled that there is no liability under the TCPA for calls to customers by their wireless carriers if the customer is not charged for the calls. Accordingly, the customer's complaint was dismissed because he was not charged for the text.[5]

B. Article III Standing

In *Salcedo v. Hanna*,[6] the Eleventh Circuit determined that a single, unsolicited text message sent in violation of the TCPA is not enough to establish standing. In this suit, Salcedo, a former client of Hanna and his law firm, received a multimedia text message from Hanna offering a discount on legal services.[7] Salcedo sued as the representative of a class of former clients who had received unsolicited text messages from Hanna, alleging violations of the TCPA.[8] The district court found that Salcedo had standing, but stayed its proceedings pending appeal.[9]

In evaluating standing, the appellate court looked for a concrete injury.[10] Under Eleventh Circuit precedent, a plaintiff suffers a concrete injury from a fax sent in violation of the TCPA because, in the minute the fax was being transmitted, he lost use of his fax machine and the fax consumed some of his supplies.[11] The court determined that a text is different from a fax because (1) it does not consume any supplies and (2) a device is not rendered unavailable while it is receiving a text.[12] Congress' legislative findings about telemarketing show that it was concerned about something much more intrusive than a single text message. In enacting the TCPA, Congress was concerned primarily about intrusive invasions of privacy in the home.[13] The ability to move outside of the home and silence a cell phone makes communication to that phone much less

2. *Id.* at 356.
3. *Id.* at 357.
4. *Id.*
5. *Id.* at 357–58 (citing 47 U.S.C. § 227(b)(2)(C); Telephone Consumer Protection Act of 1991, 77 Fed. Reg. 34233, 34235 (June 11, 2012)).
6. 936 F.3d 1162 (11th Cir. 2019).
7. *Id.* at 1165.
8. *Id.*
9. *Id.*
10. *Id.* at 1167.
11. *Id.* at 1167–68 (citing Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A., 781 F.3d 1245, 1252 (11th Cir. 2015); Florence Endocrine Clinic, PLLC v. Arriva Med., LLC, 858 F.3d 1362, 1366 (11th Cir. 2017)).
12. *Id.* at 1168.
13. *Id.* at 1169 (citing Telephone Consumer Protection Act, Pub. L. No. 102-243, § 2, 105 Stat. 2394, 2394–95 (1991) (setting forth congressional findings)).

intrusive.[14] In addition, the court found that a single unwanted text message did not create the sorts of harm required to support common law torts such as intrusion upon seclusion, trespass, nuisance, conversion, and trespass to chattel.[15] The appellate court accordingly reversed the district court's decision. One appellate judge concurred in the judgment to emphasize her view that a plaintiff who alleged receiving multiple unwanted test messages, rather than only one, might have standing to sue.[16]

C. Definition of ATDS

Three recent opinions analyzed the definition of "automatic" when deciding whether calls were made by an ATDS. *Glasser v. Hilton Grand Vacations Co., LLC*[17] combined two controversies. In the first, Glasser sued Hilton Grand Vacations Company, LLC over unsolicited phone calls related to timeshare sales. In the second, Evans sued a loan servicer for unsolicited calls about unpaid loans.[18] The district court found for Evans and against Glasser, so Glasser and the loan servicer appealed.[19] The judgment turned on whether the phone systems were *automatic* within the meaning of ATDS. The TCPA defines "automatic telephone dialing system" as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[20] Glasser and Evans argued that "using a random or sequential number generator" only applied to "to . . . produce," while the loan servicer and Hilton argued that the phrase applied to both "stor[ing and] produc[ing]."[21] The appellate court agreed with the defendants, holding "that the clause modifies both verbs."[22] Accordingly, neither of the systems that defendants used to contact the plaintiffs qualified as an ATDS.

Judge Martin dissented on this point, believing that a machine should qualify as an auto-dialer based solely on its ability to store numbers. In her view, the majority relied on an implausible definition of the word "store," rendered language of the provision superfluous, and conflicted with precedent from the Ninth Circuit.[23]

Similarly, in *Gadelhak v. AT&T Services, Inc.*,[24] the Seventh Circuit found that a device that only dialed numbers stored in its database was not an ATDS. In so doing, the court considered four different ways of reading the statute: (1) the phrase "using a random or sequential number generator" could modify both "store" and "produce," which would mean that a device must be capable of

14. *Id.*
15. *Id.* at 1170–72.
16. *Id.* at 1174 (Pryor, J., concurring).
17. 948 F.3d 1301 (11th Cir. 2020).
18. *Id.* at 1305.
19. *Id.*
20. 47 U.S.C. § 227(a)(1)(A)–(B) (2018).
21. *Glasser*, 948 F.3d at 1306 (quoting 47 U.S.C. § 227(a)(1)).
22. *Id.*; *see id.* at 1306–12.
23. *Id.* at 1314–18 (Martin, J., dissenting).
24. 950 F.3d 458 (7th Cir. 2020), *petition for cert. filed*, No. 20-209 (U.S. Aug. 21, 2020).

performing at least one of those functions using a random or sequential number generator to qualify as an ATDS—as the Eleventh Circuit concluded in *Glasser*; (2) the phrase might describe the telephone numbers themselves, specifying that the definition captures only equipment that dials randomly or sequentially generated numbers—which is how the district court, in *Gadelhak*, interpreted the provision; (3) the phrase might limit only the word "produce," which would cover not only equipment that can produce numbers randomly or sequentially, but also any equipment that can simply store and dial numbers; and (4) the phrase could describe the manner in which the telephone numbers are to be called, regardless of how they are stored, produced, or generated.[25] Ultimately, the court adopted the first method, agreeing with the approach in *Glasser*.[26]

Conversely, in *Duran v. La Boom Disco, Inc.*,[27] the Second Circuit reached a different conclusion. Duran claimed that he received at least three hundred text messages from La Boom Disco ("LBD"), a New York nightclub, over the course of eighteen months, after initially providing his phone number to get free admission. LBD countered that it did not use an ATDS to send the messages, so it was not covered by the TCPA.[28] The district court agreed with the night club and granted summary judgment for LBD.[29] The Second Circuit disagreed. Contrary to the majority in *Glasser*, the Second Circuit held that the phrase "using a random or sequential number generator" only modified the word "produce."[30] The court relied on the surplusage that would be created if the phrase applied to both clauses.[31] In addition, the TCPA had a specific exception for collecting debt owed to or guaranteed by the United States.[32] Given that debt calls would not be made by a randomly generated list, it made sense to the court that humans could generate the list of numbers and still have the system be automatic.[33] The court also relied upon a trio of interpretations of the TCPA by the Federal Communications Commission, each of which found that the statute should be interpreted broadly so that it covers newer technologies that telemarketers employ to dial from stored lists of numbers, rather than generating the numbers randomly or sequentially.[34]

25. *Id.* at 463–64 (quoting 47 U.S.C. § 227(a)(1)) (first citing *Glasser*, 948 F.3d at 1304–05; and then citing Gadelhak v. AT&T Servs., Inc., No. 17-cv-01559, 2019 WL 1429346, at *5–6 (N.D. Ill. Mar. 29, 2019), *aff'd*, 950 F.3d 458 (7th Cir. 2020), *petition for cert. filed*, No. 20-209 (U.S. Aug. 21, 2020)).

26. *Id.* at 460.

27. 955 F.3d 279 (2d Cir. 2020).

28. *Id.* at 281–82.

29. *Id.* at 282.

30. *Id.* at 284.

31. *Id.* at 284–85.

32. *Id.* at 285.

33. *Id.*

34. *Id.* at 285–87 (citing *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14014 (2003); *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 23 FCC Rcd. 559 (2008); *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 27 FCC Rcd. 15391 (2012)).

Ultimately, this critical question will be resolved by the U.S. Supreme Court as it granted certiorari in *Facebook, Inc. v. Duguid*[35] to resolve the question of "[w]hether the definition of ATDS in the TCPA encompasses any device that can 'store' and 'automatically dial' telephone numbers, even if the device does not 'us[e] a random or sequential number generator.'"[36]

D. Invalidation of the Government Debt-Collection Exception

In 2015, Congress amended the TCPA to exempt federal government debt-collection efforts from the prohibition against using an ATDS to call a cell phone.[37] Some defendants who were sued for violations of the TCPA argued that the 2015 amendment violated the First Amendment and sought on that ground to persuade courts to strike down the entire statute. Several lower courts agreed with defendants that the exemption for government debt collection was unconstitutional, but they also held the provision was severable from the rest of the statute and declined to invalidate the statute as a whole.[38]

The U.S. Supreme Court granted certiorari in one of these cases and reached the same conclusion. In *Barr v. American Association of Political Consultants, Inc.*,[39] the Court reviewed a decision by the Fourth Circuit holding that the government debt exception to the TCPA violated the First Amendment but was severable from the rest of the statute.[40] The Supreme Court reached the same conclusion, but there was no majority rationale. The lead opinion, authored by Justice Kavanaugh, and joined by Chief Justice Roberts and Justices Thomas and Alito, held that the government debt exception was a content-based restriction on speech and, as such, was subject to strict scrutiny for consistency with the First Amendment.[41] The government conceded it could not justify the exception under that standard, and the plurality ruled it unconstitutional. Justice Sotomayor concurred in the judgment.[42] She determined that the challenged provision was subject to intermediate scrutiny and found that the government's justifications for the provision did not meet that more lenient standard. Justice Gorsuch, writing alone on this point, believed like the plurality that the provision was subject to strict scrutiny and could not meet that test, but offered his own rationale for reaching that conclusion.[43] Justice Breyer, joined by Justices Ginsburg and

35. No. 19-511, 2020 WL 3865252 (U.S. July 9, 2020).

36. Petition for Writ of Certiorari at ii, Facebook, Inc. v. Duguid, No. 19-511 (U.S. Oct. 17, 2019), 2019 WL 5390116 (quoting 47 U.S.C. § 227(a)(1)).

37. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584, 588 (2015) (amending 47 U.S.C. § 227(b)).

38. *See, e.g.*, Duguid v. Facebook, Inc., 926 F.3d 1146 (9th Cir. 2019), *cert. granted in part*, No. 19-511, 2020 WL 3865252 (U.S. July 9, 2020); Rosenberg v. LoanDepot.com LLC, 435 F. Supp. 3d 308 (D. Mass. 2020); Perrong v. Liberty Power Corp., 411 F. Supp. 3d 258 (D. Del. 2019); Hand v. ARB KC, LLC, No. 4:19-CV-00108-NKL, 2019 WL 6497432 (W.D. Mo. Dec. 3, 2019).

39. 140 S. Ct. 2335 (2020).

40. Am. Ass'n of Political Consultants, Inc. v. FCC, 923 F.3d 159 (4th Cir. 2019), *aff'd sub nom.* Barr v. Am. Ass'n of Political Consultants, Inc., 140 S. Ct. 2335 (2020).

41. *Id.* at 2347.

42. *Id.* at 2356–57 (Sotomayor, J., concurring).

43. *Id.* at 2363–65 (Gorsuch, J., concurring).

Kagan, dissented on the merits issue.[44] In his view, the provision was subject to intermediate scrutiny, and the government succeeded in justifying it under that standard. Thus, six of the justices found the provision unconstitutional, but no majority agreed on the rationale.

Even though the respondents succeeded in demonstrating that the government debt exception was invalid, they did not achieve their desired result. The respondents had not been subjected to a lawsuit under this invalidated provision—they could not have been, because it offered an *exception* from liability. Their goal was to obtain a declaratory judgment holding the TCPA as a whole unconstitutional, so that they could make robocalls to cellphones as part of their political outreach activities.[45] The strategy was to convince the Court that the government debt exception was invalid *and* that it could not be severed from the rest of the statute. However, the Court held that the clause was indeed severable. Justice Kavanaugh reviewed the Court's precedents establishing a "strong presumption of severability."[46] Focusing on the Communications Act's express severability clause, the Court determined the government debt exception should be severed.[47] On this point, the justices aligned in a seven-to-two majority, with Justices Gorsuch and Thomas dissenting.

III. Telemarketing

In a significant case related to third-party telemarketing efforts, *United States v. Dish Network L.L.C.*,[48] DISH sold satellite television service through its own staff in addition to third-party telemarketing vendors to conduct campaigns; full-service retailers to sell, install, and service gear; and order-entry retailers who sold nationwide over the phone.[49] The appeal concerned DISH and four of its order-entry providers.[50] The district court found that DISH and its agents violated the TSR, the TCPA, and related state laws. The question on appeal was the extent to which DISH had to coordinate do-not-call lists with its agents (the order-entry providers).[51] DISH initially argued that it did not have an agency relationship with the providers because they had a provider contract that explicitly denied the existence of such a relationship.[52] The appellate court rejected this argument, instead focusing on the providers' acts that "benefitted DISH."[53]

Further, the district court determined DISH had substantially assisted one of the agents in making abandoned calls.[54] But the appellate court determined that

44. *Id.* at 2357–63 (Breyer, J., dissenting).
45. *Id.* at 2343, 2345.
46. *Id.* at 2350 (collecting cases).
47. *Id.* at 2352–54 (citing 47 U.S.C. § 608).
48. 954 F.3d 970 (7th Cir. 2020).
49. *Id.* at 973.
50. *Id.*
51. *Id.* at 974–75.
52. *Id.* at 975.
53. *Id.* at 977.
54. *Id.* (citing Telemarketing Sales Rule, 16 C.F.R. § 310.3(b) (2020) (barring one from providing "substantial assistance" to a violator under specified circumstances)).

the TSR "does not create liability for assisting oneself."[55] Because of DISH's agency relationship with the providers, it made "little sense to treat the entity as assisting itself."[56] DISH also argued that it should not have been found liable because it did not have actual knowledge or fairly implied knowledge under an objective standard, but the appellate court did not agree.[57] Ultimately, the appellate court remanded the case to the district court to reconsider its $280 million award of damages, holding that the district court should have based the award on the degree of harm resulting from the violations, rather than on the defendant's profits.[58]

IV. CRFA

The CRFA protects people's ability to share their honest opinions about a business's products, services, or conduct, in any forum, including social media.[59] In *In re A Waldron HVAC, LLC*, the FTC issued a decision and order against A Waldron HVAC after the company used a form contract containing a term that prohibited customers from filing a complaint with the Better Business Bureau.[60] As a part of the FTC order, the company had to notify all customers who entered such a contract that they had the right to post honest reviews of their experience with the company.[61] This case, together with four other companion cases, marked the FTC's first actions exclusively enforcing the CRFA.[62]

V. Consumer Data Harvesting

In *In re Cambridge Analytica, LLC*, the FTC alleged that Cambridge Analytica engaged in three counts of deceptive acts and practices by harvesting personal information through use of an app on Facebook in connection with political advertising. According to the complaint, the company claimed that: (1) its app did not collect any personally identifiable information from users who authorized the app; (2) it was a participant in the European Union–United States Privacy Shield framework; and (3) it adhered to Privacy Shield principles.[63] On November 25, 2019, the FTC issued an opinion and order finding that Cambridge Analytica had violated section 5 of the FTC Act on each of the three

55. *Id.* at 978.

56. *Id.*

57. *Id.* at 978–79 (interpreting 15 U.S.C. § 45(m)(1)(A) (addressing violations committed "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited").

58. *Id.* at 979–80.

59. Consumer Review Fairness Act, Pub. L. No. 114-258, 130 Stat. 1355 (2016) (codified at 15 U.S.C. § 45b (2018)).

60. Complaint at 2, *In re* A Waldron HVAC, LLC, No. C-4680 (F.T.C. June 19, 2019).

61. Decision and Order at 3, *In re* A Waldron HVAC, LLC, No. C-4680 (F.T.C. June 19, 2019).

62. Press Release, Fed. Trade Comm'n, FTC Announces First Actions Exclusively Enforcing the Consumer Review Fairness Act (May 8, 2019), https://www.ftc.gov/news-events/press-releases/2019/05/ftc-announces-first-actions-exclusively-enforcing-consumer-review.

63. Complaint at 8–9, *In re* Cambridge Analytica, LLC, No. 9383 (F.T.C. July 22, 2019).

counts set out in the complaint.[64] The FTC reviewed the representations under section 5 by assessing (1) what claims were conveyed; (2) whether those claims were false, misleading, or unsubstantiated; and (3) whether the claims were material.[65]

With respect to data harvesting, Cambridge Analytica's representations to Facebook users that it would not download their identifiable information were found to be false.[66] The FTC then found those false representations to be material, and in violation of Section 5.[67] Accordingly, the FTC issued a final order prohibiting Cambridge Analytica from making misrepresentations regarding how it handles or sells consumer information and requiring it to delete the Facebook data and work product.[68] Further, it enjoined Cambridge Analytica from utilizing or gaining any benefit from the information it collected.[69]

VI. NAD Scrutiny of Website Content Clarity

Following an inquiry by the NAD, L'Oréal USA changed three of its websites—Makeup.com, Skincare.com, and Hair.com—to make it clear that their content was produced by L'Oréal.[70] The NAD was concerned that L'Oréal's websites looked like independent publishers' sites providing general information, while also selling beauty products, because references to L'Oréal appeared at the bottom of the respective webpages, too far from the website logos and content. According to the NAD, this made it too difficult for customers to perceive that articles featuring reviews of various skincare and makeup products were, in fact, advertisements for L'Oréal products.

VII. Endorsements

In 2019, the FTC issued *Disclosures 101 for Social Media Influencers*, a brief guide to compliance with its rules requiring disclosures to assure that customers fully understood a brand's relationship with an endorser.[71] Influencers must disclose "any financial, employment, personal, or family relationship with a brand."[72] The focus should be on making sure potential consumers can "see and understand" any such relationship with the brand.[73] Finally, influencers should not make false claims

64. Opinion of the Commission at 11–14, *In re* Cambridge Analytica, LLC, No. 9383 (F.T.C. Nov. 25, 2019) (citing 15 U.S.C. § 45).
65. *Id.*
66. *Id.* at 12.
67. *Id.*
68. Final Order at 2–4, *In re* Cambridge Analytica, LLC, No. 9383 (F.T.C. Nov. 25, 2019).
69. *Id.* at 4.
70. Abby Hills, *Following NAD Inquiry, L'Oréal Modifies Disclosures to Clarify that Content on Sites May Be Advertising*, BBB Nat'l Programs (June 3, 2020), https://bbbprograms.org/programs/all-programs/nad/nad-press-releases/following-nad-inquiry-l-or%C3%A9al-modifies-disclosures-to-clarify-that-content-on-sites-may-be-advertising.
71. Fed. Trade Comm'n, Disclosures 101 for Social Media Influencers (2019).
72. *Id.* at 3.
73. *Id.* at 4.

about a product either by misrepresenting their experience or not having tried a product.[74]

The FTC has been active in bringing enforcement actions against false or misleading endorsements and reviews. In *FTC v. Devumi, LLC*, the FTC alleged that Devumi (which is now defunct) and its owner and CEO German Calas, Jr. used Devumi.com and a variety of other websites to sell fake followers, subscribers, views, and likes across a variety of social media platforms to help various public and private figures boost their profiles.[75] The FTC alleged Devumi helped its customers commit deceptive acts or practices in violation of the FTC Act.[76] The stipulated order prohibits Devumi from selling or helping others sell social media influence and imposes a judgment of $2.5 million (all but $250,000 of which is suspended) against the CEO and owner.[77]

In re Sunday Riley dealt with a cosmetics brand that sold high-end cosmetics primarily through social media channels. According to the FTC's complaint, employees of the company (at the direction of the company's eponymous CEO) faked product reviews on retailer Sephora's website, attempting to increase the average rating of the product. The CEO's direction to employees was brazen: "Tidal and Good Genes [two of the company's brands] are 4.2 and I would like to see them at 4.8+."[78] Eventually, a whistleblower stepped forward and revealed the scheme.[79] The FTC approved a proposed consent order that prohibits the company and its employees from misrepresenting the status of endorsers, requires them to disclose any connections between endorsers and the company, and requires them to instruct employees and agents of their responsibility to make such disclosures.[80] The order includes no disgorgement of gains nor any admission of fault. Two commissioners dissented from the proposed settlement, explaining that, in their view, the absence of any monetary penalty meant that "the proposed settlement is unlikely to deter other would-be wrongdoers."[81]

FTC v. Teami, LLC[82] addressed representations regarding the effectiveness of certain dietary supplements. In that case, Teami, its employees, and its agents were prohibited from representing its dietary supplements and teas as treating or preventing a variety of illnesses, helping cause weight loss, or producing

74. *Id.* at 6.

75. Complaint for Permanent Injunction and Other Equitable Relief at 3–4, FTC v. Devumi, LLC, No. 9:19cv81419 (S.D. Fla. Oct. 18, 2019).

76. *Id.* at 5 (citing 15 U.S.C. § 45(a)).

77. Stipulated Order for Permanent Injunction and Monetary Judgment at 2–3, FTC v. Devumi, LLC, No. 9:19cv81419 (S.D. Fla. Oct. 18, 2019).

78. Complaint at 4, *In re* Sunday Riley Modern Skincare, LLC, No. 192-3008 (F.T.C. Oct. 21, 2019) (quoting instructions from CEO to staff).

79. Lateshia Beachum, *Skin-Care Company Sunday Riley Settles FTC Charges of Fake Product Reviews*, Wash. Post (Oct. 22, 2019, 7:44 PM), https://www.washingtonpost.com/business/2019/10/22/sunday-riley-wanted-take-out-skincare-competition-so-it-had-employees-write-fake-reviews/.

80. Agreement Containing Consent Order at 6–7, *In re* Sunday Riley Modern Skincare, LLC, No. 192-3008 (F.T.C. Oct. 21, 2019).

81. Statement of Commissioner Rohit Chopra Joined by Commissioner Rebecca Kelly Slaughter at 3, *In re* Sunday Riley Modern Skincare, LLC, No. 192-3008 (F.T.C. Oct. 21, 2019).

82. No. 8:20-cv-518-T-33TGW (M.D. Fla. Mar. 17, 2020).

other health benefits without reliable scientific evidence that the representation was true.[83] If the company uses any human clinical tests, it must preserve all records of those tests.[84] The order prohibits misrepresentations about the status of endorsers, and requires disclosure of material connections between endorsers and the company.[85] The decision includes a judgment against the company and two officers in the amount of $15.2 million, of which all but $1 million is suspended,[86] and a variety of additional restrictions on compliance and reporting to make sure Teami does not make further misrepresentations.[87]

Relatedly, three celebrities and seven other social media influencers received letters from the FTC warning that their posts on Instagram about the tea did not adequately disclose their connections to Teami.[88] The letters reminded each influencer that she could face enforcement action and asked each to provide the FTC with an explanation of how she would make sure her posts complied with disclosure requirements relating to endorsements.

In re UrthBox, Inc.[89] examined endorsement incentives. In return for posting positive reviews on the Better Business Bureau website and on social media, UrthBox offered free snack boxes to reviewers, who, oftentimes, did not disclose they were receiving incentives for their participation.[90] The stipulated order requires UrthBox to make appropriate disclosures about its endorsers, and to make sure that its endorsers likewise disclose that the company is providing them with incentives to write positive reviews.[91] UrthBox also must pay the FTC $100,000.[92]

As one of its periodic reviews of rules and guides, in February 2020, the FTC announced that it was seeking public comment on its Endorsement Guides.[93] The announcement gives a number of examples of the sorts of issues the FTC is interested in, including "whether the practices addressed by the Guides are prevalent in the marketplace and whether the Guides are effective at addressing those practices," "whether consumers have benefitted from the Guides and what impact, if any, they have had on the flow of truthful information to consumers," and "how well advertisers and endorsers are disclosing unexpected material connections in social media."[94]

83. Stipulated Order for Permanent Injunction and Monetary Judgment at 5–8, FTC v. Teami, LLC, No. 8:20-cv-518-T-33TGW (M.D. Fla. Mar. 17, 2020).

84. *Id.* at 8–9.

85. *Id.* at 10–11.

86. *Id.* at 13–14. The officers granted liens on, and security interests in, real estate. *Id.* at 14–15.

87. *Id.* at 18–23.

88. Lisa W. Rosaya & Rebecca B. Lederhouse, *Celebrity Influencers Receive Warning Letters from Federal Trade Commission*, Baker McKenzie (Mar. 11, 2020), http://www.bakermckenzie.com/en/insight/publications/2020/03/celebrity-influencers-warning-letters.

89. No. C-4676 (F.T.C. May 14, 2019).

90. Complaint at 5–6, *In re* UrthBox, Inc., No. C-4676 (F.T.C. May 14, 2019).

91. Decision and Order at 5–6, *In re* UrthBox, Inc., No. C-4676 (F.T.C. May 14, 2019).

92. *Id.* at 9.

93. *FTC Seeks Public Comment on Its Endorsement Guides*, Fed. Trade Commission (Feb. 12, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-seeks-public-comment-its-endorsement-guides.

94. *Id.*

VIII. Conclusion

The survey period has provided numerous decisions with far-reaching implications. Going forward, we can expect that the Supreme Court will clarify what constitutes an ATDS when it decides *Facebook, Inc. v. Duguid*. The FTC will certainly continue its scrutiny of social media influencers and endorsements. Considering the massive shift to e-commerce and use of social media required by the pandemic, increased enforcement and litigation actions are likely.