

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Petition for Expedited Declaratory Ruling or,)	
in the alternative, Request for Retroactive)	CG Docket No. 02-278
Waiver filed by SGS North America, Inc.)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	

COMMENTS OF TAYLOR CARROLL

I. INTRODUCTION

On June 22, 2013, Cindy Carroll applied for and was extended credit by American Honda Finance Company (AHFC) to lease an Acura vehicle. Almost three years later, shortly before the vehicle lease was set to expire, Taylor Carroll, Cindy Carroll's husband, received nine pre-recorded messages on his cell phone, sent by SGS North America, Inc. (SGS), purporting to schedule a pre-term lease inspection. The messages were sent without Carroll's prior express written consent. Taylor Carroll ("Carroll") filed a putative class action against SGS North America, Inc. ("SGS") on July 6, 2016, alleging that the messages were telephone solicitations that violated the TCPA.¹

The timing of the barrage of telephone solicitation robocalls to Carroll and other lessees was no accident; rather, in concert with its client, AHFC, SGS's carefully orchestrated robocall blasts were sent at a time when the consumer was faced with an

imminent decision regarding the return or replacement of the leased vehicle. The pre-term lease inspection, that was the purported reason for these call blasts, was not required by the lease or finance documents signed nearly three years previously when the automobile lease transaction was executed. The purpose of the messages was not related to the credit transaction, which was at its end and nearly extinguished. As the record shows, these urgent and repeated robocalls constitute high pressure car sales tactics.

In its Petition, SGS describes itself as the “nation’s leading provider of inspection ... services,” and explains that motor vehicle lessors – such as American Honda Finance Corporation d/b/a Acura Financial Services (“AHFC”) which leased the vehicle to Cindy Carroll – contract with SGS to schedule and perform pre-term inspections of leased vehicles. As SGS’s Petition discloses, the Carroll Court has already ruled on the issue presented in the Petition when it considered the evidence, various FCC rulings and jurisprudence, and determined that the calls in question were dual purpose – “customer service and to solicit future sales and revenue” and required prior express written consent.² The Court’s ruling was well supported by the evidence. SGS’s corporate representative admitted under oath that the calls were made “as an agent in extension of American Honda” and that end-of-lease inspections are “an extension of sales” as it “keep[s] that customer happy and engaged with American Honda.”³ SGS now engages in forum shopping by filing its Petition, seeking to collaterally attack the well-reasoned Court ruling by proposing adoption of the “four corners” rule, in contravention of the

¹ *Taylor Carroll v. SGS North America, Inc.*, Civil Action No. 3:16-cv-00537-SDD-RLB (M.D. La.).

² Ruling at 2017 U.S. Dist. LEXIS 154170 (M.D. La. September 21, 2017)

clear requirements of the TCPA. For the reasons that follow, SGS' Petition should be rejected in all respects.

II. SUMMARY OF COMMENTS

The FCC has long maintained that, in order to achieve the underlying goals of the TCPA, the determination of whether a call is an advertisement “should turn, not on the caller’s characterization of the call, but on the purpose of the message.”⁴ SGS mistakenly claims this individualized assessment has led to confusion in the courts, and requests a modification of the FCC’s instruction to require calls be characterized as advertisements only by looking at the four corners of the communication itself. This would serve only to undermine the remedial purpose of the TCPA, contravene the clear language of the statute, and permit sophisticated telemarketers to avoid the TCPA’s statutory requirements of prior express written consent.⁵ A review of case law shows no confusion deciding this issue. The courts have made common sense determinations, on a case-by-case basis, and when appropriate in the evidentiary context of the case, the courts are in the best position to determine whether a call is a telephone solicitation by considering the context, timing, and purpose of the call.

³ *Id.* and *see* Anthony Perkins deposition attached as Exhibit “1” at 76.

⁴ *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC. Rcd. 14014, 14097–98, ¶¶ 139-141 (F.C.C. 2003) (“the 2003 Order”).

⁵ 47 C.F.R. §§64.1200(a)(2), (a)(3).

III. COMMENTS IN RESPONSE TO SGS's PETITION

A. Summary of the Factual Issues Unique to this Case and Which Support the Court's Determination that SGS Calls Solicited Future Sales and Revenue

The facts surrounding SGS's robocall campaign practices belie application of its proposed four corners rule and do not support its's Petition. This matter has been litigated for over two years and a comprehensive factual record has been created, all of which supports the Court's determination that SGS robocalls are dual purpose, constitute telephone solicitation, and violate the TCPA because SGS did not have prior express written consent to place its calls to either wireless or residential lines.

i. SGS Vice-President of Operations Testified that SGS's Robocall Campaigns Solicited Future Sales and Revenue

On December 16, 2016, SGS Vice-President of Operations Anthony Perkins provided sworn testimony that established the purpose of SGS pre-term robocalls constituted "telephone solicitations" within the intendment of 47 USC §227(a)(4). . Specifically, Mr. Perkins testified as follows:

Q. So you are contractually bound to promote the scheduling of these inspections?

A. ... The definition for SGS to promote is to describe the value to the lessee in having this ...The importance to American Honda is that ultimately they want to maintain that customer, and the best way to maintain that customer, or one way to maintain that customer, is to have a preterm lease inspection so this way when that lessee, they have better time to prepare if they have any financial responsibility. * * *

The level of importance here for them [American Honda] is **to have a more customer friendly**

approach to this process so they can maintain that customer and keep that customer and ultimately lease them another vehicle.

* * *

Q. Why does American Honda want to have inspections off premises?

A. Because . . . [t]hey're trying to **preserve the relationship with that client and keep them as a customer and keeping them in a new automobile.** Our service is an outsource service that for our customers was previously done in-house. So we're just working as an agent in extension of American Honda. **In a way it's an extension of sales. Not as an extension to sell our service, but an extension to keep that customer happy and engaged with American Honda.** (emphasis added)⁶

ii. *SGS Documents and Website Tout the Benefits of its Vehicle Inspection Services*

SGS's PowerPoint presentation establishes the following:⁷

- The benefits to companies like AHFC which use its services, including good customer service;
- The finance companies (AHFC) are trusting SGS with their most valued asset-their customers;
- How SGS treats their customers influences the decision to remain a customer or move on;
- How SGS's calls can and do influence its clients' customers.

⁶ Ex. "1" at 71,72,76 (emphasis added)

Other SGS materials establish:

- SGS's promotional information, which states that its pre-term inspections "Increase customer retention by reducing friction during a key point in their decision – making process."⁸
- SGS's Facebook page (as of January 25, 2018) which states that its services "... add significant value to our customers' operations and ensure business sustainability"⁹

iii. AHFC's Corporate Representative's Testimony Further Establishes the Dual Purpose of SGS Robocall Campaigns

The deposition of Mr. Tommie C. Toups establishes that the timing of SGS's pre-term lease inspection robocall campaigns is critical. SGS begins the process when the lessee must repair the leased vehicle if necessary, re-lease or buy another vehicle to qualify for loyalty waiver incentive benefits, and when the lessee is most vulnerable to sales pitches and tactics. It is not coincidental that AHFC established this time for the campaigns of robocall blasts to begin. Moreover, it set the frequency, content and timing of the call blasts.

Mr. Toups conceded the critical nature of the timing of the end-of-lease inspection process and he conceded key facts that establish the purpose of the calls constitutes telephone solicitations:

⁷ Attached as Exhibit "2" at p. 2

⁸ Attached as Exhibit "3"

⁹ Exhibit "4"

- For a leased vehicle, the decision to re-lease or purchase will come 60 to 90 days out from the end of the lease.¹⁰
- AHFC's objective is to retain a customer so he would want the end-of-lease experience to be positive.¹¹
- If a customer learns as part of the pre-term inspection that damage or excessive wear and tear exists, AHFC recommends a Honda dealership.¹²
- Repairs to leased vehicles performed by Honda dealerships assist in remarketing the vehicles.¹³
- If excessive wear of a leased vehicle exists, Honda provides a loyalty "Excessive Wear – and Use of Damage" of \$500.00 to customers who purchase or lease another Honda vehicle.¹⁴
- AHFC defines a loyal customer as one who purchases or leases another Honda or Acura automobile within 30 days prior to or after the lease ends.¹⁵
- AHFC publicly represents the benefits, services and products that a consumer obtains by buying or leasing another Honda vehicle.¹⁶
- The Waiver is a benefit offered to customers who purchase or re-lease a Honda or Acura vehicle.¹⁷

¹⁰ Tommie Toups deposition, attached as Exhibit "5" at 76,77

¹¹ *Id.* at 77

¹² *Id.* at 34.

¹³ *Id.* at 35.

¹⁴ *Id.* at 42-43, and Exhibits "5" and "6" of Toups deposition

¹⁵ *Id.* at 43

¹⁶ *Id.* at 43-44

- The Waiver program and statements regarding benefits for purchasing or leasing a vehicle are designed to promote the Honda and Acura brand and customer loyalty.¹⁸
- Honda also offers an additional waiver up to \$1,000.00 in some states to loyal customers who agree to lease or buy a new vehicle.¹⁹
- Honda encourages the use of authorized Honda facilities to ensure that leased vehicles are properly repaired with genuine Honda parts as required by the lease agreement. AHFC encourages lessees to use Honda dealerships [creating revenue for the dealerships for performing the repairs].²⁰
- AHFC advises lessees about the need for an end-of-lease inspection and directs them to schedule the inspection through SGS. Although not required by the lease, the inspection must be performed in the last sixty days of the lease.²¹
- AHFC is trusting SGS with its most valued asset, its customers.²²
- The courtesy and quality of the SGS end-of-lease inspection impacts AHFC's customer's overall experience.²³

¹⁷ *Id.* at 44

¹⁸ *Id.* at 45

¹⁹ *Id.* at 46

²⁰ *Id.* at 47

²¹ *Id.* at 49

- AHFC's customer brochure provides that lessees can take advantage of an exclusive offer of waiver of their last three lease payments by having their vehicle inspected by SGS.²⁴

The above facts clearly establish a coordinated effort between SGS and AHFC to conduct end-of-lease inspections at the critical time when the lessee must decide where to repair his vehicle, if necessary, and whether to remain loyal to Honda and re-lease or purchase another Honda vehicle. The pre-term lease inspection, which is not a requirement under the terms of the lease, is initiated by SGS's robocall blasts. SGS inspections are an indispensable part of the customer retention and resale process. It also provided a convenient opportunity to begin the robocall blasts that created a sense of urgency with the consumer who was forced to make a decision: return the vehicle and lose "loyalty" status or become a "loyal" customer with an array of benefits, all of which generated revenue for Honda. When viewed within the above factual context, the four corners proposal by SGS would facilitate abuse of the TCPA by allowing sophisticated telemarketers to employ seemingly content neutral messages when the actual purpose is customer loyalty and the purchase or rental of goods (new cars) and services (repairs) in violation of the TCPA.

²² *Id.* at 56

²³ *Id.* at 58,59

²⁴ AHFC Customer mailer, Exhibit "6"

iv. SGS Did Not Obtain Prior Express Written Consent to Send Pre-recorded Messages Using an ATDS

Discovery in this case has established the following:

- No evidence exists to establish prior express written consent to send or receive robocalls or pre-recorded messages to a cell phone.²⁵
- SGS did not seek express written consent even after the lawsuit was filed.²⁶
- SGS maintains no information from any source indicating any recipient provided consent to receive pre-recorded messages.²⁷
- SGS did not undertake any efforts to obtain consent.²⁸

Accordingly, SGS's telephone solicitations do not comply with the TCPA written consent requirement.

B. Remedial Goals of the TCPA Requires Looking at the Purpose of the Communication.

Jurisprudence and FCC Orders are replete with evidence of continued consumer frustration with unwanted telemarketing robocalls and the substantial benefits in

²⁵ Exhibit "1" at 48, 138

²⁶ *Id.* at p. 118-119

²⁷ Keith Phillips deposition, attached as Exhibit "7" at 72-73

²⁸ *Id.* at pp. 74-75, 137

protecting consumer privacy sought by the TCPA.²⁹ The underlying goal of protecting consumer privacy from unwanted telephone solicitation is not served by limiting the analysis of what constitutes telemarketing to only those messages that contain within their four corners an offer to purchase, rent or invest in property, goods or services,³⁰ or limiting dual-purpose calls to only those containing a free offer.^{31,32} The relief sought by SGS would only increase unwanted telemarketing robocalls as it would permit sophisticated telemarketers to evade the statutory requirements and the intent of the TCPA. Only by continuing to assess the purpose of the call, and not just its content, will the remedial purposes of the TCPA be achieved.

C. SGS's Proposed "Four Corners" Rule Would Contravene the Clear Language of the TCPA and Thwart Congressional Intent

The FCC should reject SGS's Petition because the proposed four corners rule would violate the clear language of the TCPA. 47 USC §227(a)(4) provides the definition of a telephone solicitation as follows:

²⁹ See, e.g., the 2003 Order, 18 F.C.C. Rcd. at 14096, ¶ 137; and *In the Matter of Rules & Regulations Implementing the Te. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830, 1837, at ¶¶ 18-19 (F.C.C. 2012) ("the 2012 Order"). See also *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 370-71, 132 S.Ct. 740, 744, 181 L.Ed.2d 881 (2012) ("[v]oluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes—prompted Congress to pass the TCPA"); and 47 U.S.C. § 227, Note, Pub. L. No. 102-243, § 2(1-4), 105 Stat. 2394, 2394 ("[a]utomated telephone calls, colloquially referred to as "robocalls," have ravaged both the landlines and mobile telephone lines of millions of American households throughout the years").

³⁰ SGS Petition, at p. 14.

³¹ *Id.* at p. 15.

³² Even accepting SGS's argument that a free offer is required for dual-purpose (which it is not), SGS offered a free pre-term lease inspection which is a service under 47 USC §227(a)(4)

(4) The term “telephone solicitation” means 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, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person’s prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization. (emphasis added)

Accordingly, the clear and unambiguous language in the TCPA mandates that the “purpose” of a call be analyzed in determining whether a telephone solicitation has occurred. The Petition completely ignores not only numerous court decisions and other orders of the FCC, but the language of the TCPA itself. Consideration of the purpose of a call in determining a telephone solicitation is statutorily mandated and cannot be changed through an interpretative rule.³³ SGS’s proposal would contravene clear congressional intent that the purpose of a call be considered in determining a telephone solicitation. For this reason, SGS’s Petition must be denied.

D. The FCC’s Prior Guidance Has Not Created Confusion in the Courts Interpreting the Scope of “Dual Purpose” Calls

In 2002, the FCC sought comment on artificial or prerecorded messages containing free offers of purporting to provide only information about products or services.³⁴ The FCC summarized the majority of comments by consumers who viewed such messages as “intended to generate future sales,” and who cautioned against any restriction from the

³³ *American Mining Cong. v. Mine Safety & Health Admin.*, 302 U.S. App. D.C. 38, 995 F.2d 1106, 1112 (D.C. Cir. 1993)(stating that a rule that “effectively amends a prior legislative rule” is “a legislative, not an interpretive rule.”)

³⁴ The 2003 Order, 18 F.C.C. Rcd. at 14095-14096, ¶ 136.

rules relative to dual purpose calls as they were seen as providing both a customer service and a “cost effective marketing tool.”³⁵ Agreeing with those comments, the FCC in its 2003 Order declared the *purpose* of the message controls whether the call is informational or an advertisement subject to the prior express written consent rule.

The subsequent elimination of the established business relationship exemption does not require re-examination of this issue or a modification of the rule. Courts are well equipped to weigh case-specific evidence and determine whether messages are telephone solicitations and, therefore, subject to the prior express written consent rule by making fact-specific findings concerning the purpose, context, timing and content of the call.

For example, in *Chesbro v. Best Buy Stores, L.P.*,³⁶ the court – which approached the issue with “a measure of common sense,”³⁷ rejected the argument that the calls were informational “courtesy messages” to advise of the expiration of reward zone points because the calls, made months after a purchase was made, served only to urge the consumer to redeem his points, which would require them to go into a store and make a purchase. Solely informational calls were recognized by courts in other cases where they

³⁵ *Id.* at 14096, ¶¶ 138-139. See also the comment, cited by the FCC, from the National Association of Attorneys General, at p. 43, in which it was stated: “[T]he application of the TCPA must turn *not* on the telemarketer’s own characterization of the prerecorded message, but on the actual purpose If the purpose of the commercial prerecorded message is to promote or sell goods or services, then it must be subject to the TCPA. This should not change simply because a marketer thinly disguises this purpose by claiming to provide ‘information only,’ claiming to offer free goods, or claiming to seek distributors for its products. If marketers could circumvent the TCPA merely by communicating ‘information only,’ and saving the real sales pitch for the consumer’s call in response to the message, the ban on prerecorded messages could be avoided so easily as to become a nullity.”

³⁶ 705 F.3d 913 (9th Cir. 2012).

³⁷ *Id.* at 918.

were made within moments of the consumer having initiated a transaction.³⁸ The fact that a different result was reached in *Pedro-Salcedo v. Haagan Dazs Shoppe Co., Inc.*,³⁹ under seemingly similar circumstances, is not evidence of confusion in the courts for which clarification from the FCC is needed; rather, it exemplifies the courts' common-sense approach for assessing the purpose, content, context and timing of the message.

The cases cited by SGS at footnotes 28 and 29 of its FCC Petition also fail to show confusion by the courts when the varying evidence and procedural postures of the cases are examined. The *Sandusky* and *Katz* Courts⁴⁰ viewed the issue in the context of a motion for summary judgment and were therefore able to examine the evidence presented on the issue. Confusion in the courts is not shown by the differing results in those two cases because “no record evidence”⁴¹ showed a financial benefit from sending the faxes presented in *Sandusky*; whereas, in *Katz*, the court found the “evidence demonstrates the calls to Plaintiff were advertising because they were made for customer service purposes and to increase future sales and revenue.”⁴² In contrast, the *Boehringer* and *Enclarity*

³⁸ See, e.g., *Wick v. Twilio, Inc.*, Civ. A. No. 16-00914RSL, 2017 WL 2964855 (W.D. Wash. July 12, 2017) (finding text message received during the process of attempting to obtain a free sample and *immediately after* providing phone number and other information was not an advertisement); and *Daniel v. Five Stars Loyalty, Inc.*, Civ. A. No. 15-cv-03546WHO, 2015 WL 7454260 (N.D. Cal. Nov. 24, 2015) (finding call sent *within minutes* of providing phone number for registering in a loyalty program was not telemarketing but was sent for the purpose of completing the registering process).

³⁹ Civ. A. No. 5:17-cv-03504-EJD, 2017 WL 4536422 (N.D. Cal. Oct. 11, 2017), a case that also involved a store's loyalty program, but unlike *Daniel*, court finds text could constitute an advertisement because it was not sent to complete the registration process.

⁴⁰ *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218 (6th Cir. 2015); and *Katz v. Am. Honda Motor Co., Inc.*, Civ. A. No. 15-cv-4410-CBM-RAOX, 2017 WL 3084159 (C.D. Cal. May 12, 2017).

⁴¹ *Sandusky*, *supra*, 788 F.3d. at 225.

⁴² *Katz*, *supra*, 2017 WL 3084159, at *2.

Courts⁴³ viewed the issue at the preliminary motion to dismiss phase, under which all factual allegations must be taken as true, such that the faxes related to the sender's products or services were properly characterized as advertisements as they plausibly had a commercial purpose. Lastly, the ruling in *Dukes v. DirecTV, LLC*⁴⁴ provides no guidance because it dealt with exempt calls for debt collection.

Similar to *Katz*, the evidence presented by Carroll in opposition to the motion for summary judgment filed by SGS in *Carroll v. SGS*⁴⁵ was likewise found sufficient to establish a commercial purpose for the nine robocalls SGS sent three years after Carroll's wife had entered into an automobile lease transaction. SGS claims its calls were made only to schedule an inspection of the vehicle. But the sworn testimony of SGS's corporate representatives completely contradicts this representation, as does its public postings. SGS's Petition lacks credibility given the factual record and the Court's ruling.

E. Adoption of the Four Corners Rule Will Create and not Reduce Uncertainty

As evidenced by the Court's ruling, SGS's only way to avoid liability for its telemarketing activities is by petitioning the FCC to adopt the four corners rule and thus prevent the Court from considering the purpose of its messages. Such a collateral attack on the Court's ruling is inappropriate and would frustrate the intent of the statute. The four corners rule has been criticized by courts which have struggled with its limitations and application. In *AM Int'l, Inc. v. Graphic Management Assocs., Inc.*, 44 F.3d 572,

⁴³ *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm. Inc.*, 847 F.3d 92 (2d. Cir. 2017); and *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, Civ. A. No. 16-13777, 2017 WL 783499 (E.D. Mich. Mar. 1, 2017), *rev'd and remanded*, Civ. A. No. 17-1380, 2018 WL 5726133 (6th Cir. Nov. 2, 2018).

⁴⁴ Civ. A. No. 3:16-cv-01418-G, Dkt. No. 25 (N.D. Tex. Nov. 7, 2016).

575 (7th Cir. 1995), the court observed that the “four corners” rule “is better regarded as a generalization then as the premise of a syllogism,” stating:

“[A] clear document can be rendered unclear – even have its apparent meaning reversed, by the way in which it connects, or fails to connect, with the activities that it regulates. Discrepancy between the word and the world is a common source of interpretive problems everywhere. *Id.* at 577⁴⁶

Adoption of the four corners rule would undoubtedly allow sophisticated telemarketers, under the guise of ambiguously vague language, to conduct telephone solicitations, the purpose of which is to drive call recipients to act in a way that encourages the purchase or rental of or investment in property, goods or services, much like SGS’s pre-term free inspection messages drive lessees to repair their vehicles at Honda dealers, take advantage of loyalty incentive and waiver programs, and maintain good customer relations, all of which are designed to sell or lease another vehicle. SGSs’ proposal would prevent analyzing the “word” of the message with the “world” in which it applies, which the *AM Int’l* court found unacceptable. In today’s world of sophisticated telemarketing, the four corners rule will enable aggressive telemarketers to skirt the clear language of the TCPA.

F. The Issue of Whether a Call is an Advertisement is Within the Scope of the Courts

The cases discussed in Section D above do not reflect any confusion by courts in their determination of whether a call has a commercial or dual purpose, and are therefore

⁴⁵ Civ. A. No. 3:16-cv-00537-SDD-RLB (M.D. La.).

⁴⁶ *See, URS Corp. v. Ash*, 101 Ill. App. 3rd 229, 234, 427 N.E.2d 1295, 1299 (The “four corners” rule has two flaws: “it assumes a precision in language which cannot exist,” and requires the trial judge to determine “the true intent of the parties in a transaction to which he is far removed both in time and circumstance.”)

subject to the prior express written consent requirement. Moreover, the existence of a commercial purpose underlying a call is not a technical issue that would warrant the FCC's technical expertise, but rather is fact-specific and inappropriate for the blanket rule sought by SGS. Any such rule only serves to strip courts of their authority to make the above exemplified common sense factual determinations necessary to determine TCPA compliance. Moreover, it would require courts to ignore the overwhelming evidence of commercial or dual purpose such as what is found herein. Such fact-intensive determinations are well suited to judicial and not regulatory review.

G. SGS Calls to Schedule and Confirm Vehicle Inspections Require Prior Express Written Consent

SGS relies upon the Commission's 2006 order, which explained "messages whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender *are not* advertisements."⁴⁷

SGS then cites examples of communications which it contends are not "advertisements" and thus fall outside the scope of "telemarketing."⁴⁸ However, the facts of this matter distinguish SGS messages from those examples of non-advertisement messages listed in its Petition. Most of the examples address communications that occur immediately after a transaction, were necessary for the completion of the transaction, or reference change in the terms and conditions of a transaction.

Unlike the cited examples, the SGS pre-term inspection messages are factually distinguishable for the following reasons:

⁴⁷ SGS Petition at p. 16

⁴⁸ *Id.*

- The lease agreements executed by Carroll and other lessees do not require pre-term inspections;
- The credit applications executed by Carroll and other lessees do not require pre-term lease inspections;
- SGS messages were sent at or near the conclusion of the lease agreement years after the transaction was executed and when the leases were at their end;
- A pre-term inspection is voluntary;
- The messages did not change or alter the terms of the lease or credit that was extended;
- The messages did not confirm or complete the credit or lease transaction;

Accordingly, SGS's reliance on the commission's 2006 order is misplaced as its messages did not facilitate, complete or confirm a commercial transaction and instead were, as the Court found, dual purpose – "customer service and to solicit future sales and revenue."⁴⁹

Further, in its Petition, SGS contends that it "... may rely upon the consent given by a consumer who provides a telephone number in connection with a credit transaction [like a motor vehicle lease agreement]" to establish prior express consent to make its robocalls since "... telephone numbers provided by the lessee to the lessor in connection with the leased transaction" are called.⁵⁰ SGS relies upon the *ACA International Declaratory Ruling* and the *2015 Omnibus TCPA Declaratory Ruling* which address the ability of a creditor or debt collector (which SGS was not) to make robocalls without prior express written consent provided the calls *are related to the debt* (which SGS's calls were not). SGS's contention that "... provision of a cell phone number to a creditor, e.g., as part of a credit application reasonably evidences prior express

⁴⁹ Exhibit "2"

consent by the cell phone subscriber to be contacted at that number regarding the debt.” is misplaced and in error.⁵¹ The pre-term lease inspection robocalls made by SGS are clearly not “regarding the debt” associated with the lease. As stated above, the pre-term inspections are completely unrelated to the underlying debt, especially given the timing of the robocalls, which are at the end of the lease term when the debt is nearly extinguished. Since the SGS messages were not “regarding the debt” but were instead designed to facilitate customer loyalty resulting in revenue for its client, AHFC, SGS was required to obtain prior express written consent.

H. SGS’s Request for Retroactive Waiver Should Be Rejected

The purpose sought to be achieved by SGS is suspect considering the ongoing litigation against it. As set forth above, SGS did not obtain any express consent to place calls using pre-recorded messages sent from its ATDS for any of its call campaigns and SGS has taken no action to comply with the TCPA’s express consent requirement. The calls are not related to any debt on the vehicle lease but only a pre-term inspection that is nowhere disclosed on the credit application or the lease documents. SGS’s request for a “limited retroactive waiver” must be denied as it is not supported by “disparate” court rulings. SGS’s attempt to use the FCC to collaterally attack the Court’s ruling for purposes of obtaining absolution for its actions must be rejected.

⁵⁰ SGS Petition at p. 18

⁵¹ SGS Petition at p. 18

Submitted: January 24th, 2019.

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