

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

In the Matter of)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telecommunications Consumer Act of 1991)
)

To The Commission:

**Petition of ContextMedia, Inc. d/b/a Outcome Health
For Clarification, or, in the Alternative, for Declaratory Ruling**

Angela E. Giancarlo
Howard W. Waltzman
Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006
202-263-3000

Sanford Michelman
Michelman & Robinson, LLP
10880 Wilshire Blvd.
19th Floor
Los Angeles, CA 90024
310-299-5500

*Counsel for ContextMedia, Inc. d/b/a
Outcome Health*

Table of Contents

I. Introduction 1

II. Background 3

III. The Commission Should Clarify Or Declare That An Unknowable Technical Error Is Protected From Liability Pursuant To The *SoundBite* Decision 7

IV. The Commission Should Clarify Or Declare That An Undetected and Inadvertent Technical Error Satisfies The Requirements For A Safe Harbor..... 10

V. A Limited Safe Harbor In This Instance Would Serve The Public Interest 12

VI. Conclusion..... 14

I. Introduction

Founded in 2006 by Rishi Shah and Shradha Agarwal, and headquartered in Chicago, Illinois, ContextMedia, Inc. d/b/a Outcome Health (“Outcome”) exists to support and promote universal good health and well-being. The company has built and operates a video platform to equip medical personnel with timely, relevant health information at the time of care. Outcome closely coordinates with healthcare professionals to support patients as they confront health-related issues and decisions. Outcome has a presence in almost 20 percent of doctors’ offices in the United States, and is available during more than 580 million patient visits per year.

The subject of the instant request, Outcome’s “Healthy Tips” program, was one avenue by which Outcome delivered information to patients. Specifically, Outcome created Healthy Tips to provide consenting subscribers with a daily text message designed to promote healthy life choices in between doctor visits. These daily text messages offered ways for consenting subscribers to eat better, be more active, and affirmatively take steps to live healthier lives. Such “purely informational” wireless messages are exactly the type that the Federal Communications Commission (“Commission”) has determined “that consumers find highly desirable and ... do[es] not want to discourage.”¹

Congress enacted the Telephone Consumer Protection Act of 1991² (“TCPA”) to combat unwanted telemarketing and other calls not solicited by consumers. The Commission’s rules similarly seek to prevent such calls, while permitting “desirable” calls beneficial to consumers. Thus, the Commission has exempted certain types of calls from the TCPA’s requirements, as

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 12-21, 27 FCC Rcd 1830, 1841 ¶29 (2012).

² 47 U.S.C. §227.

well as provided a safe harbor for companies that engage in good faith efforts to comply with the TCPA and the Commission's rules.

These exemptions and safe harbors are particularly important given the explosion in TCPA-related liability. Frivolous TCPA suits are rampant.³ These suits divert companies' resources away from developing and enhancing products that benefit consumers, and they serve as a disincentive for companies to provide valuable information to consumers in a timely manner. These lawsuits can potentially expose companies to crippling liability even if they have taken affirmative steps to comply with the TCPA and the Commission's rules.

Outcome has experienced such litigation first hand, forcing the company to shut down an informational program that provided patients with timely health-related information. Outcome asserts here that the company has not violated the TCPA or the Commission's rules, and thus should be protected by the Commission's intent that good-faith compliance with the agency's rules should not result in liability. As set forth below, Outcome respectfully requests that the Commission clarify or declare that a discrete technical error does not eliminate the liability protection afforded by the 2012 *SoundBite* Declaratory Ruling⁴ or preclude the granting of a safe harbor for good-faith compliance with such decision. Outcome submits that grant of a safe harbor in this instance would serve the public interest.

³ "TCPA litigation has consistently increased year-after-year. Between 2010 and 2016 there was a 1,273% increase in litigants; between 2015 and 2016 alone the total number of litigants increased 32%." Josh Adams, Dir. of Research, ACA Int'l, *Unintended Consequences of an Outdated Statute: How the TCPA Fails to Keep Pace with Shifting Consumer Trends* (May 2017) ("Adams Study") at 2.

⁴ *SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, Declaratory Ruling, 27 FCC Rcd 15391 (2012) ("*SoundBite*").

II. Background

The Commission has acknowledged the substantial consumer benefits arising from legitimate communications between businesses and consumers.⁵ Outcome's Healthy Tips program was one such beneficial program.⁶ Designed to incorporate input from doctors, nurses, and patients, consenting subscribers received brief, daily texts setting forth guidance on the importance of keeping healthy in between physician visits and offering actionable tips that patients could use to improve their health. Specifically, a patient sitting in a doctor's office watching health-related video segments while waiting for his or her appointment could send a text to voluntarily subscribe to receive daily Healthy Tips. Outcome did not sell any products through Healthy Tips, and the program did not generate any revenue. Rather, Healthy Tips text messages met the goal set by medical personnel: to regularly but gently inform and remind consenting patients about activities and choices that would bring about positive health outcomes in between medical visits.

At its outset, the Healthy Tips program was administered by independent SMS platform Signal HQ, which had sole responsibility for maintaining a database of subscribers that elected to opt-in to (subscribe) and opt-out of (stop receiving messages from) the program. During the time period that Signal HQ managed the Healthy Tips program, all unsubscribe requests were fulfilled in a timely manner—no subscriber received Healthy Tips *after* sending a text request to unsubscribe. The subscribe-unsubscribe management by Signal HQ was flawless.

Unfortunately, Signal HQ ceased business operations in early 2015.

⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 at ¶ 37 (2003) ("2003 TCPA Order").

⁶ As discussed below, the Healthy Tips program was discontinued in light of the pending litigation.

Thereafter, beginning in April 2015, Outcome contracted with Twilio Inc. (“Twilio”). As with Signal HQ, the management of the program for those that subscribed or unsubscribed directly through Twilio was flawless. For the sake of clarity, the process is described in greater detail below.

Outcome displayed video messages in physicians’ offices informing patients about the program and providing instructions on how to subscribe if they wished to participate. Specifically, interested patients were instructed to subscribe to Healthy Tips by sending a text message to an SMS “short code” number provided by Signal HQ or Twilio (depending on which entity managed the program at the time; together “SMS Provider”) asking to sign up for the program (*e.g.*, by texting the word “subscribe”). The SMS Provider receiving these incoming text messages electronically forwarded them to Outcome, where Outcome’s software would receive and process the request. The software would then generate a text message to the mobile number, asking the patient to confirm his or her subscription to Healthy Tips. If the patient responded in the affirmative (“Y” or “YES”), the SMS Provider would transmit Y or YES to the Outcome software, which would then add the mobile number to the database as a Healthy Tips subscriber. If the sender did not respond to the confirmation message, the number would not transmit to Outcome’s software and would not be added to the Healthy Tips subscriber database. Outcome never used any third-party phone lists. Rather, the company collected mobile numbers solely through this voluntary subscription process.

Meanwhile, Outcome provided the SMS Provider each day with a list of consenting subscribers to whom to text, as well as the body of the day’s message. The SMS Provider then delivered the text message to consenting Healthy Tips subscribers. This list was updated daily

to ensure that Outcome sent messages only to consenting subscribers and honored all opt-out requests. In addition to the health message, Outcome's Healthy Tips text messages always included clear opt-out instructions. Specifically, each text message included the following language: "To opt-out, reply STOP." In addition, "CANCEL" or "STOP CMH TIPS" would also convey a subscriber's preference to opt-out.

When a subscriber responded to a Healthy Tips text message with one of these words, the SMS Provider would pass the message on to Outcome, and the Outcome software would receive and process the request by flagging the sender's mobile number as unsubscribed. Consistent with best practices and the *SoundBite* decision, the software would then generate a text message confirming that the number had been unsubscribed, and the SMS Provider would transmit that confirmation to the sender of the opt-out request. From this point forward, Outcome would not send any further text messages to these mobile numbers.

Outcome devised and had in place comprehensive procedures, which company personnel followed to comply with the TCPA, including a routine practice for honoring unsubscribe requests. As noted earlier, every Healthy Tips text message included explicit instructions for opting out. Outcome hard-coded the opt-out process into its software. In addition, Outcome kept precise subscriber records, including records of those patients electing to unsubscribe. Outcome personnel were trained on TCPA compliance and the company built best practices into its software.

In March 2016, however, Outcome received notice from counsel to an individual who subscribed during the time period that Signal HQ was managing the program, but sought to unsubscribe during the time period that Twilio was managing the program. Counsel demanded

that the subscriber not receive any further text messages. As a result, Outcome shut down the entire program that day and began investigating why the request to unsubscribe had not been honored. Despite shutting down the entire program, the lawyer filed a putative class action in the District Court for the Northern District of Illinois,⁷ seeking approximately \$192 million in fines pursuant to the TCPA.

Through its investigation, Outcome identified an unknown and inadvertent technical error that caused the improper processing of unsubscribe requests in certain limited circumstances. Specifically, those subscribers that subscribed and sought to unsubscribe while under the management of the program by Signal HQ had no issues; the same is correct with respect to Twilio. But Outcome discovered through its investigation that the population of people who subscribed under Signal HQ's management of the program who were transferred to Twilio (approximately 2240 individuals) could not unsubscribe because the database of consenting subscriber mobile numbers assembled by Signal HQ included a "carriage return" character after each number. Twilio's program did not include any such character. This fact led Outcome to uncover an obscure glitch: If a Healthy Tips subscriber joined the program during Signal HQ's management of the program and later requested to unsubscribe during Twilio's management, the new software did not—and could not—properly match the number (and fulfill the unsubscribe request) due to the presence of the carriage return character.

This unknown technical error was not created by Outcome. Again, the very day a subscriber complained, the entire program was shut down. Despite these facts, the plaintiff is

⁷ See *Griffith v. ContextMedia, LLC, d/b/a Outcome Health*, 1:16-cv-02900 (N.D. Ill).

seeking approximately \$192million in fines pursuant to the TCPA (effectively putting Outcome out of business for an unknown and inadvertent technical error).

III. The Commission Should Clarify Or Declare That An Unknowable Technical Error Is Protected From Liability Pursuant To The *SoundBite* Decision

Legitimate communications to consenting recipients such as those between Outcome and its Healthy Tips subscribers generate substantial consumer benefits. Without sales offers and without generating revenue, the program was implemented in good faith to remind consenting patients about the importance of maintaining good health. The program was specifically designed in consultation with physicians, who believed that providing patients with daily tips on how to lead a healthier life would improve patient outcomes.

Therefore, Outcome respectfully requests that the Commission clarify or declare that the unknown and inadvertent technical error present in Outcome's system as a result of the migration of the program from Signal HQ to Twilio does not eliminate or curtail Outcome's eligibility for the liability protection afforded by the 2012 *SoundBite* ruling. Outcome satisfies the necessary criteria, as discussed below.

In *SoundBite*, the Commission ruled that a consumer's prior express consent to receive text messages encompasses consent to receive a final one-time confirmation text message.⁸ In reaching this outcome, the Commission sought to ensure that wireless consumers would continue to benefit from the TCPA's protection against unwanted text messages, while giving consumers certainty that their opt-out requests were successfully processed.⁹ Companies that

⁸ See *SoundBite*, 27 FCC Rcd at 15394 at ¶ 8 n.30.

⁹ See *id.*, 27 FCC Rcd at 59391 at ¶ 1.

engage in good-faith efforts to comply with the *SoundBite* ruling should be afforded the liability protection contemplated by the ruling.¹⁰

In addition, we note that the Commission has jurisdiction under Section 227 of the Communications Act (“the Act”)¹¹ to issue clarifications and declaratory rulings regarding the agency’s interpretation and implementation of the TCPA.¹² Indeed, the Commission has cited its “significantly broad” authority over practices subject to Section 227.¹³

Moreover, the Commission has ample precedent, in addition to *SoundBite*, for clarifying that good-faith efforts to comply with the statute and the Commission’s rules do not warrant liability under the TCPA. As far back as 2003, the Commission determined “that a safe harbor should be established for telemarketers that have made a good-faith effort to comply with the national do-not-call-rules.”¹⁴ There, the Commission concluded that a seller or its agent would not be liable for violating the rules if the seller could demonstrate compliance with certain criteria as part of its “routine business practice,” even in the event of an error.¹⁵

The Commission further recognized “that parties who have made good-faith efforts to comply with the national do-not-call rules may, nonetheless, occasionally make some calls in

¹⁰ The *SoundBite* petition reported that “at least twelve [TCPA] lawsuits have been filed, including against well known companies.”

¹¹ 47 USC § 227.

¹² The Commission may issue a declaratory ruling “terminating a controversy or removing uncertainty.” 47 CFR § 1.2.

¹³ 2003 TCPA Order, 18 FCC Rcd at ¶ 15 (noting that the FCC’s jurisdiction over telemarketing practices is “significantly broader” than the FTC’s).

¹⁴ *Id.* at ¶ 38.

¹⁵ *Id.* (stating that telemarketers must have: (i) established and implemented written procedures to comply with the do-not-call rules; (ii) trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to the do-not-call rules; (iii) maintained and recorded a list of telephone numbers the seller may not contact; (iv) used a process to prevent telemarketing to any telephone number on the do-not-call list no more than three months prior; and (v) ensured that any subsequent call otherwise violating the do-not-call rules is the result of error). *See also* 47 CFR § 64.1200(c)(2)(i)(A)–(E).

error to registered telephone lines [and therefore] established standards for a safe harbor exemption from liability.”¹⁶ The Commission noted that the seller must “show that the unlawful calls were the result of identifiable error and made in spite of adherence to the enumerated do-not-call procedures.”¹⁷

Outcome is entitled to a similar “error defense” because its technical error occurred despite the company’s comprehensive policies.¹⁸ Outcome has acted in good faith to comply with the Commission’s TCPA rules.¹⁹ As noted earlier, Outcome’s trained personnel devised and implemented TCPA compliance procedures that were routinely followed, were hard-coded into Outcome’s internal software, and which included steps for handling unsubscribe requests. Moreover, in addition to the Healthy Tips, each message included opt-out instructions.

Nonetheless, despite Outcome’s diligence, a technical error caused the improper processing of unsubscribe requests received from subscribers who had signed up during Signal HQ’s management of the messaging program, but later sought to unsubscribe during Twilio’s management. As soon as Outcome learned about this issue, the company immediately halted the Healthy Tips program to ensure its compliance with the TCPA and the Commission’s rules.

¹⁶ See *Dynasty Mortgage, L.L.C., Order of Forfeiture*, 22 FCC Rcd 9453 at ¶ 4 (2007) (“*Dynasty Mortgage*”); see also 2003 TCPA Order, 18 FCC Rcd at 14040.

¹⁷ *Dynasty Mortgage* at ¶ 5.

¹⁸ *Id.* at ¶ 41.

¹⁹ Outcome did not use an autodialer to send daily Healthy Tips texts. 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.” 47 USC § 227(a)(1). The wireless numbers to which the daily Healthy Tips texts are sent are not generated in a random or sequential fashion. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752, 8776 ¶ 47 (1992). In addition, the texts are targeted and sent only to those consumers that have provided their wireless numbers as part of their requests to receive the daily messages. Even if the Commission considers these texts to be sent using an autodialer, the agency should nonetheless recognize a safe harbor for instances when a legitimate caller makes an inadvertent technical error pursuant to *SoundBite*.

Outcome's suspension of the program immediately upon learning of the issue conclusively demonstrates its good faith attempt to comply with the TCPA.

Given that the error occurred regardless of the company's incorporation and observance of internal enumerated procedures, the Commission should clarify or declare that Outcome's error does not violate the TCPA or the Commission's rules.

IV. The Commission Should Clarify Or Declare That An Undetected and Inadvertent Technical Error Satisfies The Requirements For A Safe Harbor

The Commission has granted a safe harbor from liability from its rules or statutory provisions on many occasions and covering myriad circumstances. In this case, Outcome encourages the Commission to clarify or declare that Outcome's unknown and inadvertent technical error is exempt from liability and entitled to safe harbor relief.

As discussed above, in the TCPA context, the Commission has recognized that parties who have made good faith efforts to comply with its rules may occasionally experience technical error. Thus, the agency established "a safe harbor exemption from liability" in these instances.²⁰

Similarly, the Commission created a safe harbor from the prohibition on autodialed or prerecorded message calls to wireless numbers for those numbers recently ported from wireline service.²¹ Likewise, the Commission later ruled that "where a caller believes he has consent to make a call and does not discover that a wireless number had been reassigned prior

²⁰ See *Dynasty Mortgage* at ¶ 4; see also 47 CFR § 64.1200(c)(2)(i); 2003 TCPA Order, 18 FCC Rcd at 14040.

²¹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 19215 (2004) ("2004 TCPA Order").

to making or initiating a call to that number for the first time after reassignment, liability should not attach for that first call.”²²

Most recently, in the context of identifying ways by which telecommunications carriers can help block fraudulent calls, the Commission is currently examining whether there are objective standards that would indicate to a reasonably high degree of certainty that a call is illegal.²³ The Commission has asked about whether to adopt a safe harbor to give carriers certainty that they will not be found in violation of the Commission’s rules when they block these calls.²⁴

Here, Outcome had no knowledge of the presence of “carriage return” characters in the program created by Signal HQ. The company could not have anticipated that this obscure technical glitch would render unsubscribe requests unreadable. Thus, Outcome was never in a position to correct the issue. Likewise, given this unique and unusual circumstance, Outcome had no reason to suspect that its longstanding TCPA compliance procedures would not be effective for subscribers who opted-in during Signal HQ’s management of the program, but sought to opt out during Twilio’s management. As set forth herein, the management of the Healthy Tips program was flawless with respect to TCPA compliance, except for the discrete population of individuals that migrated from Signal HQ to Twilio. Outcome reasonably concluded that consent to contact the affected subscribers remained valid.

²² *Omnibus TCPA Declaratory Ruling*, 30 FCC Rcd 7961, 8006 ¶ 85 (2015).

²³ *See Advanced Methods to Target and Eliminate Unlawful Robocalls*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 2306, 2316 ¶ 34 et al. (2017).

²⁴ *See id.*

At no time did Outcome engage in willful noncompliant behavior.²⁵ On the contrary, Outcome was unaware of and could not have anticipated so discrete a technical issue. Yet this anomaly blocked Outcome's desire, and significant efforts, to fulfill opt-out requests. Furthermore, Outcome could not have known that the error rendered its routine internal checks unsuccessful. In this case, a safe harbor would not exempt Outcome from the rules; such relief would merely preclude the TCPA from demanding the impossible.²⁶

The Commission should therefore clarify or declare that an unknown and inadvertent technical error is exempt from liability and entitled to safe harbor protection. Outcome did not violate the TCPA in this instance because the issue arose due to a specific technical error, which Outcome could not have anticipated.²⁷ To find otherwise would be inconsistent with the legislative intent of the TCPA.

V. A Limited Safe Harbor In This Instance Would Serve The Public Interest

Commission action to grant a limited safe harbor for Outcome would serve the public interest. As an initial matter, we note that the Healthy Tips messages did not involve telemarketing, solicitation, or advertising. Nor did they trigger the other concerns that Congress attempted to address through the TCPA, such as improperly shifting marketing costs to consumers, tying up blocks of telephone lines, or inhibiting the ability of the subscriber to reach a public safety entity. Instead, Healthy Tips messages were designed to promote an important public good—the need to frequently remind patients to adopt and maintain healthful habits in between medical appointments. These messages were only sent to patients

²⁵ See 2004 TCPA Order at ¶ 8.

²⁶ See *id.* at ¶ 9.

²⁷ *Dynasty Mortgage* at ¶ 37 (“[O]nce an entity has demonstrated compliance with each safe harbor standard, it may then invoke an error claim by showing ... a specific error.”).

who affirmatively subscribed to the program, believing the Healthy Tips program would be useful to them as they endeavored to lead a healthy life.

While the Commission has articulated best practices that Outcome and other legitimate entities routinely employ, these solutions are not foolproof, either individually or collectively. Without a safe harbor to shield lawful actors from liability for an unknowable technical error, substantial ambiguity—and the associated litigation risk—continues to exist. Moreover, the costs of such uncertainty are ultimately borne by consumers. By adopting an administrable safe harbor for complying with the statute, the Commission would bring greater clarity for businesses and consumers alike. A safe harbor would also help spur increasingly robust TCPA compliance for Outcome and others who take reasonable steps to comply with the statute.

Indeed, even the threat of TCPA litigation chills legitimate, beneficial communications that serve the public interest. As noted earlier, Outcome shut down the Healthy Tips program. Commission action consistent with the instant petition will serve the public interest by helping to curb costly, and oftentimes exploitive, litigation.

The legal uncertainty caused by TCPA litigation has harmed consumers and businesses alike, as discussed above. Between 2010 and 2016, there was a 1,273 percent increase in litigants and between 2015 and 2016 alone, the total number of litigants increased by 32 percent.²⁸ Legitimate entities employing modern communications technology in good faith risk class action suits that may seek millions of dollars in damages even if such entities make substantial efforts to comply with the TCPA and the Commission's rules. This risk has caused

²⁸ See Adams Study at 2.

Outcome to eliminate pro-consumer communications, which is most unfortunate given that Outcome's tools have had a significant and measurable impact on improving health outcomes.

Moreover, this litigation potentially threatens to impose significant, unjustified liability on Outcome as a result of an inadvertent technical error in an otherwise compliant opt-out program. Plaintiff alleges that Outcome sent more than 128,000 text messages to 2,239 putative class members.²⁹ If that class is certified and liability is found, Outcome could theoretically be liable for damages of between \$64 and \$192 million despite Outcome's extensive, good-faith efforts to comply with the TCPA. To permit the individuals in the proposed class to recover, on average, \$85,753 is merely a windfall and exploitation of the TCPA due to a technical error, and does not further the intent of the TCPA.

A clarification or declaration creating a limited safe harbor in this case would better reflect the TCPA's intent. Consumers are best-served by sound enforcement—punishing undesirable practices undertaken by bad actors rather than unjustly curtailing communications between legitimate entities and consumers. TCPA litigation for technical errors in an otherwise TCPA-compliant program significantly hamper the ability of Outcome and other legitimate entities to engage in lawful communications.

VI. Conclusion

In light of the foregoing, Outcome respectfully requests the Commission to clarify or declare that a discrete, obscure technical error does not eliminate the liability protection afforded by the 2012 *SoundBite* Declaratory Ruling, or, in the alternative, preclude the granting

²⁹ See Plaintiff's Motion for Class Certification at 4.

of a safe harbor. Outcome submits that grant of a safe harbor in this instance would serve the public interest.

Respectfully submitted,

/s/ Angela E. Giancarlo

Angela E. Giancarlo
Howard W. Waltzman
Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006
202-263-3000

Sanford Michelman
Michelman & Robinson, LLP
10880 Wilshire Blvd.
19th Floor
Los Angeles, CA 90024
310-299-5500

*Counsel for ContextMedia, Inc. d/b/a
Outcome Health*

October 20, 2017