

BOHRER BRADY, LLC
8712 Jefferson Highway
Suite B
Baton Rouge, Louisiana 70809

Philip Bohrer*
Scott E. Brady
Amanda E. McGowen

Greta Bordelon, Paralegal
Shannon L. Durham, Paralegal

Telephone: (225) 925-5297
Facsimile: (225) 231-7000
Email: phil@bohrerbrady.com
Email: scott@bohrerbrady.com
Email: amcgowen@bohrerbrady.com
Website: www.bohrerbrady.com

* Also Licensed In Texas

February 25, 2019

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20054

Re: **Notice of Ex Parte Meeting Regarding the Rules and Regulations
Implementing the Telephone Consumer Protection Act of 1991**
CG Docket No. 02-278

Dear Ms. Dortch:

On Feb. 21, 2019, Philip Bohrer of Bohrer Brady, LLC, and Christopher K. Jones of Keogh, Cox & Wilson, Ltd., counsel for Taylor Carroll ("Carroll"), met in person with Mark Stone, Deputy Bureau Chief of the Consumer and Governmental Affairs Bureau, and Kurt Schroeder, Chief of the Consumer Policy Division of the Consumer and Governmental Affairs Bureau, of the Federal Communications Commission ("Commission") to discuss the Petition for Expedited Declaratory Ruling, or in the Alternative, Request for Retroactive Waiver (the "Petition") filed by SGS North America, Inc. ("SGS") on December 17, 2018. Additionally, several consumer groups attended the meeting in person and by phone. The consumer representatives included Margot Saunders of the National Consumer Law Center, Carolyn Carter, George Slover and Maureen Mahoney of Consumer Reports-Advocacy, Christine Bannon of the Electronic Privacy Information Center, Susan Grant of Consumer Federation of America, Linda Sherry of Consumer Action and Ira Rheingold of the National Association of Consumer Advocates. The consumer groups have filed their own *Ex Parte*.

During the meeting, we covered the matters contained in the Comments of Taylor Carroll filed into the record of this matter on January 24, 2019, including the following points¹:

¹ The Comments of Taylor Carroll can be accessed here:
<https://ecfsapi.fcc.gov/file/10124149519595/Comments%20of%20Taylor%20Carroll.pdf> and
<https://ecfsapi.fcc.gov/file/10124149519595/Exhibits%201%20thru%207.pdf>

I. THE COMMISSION HAS LONG RECOGNIZED THAT INTENT AND PURPOSE MUST BE CONSIDERED IN DETERMINING WHETHER DUAL PURPOSE MESSAGES CONSTITUTE ADVERTISING OR TELEMARKETING

In 2002, the Commission recognized that a call using a prerecorded voice message is dual purpose and may constitute telemarketing when a call is motivated in part by the desire to ultimately sell goods or services.² In its 2003 Order, the Commission determined that dual purpose calls that contained both customer service and informational, as well as marketing components, constitute telemarketing.³ Additionally, the Commission agreed “. . . that application of the prerecorded message rule must consider the purpose of the message.”⁴

Further, 47 U.S.C. §227(a)(4) and 47 C.F.R. §64.1200(f)(12) define “telemarketing” as 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. Accordingly, both the express language of the TCPA and the Commission’s regulations require consideration of intent and purpose of a call to determine if the message constitutes telemarketing.

II. SGS “4 CORNERS” PROPOSAL IS A RADICAL DEPARTURE FROM THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE TCPA AND THE COMMISSION’S PRIOR ORDERS

SGS’ 4 Corners proposal requests that the Commission reject both the clear language of the TCPA and prior Commission orders, in contravention of over seventeen years of clear guidance and direction requiring intent and purpose to be considered in determining whether a message constitutes telemarketing.

² *In Re: Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 17 FCC Rcd 17459, 17478, 2002 FCC LEXIS 4578, *54-55, 27 Comm. Reg. (P&F) 578 (F.C.C. September 18, 2002)

³ *In Re: Rules and regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14095 ¶136, 2003 WL 21517853 (F.C.C. July 3, 2003) (“2003 Report and Order”).

⁴ In addition, we amend the prerecorded message rule at 47 C.F.R. §64.1200(c)(2) so that the prohibition expressly applies to messages that constitute “telephone solicitations,” as well as to those that include or introduce an “unsolicited advertisement.” We agree with those commenters who suggest that application of the prerecorded message rule should turn, not on the caller’s characterization of the call, but on the purpose of the message. *Id.* at ¶141

The application of the 4 Corners rule in the SGS matter would have prevented discovery and consideration of extensive evidence supporting the Carroll Court's determination that SGS prerecorded messages are dual purpose.⁵

Discovery, which would not have occurred under SGS' proposal, has established that SGS is a large multinational, publicly traded company with over 2,600 offices and labs worldwide. SGS took no steps to obtain express written consent, or any form of consent. SGS utilized an ATDS to place its prerecorded message calls to both cell and residential lines, all of which occurred within sixty to ninety days before the end of a lease. On the face of the calls, SGS offered a free inspection service which itself constitutes a commercial purpose. An end of lease inspection was not required by any of the underlying transactional documents. The voluntary end of lease inspection helps SGS' clients, the vehicle lessors, (in this case America Honda Finance Company) remarket the leased vehicles. If repairs were needed, SGS recommends to the lessee that a Honda dealership perform the repairs, thus generating repair revenue. Vehicle lessees can access certain incentives designed to keep the customer and sell or lease another vehicle to the customer. SGS places the calls as an extension of the vehicle manufacturer's sales force, the purpose of which is to keep the lessee and to put the lessee in a new car. SGS markets its services to vehicle manufacturers by claiming to add significant value to their operations and to insure business sustainability. Under SGS' "4 corners" proposal, none of the above evidence would have been obtained or considered. This evidence provided the Carroll Court with an extensive record which supports its ruling.

III. COURTS ARE BEST SUITED TO EVALUATE DUAL PURPOSE MESSAGES

The Carroll Court conducted a common-sense analysis, considered the above evidence, and denied SGS' motion for summary judgment on the issue of whether its prerecorded messages constituted telemarketing.⁶ As SGS concedes, the Carroll Court, at trial on the merits, can weigh the evidence, consider the credibility of witnesses, and ultimately decide whether SGS' messages constitute telemarketing. The FCC does not conduct fact finding inquiries. Accordingly, the courts are the proper forum for determining if a message is telemarketing in light of the purpose and intent of the message.

⁵ "Based on the evidence contained in the record and relevant jurisprudence, the Court finds that the purpose for the phone calls was dual-customer services and to solicit future sales and revenues." *Carroll v. SGS N. Am., Inc.*, Civil Action No. 16-537-SDD-RLB, 2017 U.S. Dist. LEXIS 154170 (M.D. La. Sept. 21, 2017)

⁶ Courts have adopted a "common sense" approach to analyzing whether a prerecorded message constitutes telemarketing. *See, Chesbro v. Best Buy Stores, L.P.*, 705 F.3d. 913 (9th Cir. Dec. 27, 2012)

IV. SGS PROPOSED 4 CORNER RULES IS UNMANAGEABLE

SGS proposes that: “A communication does not have a *dual purpose* if there is nothing within the communication that advertises the availability or quality of or otherwise encourages the purchase or rental of or investment in a product, good or service.”⁷ However, whether a message “encourages” cannot be determined from the 4 corners of the message. Instead, both purpose and intent must be considered to determine if a message “encourages” the purchase, rental of or investment in a product, good or service.⁸

For example, under SGS’ proposal, the lease inspector could conduct a sales presentation during the inspection, which could not be considered when determining if the call constituted telemarketing. This would enable sophisticated telemarketers to expand the scope of their activities and would encourage, and not reduce, TCPA violations.

Although not discussed at the meeting, a recent case exemplifies why SGS’ petition must be denied. In *Chinitz v. NRT West, Inc.*⁹, the Court held that the context and intent of a robocall must be considered in determining whether a message is telemarketing. In *Chinitz*, the defendant used a prerecorded voice message that portrayed a live call experiencing a bad connection. If the call was connected, a live call would then follow with the defendant engaging in a sales pitch. The defendant argued that express written consent was not required because the first call did not contain any advertisement and was not telemarketing, arguing that the Court should not look beyond the actual content of the message. Rejecting this argument, the Court determined that the purpose of the call was to “introduce” an advertisement made in the follow up call, which triggered statutory coverage of the TCPA under the “common sense” analysis. Thus, the Commission need look no further than *Chinitz* for an example of abuse that will occur if the Commission grants SGS’ petition.

⁷ SGS Petition at p.14.

⁸ SGS proposes that the Commission disregard “telemarketing” which is defined as: “[T]elemarketing 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.” 47 C.F.R. §64.1200(f)(12)

⁹ 18-cv-0611, 2019 WL 720996 (N.D. Cal. February 20, 2019)

V. SGS' PRERECORDED MESSAGES DO NOT FIT WITHIN THE *PURELY INFORMATIONAL* MESSAGE EXCEPTION OF THE 2006 ORDER REQUIRING PRIOR EXPRESS WRITTEN CONSENT

The TCPA prohibits the use of automated telephone equipment “to initiate any telephone call to any residential telephone line using an artificial or prerecorded message to deliver a message without the prior express consent of the called party, unless . . . exempted by rule or order by the Commission . . .” 47 U.S.C. §227(b)(1)(B). The FCC has exempted calls using prerecorded messages that do not “include [] or introduce [] an advertisement or constitute [] telemarketing . . .” 47 C.F.R. §64.1200(a)(2). “Advertisement” is defined as “any material advertising the commercial availability or quality of any property, goods or services.” 47 C.F.R. §64.1200(f)(1). In its 2003 Order, the Commission agreed that “. . . messages whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously entered into with the sender are not advertisements for the purpose of the TCPA’s facsimile advertising rules.” *In Re: Rules & Regs. Implementing the Tel. Consum. Prot. Act of 1991*, 21 FCC Rcd. 3787, 3812, ¶49 (April 5, 2006). In the 2006 order, the Commission provided numerous examples of messages it described as “purely informational” because the messages facilitated, completed or confirmed a transaction.¹⁰ However, SGS’ messages were not purely informational and do not fit within this exception.

SGS calls are at the end of a lease, two or three years, or longer, after the transaction was completed. The inspections are not required. The SGS messages do not change or alter the terms of the lease or relate to the debt, nor were the calls needed to facilitate, confirm or complete the underlying transaction. SGS had no relationship with the lessee call recipients. Accordingly, SGS’ prerecorded messages are distinguishable from the examples of purely informational messages outlined by the Commission.

VI. THERE IS NO CONFUSION REGARDING DUAL PURPOSE MESSAGES

SGS contends that the Commission created confusion by considering purpose and intent in determining whether dual purpose messages constitute telemarketing. However, this is not correct. The Commission has consistently held that purpose and intent must be considered. Courts have routinely rejected similar “4 Corners” limitations on telemarketing

¹⁰ See also, *Chesbro*, *supra*

analysis and have instead followed the Commission's clear guidance and applied a common-sense analysis.¹¹

The fact that various courts have reached different conclusions regarding whether a particular message constitutes telemarketing is based upon the standard of review applied by the Court and the specific facts of each case. SGS contends there is confusion but, in reality, SGS and other telemarketers who have filed similar petitions are voicing their collective dissatisfaction with the TCPA and the Commission's orders regarding dual purpose calls. This does not warrant a reversal of both the express language of the TCPA and prior Commission orders on dual purpose calls.

VII. ADDITIONAL MATTERS DISCUSSED

We responded to questions from the attendees as follows:

- a) Are the calls required? We advised that the calls were not required by any of the underlying transactional documents which consisted of the credit application and vehicle lease. A vehicle lessee was free to return the leased vehicle without an inspection.
- b) What was the relationship between SGS and other parties to the transaction? We explained that SGS was contracted by a vehicle manufacturer and made the end of lease vehicle inspection calls on behalf of the vehicle lessor to the vehicle lessee.
- c) How does SGS obtain the phone numbers it calls? We advised that vehicle lessors, such as American Honda Finance Company, transmit to SGS contact information, including phone numbers, for vehicle lessees whose leases are set to expire within 60 to 90 days on a nightly basis.

¹¹ *Golin v. Veritas Entertainment, LLC*, 788 F.3d 814 (8th Cir. June 8, 2015) (“While the content of the calls control whether they were “advertisements,” their purpose controlled whether they were “telemarketing.” . . . Notwithstanding the plain language of the Regulations, Defendants argue that we should consider only the content of the calls in determining whether they were “telemarketing.” See, e.g., *Alleman v. Yellow Book, Inc.*, No. 12-cv-1300-DRH-PMF, 2013 U.S. Dist. LEXIS 127212, 2013 WL 4782217 at *6 (S.D. Ill. Sept. 6, 2013). We refuse to do so. Neither the TCPA nor its implementing regulations “require an explicit mention of good, product or service” where the implication of an improper purpose is “clear from the context.” at *820.

- d) Was there any consent language in the documents? We advised that there was no valid TCPA express consent language in any of the documents for the putative class members in the Carroll case.
- e) Do our facts create an inference of consent? We advised that there is no express written consent. Further, there is no inference of consent possible. Any disclosure of a phone number given by a vehicle lessee was exclusively to American Honda Finance Company and solely for the purpose of obtaining credit for the lease. As such, vehicle lessees could not foresee receiving end of lease inspection calls as such calls were not required by the credit application or by the underlying lease and are far outside the scope and purpose of the credit application.

VIII. A RETROACTIVE WAIVER IS NOT JUSTIFIED

There is no good faith factual or legal basis on which SGS can seek a retroactive waiver. SGS did nothing to attempt TCPA compliance, did not seek prior express written consent, or any form of consent, and continued to place calls using an ATDS and a prerecorded voice message to both wireless and residential lines after the Court's ruling that its messages were dual purpose telemarketing. After over two and a half years of litigation, much discovery and adverse court rulings, SGS, by filing its petition, now forum shops seeking to collaterally attack the Court's rulings and authority by requesting a retroactive waiver. Not only is this request untimely, there are no special circumstances, a waiver is not in the public's best interests, and would set a bad precedent by allowing telemarketers to seek a waiver from the Commission to avoid the consequences of court determinations.

If there are any questions, please contact Philip Bohrer, Bohrer Brady, LLC, at 225/925-5297 or phil@bohrerbrady.com.

This disclosure is made pursuant to 47 C.F.R. §1.1206.

Sincerely,

BOHRER BRADY, LLC

Philip Bohrer