

15 2019

FCC Mailroom

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and Regulations
Implementing the Telephone Consumer
Protection Act of 1991

CG Docket No. 02-278

Petition for Expedited Declaratory Ruling
Clarifying 47 U.S.C. § 227(b)(1)(B) of the
Telephone Consumer Protection Act

**Comments of Robert Braver in Opposition to Petition for Expedited Declaratory Ruling
filed by Northstar Alarm Services, LLC**

DOCKET FILE COPY ORIGINAL

David Humphreys
Luke Wallace
Paul Catalano
HUMPHREYS WALLACE HUMPHREYS, P.C.
9202 S. Toledo Avenue
Tulsa, OK 74137
(918) 747-5300

Keith J. Keogh
Timothy J. Sostrin
KEOGH LAW LTD
55 W Monroe St, Ste 3390
Chicago, IL 60603
(312) 726-1092

March 15, 2019

Attorneys for Robert Braver

No. of Copies rec'd
List ABCDE

074

Table of Contents

Summary.....	1
I. Northstar's Soundboard Calls.....	2
II. The Statutory and Regulatory Text Prohibit Unsolicited Soundboard Calls	4
III. Northstar Misreads the Legislative History.....	8
IV. Public Policy Supports Regulation of Soundboard Calls.....	11

Summary

This Commission has repeatedly expressed its desire to focus on “bad actors” who flagrantly violate its regulations implementing the Telephone Consumer Protection Act (TCPA). The petition filed by Northstar Alarm Services, LLC (“Northstar”) provides the Commission with an opportunity to address such conduct head on. Through its soundboard vendor Yodel Technologies, LLC, Northstar conducted a telemarketing campaign in 2016 in which it solicited a data broker to provide the residential telephone numbers of millions of people who had no prior relationship with Northstar whatsoever. Northstar then placed over 75 million “spoofed” telemarketing calls to those phone numbers, with fake “local” telephone numbers displaying on the recipients caller ID, all the while knowing it had no consent to place the calls. Each of these calls used prerecorded voice messages that concealed and misrepresented Northstar’s identity, identifying the caller as the “local Department of Home Security” and the “Security Help Center.” Even worse, Northstar scripted these prerecorded messages to blatantly lie about “issues with false alarms” “in your neighborhood,” which Northstar had fabricated in order to deceive the recipients of its calls and, hopefully, frighten them into a quick sale.

All of this was done through the “Soundboard technology” at issue in Northstar’s petition. After using this technology to violate numerous rules enacted by this Commission, Northstar has the audacity to claim that “soundboard technology protects consumers.” Petition at p. 9. This commission need only listen to a single recording¹ of the soundboard calls that Northstar placed to Mr. Braver to see the ridiculousness of Northstar’s claim. Soundboard calls don’t just use a “prerecorded voice” in violation of the plain language of the TCPA, they deceive consumers into believing that they might be able to obtain answers to their questions, but quickly

¹ A recording of the soundboard call that Braver received is attached hereto on computer disk. A transcript of the recording is also attached hereto as Appendix A.

destroy that illusion with nonsensical and unresponsive prerecorded voice messages that completely fail to live up to the promise of real conversation. The Commission should deny Northstar's petition.

I. Northstar's Soundboard Calls²

Although Northstar operates its own call center in the United States, Northstar decided in January 2016 to hire a vendor, Yodel Technologies, using soundboard agents in India to place prerecorded telemarketing calls on Northstar's behalf. Yodel purchased contact information for homeowners across the country, who had no prior relationship with Northstar whatsoever, and then called those individuals using the prerecorded soundboard system so that those persons could be "qualified" to purchase Northstar's home security products, and then referred to Northstar after completing the soundboard process. Both Northstar and Yodel understood that these individuals had not provided prior express consent to receive these calls. In fact, both continued to make the calls despite numerous consumer complaints and requests to stop calling

Between February 2016 and October 2016, Yodel made over 75 million soundboard calls to over six million people on Northstar's behalf.³ This call volume alone refutes Northstar's contention that its calls occurred only on a 1 to 1 basis. For instance, in a single day on August 26, 2016, the same day that Braver received a call, Yodel placed over one million soundboard calls just on Northstar's behalf.

The soundboard agents were employed by a call center in India, called Zealous, that contracted with Yodel. The soundboard agents were not required to be able to speak English;

² All of the contentions presented herein are documented and set forth at Doc. 42 of Braver's litigation against Northstar. *See Braver v. Northstar*, 15-cv-383, Doc. 42 (W.D. Okla.).

³ Yodel has numerous clients. Extrapolating the call volume made on just Northstar's behalf would mean that Yodel likely made hundreds of millions of soundboard telemarketing calls.

they were trained only to follow the prerecorded script by pressing the appropriate buttons in order. Specifically, they view a computer screen which displays buttons corresponding to each prerecorded prompt in the script and, when they press the button, a prerecorded audio file stored on Yodel's servers plays over the phone to the called party. For example, one version of the prerecorded script was as follows, with each numbered paragraph representing a separate prerecorded audio file:

1. Hello this is Amy, I am security advisor, can you hear me okay?
2. Okay, good, I am with the security help center and the reason why I am calling today is that there have been issues with false alarms, with home security systems in your neighborhood, have you been informed about that?
3. With crime rates and mass shooting on the rise in the US and national security with our borders, you can see having false alarms with home security systems in your area can be a big concern right?
4. So it's my job to make sure that all the homes in your neighborhood are aware of the technologies and security programs available in your area, I just have a couple of questions to see what your home will qualify for. Are you the homeowner?

Northstar approved this misrepresentation about "false alarms . . . in your neighborhood", despite knowing that its sales pitch was false. Yodel's CEO testified the statement is "just sales language".

In order to mislead consumers into thinking that a local number was calling, the soundboard system was designed to display a bogus telephone number on the recipient's caller id, which almost always began with the same area code as the telephone number that Yodel dialed. Yodel referred to this tactic as "local presence." It is illegal. 47 U.S.C. § 227(e).

Northstar testified that it did not want Yodel to inform consumers that Northstar was involved in the calls and did not even want Yodel to provide Northstar's phone number to the consumers called.

Even after some consumers discovered that Northstar was behind the calls, Northstar's call center employees regularly denied any knowledge about use of a robocall system whenever

confronted with complaints. After one consumer complaint, Northstar's telemarketing director asked Yodel:

"How would they know leads are being sent to NorthStar if they are receiving a call from the Security Help Center? I am feeling exposed, please advise."

On August 26, 2016, Braver received a telephone call from the soundboard system. A transcript of that call is attached hereto as Appendix A. On August 28, 2016, Braver sent Northstar a letter explaining that the robocalls were illegal and asking for additional information for his investigation. As a result of Braver's letter, Northstar's management debated internally whether or not to stop placing the prerecorded soundboard calls, and stated in internal emails that its decision on what to do about the illegal calls would depend on how much money Northstar was making as a result of the telemarketing campaign. Apparently, Northstar believed that its profits made the illegality worth the risk. After this discussion, Northstar thumbed its nose at the TCPA and entered into a new contract with Yodel for prerecorded soundboard calls on its behalf.

II. The Statutory and Regulatory Text Prohibit Unsolicited Soundboard Calls

Both the plain language of the TCPA and the Commission's rules implementing the statute expressly and unequivocally regulate the prerecorded voice Soundboard calls. First, the TCPA's regulation of nonconsensual calls to cellular telephone numbers categorically prohibits the mere *use of a prerecorded voice*. 47 U.S.C. § 227(b)(1)(A) ("it shall be unlawful . . . to make any [nonemergency and nonconsensual] call . . . using . . . an artificial or prerecorded voice" to cellular telephone numbers). The Commission's implementing regulation tracks this language, providing that "no person or entity may . . . initiate any [nonemergency and nonconsensual] telephone call . . . using . . . an artificial or prerecorded voice" to a cellular telephone number. 47 C.F.R. § 64.1200(a)(1).

Northstar contends that “the plain language of the TCPA demonstrates that it does not prohibit soundboard technology.” Petition at p. 7. Yet Northstar admits that all soundboard calls use prerecorded voice messages. *Id.* at p. ii (“soundboard technology involves the use of snippets of recorded messages”); *Id.* (“the operator chooses the appropriate messages” to use during the calls);⁴ *Id.* (referring to soundboard’s “use of recorded messages”); *Id.* at p. 3 (“soundboard technology works by . . . using recorded audio clips in lieu of . . . the agent’s own voice”). By undisputedly using a prerecorded voice, soundboard calls fall under the plain language of the statute and this Commission’s rules.

In making its argument, Northstar ignores the plain provisions of the TCPA concerning calls to cellular telephone numbers because there is simply no way to creatively construe these provisions as being inapplicable to soundboard prerecorded calls. These provisions expressly regulate the mere use of a prerecorded voice in a telephone call and it is undisputed that all soundboard calls use a prerecorded voice. Thus, the Commission should deny Northstar’s petition to the extent it seeks a declaratory ruling that these provisions do not apply to soundboard calls.

Second, the TCPA’s regulation of nonconsensual telemarketing calls to residential telephone numbers likewise prohibits calls “using an artificial or prerecorded voice to deliver a message.” 47 U.S.C. § 227(b)(1)(B) (“it shall be unlawful for any person . . . to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice deliver a message without the prior express consent of the called party[.]”) The Commission’s implementing regulation sets forth the same language. 47 C.F.R. § 64.1200(a)(3).

Northstar argues that these provisions specifically do not apply to soundboard

⁴ Of course, the recorded messages are often completely inappropriate as shown below and in the attached recording.

prerecorded calls. First, it contends that “the provision prohibits initiating the call” and that “implicit in this term is the idea that human intervention will not continue beyond the call’s initiation.” *Pet.* at p. 7. It goes on to assert that only fully automated prerecorded “messages” would be prohibited. Yet the TCPA’s plain language does not have any such qualifying language.

Essentially, Northstar is attempting to impose separate requirements found in the Commissions’ ATDS rulings while at the same time ignoring the fact that ATDS calls frequently involve “human intervention beyond the call’s initiation,” for instance when they are transferred to a waiting sales agent.⁵ *See* 47 C.F.R. § 64.1200(a)(1). Yet under Northstar’s view, autodialed calls would not be regulated by the statute if a human telemarketer came on to the line after the call was answered. Thus, the prohibition on the initiation of a call does not logically preclude human involvement during the remainder of the call.

Moreover, Northstar ignores the legislative history, in which Congress confirms the statute’s application to calls in which a human being plays the prerecorded message *after* the initiation of the call:

“when a consumer answers the phone, a ‘live’ person can ask the consumer if he or she consents to listening to a recorded or computerized message. If the consumer indicates express consent, the ‘live’ caller may switch to a record-ed or computerized message. The Committee does not believe that this consent requirement will be an inordinate regulatory burden on the telemarketer.”

Senate Committee Report, S. Rep. 102-178-1991 pg. 8; *see also* comments of Senator Hollings upon introduction and passage of S. 1462 (the TCPA) on November 7, 1991 (Senate Record 137-Cong. Rec. 16204, 1991) (“Such consent also could be obtained by a live person who simply

⁵ This is true whether those systems use random or sequential number generators, or call from a preset list.

asks the called party whether he or she agrees to listen to a recorded message.”) Clearly if Congress envisioned that a human who initiated a call would need to obtain consent in order to lawfully play a prerecorded voice during that call, the prerecorded calls at issue here would be prohibited as there is no such human on the line speaking and no attempt to ever obtain consent.

Second, Northstar argues that the language “using an artificial or prerecorded voice to deliver a message” “implies that the *only* mechanism employed to deliver a message is the recording[.]” Pet. at p. 8 (emphasis added). Northstar contends that because soundboard agents “choose snippets” of prerecorded voices to play during the call, it is the soundboard agent, not the recording, that is delivering the message. *Id.* Yet this is the exact scenario discussed in the above legislative history of a live agent being on the line and then choosing to play a prerecorded message if consent was obtained, except that here there was no attempt to obtain consent. In both situations, the prerecorded messages that play *were the result of a human being pressing a button* during the call. See S. Rep. 102-178-1991 pg. 8; Senate Record 137-Cong. Rec. 16204, (November 7, 1991). The congressional record flatly refutes Northstar’s strained interpretation of the statute.

The mere fact that a human being chooses which button to press on the soundboard does not change the fact that the call is still “using a prerecorded voice to deliver a message.” Indeed, a prerecorded voice call need not be fully automated in order to be regulated; otherwise, there would be no reason for Congress to *separately* regulate the use of automatic telephone dialing systems. See 47 U.S.C. § 227(b)(1)(A) (regulating calls using any “automatic telephone dialing system or an artificial or prerecorded voice”) (emphasis added).

Finally, Northstar argues that because the statute prohibits delivering “a message” using an artificial or prerecorded voice, it only applies to calls that “simply play a uniform, singular

message.” Pet. at p. 8. Following Northstar’s logic, any call that delivered multiple, discrete prerecorded messages would be unregulated simply because it played more than one message. This is, of course, an absurd reading of the statute and the Commission’s regulations, yet it is the logical conclusion of Northstar’s argument.

This Commission should therefore follow the guidance of Federal Trade Commission’s 2016 Staff Opinion Letter concerning the application of the FTC’s linguistically similar Telemarketing Sales Rule (“TSR”) to soundboard technology. In that letter, FTC staff found:

“the plain language of the TSR provision governing prerecorded calls imposes restrictions on “any outbound telephone call that delivers a prerecorded message.” It is indisputable that calls made using soundboard technology deliver prerecorded messages. As such, under the plain meaning of the words in the TSR’s prerecorded call provision, outbound telemarketing calls using soundboard technology are covered because such calls “deliver a prerecorded message.”

Appendix B at p. 3. This Commission has repeatedly stated that it seeks to harmonize its rules with the FTC’s TSR. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act*, 27 FCC Rcd. 1830, 1831 (February 15, 2012); *In re Joint Petition Filed by Dish Network*, 28 FCC Rcd. 6574, 6588 (May 9, 2013). Allowing Northstar to make over 75 million misleading prerecorded messages because it played multiple prerecorded voices would not only contravene the plain language of the statute, it would create a conflict between the TCPA and the FTC staff’s guidance on the TSR, leading to uncertainty and incongruity in the regulation of prerecorded voice calls.

III. Northstar Misreads the Legislative History

Knowing that the plain language of the statute and the Commission’s regulations do not support its argument, Northstar also contends that the legislative history shows that Congress was not concerned about prerecorded messages played by human beings. It contends “the legislative history is replete with evidence that Congress was not worried about the use of audio

clips being deployed as part of a dynamic, real-time, two-way conversation.” Pet. at p. 8. This is simply false, as shown above. The legislative history shows that Congress addressed exactly this scenario and intended for the prior express consent requirement to apply to such calls. See S. Rep. 102-178-1991 pg. 8; Senate Record 137-Cong. Rec. 16204, (November 7, 1991). Northstar may pretend that this history doesn’t exist, but the Commission should follow the congressional will.

In any event, Northstar’s reading of the remaining legislative history is mistaken. For instance, it contends that congress was only concerned about “consumer complaints in which a recipient picked up the phone, heard dead air, and then was disconnected.” Pet. at p. 9. Yet that specific concern was about *automatic telephone dialing systems*, not prerecorded voice calls, which are separately regulated. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, ¶¶ 146-147 (July 3, 2003) (“2003 Order”). Indeed, a call in which a recipient hears only dead air is, by definition, a call in which no prerecorded voice is used.

The simple fact is that Congress chose to regulate *both* ATDS calls and calls that use prerecorded voices. See 47 U.S.C. § 227(b)(1)(A) (regulating calls using any “automatic telephone dialing system or an artificial or prerecorded voice”) (emphasis added).⁶ All Northstar has done is cherry pick quotations from the legislative history that apply to ATDS calls and pretend that Congress therefore didn’t have any separate concerns about calls using a prerecorded voice. Of course, it did, as discussed above, and that concern, was clearly expressed in the final legislation. See Pub. Law 102-243, section 2(13) (“evidence presented to the

⁶ Accordingly, there is no requirement for the use of an artificial or prerecorded voice in the ATDS definition. See 47 U.S.C. § 227(a)(1). They are separate regulations.

Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call”).

Northstar also contends that Congress expressed a desire to “allow for technological advancements,” and that soundboard technology should not be regulated because it is such an advancement. To begin, Northstar has failed to cite to any statement of any congressmen that supports the premise of its argument. It was precisely *because* of technological advances that Congress felt compelled to enact the statute. See Pub. Law 102-243, section 2(13) (“The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.”) There is no support for the contention that Congress did not intend for the statute to apply to “new” technologies. Indeed, the Commission has expressly recognized that its regulations will continue to apply even through the “evolution of the teleservices industry,” acknowledging that “we fully expect automated dialing technology to continue to develop.” 2003 Order, 18 FCC Rcd. 14014 at ¶ 132. .

But of course, soundboard is not a new or advanced technology in any case. It is literally a collection of audio files on a computer that a user can select and play over the phone. According to Northstar’s own expert, “soundboards have been in use for decades” *Braver v. Northstar*, 15-cv-383, Doc. 57-17 at pp. 16-18 (W.D. Okla.) (identifying two devices manufactured in the early 1980s). Despite filing its expert report in federal court when it thought that fact favorable to its litigation position, Northstar falsely represents to this Commission that “Congress could not have been envisioning that the Act would prohibit the use of soundboard technology because the technology did not exist.” Pet. at p. 8. Northstar’s own prior admission shows otherwise.

IV. Public Policy Supports Regulation of Soundboard Calls

Lastly, Northstar asks the Commission to look beyond the statutory language and Congressional will, arguing that “public policy supports permitting calls using soundboard technology,” because it (allegedly) “provides numerous benefits to industry, consumers, and regulatory enforcement agencies. Pet. at p. 10. Yet the commission cannot simply stray from the plain language of the statute as a matter of policy “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 499–500 (1998)(quoting, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–843 (1984)). As shown above, Congress intended to regulate all prerecorded calls. See 105 Stat. 2395, Pub. L. 102-243 (“the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, *regardless of the type of call*”) (emphasis added).

Moreover, the Commission cannot exempt soundboard telemarketing calls from the TCPA⁷. While the statute gives the Commission latitude to exempt certain calls otherwise subject to 47 USC § 227(b)(1)(B), the Commission is expressly precluded from exempting calls that include the transmission of an unsolicited advertisement at 47 USC § 227(b)(2)(B). Thus, Northstar’s soundboard telemarketing calls do not qualify for an exemption in any case.

⁷ Desperate to make its request into a lawful use of authority by the FCC, Northstar has stated in briefing filed in Braver’s lawsuit, “Northstar’s Petition does not ask the FCC to exempt calls” using soundboard technology. Instead, it asserts that the definition of prerecorded voice should exclude messages recorded in advance and delivered using soundboard technology. *Braver v. Northstar*, 15-cv-383, Doc. 97-17 at pp. 8-9 (W.D. Okla.). Despite its effort at linguistic gymnastics, Northstar is seeking an exemption by the FCC of all soundboard calls from the ambit of the TCPA regardless of whether such calls include unsolicited advertising.

Perhaps more importantly, the evidence overwhelmingly refutes Northstar's rosy portrayal of soundboard telemarketing. Northstar claims that "[f]irst and foremost, soundboard technology protects consumers" because the "recorded snippets . . . ensure that consumers are not being misled by inadvertent unscripted comments." Pet. at p. 10. This is an audacious contention considering that Northstar scripted its own soundboard calls to *baldly lie* to consumers about who was calling ("the local department of home security") and about why they were calling ("false alarms in your neighborhood"), which Northstar's vendor admitted was a purely fabricated sales tactic, obviously designed to frighten consumers into a sale. Northstar's own actions show that soundboard technology does nothing whatsoever to prevent misleading and even fraudulent telemarketing practices.

Next, Northstar contends that soundboard technology benefits consumers by providing the opportunity "to receive an appropriate response" to their questions, claiming that "in fact, soundboard technology has become so advanced and refined that consumers usually do not even recognize the difference between it and a traditional live voice operator." Pet at p. 11. The Commission need only listen to the recording of Northstar's soundboard call to Mr. Braver to know that that contention is flat wrong. The prerecorded responses to Braver either entirely ignore his questions or were almost laughably inept at addressing them:

BRAVER: Okay, and what company did you say you were with?

PRERECORDED VOICE: Are you a US citizen?

BRAVER: Uh yes, but what company did you say you were with?

PRERECORDED VOICE: Does your home have at least two bedrooms? Appendix A at 2:36-39.

BRAVER: Well, I guess I'm still not understanding what's the issue? Issue with false alarms in the neighborhood. What is it about my neighborhood? Is what I am still not understanding. What is it about my neighborhood that's causing false alarms? I don't have any problems with that. That's why I am all confused here.

PRERECORDED VOICE: that's fine. Oh, and I almost forgot one last question. Now do you currently have a home security system ? *Id.* at 3:56-61.

BRAVER: Okay, well I, I don't understand your...I guess I don't know that you understood my question. So, you're talking about stuff that's specific to my area? What is that is different in my area verses other areas?

Pause

BRAVER: Hello? Are you there?

PRERECORDED VOICE: Okay.

BRAVER: Hello? *Id.* at 1:16-22.

PRERECORDED VOICE: Now, before we finish up, I want to check one last thing here. But I want to see if we have a specialist available now for you to speak with.

BRAVER: I don't have time for that right now.

PRERECORDED VOICE: Uh okay yeah. This is good, we do actually have someone that covers your area that we can connect you with right now. Hang on while I bring one of them on.

BRAVER: I don't have time for that right now.

PRERECORDED VOICE: Yes people are doing things that they normally wouldn't do. So, the crime rate is continuing to go up, but I can simply get you over to a specialist. If you don't like what you hear, then we can just shake hands and part as friends, okay?

BRAVER: Yeah, I don't have time for that right now, but you said someone would, could call me later? That would be fine.

Pause

PRERECORDED VOICE: Uh Hello, are you still there?

BRAVER: Yeah, I'm here. Like I said I don't have time. You said that someone could call me back at a later time. That would be alright, but I don't have time right now.

PRERECORDED VOICE: Uh yeah no. we're not going to be much longer.

BRAVER: Yeah I don't have time to talk. I have to go like right now. I got someone waiting on me. I don't have time to talk to anyone right now.

PRERECORDED VOICE: Look, I understand. A lot of people I talk to actually think...

PRERECORDED VOICE: Uh yeah no, were not going to be much longer.

BRAVER: Okay, I have to get off the phone now. Hello? Hello? Is anybody there?

Hello? *Id.* at 3:70-90.

Northstar's own calls thus show that soundboard technology is a frustrating annoyance, not a replacement for real, human conversation.

Northstar also contends that "were the Commission to rule that the TCPA prohibits soundboard technology in telemarketing calls absent prior express consent, businesses with

legitimate interest in reaching new customers . . . will be *severely impaired* in their efforts.” Pet at p. 11 (emphasis added). Nonsense. Legitimate businesses have been using the telephone to communicate with consumers for decades without relying on soundboard technology; in fact, most continue to do so today. There is simply no evidence that soundboard technology is crucial to any legitimate business practice. In any event, this exact argument was rejected by the legislative history, which clearly found it was not an undue burden to obtain consent before playing the prerecorded voice message even if it was during the same call.

As such, the Commission should again follow the guidance of FTC’s 2016 Staff Opinion Letter concerning soundboard technology, which FTC staff issued after receiving “a steadily increasing volume of formal and informal complaints from consumers about telemarketing calls utilizing soundboard technology.” Appendix B at p. 1. As FTC staff noted:

“Consumers complain that during these calls they are not receiving appropriate recorded responses to their questions or comments. Consumers further complain that often no live telemarketer intervenes to provide a human response when requested to do so, the recorded audio snippets that are played do not adequately address consumer questions, or the call is terminated in response to consumers questions. Indeed, media reports also have taken note of this phenomenon, which some in the press have dubbed telemarketing “robot” calls. Simply put, since we issued the letter in 2009, staff has seen evidence of the widespread use of soundboard technology in a manner that does not represent a normal, continuous, two-way conversation between the call recipient and a live person. This is inconsistent with the principles we laid out in our September 2009 letter as well as our understanding of the technology at the time we issued the letter.⁴ Moreover, this type of use does not provide the consumer benefits upon which we based our September 2009 opinion.”

Id. at pp. 1-2. The evidence here shows that the FTC staff was correct – soundboard technology is harmful to consumers.

VI. Response to ad hominem Attack on Mr. Braver

In an effort to deflect from it and Yodel’s violation of the TCPA, Northstar attempts to place the blame on “plaintiffs and their counsel” for bringing suit under the TCPA and especially

on Mr. Braver as a “serial litigant.” See Petition at pp. ii and fn. 3. They attempt to case further aspersions on Mr. Braver for his website and efforts to encourage consumers to stand up and seek enforcement of their privacy rights; rights of such significance that Congress passed the TCPA to provide a mechanism to vindicate these rights.

Robert Braver is a long time privacy advocate, having advocated on behalf of himself and other consumers through his website, his comments to the FCC, and litigation since 1998. He registered his do not call domain names *before* the Do Not Call Registry and donotcall.gov existed. His domain was not intended to deceive as its similarity to a future government domain was unknown. In fact, Braver directs people who find his website to donotcall.gov.

In making its allegation of serial litigant and “nuisance settlements”, Northstar does not, and in fact cannot, point to a single instance where Mr. Braver brought a suit “for any improper purpose.” Instead, Mr. Braver brings suits to enforce the TCPA as Congress intended.

Mr. Braver has not acquired multiple lines to increase his likelihood of receiving calls that violate the TCPA, but like most consumers has a single residential telephone line and a single cellular telephone line for each member of his immediate family. He simply refuses to stand idly by while telemarketers ignore the law. If the telemarketing industry wants to stop Mr. Braver from vindicating his rights under the TCPA, it has a simple solution: stop calling Mr. Braver in a manner that violates the TCPA.

The picture Northstar attempts to paint of Mr. Braver, the lawsuit against it, and the use of soundboard technology in telemarketing is a false narrative intended to distract the FCC from its violations of the TCPA.

The Commission should deny Northstar’s petition.

Respectfully submitted,

By:

Timothy J. Sostrin

Timothy J. Sostrin
Keith J. Keogh
KEOGH LAW LTD
55 W Monroe St, Ste. 3390
Chicago, IL 60603
(312) 726-1092 / (312) 726-1093 –fax
keith@keoghlaw.com
tsostrin@keoghlaw.com

and

David Humphreys, OBA #12346
Luke Wallace, OBA #16070
Paul Catalano, OBA #22097
9202 S. Toledo Avenue
Tulsa, OK 74137
(918) 747-5300 / (918) 747-5311 (Fax)
david@hwh-law.com
luke@hwh-law.com
paul@hwh-law.com

ATTORNEYS FOR ROBERT BRAVER

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of Rules and Regulations
Implementing the Telephone Consumer
Protection Act of 1991

CG Docket No. 02-278

Petition for Expedited Declaratory Ruling
Clarifying 47 U.S.C. § 227(b)(1)(B) of the
Telephone Consumer Protection Act

APPENDIX A
**to Comments of Robert BRAVER in Opposition to Petition for Expedited Declaratory
Ruling filed by Northstar Alarm Services, LLC**

Transcript of Northstar's August 26, 2016 Soundboard Call to Mr. BRAVER

- 1 BRAVER: Hello?
- 2 PRERECORDED VOICE: Hello, this is Billy. I'm a party advisor here with the local department
3 of home security on a recorded line. Can you hear me okay?
- 4 BRAVER: Yeah, I'm sorry, who is this?
- 5 PRERECORDED VOICE: Okay, good. I'm with the security help center and the reason why I'm
6 calling today is that there have been issues with false alarms with home security systems in your
7 neighborhood. Have you been informed about that?
- 8 BRAVER: Uh, no I've had no issues with false alarms.
- 9 PRERECORDED VOICE: So it's my job to make sure that all the homes in your neighborhood
10 are aware of the technologies and security programs available in your area. I just have a couple
11 questions to see what your home will qualify for. Now, do you own your home?
- 12 BRAVER: Yeah, so what is it that is specific about my area verses other areas?
- 13 PRERECORDED VOICE: I understand, what I can do for you, so you don't miss out on this
14 limited time offer is transfer you over to a specialist to explain the details to you. Then you can
15 decide for yourself if it's a good fit for you and your family.
- 16 BRAVER: Okay, well I, I don't understand your...I guess I don't know that you understood my
17 question. So, you're talking about stuff that's specific to my area? What is that is different in my
18 area verses other areas?

19 *Pause*

20 BRAVER: Hello? Are you there?

21 PRERECORDED VOICE: Okay.

22 BRAVER: Hello?

23 PRERECORDED VOICE: Haha, you know I actually get that a lot. This is a legitimate offer
24 we're actually looking for a model home in your area and word of mouth is how we grow our
25 company. But before you decide anything, I just want to finish up here and get you over to a
26 security specialist and they will, you know, give you all the details and you can decide for
27 yourself if it's a good fit.

28 BRAVER: Okay, well I really don't have time to get into, uh, any kind of lengthy discussion
29 with anyone at the moment cause I'm kind of in the middle of something. Umm, but I'm...
30 you're not really clear cause you're not really answering my question.

31 PRERECORDED VOICE: You know, I don't really know that off the top of my head. If you
32 remember that; I think I can get someone to help answer that in a moment.

33 BRAVER: okay well, like I said I really don't have time to get involved with anything at the
34 moment.

35 PRERECORDED VOICE: Uhh, yeah, no. We're not going to be much longer.

36 BRAVER: Okay, and what company did you say you were with?

37 PRERECORDED VOICE: Are you a US citizen?

38 BRAVER: Uh yes, but what company did you say you were with?

39 PRERECORDED VOICE: Does your home have at least two bedrooms?

40 BRAVER: Uh yes.

41 PRERECORDED VOICE: Okay, is your home a mobile home or trailer?

42 BRAVER: Uh no.

43 PRERECORDED VOICE: Okay. Now it looks like this is all the information I need to see if I
44 can qualify you.

45 BRAVER: Okay and what company did you say you were with again?

46 PRERECORDED VOICE: I am with the security help center.

47 BRAVER: Security Help Center? Never heard of em'.

48 PRERECORDED VOICE: Okay, now it looks like this is all the information I need to see if I
49 can qualify you. Let's see here. Okay, one second. Uh yes, okay, it does look like you do qualify
50 to speak with one of our security specialists about how to make your home more secure. Okay,

51 so, now based on the information you've given me. You do seem like a person who does seem
52 concerned about your security within your home. Okay.

53 BRAVER: Uh, no.

54 PRERECORDED VOICE: I feel like you can benefit from some new information on how to
55 make your home more secure.

56 BRAVER: Well, I guess I'm still not understanding what's the issue? Issue with false alarms in
57 the neighborhood. What is it about my neighborhood? Is what I am still not understanding. What
58 is it about my neighborhood that's causing false alarms? I don't have any problems with that.
59 That's why I am all confused here.

60 PRERECORDED VOICE: that's fine. Oh, and I almost forgot one last question. Now do you
61 currently have a home security system ?

62 BRAVER: Um yes.

63 PRERECORDED VOICE: Okay, can you please confirm your first and last name.

64 BRAVER: Uh, this is Robert BRAVER.

65 PRERECORDED VOICE: I am going to schedule a time for a security specialist to give you a
66 call back to discuss the details. Now what's the best time for them to reach you, morning,
67 afternoon or evening?

68 BRAVER: It just depends on what day it is or what my schedule is. Do they make calls on
69 weekends?

70 PRERECORDED VOICE: Now, before we finish up, I want to check one last thing here. But I
71 want to see if we have a specialist available now for you to speak with.

72 BRAVER: I don't have time for that right now.

73 PRERECORDED VOICE: Uh okay yeah. This is good, we do actually have someone that
74 covers your area that we can connect you with right now. Hang on while I bring one of them on.

75 BRAVER: I don't have time for that right now.

76 PRERECORDED VOICE: Yes people are doing things that they normally wouldn't do. So, the
77 crime rate is continuing to go up, but I can simply get you over to a specialist. If you don't like
78 what you hear, then we can just shake hands and part as friends, okay?

79 BRAVER: Yeah, I don't have time for that right now, but you said someone would, could call
80 me later? That would be fine.

81 *Pause*

82 PRERECORDED VOICE: Uh Hello, are you still there?

83 BRAVER: Yeah, I'm here. Like I said I don't have time. You said that someone could call me
84 back at a later time. That would be alright, but I don't have time right now.

85 PRERECORDED VOICE: Uh yeah no. we're not going to be much longer.

86 BRAVER: Yeah I don't have time to talk. I have to go like right now. I got someone waiting on
87 me. I don't have time to talk to anyone right now.

88 PRERECORDED VOICE: Look, I understand. A lot of people I talk to actually think...

89 PRERECORDED VOICE: Uh yeah no, were not going to be much longer.

90 BRAVER: Okay, I have to get off the phone now. Hello? Hello? Is anybody there? Hello?

91 PRERECORDED VOICE: So you...

92 ***** Call is Transferred to a Live Sales Agent * * * *

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and Regulations
Implementing the Telephone Consumer
Protection Act of 1991

CG Docket No. 02-278

Petition for Expedited Declaratory Ruling
Clarifying 47 U.S.C. § 227(b)(1)(B) of the
Telephone Consumer Protection Act

APPENDIX B
**to Comments of Robert BRAVER in Opposition to Petition for Expedited Declaratory
Ruling filed by Northstar Alarm Services, LLC**

2016 FTC Staff Opinion Letter



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Lois C. Greisman
Associate Director
Division of Marketing Practices

November 10, 2016

Michael Bills
132 S 600 East, Suite 204
Salt Lake City, UT 84102

Re: September 11, 2009 Staff Opinion Letter on Soundboard Technology

Dear Mr. Bills:

We are writing to you regarding the informal staff opinion letter we provided to your former company, Call Assistant, LLC, on September 11, 2009.¹ Our September 2009 letter responded to Call Assistant's inquiry regarding whether the Telemarketing Sales Rule's ("TSR") provisions governing outbound telemarketing calls that deliver prerecorded messages² apply to calls utilizing soundboard technology, which is technology that allows a live agent to communicate with a call recipient by playing recorded audio snippets instead of using his or her own live voice. In the September 2009 letter, staff stated its opinion that the technology, as described by Call Assistant, would not be subject to the prerecorded message provisions of the TSR. Staff's opinion was based on important features that Call Assistant highlighted about its technology – i.e., that for the entire duration of a call made using the technology, a single live agent stays with the call from beginning to end, listens to every word spoken by the call recipient, determines what is heard by the call recipient, and has the ability to interrupt recordings and use his or her own voice to communicate with the call recipient if needed. In our view at that time, these features made the calls "virtually indistinguishable" from normal two-way conversations with live operators and placed them outside the scope of the TSR's prerecorded message provisions.

Since the issuance of our September 2009 letter, staff has received a steadily increasing volume of formal and informal complaints from consumers about telemarketing calls utilizing soundboard technology. Consumers complain that during these calls they are not receiving appropriate recorded responses to their questions or comments. Consumers further complain that often no live telemarketer intervenes to provide a human response when requested to do so, the recorded audio snippets that are played do not adequately address consumer questions, or the call

¹ A copy of the September 11, 2009 staff opinion letter can be found at http://www.ftc.gov/sites/default/files/documents/advisory_opinions/opinion-09-1/opinion0901_1.pdf. Call Assistant, LLC, filed for Chapter 7 bankruptcy on August 13, 2015. *In re Call Assistant LLC*, Case No. 15-11708 (KJC) (Bankr. D. Del. Aug. 13, 2015).

² 16 C.F.R. § 310.4(b)(1)(v).

Michael Bills

Page 2 of 6

is terminated in response to consumers questions. Indeed, media reports also have taken note of this phenomenon, which some in the press have dubbed telemarketing “robot” calls.³ Simply put, since we issued the letter in 2009, staff has seen evidence of the widespread use of soundboard technology in a manner that does not represent a normal, continuous, two-way conversation between the call recipient and a live person. This is inconsistent with the principles we laid out in our September 2009 letter as well as our understanding of the technology at the time we issued the letter.⁴ Moreover, this type of use does not provide the consumer benefits upon which we based our September 2009 opinion.

In response to rising complaints and concerns, staff reached out to the Professional Association for Customer Engagement (“PACE”), which is a trade association representing call centers, and the Soundboard Association, a trade organization representing manufacturers and users of soundboard technology. During the last few months, we have had multiple productive discussions and meetings with PACE and the Soundboard Association to learn more about soundboard technology and obtain industry input regarding the regulatory status of that technology. Both PACE and the Soundboard Association were responsive to requests, provided meaningful input to assist staff in its review of this technology, and highlighted the potential benefits of responsible soundboard use. Staff carefully considered the input of PACE and the Soundboard Association.

A fundamental premise of our September 2009 letter was that soundboard technology was a surrogate for the live agent’s actual voice. A human being cannot conduct separate conversations with multiple consumers at the same time using his or her own voice. Nonetheless, some companies are routinely using soundboard technology in precisely this manner, and these companies are improperly using our September 2009 letter to justify their actions in court proceedings⁵ and in investigations. Indeed, Call Assistant noted publicly that

³ See, e.g., Sean Gallagher, *The New Spam: Interactive Robo-Calls From the Cloud as Cheap as E-Mail*, ARS TECHNICA, (Apr. 15, 2015), <http://arstechnica.com/information-technology/2015/04/the-new-spam-interactive-robo-calls-from-the-cloud-as-cheap-as-e-mail>; Alexis C. Madrigal, *Almost Human: The Surreal, Cyborg Future of Telemarketing*, THE ATLANTIC, (Dec. 20, 2013), <http://www.theatlantic.com/technology/archive/2013/12/almost-human-the-surreal-cyborg-future-of-telemarketing/282537/>; Alexis C. Madrigal, *The Only Thing Weirder Than a Telemarketing Robot*, THE ATLANTIC, (Dec. 13, 2013), <http://www.theatlantic.com/technology/archive/2013/12/the-only-thing-weirder-than-a-telemarketing-robot/282282/>; Zeke Miller & Denver Nicks, *Meet the Robot Telemarketer Who Denies She's a Robot*, TIME, (Dec. 10, 2013), <http://newsfeed.time.com/2013/12/10/meet-the-robot-telemarketer-who-denies-shes-a-robot/>; Kris Hundley, *These Telemarketers Never Stray From Script*, TAMPA BAY TIMES, (Nov. 14, 2013), <http://www.tampabay.com/news/these-telemarketers-never-stray-from-the-script/2152303>.

⁴ For example, Call Assistant highlighted the ability of its agents to use their own voices during calls using its soundboard technology: “Our technology merely substitutes sound files for the agent’s voice (*although the agent can interject with his or her voice at any time*) . . .” (emphasis supplied). See also September 2009 Letter at 1 (“In response to the greeting, the agent may elect to speak to the call recipient *using his or her voice*, or may press a button to play an appropriate recorded script segment. . . . At all times, even during the playing of a recorded segment, *the agent retains the power to interrupt any recorded message to listen to the consumer and respond appropriately.*”) (emphasis supplied).

⁵ See, e.g., *Fitzhenry v. ADT Corp.*, No. 9:14-CV-80180 (S.D. Fla.); *Barrett v. ADT Corp.*, No. 12:15-CV-1348 (S.D. Ohio).

Michael Bills

Page 3 of 6

one of the advantages of its technology is that “an agent can conduct multiple calls simultaneously.”⁶ Staff also has seen evidence that call centers are using soundboard technology to increase the number of outbound calls they can make. In addition, in our discussions and meetings, industry representatives acknowledged that call centers routinely use soundboard technology to allow a single live agent to handle more than one call at the same time.

The plain language of the TSR provision governing prerecorded calls imposes restrictions on “any outbound telephone call that delivers a prerecorded message.”⁷ It is indisputable that calls made using soundboard technology deliver prerecorded messages. As such, under the plain meaning of the words in the TSR’s prerecorded call provision, outbound telemarketing calls using soundboard technology are covered because such calls “deliver a prerecorded message.”⁸

Given the actual language used in the TSR, the increasing volume of consumer complaints, and all the abuses we have seen since we issued the September 2009 letter, we have decided to revoke the September 2009 letter. It is now staff’s opinion that outbound telemarketing calls that utilize soundboard technology are subject to the TSR’s prerecorded call provisions because such calls do, in fact, “deliver a prerecorded message” as set forth in the plain language of the rule.⁹ Accordingly, outbound telemarketing calls made using soundboard technology are subject to the provisions of 16 C.F.R. § 310.4(b)(1)(v), and can only be made legally if they comply with the requirements set forth in Section 310.4(b)(1)(v)(A) (for calls selling goods or services), Section 310.4(b)(1)(v)(B) (for calls seeking charitable contributions from members or prior donors), or Section 310.4(b)(1)(v)(D) (healthcare messages by a covered entity or its business associate under HIPAA).

In reaching this conclusion, staff did consider whether an express requirement that live agents using soundboard technology only handle one call at a time would change the analysis. Staff has concluded that it would not. First, even with a 1-to-1 limitation in place, such calls would still “deliver a prerecorded message” and therefore would fall within the plain language of 16 C.F.R. 310.4(b)(1)(v). Moreover, in staff’s view, a 1-to-1 limitation would not stop abusive use of the technology. Based on preliminary information provided by industry representatives, a significant percentage of the total number of call center seats utilizing soundboard technology are used to make telemarketing or lead generation calls. A 1-to-1 limitation would allow a lead generation operation to use soundboard technology in which live operators simply press a button to play a prerecorded message offering a good or service that asks the consumer to say “yes” or press 1 on their phone if they are interested. If the consumer says yes or presses 1, the live agent would then transfer the call to the seller who makes a telemarketing pitch. Such calls are indistinguishable from standard lead generation robocalls that are governed by the TSR and are the subject of a large volume of consumer complaints and significant telemarketing abuse. The

⁶ *Nougar, L.C., et al. v. Revocalize, LLC, et al.*, No. 2:11-cv-127, DE 41 (D. Utah, Oct. 18, 2011).

⁷ 16 C.F.R. § 310.4(b)(1)(v).

⁸ *Id.*

⁹ *Id.* Staff notes that representatives of both PACE and the Soundboard Association disagree with this conclusion.

Michael Bills

Page 4 of 6

fact that a live operator, instead of a computer, “delivers” the prerecorded message and transfers interested consumers to sellers makes little difference from the call recipient’s perspective. Thus, even a 1-to-1 limitation would permit soundboard technology to be used to deliver calls that are indistinguishable from the telemarketing robocalls that consumers consider to be abusive and that are illegal under the TSR.

Finally, staff does recognize that when the Commission adopted the TSR’s robocall provisions TSR in 2008, it foresaw that technology could evolve to allow the use of interactive prerecorded messages in telemarketing calls in a manner “essentially indistinguishable from conversing with a human being.”¹⁰ Indeed, soundboard technology, when used properly, may one day approach that level of proficiency. If and when such advances occur, the Commission noted that parties could seek further amendment of the TSR or exemptions from the prerecorded message provisions.¹¹

In order to give industry sufficient time to make any necessary changes to bring themselves into compliance, the revocation of the September 2009 letter will be effective six months from today, on May 12, 2017. As of that date, the September 11, 2009 letter will no longer represent the opinions of FTC staff and cannot be used, relied upon, or cited for any purpose.

In closing, staff notes that revocation of the September 2009 opinion letter does not mean that the TSR prohibits all calls made using soundboard technology. To the contrary, call centers can still use soundboard technology for in-bound calls and to place a wide variety of outbound calls, such as non-telemarketing calls (e.g., political calls, survey calls, and pure informational calls), telemarketing calls that fall within the exemptions set forth in Section 310.4(B)(1)(v)(A), (B), or (D), certain types of charitable donation calls, and calls that are expressly exempt from the TSR under Section 310.6 (e.g., business-to-business calls). In fact, the preliminary data provided indicates that a significant percentage of call center seats that utilize soundboard technology are used for in-bound calls or to place non-telemarketing calls, such as political or charitable calls. As long as those calls remain outside the scope of the TSR, companies can continue to use soundboard technology for those types of calls without violating the TSR. Please note, however, that we do not opine on whether the use of such technology complies with state or other federal laws, including the Telephone Consumer Protection Act, 47 U.S.C. § 227, or its corresponding regulations implemented by the Federal Communications Commission, 47 C.F.R. § 64.1200.

Please be advised that the views expressed in this letter are those of the FTC staff, subject to the limitations in 16 C.F.R. § 1.3. They have not been approved or adopted by the Commission, and they are not binding upon the Commission. However, they do reflect the views of staff members charged with enforcement of the TSR.

¹⁰ *Telemarketing Sales Rule*, 73 Fed. Reg. 51,164, 51,180 (Aug. 29, 2008).

¹¹ *Id.* (“Accordingly, nothing in this notice should be interpreted to foreclose the possibility of petitions seeking further amendment of the TSR or exemptions from the provisions adopted here.”)

Michael Bills
Page 5 of 6

Sincerely,

Lois C. Greisman
Associate Director
Division of Marketing Practices

Cc: Michele A. Shuster, Esq.
General Counsel, PACE
6530 W. Campus Oval, Suite 210
New Albany, OH 43054

The Soundboard Association
c/o Peter B. Miller, Esq.
Crowell & Moring LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004

Call Assistant, LLC
78-00 3rd Street N., Suite 900
St. Paul, MN 55128

Ronald S. Gellert
Gellert Scali Busenkell & Brown, LLC
1201 N. Orange Street, Suite 300
Wilmington, DE 19801
Counsel for Debtor, Call Assistant, LLC

David Carickhoff
Jennifer L. Dering
Archer & Greiner, P.C.
300 Delaware Ave., Suite 1100
Wilmington, DE 19801
Bankruptcy Trustee for Call Assistant, LLC

Noguar
5286 S 320 West
Murray, UT 84107

Avatar Technologies, Inc.
138 Columbus Ave., 2nd Floor
Mount Vernon, NY 10553

Michael Bills

Page 6 of 6

Robby H. Birnbaum
Greenspoon Marder
One Boca Place, 2255 Glades Road, Suite 400-E
Boca Raton, FL 33431
Counsel for Avatar Technologies, Inc.

DOCKET NO. 02-278

Attachment A

DOCUMENT OFF-LINE

This page has been substituted for one of the following:

- o This filing contains confidential information (Not For Public Inspection)
- o An oversize page or document (such as a map) which was too large to be scanned into the ECFS system.
- o Microfilm, microform, certain photographs or videotape.
- o Other materials which, for one reason or another, could not be scanned into the ECFS system.

The actual document, page(s) or materials may be reviewed by contacting an Information Technician at the FCC Reference Information Center, at 445 12th Street, SW, Washington, DC, Room CY-A257. Please note the applicable docket or rulemaking number, document type and any other relevant information about the document in order to ensure speedy retrieval by the Information Technician.

122-R OM