

**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

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

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Northstar Alarm Services, LLC (Northstar) filed comments in support of its own Petition for an Expedited Declaratory Ruling. Robert Braver submits these reply comments to address inaccurate contentions made by Northstar and to address contentions made by the Soundboard Association in its comments supporting Northstar's petition.

I. Many Soundboard Calls are Placed by Automated Systems that Dial Millions of Calls per Day

Northstar admits that all soundboard calls use prerecorded voice messages. *Northstar Petition*, 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); *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”).

Ignoring that the TCPA and the Commission’s regulations require consent for *both* calls using a prerecorded voice *and* calls made by “automatic telephone dialing systems,”¹ Northstar nevertheless claims that soundboard calls are not regulated because they are not “wholly automated.” *Northstar Comments* at p. 7. Yet there is no such limitation in the statute or this Commission’s regulations; their plain language regulates calls using a prerecorded voice regardless of whether those calls are “automated.”² Northstar further fails to address the

¹ 47 U.S.C. § 227(b)(1)(A) (“It shall be unlawful . . .to make any call . . . using any automatic telephone dialing system **or** an artificial or prerecorded voice . . .”) (emphasis added); 47 C.F.R. § 64.1200(a)(1) (same); *see also* 47 U.S.C. § 227(b)(B) (“It shall be unlawful . . . to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party”); 47 C.F.R. § 64.1200(a)(3) (same).

² *See e.g. Bound v. Grand Bahama Cruise Line, LLC*, 2016 U.S. Dist. LEXIS 194031, * 5 (N.D. Ga. 2016) (“[I]t is clear that the use of an ATDS is not a necessary element. Rather, Plaintiff can also state a valid claim under § 227(b)(1)(A) by alleging that Defendant used an artificial or prerecorded voice to make these calls.”); *Vaccaro v. CVS Pharm., Inc.*, 2013 U.S. Dist. LEXIS 99991, *4-5, n. 2 (S.D. Cal. 2013) (“Because the provision is written in the disjunctive, plaintiffs

legislative history, which rejects any need for the calls to be wholly automated as Congress explicitly contemplated a *live person being on the call* to obtain consent before using a prerecorded voice:

“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 asks the called party whether he or she agrees to listen to a recorded message.”)

More troubling than Northstar’s avoidance of the statutory text and legislative history, however, are the false and misleading contentions it makes about how soundboard calls are dialed and about the number of soundboard calls that its vendor, Yodel Technologies, placed. The call records produced in the Braver litigation show that Yodel’s soundboard system frequently made more than a **million calls per day** on Northstar’s behalf in a single telemarketing campaign. *See Braver v. Northstar*, 17-cv-383, Doc. 42-9. This does not include the calls Yodel’s soundboard system made for its numerous other clients. Yet Northstar incredibly contends that soundboard calls “are not . . . placed by a computer or other machine. Rather, they are placed and overseen by live agents.” *Northstar Comments* at p. 7. This is false. Northstar’s soundboard calls were not placed by live agents. Rather, as Yodel testified in the Braver litigation, the soundboard calls it placed for Northstar **were automated** – they were dialed by a computer while no human being was on the line:

can state a claim under the TCPA by alleging the use of (1) an ‘artificial or prerecorded voice’ *or* (2) an ATDS.” (original emphasis)

Q. And how does -- is there a pacing configuration on the Yodel dialer?
A. What do you mean?
Q. The rate at which numbers are dialed?
A. Yes.
Q. What was that pacing configuration for the Northstar calls?
A. It varies. **It's automated.**
Q. So that would be something that would be set with each campaign?
A. It's -- yes, it -- it can be set on each campaign.
Q. Does it have predictive dialing pacing?
A. Yes.
Q. Were the Northstar -- were the Northstar calls used with predictive pacing?
A. Yes.
Q. And so let's just make sure we are talking about the same thing. So this would be an instance in which **the computer essentially initiates the call and detects whether or not it's answered by a human or a voice mail, and if there's an answer, then it transfer the call to a person; is that right?**
A. **That's how the predictive system works, yes.**
Q. **And is that how the Yodel dialer worked with respect to the Northstar calls?**
A. **Yes.**

See Braver v. Northstar, 17-cv-383, Doc. 42-4 at pp. 16-17. Thus, Northstar's contention that "the use of a live operator limits the numbers of calls that can be made"³ is false.

Perhaps in order to sell the bogus contention that its soundboard calls were manually dialed by human beings, Northstar misleadingly claims that its soundboard vendor, "placed, on average, just one call to each *class member* (i.e. approximately 253,000 calls to about 240,000 individuals) over the course of just over eight months" and contends that this is "hardly the repeated and harassing volume of calls that the TCPA was enacted to address in the first instance." Northstar Comments at p. 2 (emphasis added). What Northstar conveniently fails to explain is that it is only providing the number of calls made *to the class* certified in the Braver action, which was purposely narrowed and represents only a *very small subset* of all the

³ Northstar Comments at p 8.

soundboard calls placed in Northstar’s telemarketing campaign⁴ - over **75 million soundboard calls** to over **six million numbers**, all placed on Northstar’s behalf during the same time period. *See Braver v. Northstar*, 17-cv-383 at Doc. 42-9; *Id.* at Doc. 42-2, ¶¶ 14-18. And approximately 99% of those calls were spoofed with fake, local caller id numbers. *Id.* at ¶¶ 36-44. The factual record developed in the Braver litigation utterly refutes Northstar’s contentions to this commission that soundboard calls are not automated.

II. Soundboard Technology Does not “Ensure Compliance”

In its comments, the Soundboard Association contends that soundboard technology is used to “protect consumers and ensure compliance” with telemarketing regulations. *Soundboard Association Comments* at p. 2. Northstar’s conduct shows otherwise. As shown in Braver’s initial comments, and the call recording attached thereto, the prerecorded messages used in Northstar’s soundboard calls falsely identify the caller as the “local Department of Home Security” and the “Security Help Center”⁵ and blatantly lied about “issues with false alarms” “in your neighborhood,” when no such issues existed. *See Braver v. Northstar*, 17-cv-383 at Doc. 72, pp. 5-6. In Northstar’s case, the use of soundboard technology did not ensure compliance with any regulations, it ensured a consistently deceptive telemarketing scheme and allowed Northstar to hide its involvement unless someone was later connected to sign up for service. Moreover, the people called had no prior relationship with Northstar whatsoever. *Id.* at p. 6. Northstar simply paid for a list of telephone numbers for homeowners across the country and then used its vendor to blast out millions of calls, knowing that it did not have consent to do so. *Id.*

⁴ The class was limited to only those calls bearing certain “status codes” in the call records and thus excluding most of the calls in the campaign. *See Braver v. Northstar*, 17-cv-383, Doc. 72 at p. 4.

⁵ These representations violate the Commission’s regulations, which require the caller to provide “the name of the person or entity on whose behalf the call is made.” *See* 47 C.F.R. § 64.1200(d)(4)

Thus, it should be clear that soundboard technology does absolutely nothing to ensure compliance with telemarketing regulations or protect consumers. The Soundboard Association comments only confirm this; the association acknowledges that “the FTC is actively enforcing” its prerecorded call rules against soundboard callers. *Association Comments* at p. 1. This Commission should do the same.

It is important to note that neither the FTC’s rules nor this Commission’s rules “would effectively ban the technology,” as the Soundboard Association contends. *Id.* at p. 4. They merely require consent in order to make calls using prerecorded voices. Thus, Northstar could have avoided the situation it created by simply obtaining consent to make its calls. It chose not to and instead bombarded millions of random consumers in a massive telemarketing scheme to drive sales.

III. The Court Rejected Northstar’s *Ad Hominem* Attacks on Braver

Despite a clear record that Northstar and its soundboard vendor knowingly engaged in egregious violations of this Commission’s regulations, Northstar continues to attack Mr. Braver personally, contending that he is engaged in “lawsuit abuse” and is only seeking to enrich his attorneys instead of the class members he represents. *Northstar Comments* at p. 2. The court in the underlying litigation against Northstar found otherwise. As the court held,

“Defendants argue that Braver is inadequate because he ‘will place his own interests above the class’s and even abandon class claims altogether, if it suits his purposes.’ The evidence indicates otherwise. For example, defendants offered Braver a substantial sum of money to dismiss his claims in this case and abandon the class, which he rejected. Doc. no. 67, TR at 36. **The court concludes that Braver can be relied upon to see to it that the interests of the class come first** and that, for instance, if the case is to be settled, it is settled on a basis that provides substantial relief to his fellow class members (commensurate with the merits as they may appear at that juncture), rather than a pittance for the class members and a windfall for class counsel.”

see Braver v. Northstar, 17-cv-383, Doc. 72 at p. 16.

The reality is that a court has already rejected Northstar's attacks on Mr. Braver. After losing in court, Northstar is just regurgitating the same nonsense here, and trying to spin this Commission's legitimate concerns about lawsuit abuse into a condemnation of Mr. Braver and his case.⁶ Mr. Braver respectfully and sincerely hopes that after reviewing the evidence, the Commission will see that his lawsuit against Northstar is well and fully justified. The Commission should deny Northstar's petition.

Respectfully submitted,

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⁶ “When it comes, for instance, to determining whether the representative parties will fairly and adequately protect the interests of the class . . . it is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house.” *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 895 (7th Cir. 1981).