

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

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

**Comments of Joe Shields on the Petition For Expedited Declaratory Ruling of
Rubio’s Restaurant Inc.**

The Rubio’s Restaurant Inc. (hereinafter “Rubio’s”) petition is based on the assumption that non-telemarketing text message calls to cell numbers deserve radical different treatment than telemarketing text message calls to cell numbers. As has been pointed out repeatedly to the Commission, the TCPA is content neutral in its regulation of automatically dialed calls including text message calls to cell numbers. The TCPA regulates the method not the content of text message calls.

The TCPA Regulates More Than Telemarketing Calls

The original purpose of the TCPA was to regulate certain uses of technology that are abusive and potentially dangerous. The TCPA regulates these abuses by prohibiting certain technologies altogether, rather than focusing specifically on the content of the messages being delivered. Contrary to petitioners claim, Congress did foresee the changes in technology that would allow increased access to consumers and in response crafted the TCPA.

The TCPA is more than just telemarketing regulation; it is an important consumer protection statute. Opening cell phones to more calls through an EBR or similar exemption would drastically increase the amount of calls a consumer could receive. The

heightened cost-shifting, privacy, and safety concerns for cell phones justify a continued strict consent scheme with respect to such communications.¹

“The TCPA is not only directed at telephone solicitations, it is also directed at autodialer calls to cellular phones, as reflected by the different subsections of § 227, which create separate causes of action for telephone solicitations and automated calls to cellular phones.” *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744, 752 (W.D. Tex. 2011)

There is No EBR Exemption for Calls to Cell Phones

Rubio’s appears to be playing the EBR card in its petition. Rubio’s claims the text messages in question are business related. But there is no EBR exemption for text message calls to cell numbers. Rubio’s text message calls are no different than automated debt collection calls, survey calls and political calls to cell numbers. The Commission has made clear that no matter the purpose of the call prior express consent or an emergency purpose are the only TCPA exemptions for autodialed calls to cell numbers. “Robocalls are illegal when made to consumers’ cell phones without consent or in the absence of an emergency.” *In The Matter of Dialing Services LLC*, FCC 14-59, May 7th, 2014. Consequently, since Rubio’s did not supply the cell phones to employees, Rubio’s cannot claim that the text message calls in question are limited to intra-company communications when the text message calls in question are made to personal cell phones i.e. to members of the public. The only other issue Rubio’s raises is the called party issue

¹ *Heidtke, Daniel B. and Stewart, Jessica and Waller, Spencer Weber, The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology* (September 17, 2013). Loyola University Chicago School of Law Research Paper No. 2013-016.

which according to well settled law is the subscriber to the cell number and not some intended called party.

Being Sued Does Not Justify FCC Clarification

It is obvious that most of those that have filed petitions or comments supporting limiting aspects of the TCPA with the Commission are being sued for violating the TCPA. Being sued for violating the TCPA is not a valid reason to create an unlimited and virtually irrefutable exemption for text message calls to reassigned cell numbers. As the Commission has previously decided: "...we reject proposals to create a good faith exception for inadvertent autodialed or prerecorded calls to wireless numbers..." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, ¶ 123, 18 FCC Rcd. 14014, 2003 WL 21517853, 2003 FCC Lexis 3673 (2003). "Indeed, the distinction proffered by AT&T potentially would eviscerate the policy goals of the statute in protecting telephone subscribers from unwanted telemarketing calls by creating a **virtually irrefutable defense** (emphasis added) that the telemarketer was trying to reach 'someone else' at that number. *In the Matter of Consumer.net v. AT&T*, 15 FCC Rcd. 281, 1999 WL 1256282 (1999).

But then Rubio's did not provide the style of the case to the Commission which begs the question why wasn't it provided? Is there something in the complaint that paints a different picture than what the petitioner paints? From past experience that may very well be the case. Certainly, the fact that the cell number was disconnected for at least 30 days, if not the standard 90 days, begs the question why Rubio's did nothing when many of the 876 text messages would have been bounced as undeliverable.

For that matter in what time frame were these 876 text message calls made? Was it in several days, several weeks, several months or several years? Apparently, and from their own petition, Rubio's knew they were calling a reassigned number² yet they did nothing to stop the text message calls. If these text message calls are so important to Rubio's why are employees using personal cell phones for business related matters? Are employees required to provide their personal cell number as a condition of employment? Rubio's alludes to employers subsidizing personal cell phone costs but does not state that Rubio's subsidizes its own employee's cell phone costs. One cannot claim prior express consent when employees are required to provide personal cell numbers as a condition of employment. These are fact patterns that the petitioner has failed to provide the Commission.

Services are Available That Identifies Cell Phone Subscribers

Rubio's regurgitates the claim made by similar petitions and commentors supporting those petitions that there is no service that identifies the current subscriber to a cell number. It's a lame excuse at best. According to Becky Burr (Neustar Deputy General Counsel and Chief Privacy Officer and former FTC Attorney-Advisor), Neustar's TCPA compliance services "use continuously updated and **highly accurate phone data** (emphasis added) that gets updated multiple times per minute to tell you instantly . . . whether the subscriber name that you have matches."³ Neustar is not the only one offering such a service. Infutor, Nextmark List or Contact Center Compliance offers the same or similar service.

² The current subscriber and the called party informed Rubio's that they were calling a reassigned number. See petition 1st paragraph at page 3 and 2nd paragraph at page 7.

³http://www.neustar.biz/information/docs/pdfs/solutionsheets/credit_and_collections_tcpa.pdf

Called Party is Not Equivalent to Intended Called Party

The plain language of the statute is clear – prior express consent must be obtained from the called party and not some intended called party. The phrase “intended” is **never** mentioned in the statute. Subsection (b)(1)(A)(iii) contains the phrase "for which the called party is charged." Thus "called party" can only mean the current subscriber of the cell phone number because the current subscriber not the previous subscriber pays for calls. The same phrase "called party" is used in subsection (b)(2)(C) regarding FCC authority in exempting calls when the calls "are not charged to the called party." It is ludicrous to suggest that an “intended called party” would be charged for a call to a consumer that actually receives the call. In subsection (d)(3) the phrase “called party” is used 3 times. It is also ludicrous to suggest that identification of the caller be provided to the “intended called party” instead of the consumer that receives the call. In fact it is impossible to provide identification of the caller to an intended called party. Interpretations that called party means intended called party makes much of the TCPA meaningless. Such an interpretation leaves a call recipient with no statutory basis to stop calls meant for the previous subscriber.

TCPA Law Suits Benefit Consumers

Rubio’s claims that: “TCPA litigation abuses are frequent and increasing.” This is a fable created by similar petitions and commentors supporting similar petitions. Contrary to petitioners claims the intentional abuses of the TCPA by legitimate companies, such as the petitioner, are the cause for the increase in TCPA claims. In the year since federal courts were opened to private TCPA litigants, the number of TCPA cases filed increased

by 34%. However, relative to other consumer protection statutes (e.g., FDCPA and FCRA), TCPA litigation remains a relatively low proportion of a federal court's docket⁴.

The prospect of a large class action suit provides a significant deterrent, especially given the FCC's limited enforcement efforts. Class actions also bring attention to the TCPA and the illegality of conduct by legitimate companies. Increased attention to the statute increases compliance by industry members and increases awareness by consumers, which is important where enforcement is lacking.

Voluminous Case Law Holds Called Party is the Actual Subscriber and Recipient of the Call and Not Some Intended Called Party

Rubio's claims that the courts are split on the issue of who the called party is. There is no such split and such a claim is at best an exaggeration. Voluminous case law debunks such claims. "Standing to bring a private right of action is recognized for the person who answers a call to their cell phone, even if the caller intended to reach a different person." *Soppet v. Enhanced Recovery Co., L.L.C.*, 679 F.3d 637 (7th Cir. 2007) ("called party" means the person subscribing to the called number at the time the call was made; *Kane V. National Action Fin. Servs., Inc.*, 2011 WL 6018403 (E.D. Mich. Nov. 7, 2011) at *7. "Like Kane, Plaintiff has received calls on his own cellular phone from a party using an automated dialing system and intending to reach someone else." *Harris v. World Financial Network National Bank et al*, 867 F.Supp.2d 888 (2012) WL 1110003. "The TCPA is essentially a strict liability statute which imposes liability for erroneous unsolicited [calls]." *Alea London Ltd. v. American Home Services, Inc.*, 638 F.3d 768, 776 (11 Cir. 2011). "...provides for a cause of action for any person who receives an unsolicited fax and does not limit the cause of action to the intended recipient of an

⁴ *Heidtke*

unsolicited fax.” *Dawson v. Am. Dream Home Loans*, No 06CV000513, 2006 WL 2987104 (Ohio Com. Pl. Oct. 4, 2006). “Accordingly, the Court finds that the “called party” for the purposes of § 227(b)(1)(A)(iii) was not Former Customer, but the Plaintiffs”. *Breslow v. Wells Fargo Bank, NA*, 857 F. Supp. 2d 1316 - Dist. Court, SD Florida 2012.

"Defendant’s position that only the intended recipient has standing to bring a claim under the TCPA **has been squarely rejected in no less than twenty cases**, (emphasis added) cases that are factually similar to the instant case." "Adopting Defendant’s position would shift responsibility from a business making automatic and prerecorded calls to individuals receiving them." *Olney v. Progressive Casualty Ins. Co.*, 2014 WL 294498 (S.D. Cal., Jan. 24, 2014). "Instead, the Court is persuaded by Plaintiffs’ argument that the TCPA is intended to protect the telephone subscriber, and thus it is the subscriber who has standing to sue for violations of the TCPA." *Gutierrez v Barclays* Case No. 10-cv-1012 DMS (BGS) (S.D. Cal. Feb. 9, 2011). “The use of ‘called party’ to unambiguously refer to the actual recipient in another section of the TCPA is compelling evidence that the term carries the same meaning in other provisions.” *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316, 1321 (S.D. Fla. 2012). See also *Osorio v. State Farm Bank, F.S.B.*, 746 F. 3d 1242 (11th Cir. 2014) “We accordingly reject State Farm’s argument that the “intended recipient” is the “called party” referred to in 47 U.S.C. § 227(b)(1)(A)”.

“Numerous courts that have considered this issue have held a party to be a ‘called party’ if the defendant intended to call the individual’s number, and that individual was the regular user and carrier of the phone.” *Swope v. Credit Management LP*, 2013 WL

607830 (E.D. Mo. 2013), at *3. "...the district court held that the plaintiff qualified as a "called party" because he was "the regular user and carrier of the cellular telephone..." "[t]he fact that the telephone number was registered to [his] fiancée's name does not change this result. *Page v. Regions Bank*, 2012 WL 6913593, at *4-*5. "... the plaintiff had standing to sue under the TCPA even though she was merely "an authorized user of her shared cellular plan" and "her ex-husband was the primary account holder." *Agne v. Papa John's International, Inc.*, 286 F.R.D. 559, 565 (W.D. Wash. 2012). The thrust of these decisions and others is that a plaintiff's status as the "called party" depends not on such technicalities as whether he or she is the account holder or the person in whose name the phone is registered, but on whether the plaintiff **is the regular user of the phone...**" (emphasis added) *Manno v. Healthcare Revenue Recovery Group, LLC*, 289 F.R.D. 674 (S.D. Fla. 2013). "The only logical interpretation of "called party" as used in this section is the "actual recipient." *Olney v. Progressive Casualty Ins. Co.*, 2014 WL 294498 (S.D. Cal., Jan. 24, 2014).

This is not an exhaustive list of court decisions holding that the called party is the subscriber to the cell number that receives the call. The petitioner cites several cases that when scrutinized do not support petitioners claims and all of them are suspect as to the issue of autodialed calls to reassigned cell phone numbers. *Leyse v. Bank of Am.*, No. 09–7654 (JGK), 2010 WL 2382400, at *4 (S.D.N.Y. June 14, 2010) was a robocall to a landline where the roommate answered a call intended for the other roommate. In that case the intended called party and the called party happens to be one and the same. In comparison, *Cellco Partnership d/b/a Verizon Wireless v. Dealers Warranty, LLC*, No. 09–1814 (FLW) dealt with the issue of a wireless carrier suing for robocalls to their

subscribers. Verizon was neither the called party nor the intended called party. Lastly, *Kopff v. World Research Grp., LLC*, 568 F. Supp. 2d 39, 40–42 (D.D.C. 2008) dealt with an employee’s standing to sue for junk fax ads. Similar to the *Leyse* case the business that received the junk fax ad was both the intended called party and the called party. But more importantly, none of these cases deal with the issue of calling reassigned cell numbers whereas the voluminous case law cited above does address that specific issue.

“*Leyse*, 2010 WL 2382400, and *Kopff*, 568 F. Supp. 2d 39, are thus distinguishable because it was undisputed in those cases that the plaintiffs were not the subscribers to the telephone numbers called.” *Olney v. Progressive Casualty Ins. Co.*, 2014 WL 294498 (S.D. Cal., Jan. 24, 2014)..

Rubio’s Cannot Create an Affirmative Defense

Unbelievable as it sounds, Rubio’s goes to such an extreme in its petition as to ask the Commission to add a “...affirmative, bad faith defense...” to a consumer protection statute. This shows how absurd these petitions have become. The petitioner is asking the Commission to convert a consumer protection statute to a business protection statute! Such a request fails to meet the requirements of terminating a controversy or removing uncertainty under 47 C.F.R. §1.2. Such a request is a blatant attempt to bypass Congress and the courts to: “...alleviate liability...” for legitimate company’s engaging in intentional violations of the TCPA. Rubio’s cannot create and write in an exemption into the TCPA to suit their needs! Rewriting of the TCPA, or any other Federal law for that matter, is exclusively Congress's province not the province of the petitioner or the Commission.

Congress Intended To Regulate Certain Uses of Technology

In support of its petition Rubio's attempts to limit the congressional purpose of the TCPA: "...to prohibit automated and prerecorded telemarketing calls..." This is a typical mischaracterization of the legislative history of the TCPA. As stated above the original purpose of the TCPA was to regulate certain uses of technology that are abusive and potentially dangerous. For their self-serving reasons Rubio's misquotes Senator Hollings introductory statement. Senator Hollings never stated that telemarketing calls are the scourge of modern civilization. What Senator Hollings actually said is:

Mr. President, today I am introducing the **Automated Telephone Call Protection Act of 1991**. This bill will ban computerized telephone calls to the home and so-called junk fax. **Computerized calls are the scourge of modern civilization**. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall." 137 Cong. Rec S16204-01 (1991)

The word telemarketing never appears in the above statement of Senator Hollings. Rubio's text message calls are exactly what Congress sought to regulate with the TCPA. More specifically, Congress intended to regulate these so called good faith mistakes. Given the number of good faith mistakes that can and will be made by automated equipment such calls require regulation. If an exemption existed for good faith mistakes then there would be no incentive to comply with the TCPA as every call could be written off as a good faith mistake. Congress recognized this fact and placed reasonable limitations on automated calls. The requirement of prior express consent limits automated calls to those that have requested them. The TCPA does not require that cell phone subscribers opt out of automated calls they never requested. That is the fallacy with the many petitions that seek to create an "intended" called party exemption.

Conclusion

The Commission must bear in mind that the effectiveness of the TCPA will ultimately be defined by its ability to protect consumers' cell phones. The Commission must also bear in mind that consumers are increasingly experiencing more unlawful conduct on their cell phones than by any other media. The blame is put on the widening use of cell phones. Such blame is misplaced. It is the use of automatic dialing technology that is to blame. One never hears from those that use the technology responsibly. The only ones that the Commission hears from are those that are being sued. And in most if not all cases they are being sued for good reason. Rubio's is a good example – why did Rubio's continue to make text message calls to a disconnected number that generated an undeliverable return message response?

Being sued for violating the TCPA is not a valid reason to create a virtually irrefutable defense. Being sued for violating the TCPA is not a valid reason to force consumers to be subjected to unwanted, unauthorized and dangerous calls to their cell numbers which are intended for a previous subscriber. The Commission needs to protect consumer's cell phones and denying the Rubio's petition would be one way to protect consumer's cell phones.

Respectfully submitted,

_____/s/_____

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