

**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)

**Reply Comments of Joe Shields on the Comments of the Consumer Bankers
Association on Their Petition for Declaratory Ruling**

I hereby submit these reply comments on the comments filed by the Consumers Bankers Association (hereinafter “CBA”) on the Consumer Bankers Association Petition for Declaratory Ruling. The commentor continues the same baseless and frivolous argument that there is some ongoing confusion about called party. This is a non-starter as the courts are unanimous on called party. Further, commentor falsely claims that creating a virtual irrefutable defense to the TCPA will benefit consumers. The only beneficiary’s to a virtual irrefutable defense as suggested by the CBA petition are business organizations that consider the TCPA an impediment to their autodialing business objectives. CBA has not provided any legal basis in its comments that would support creating a virtual irrefutable defense for wrong number calls.

Commentor regurgitates their claim that creating an “intended” called party exemption would “remove uncertainty” on the called party issue. There has never been any uncertainty on called party. Courts are unanimous in their definition of called party.

Commentor suggests that creating an “intended” called party exemption: would not reduce consumer’s rights. Such a claim is beyond frivolous given that the creation of an “intended” called party exemption would leave everyone receiving wrong number

calls without any protection whatsoever. Further, such an “intended” called party exemption would shift responsibility from the caller to the called party. “Adopting Defendant’s position would shift responsibility from a business making automatic and prerecorded calls to individuals receiving them. The Court feels that the stronger public policy to be served by the TCPA is protecting individuals from such calls.” *Olney v. Progressive Casualty Ins. Co.*, 2014 WL 294498 (S.D. Cal., Jan. 24, 2014).

Commentor asks the Commission not only to create an “intended” called party exemption but also to make this new exemption retroactive. The Commission cannot create a new compliance requirement that is retroactive. Conversely, neither can the Commission create a new exemption that is retroactive.

The Commission has repeatedly refused to create an exemption or safe harbor for wrong number calls: “...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), “would eviscerate the policy goals of the statute in protecting telephone subscribers from unwanted telemarketing calls by creating a virtually irrefutable defense that the telemarketer was

trying to reach ‘someone else’ at that number.” In re Consumer.Net, 99 F.C.C. 401 (1999).

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 illegal conduct on their cell phones from legitimate companies 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.

The Commission can and must deny the CBA petition.

Respectfully submitted,

_____/s/_____

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