

**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 Twitter Inc. on the Consumer  
Bankers Association Petition for Declaratory Ruling**

I hereby submit these reply comments on the comments filed by Twitter Inc. on the Consumer Bankers Association Petition for Declaratory Ruling. The commentor continues the same baseless and frivolous argument that it is not possible to determine when a cell phone number has been reassigned to another person. This is a non-starter as clearly, before any number is reassigned the number is placed into an unassigned pool on average for 90 days.

During that time frame a disconnected number or undeliverable message, in the case of text messages, is generated. Consequently, the commentor knows every time a number is disconnected. Obviously, Twitter does not act responsibly and fails to remove such disconnected numbers. In reality, what the commentor does is make it impossible for someone with a new number to stop the text messages. See Sections A through D of *Nunes v. Twitter*, Case No.: 3:14-cv-02843, (N.D. CA, Filed June 19<sup>th</sup>, 2014). As is clearly shown in the original complaint Twitter intentionally thumbed their nose at the TCPA. More importantly, Twitter has joined the very long list of those that lost their Motion to Dismiss on thier 5 page theory of intended called party. See attached order.

Commentors in this proceeding are trying to hold consumers, the TCPA and the Commission hostage. They are claiming that they will stop all consumer requested communications if the Commission does not create an exemption for their wrong number calls. It is the policy of the United States not to negotiate with terrorists. This hostage taking of consumers, the TCPA and the Commission is no different than hostage taking by terrorists. The Commission should not negotiate with those that attempt to hold consumers, the TCPA and the Commission hostage.

Similar threats were made when the Commission sought comments on the National do-not-call registry:

**“Without a doubt this will cause worldwide economic catastrophe.** I am not an alarmist. But mark my words, when I say the government backing and subsequent free marketing of this list **will plunge the world into depression.**“ *Customer Inter@ction Solutions, What More Could "The Industry" Have Done? By Rich Tehrani, Group Editor-In-Chief, Technology Marketing Corporation*<sup>1</sup>

Obviously, those threats never came to pass. Making such threats is childish at best and is a disservice to consumers and the Commission. The Commission should not let themselves be coerced by those that are being rightfully sued for violating the TCPA.

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.

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<sup>1</sup> <http://www.tmcnet.com/call-center/0503/0503hp.htm>

Commentor admits that the Consumers Banking Associations is duplicative of other petitions. The Commission should exercise its authority to deny duplicative petitions.

The Commission should exercise its authority to protect the privacy and safety of cell phone users.

The Commission can and should deny the CBA petition.

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEVERLY NUNES,  
Plaintiff,  
v.  
TWITTER, INC.,  
Defendant.

Case No. 14-cv-02843-VC

**ORDER DENYING MOTION  
TO DISMISS**

Re: Dkt. No. 37

Beverly Nunes has filed a putative class action against Twitter, alleging that Twitter has violated the Telephone Consumer Protection Act ("TCPA") by using an automatic telephone dialing system to send text messages en masse to cell phones without the consent of the recipients. Nunes alleges that she and some of her fellow potential class members possess "recycled numbers" that previously belonged to people who consented to receive the texts, and that Twitter knew or should have known that the numbers had been transferred to people who had not given their consent. She alleges that other potential class members originally consented to receive texts and then attempted to withdraw that consent, only to be ignored by Twitter. Twitter has moved to dismiss the complaint on the ground that Nunes has failed to state a claim.

As pertinent here, the TCPA makes it unlawful to use an "automatic telephone dialing system" to "make any call" without "the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). The statute defines an automatic telephone dialing system as "equipment which has the capacity: (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." § 227(a)(1). Under Ninth Circuit precedent, a text message is a "call" within the meaning of the TCPA. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009).

1           The parties first dispute whether the complaint sufficiently alleges that the equipment  
2           Twitter uses to send its texts qualifies as an automatic telephone dialing system. Nunes' primary  
3           theory, set forth in the bulk of the complaint, is that Twitter's equipment qualifies because it  
4           "stores" telephone numbers and then "dials" those numbers (by sending text messages to them)  
5           without human intervention. Twitter responds that it is not enough for the equipment to "store"  
6           the numbers and then "dial" them without human intervention, because under the statute the  
7           equipment must also have the "capacity" to "generate" numbers using a "random" number  
8           generator or a "sequential" number generator. The equipment at issue in this case, Twitter argues,  
9           merely stores and dials numbers from a database, and does not have the capacity to "generate"  
10          numbers, either with a "random" or a "sequential" number generator.

11          The Federal Communications Commission has construed the statute in a manner that  
12          appears more consistent with Nunes' theory. Specifically, the FCC has construed Section  
13          227(a)(1) to cover "any equipment" with the capacity to "generate numbers and dial them without  
14          human intervention regardless of whether the numbers called are randomly or sequentially  
15          generated or come from calling lists," including "hardware [that], when paired with certain  
16          software, has the capacity to store or produce numbers and dial those numbers at random, in  
17          sequential order, or from a database of numbers." *In re Rules & Regulations Implementing the*  
18          *Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rec'd 15391, 15399 n.5 (2012) (citing *In re Rules &*  
19          *Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rec'd 14014, 14091-92  
20          (2003)). Although this language is not crystal clear, it appears to encompass any equipment that  
21          stores telephone numbers in a database and dials them without human intervention. This appears  
22          to be the way predictive dialers worked (the technology at issue in the FCC orders), and it is the  
23          way Nunes alleges that Twitter's equipment works in this case.

24          At least two district courts have held that the FCC, in the above-referenced orders,  
25          unlawfully expanded the statute's definition of an automatic telephone dialing system. *See Marks*  
26          *v. Crunch San Diego*, \_\_\_ F.Supp.3d \_\_\_, 2014 WL 5422976, at \*3 (S.D. Cal. Oct. 23, 2014);  
27          *Dominguez v. Yahoo!*, 8 F.Supp.3d 637, 643 & n.6 (E.D. Pa. 2014). But here Twitter has not  
28          asked the Court to reject the FCC's interpretation of the statute. Instead, in its motion to dismiss

1 Twitter only asserts that the FCC orders are distinguishable. *See* MTD at 6. But as discussed  
2 above, the FCC's reasoning about predictive dialers appears to apply equally to the complaint's  
3 allegations about Twitter's equipment. The district courts in *Marks* and *Dominguez* reached  
4 similar conclusions about the breadth of the language in the FCC's orders, even as they rejected  
5 that language as unlawful. Accordingly, Nunes' primary theory for why Twitter uses an automatic  
6 telephone dialing system (namely, that the equipment as alleged falls within the definition adopted  
7 by the FCC) is correct, and the Court declines to consider at this stage whether the FCC's  
8 definition constitutes an unlawful expansion of the statute, particularly where Twitter has not  
9 made that argument and where courts are in disagreement about it. *Compare Marks* and  
10 *Dominguez* with *Sterk v. Path*, \_\_ F.Supp.3d \_\_, 2014 WL 2443785, at \*4 (N.D. Ill. May 30,  
11 2014).<sup>1</sup>

12 Moreover, the complaint contains a secondary theory about how Twitter's equipment  
13 qualifies as an automatic telephone dialing system. In paragraph 61, Nunes alleges that even if the  
14 statute requires that the equipment have the capacity to "generate" numbers at random or  
15 sequentially (rather than merely pulling and dialing numbers from a database without human  
16 intervention), Twitter's equipment indeed has this capacity. Twitter argues that this allegation is  
17 wrong and that Twitter's equipment would need to be dramatically reconfigured to meet the  
18 narrower definition of an automatic telephone dialing system, but that is not apparent from the  
19 allegations in paragraph 61, and it is therefore an evidentiary matter that cannot be resolved at the  
20 pleading stage. Accordingly, even if Twitter were correct that Nunes' broader definition of an  
21 automatic telephone dialing system is not supported by the FCC orders (or that the FCC orders  
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23 <sup>1</sup> At the hearing on the motion to dismiss, counsel for Twitter did begin to argue that the FCC  
24 orders – to the extent they define "automatic telephone dialing system" as broadly as the complaint  
25 purports to in this case – improperly expand the language of Section 227(a)(1). In particular,  
26 counsel argued that the Ninth Circuit held in *Satterfield v. Simon & Schuster*, 569 F.3d 946, 951  
27 (9th Cir. 2009) that the statutory definition of an automatic telephone dialing system is clear and  
28 unambiguous, and that therefore any attempt by the FCC in its orders to resolve statutory  
ambiguity by adding meaning to the definition is unlawful. But it appears the *Satterfield* court  
merely held that the word "capacity" in Section 227(a)(1) is unambiguous, not that the entire  
statutory definition is unambiguous. In any event, if Twitter wishes to argue that the FCC  
exceeded its authority in defining an automatic telephone dialing system, it may do so at the  
summary judgment stage.

1 improperly expand the definition), in light of paragraph 61 dismissal of the complaint would not  
2 be warranted.

3 Finally, putting aside whether the texts are sent from an automatic telephone dialing  
4 system, Twitter argues that Nunes fails to state a claim under the TCPA because Twitter has  
5 obtained consent to send texts to her. As previously mentioned, calls (or in this case, texts) from  
6 an automatic telephone dialing system are lawful if made with the "prior express consent of the  
7 called party." 47 U.S.C. § 227(b)(1)(A). Twitter contends it received consent on the facts alleged  
8 in this case because: (i) the complaint alleges that Nunes and other potential class members  
9 possess "recycled" cell phone numbers that previously belonged to people who consented to  
10 receive texts from Twitter; and (ii) a person who previously possessed the cell phone number, and  
11 not the new person who actually received the text, should be considered the "called party" from  
12 whom Twitter received "consent." This argument fails for all the reasons provided by Judge  
13 Easterbrook in *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637 (7th Cir. 2012).

14 Accordingly, Twitter's motion to dismiss is denied.

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16 **IT IS SO ORDERED.**

17 Dated: November 26, 2014



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VINCE CHHABRIA  
United States District Judge

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