

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
) CG Docket No. CG 02-278
Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)
)
Petition for Declaratory Ruling or)
Clarification of Citizens Bank, N.A.)

TO: The Commission

**PETITION FOR A DECLARATORY RULING AND/OR
CLARIFICATION BROUGHT BY CITIZENS BANK, N.A.**

Monica S. Desai
SQUIRE PATTON BOGGS (US) LLP
2550 M Street, NW
Washington, D.C. 20037
(202) 457-7535

Martha S. Sullivan
Sean L. McGrane
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower, 127 Public Square
Cleveland, Ohio 44114
(216) 479-8500

Counsel to Petitioner Citizens Bank, N.A.

Counsel to Petitioner Citizens Bank, N.A.

Dated: January 16, 2015

EXECUTIVE SUMMARY

Petitioner Citizens Bank, N.A. (“Citizens”) respectfully seeks clarification and/or a declaratory ruling from the Commission on a question regarding the scope of “prior express consent” under the Telephone Consumer Protection Act (the “TCPA”): namely, where a called party takes purposeful and affirmative steps to release her cell phone number to the public for regular use in normal business communications – by, *inter alia*, listing the cell phone number in advertisements and internet sites as the sole contact number for her business – has the party provided prior express consent to receive non-telemarketing calls on that number?

This question is not academic. Today, Citizens is facing potentially significant vicarious liability in a TCPA class action brought by a defaulted debtor who purposefully and affirmatively invited the general public to contact her on her cell phone number by broadly advertising her name and cell phone number in connection with certain registered businesses she owned. Instead of repaying the money she borrowed from Citizens, plaintiff now seeks to capitalize on her defaults by suing for calls placed to attempt to recover the amounts she owes. Obviously, persons who repeatedly advertise their name and cell phone number for commercial use and invite the public to call that cell phone number cannot claim to be surprised, or that their privacy has been invaded, when they receive non-telemarketing calls on that number. More importantly, plaintiffs like the one suing Citizens should not be able to set a “TCPA litigation trap” by purposefully advertising their name and cell phone number, purposefully inviting the public to call them at that number, and then suing someone who calls the advertised number for informational, non-telemarketing purposes. In enacting the TCPA, Congress did not intend such a result. Accordingly, the Commission should answer the above question in the affirmative.

TABLE OF CONTENTS

EXECUTIVE SUMMARY i

INTRODUCTION..... 1

I. BACKGROUND 3

 A. The Underlying Debt Obligations..... 3

 B. Sanders’ Widespread Advertisement of Her Name and the 3848 Number for Business Purposes 4

II. The TCPA’s Legislative History and Commission Precedent Support the Requested Clarification..... 6

III. Policy Reasons Support the Requested Clarification 10

 A. The Requested Clarification Related to Calls to Purposefully Advertised Cell Phone Numbers Will Not Result in a Flood of Debt Collection Calls to Parties At Work 10

 B. It is Better Public Policy for Debt Collection Calls to be Made Through Dialing Systems 11

 C. Absent the Requested Clarification, Business Advertisements Including Cell Phone Numbers Will Form the Basis for the Next Series of TCPA “Litigation Traps” 12

 D. Manual Calls Will Not Protect Against Having to Defend Frivolous Litigation . 13

 E. There is Precedent for the Narrow Clarification Requested by Citizens 14

IV. Clarification From the Commission is Needed 16

CONCLUSION 16

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
) CG Docket No. CG 02-278
Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)
)
Petition for Declaratory Ruling or)
Clarification of Citizens Bank, N.A.)

TO: The Commission

**PETITION FOR A DECLARATORY RULING AND/OR
CLARIFICATION BROUGHT BY CITIZENS BANK, N.A.**

This Commission has long held that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given”¹ It should follow that, when a called party has taken purposeful and affirmative steps to advertise her cell phone number as the contact point for normal business communications, non-telemarketing calls made to that cell phone number are exempt from liability under the Telephone Consumer Protection Act (“TCPA”).² This is because the called party has consented to receiving such calls by expressly inviting the public, through advertisements, to call that cell phone number, at least for non-telemarketing informational purposes. While this is basic common sense, it also has critical implications in the context of the TCPA. In order to stop putative plaintiffs from setting yet another type of “TCPA litigation trap,” the Commission must clarify that non-telemarketing calls to such purposefully advertised

¹ Federal Communications Commission, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8769, para. 31 (1992) (“*1992 TCPA Order*”).

² 47 U.S.C. § 227.

cell phone numbers cannot form the basis of a lawsuit under the TCPA. The legislative history of the TCPA and the Commission's rulings interpreting the statute confirm that the TCPA was not intended to impose liability for such calls.

Accordingly, pursuant to Section 1.2 of the Commission's rules, Petitioner Citizens Bank, N.A. ("Citizens") respectfully seeks clarification and/or a declaratory ruling from the Commission that a called party has provided prior express consent to receive non-telemarketing, auto-dialed or pre-recorded voice calls on a cell phone number where the called party takes purposeful and affirmative steps to release her cell phone number to the public for regular use in normal business communications by, *inter alia*, listing the cell phone number in advertisements as the sole contact number for her business and otherwise inviting anyone to call the number for commercial communications.

This is not an academic problem. Today, Citizens is facing potentially significant vicarious liability in a TCPA class action brought by a defaulted debtor who affirmatively and voluntarily made her cell phone number available for public distribution by, *inter alia*:

- listing the cell phone number in public advertisements as the sole contact number for her registered business;
- listing the cell phone number throughout her business' website and expressly inviting calls to the number;
- including the cell phone number on business cards and customer receipts; and
- registering the cell phone number as the "Authorized Official Phone Number" for her business in forms filed with the United States Centers for Medicare and Medicaid Services – an agency of the United States government – in connection with the Health Insurance Portability and Accountability Act ("HIPAA") of 1996.

The clarification requested herein would be consistent with the statute's founding principles and would likely reduce the amount of vexatious class action litigation brought by

individuals who have invited the world to contact them on a cell phone number but are selectively indignant when contacted on that cell phone number regarding a defaulted debt.

I. BACKGROUND

A. The Underlying Debt Obligations

Citizens is a Rhode Island corporation that provides lending services in select markets nationwide. Citizens is presently defending a putative class action lawsuit in the United States District Court for the Southern District of California, in which the named plaintiff has alleged negligent and/or knowing and willful violations of the TCPA.³ The plaintiff, Linda Sanders (“Sanders”), purports to bring claims on behalf of a broad class of individuals.

In late 2007, Sanders entered into two loan agreements with Citizens – first as a cosigner and then as a direct borrower. In making the loans to Sanders, Citizens relied on the representations she made in her loan applications. On each loan application, Sanders represented that she was a self-employed owner of a restaurant and catering business, and that she had been so employed for 5 years. The original principal balance on the two loans combined was approximately \$44,000. No payments have been made on the loans since September 2010.

After Sanders defaulted on the loans, Citizens engaged certain third party vendor(s) to attempt to collect the underlying debts. Sanders stopped responding to attempts to contact her on any of the telephone phone numbers she had provided to Citizens in connection with her loans. Certain of the vendor(s) attempted to reach her on a number that Sanders publicly advertised in numerous locations as a contact number for her and her business (the “3848 Number”). The 3848 Number is a cellular telephone number. Sanders’ claims against Citizens arise out of calls allegedly made to the 3848 Number.

³ See *Sanders et al v. RBS Citizens, N.A.*, No. 13-cv-03136-BAS-RBB (S.D. Cal., Oct. 16, 2014).

B. Sanders' Widespread Advertisement of Her Name and the 3848 Number for Business Purposes

By her own account, Sanders' businesses have focused in large part on the food and hospitality industries. On the internet site for one of her businesses, Sanders writes:

Following a long career in Corporate America and the Academic World . . . [i]n 2003 I opened my first coffeehouse. After five years of growth I realized I wanted more and my customers were yearning for more from my business, thus my full service restaurant and catering service was born On January 1, 2010, I added a new branch to my business The name of my newest company is IndividualiTEA and Coffee.

As described on its internet site, IndividualiTEA and Coffee ("IndividualiTEA") – a company registered to do business with the California Secretary of State – provides specialty tea and coffee to corporate customers across Southern California:

...We will continue to develop relationships with current clients, like: television and radio personalities and stations, entertainers, government officials, universities, colleges, schools and brides. Further, we will expand our business to include airlines, hotels, golf courses, restaurants and cafes, spas and supermarkets, community organizations and expositions.

The "scope of services" offered by IndividualiTEA includes (i) airline tea and coffee service, (ii) hotel guest room amenities, (iii) kiosk amenities, (iv) personalized corporate gifts, (v) restaurant beverage service, (vi) spa and resort tea service, (vii) tea and coffee accessories and (viii) tea and coffee receptions.

Sanders used the 3848 Number as the exclusive business telephone number for IndividualiTEA, and widely advertised her name and the 3848 Number in connection with that business. For example, the 3848 Number is listed as the sole contact number at the bottom of the "Contact Us" section of IndividualiTEA's internet site, located at www.IndividualiTEA.com. Indeed, the 3848 Number is plastered throughout the internet site, prominently displayed at the bottom of the "Our Services" page, the "Tea" page, the "Coffee" page and the "Retail Store"

page. The 3848 Number also appears as the “Customer Service Phone” on email confirmations received for purchases made from IndividualiTEA. Similarly, business cards for IndividualiTEA identify Sanders as “President” and list the 3848 Number as the sole contact phone number.

Sanders did more than voluntarily make the number available for public distribution via her company website. In July 2010, IndividualiTEA advertised in a glossy, 52-page publication called “Specialty Coffee Retailer.” The publication included a 15-page “2010 Product Showcase” in which IndividualiTEA purchased a tombstone advertisement. The advertisement lists Sanders as the contact person for IndividualiTEA and the 3848 Number as the only contact phone number. The advertisement states, in relevant part:

IndividualiTEA and Coffee Company
2823 Sandwood St., Lakewood, CA 90712
Contact: Linda Sanders
Phone: []-3848
Fax: []-8018

...
IndividualiTEA and Coffee Company is currently
operating online, selling to airlines, hotels, spas, cafes.
Our sister company Desserts by Design⁴ is currently catering
to businesses and school lunch programs across California.

Sanders purposefully released the 3848 Number to the public for use in normal business communications in a number of other ways, including registering the 3848 Number with the “Long Beach [California] Business List,” a website directory that provides a “platform that allows small businesses to advertise directly to consumers at little or no cost.”⁵ The 3848 Number appears on a number of other websites (including www.chamberofcommerce.com) as the sole contact number for IndividualiTEA. And, the 3848 Number is listed with the Data

⁴ Sanders listed Desserts by Design as her employer and the business she owned on her loan applications in 2007.

⁵ Reverse Lookup of the 3848 Number on Long Beach Business List, <http://www.longbeachbusinesslist.com>.

Universal Numbering System (“DUNS”) as the contact number for IndividualiTEA (DUNS No. 96-203-1758) and a second business owned and incorporated by Sanders and registered in California as a nonprofit public benefit corporation, Peaceful Life for Aging Adults, Inc., *aka* Peaceful Living for Aging Adults (DUNS No. 07-862-3617).

Sanders also used the 3848 Number in connection with IndividualiTEA’s application to the Centers for Medicare and Medicaid Services, an agency of the United States government, for a National Provider Identifier (“NPI”) that health care providers (both individuals and entities) are required to obtain for use in administrative and financial transactions under HIPAA. On an NPI form available through HIPAASPACE.COM, Sanders again identified herself as the “President” of IndividualiTEA and listed the 3848 Number as the “Business Phone Number” and “Authorized Official Phone Number” for IndividualiTEA.

In short, Sanders – as owner, President and sole proprietor of IndividualiTEA – used the 3848 Number as the exclusive telephone number by and through which IndividualiTEA advertised for, conducted and solicited business.

II. The TCPA’s Legislative History and Commission Precedent Support the Requested Clarification.

The TCPA prohibits any person within the United States from making “any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service . . . or any service for which the called party is charged for the call.”⁶ It is this provision of the TCPA that Citizens has been accused of violating in the pending court action.

The statute and its legislative history recognize the competing interests against which the

⁶ 47 U.S.C. § 227(b)(1).

Congressional intent behind the statute must be evaluated – including legitimate commercial activity. For example, the 1991 U.S. House of Representatives Report recommending the bill’s passage (the “House Report”) emphasized that the “restriction on calls to emergency lines, pagers and the like does not apply when the called party has provided the telephone number of such a line to the caller *for use in normal business communications.*”⁷ The Commission, too, has determined (at least with respect to facsimiles) that “a number obtained from the recipient’s own directory, advertisement, or internet site was voluntarily made available for public distribution . . . *For instance, if the sender obtains the number from the recipient’s own advertisement, that advertisement would serve as evidence of the recipient’s agreement to make the number available for public distribution.*”⁸

The same analysis is equally appropriate for calls to cell phones, at least with respect to non-telemarketing calls: where a called party makes her cell phone number available for public distribution through advertisements, or through some other purposeful and affirmative act releasing the number to the public for use in normal business communications, the called party has given “their invitation or permission to be called at the number which they have given.”⁹

The House Report also recognizes that the TCPA “reflects a balance the Committee reached between barring all calls to those who objected to unsolicited calls [and] a desire to not

⁷ House Report, 102-317 at 17, 1st Sess., 102nd Cong. (1991).

⁸ Federal Communications Commission, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3795, para. 15 (2006) (“*2006 Junk Fax Order*”) (emphasis added).

⁹ *1992 TCPA Order*, 7 FCC Rcd at 8769, para. 31; *see also* Federal Communications Commission, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14043, para. 44 n. 157 (2003) (*2003 TCPA Order*).

unduly interfere with ongoing business relationships.”¹⁰ The Commission has long confirmed the need to “balance the privacy concerns which the TCPA seeks to protect [and] the continued viability of useful business services.”¹¹ And, more recently, federal courts of appeals construing the TCPA have recognized the need to balance competing interests when applying the TCPA. As the Eleventh Circuit Court of Appeals stated earlier this year:

A review of the statutory and regulatory background is critical to understanding the proper resolution of the issues raised by this appeal. In response to evidence that automated or prerecorded calls are a nuisance and an invasion of privacy, Congress passed the Telephone Consumer Protection Act to balance individuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade.¹²

The need to balance these competing interests is manifest in the definition of “prior express consent” adopted by the Commission in 1992: “Persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”¹³ This definition recognizes that a party’s privacy interests are diminished when the party “knowingly releases” her telephone number to the public and invites the public to contact her at the released number. And this is especially true when a party knowingly releases her telephone number to the public expressly for business or commercial purposes. Indeed, the House Report recognized as much in stating that the TCPA’s restriction on calls to cellular telephones and other mobile devices was not meant to apply where “the called party has provided the telephone number of such a line to the caller *for use in normal business communications*. The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their

¹⁰ H.R. Rep. 102-317 at 13.

¹¹ *1992 TCPA Order*, 7 FCC Rcd at 8754, para. 5.

¹² *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1121 (11th Cir. 2014).

¹³ *1992 TCPA Order*, 7 FCC Rcd 8752, 8769, para. 31.

customers.”¹⁴

In order to properly balance individuals’ privacy rights with the need for legitimate commercial and business communications, the TCPA affords the Commission the “flexibility to design different rules for those types of automated or prerecorded calls that are not considered a nuisance or invasion of privacy.”¹⁵ This makes sense: under the TCPA and its regulatory regime, not all telephone calls are created equal. The legislative history, for example, makes clear that telemarketing calls to the home are particularly invasive of privacy. The House Report found that “many consumers are outraged [by] the proliferation of intrusive, nuisance calls to their homes from telemarketers. . . [T]herefore, federal law is needed to control residential telemarketing practices.”¹⁶

Conversely, calls made for purely informational purposes have historically been considered to be substantially less of an invasion of privacy, as compared to pure telemarketing calls. Many such calls are thus outside the scope of TCPA liability. For example, in 1992, the Commission held that autodialed debt collection calls to residential telephone lines are exempt from liability under the TCPA as “commercial calls which do not transmit an unsolicited advertisement”¹⁷ Three years later, in 1995, the Commission reiterated that autodialed debt collections calls to residential lines are permitted under the TCPA.¹⁸

The narrow clarification requested herein would not conflict with the privacy or cost

¹⁴ H.R. Rep. 102-317 at 17.

¹⁵ *Mais*, 768 F.3d at 1122.

¹⁶ H.R. Rep. 102-317 at 2. Likewise, former Senator Larry Pressler (R-SD) stated that “[p]eople are increasingly upset over this invasion of their privacy by unrestricted telemarketing.” 137 Cong. Rec. 518317 (daily ed. Nov. 26, 1991) (statement of Sen. Pressler).

¹⁷ *1992 TCPA Order*, 7 FCC Rcd at 8773-73, para. 40; *see also* 47 C.F.R. 64.1200(a)(2)(v).

¹⁸ Federal Communications Commission, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12400-01, paras. 17, 19 (1995) (“*1995 TCPA Reconsideration Order*”).

concerns animating the TCPA. In its report recommending the TCPA's passage (the "Senate Report"), the United States Senate recognized a "substantial governmental interest in protecting telephone subscribers' privacy rights from *unsolicited telephone solicitations*."¹⁹ But where, as here, a called party *actively solicits* and invites calls to her cell phone number through numerous public advertisements and other affirmative and purposeful steps, the privacy and cost concerns animating passage of the TCPA are not implicated. Indeed, the called party has no expectation of privacy in a telephone number which he or she releases to the public (and, in this case, quite widely releases) for regular use in normal business communications.

III. Policy Reasons Support the Requested Clarification

The clarification requested by Citizens is consistent with the letter and purpose of the TCPA, for the reasons stated above. There are also important policy considerations which support the requested clarification.

A. The Requested Clarification Related to Calls to Purposefully Advertised Cell Phone Numbers Will Not Result in a Flood of Debt Collection Calls to Parties At Work

All communications related to debt collection are heavily regulated under numerous federal, state and even local laws.²⁰ Accordingly, providing the requested clarification in the *narrow context where the called party specifically advertised her name and cell phone number*

¹⁹ Senate Report 102-177 at 7, 102d Cong., 1st Sess. (emphasis added).

²⁰ For example, debt collection is governed by the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*; the Fair Debt Collection Practices Act ("FDCPA"), codified at 15 U.S.C. § 1692 *et seq.*; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (as amended by the Fair and Accurate Credit Transactions Act); the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*; the Fair Credit and Charge Card Disclosure Act, 15 U.S.C. § 1637(c), Pub. L. No. 100-583, 102 Stat. 2960; the Federal Bankruptcy Code, Title 11 of the U.S.C., Pub. L. No. 95-598, 92 Stat. 2549; and numerous other federal, state and local laws. *See, e.g.*, Illinois Collection Agency Act, 225 ILCS 425 *et seq.*; California Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code § 1788 *et seq.*; Florida Fair Consumer Credit Practices Act, Fla. Stat. Ann. § 559.55 *et seq.*; West Virginia Collection Agency Act of 1973, W.Va. Code Ann. § 47-16-1 *et seq.*

and invited the public to call that number for business communications would only protect the caller from defending frivolous TCPA claims like the claims asserted against Citizens. A caller seeking to recover unpaid debt would still be required to comply with the myriad federal, state and local protections afforded to debtors receiving debt collection communications – meaning that the clarification requested herein will not lead to an increase in harassing or other unsolicited debt collection calls.

B. It is Better Public Policy to Support the Making of Debt Collection Calls Through Dialing Technology

Automatic telephone dialing technology is used in the context of debt collection communications to benefit both the calling party and the party being called. Such systems facilitate efficient and responsible communications by, for example, making it much easier to (i) verify that the right number has been dialed, (ii) track the frequency and timing of the calls made, and (iii) ensure that the information being relayed to the debtor is permissible and consistent with the federal, state, and local laws applying to such communications. The use of dialing technology and pre-recorded voice also helps ensure that the calls to debtors are uniform. Manual calls are burdensome and expensive, and increase the risk of incurring liability under federal, state, and local debt collection laws. Congress recognized the benefits of dialing technology by specifically allowing the use of an ATDS as long as the calling party had prior express consent to call.²¹

Moreover, even if it were feasible to make manual calls (and, in many cases, manual calls are simply not feasible), the costs of manual calls will almost certainly be passed on to consumers – a result which is inconsistent with the TCPA’s stated desire to preserve “the

²¹ 47 U.S.C. § 227(b)(1).

continued viability of beneficial and useful business services.”²² Finally, as explained in more detail below, even manual calls do not safeguard against aggressive plaintiffs pursuing TCPA litigation under the theory that even *manual* dialing systems can be hypothetically modified to become an ATDS in the future.²³

C. Absent the Requested Clarification, Business Advertisements Including Cell Phone Numbers Will Form the Basis for the Next Series of TCPA “Litigation Traps”

The clarification requested herein will also help to curb the growing use of the TCPA “as a device for the solicitation of litigation.”²⁴ It is a clever scheme indeed to “solicit litigation” by purposefully advertising a cell phone number to the general public for the purposes of business communications and then suing under the TCPA when called on that cell phone number for non-telemarketing business communications. Without clarification, serial plaintiffs and their counsel will be free to entrap not only debt collectors but other corporate or civic institutions by inviting calls to cell phone numbers through public advertisements and distribution, only to then bring claims under the TCPA against these institutions. Sanders, for example, notes on her website that IndividualiTEA’s past and potential clients include “government officials, universities, colleges [and] schools.” If one of these types of organizations sees the advertisement and contacts Sanders at the advertised number – say, for example, a university placement office seeking to secure internship opportunities for its students, a university booster club seeking to use parking lot space for a car wash fundraiser, a university science lab asking for tea samples to use in a science experiment, or even an alumni organization seeking to connect with Sanders –

²² 1992 TCPA Order, 7 FCC Rcd at 8754, para. 5.

²³ See *supra* section III.D of this Petition; see also *Hunt v. 21st Mortgage Corp.*, 2013 U.S. Dist. LEXIS 132574, at * 11 (D. Ala. Sept. 17, 2013); *Gragg v. Orange Cab Co.*, 2014 U.S. Dist. LEXIS 16648 at *8-9 (W.D. Wa. Feb. 7, 2014).

²⁴ *West Concord 5-10-1.00 Store, Inc. v. Interstate Met Corp.*, No. 2010-00356, 31 Mass. L. Rep. 58 (Mass. Super. Ct. Mar. 5, 2013).

those calls would potentially give rise to liability under the TCPA. And, as explained below, whether a call is made from a basic smartphone, a rotary telephone, or a phone connected to a university dialing system, no call is safe from frivolous TCPA litigation, in part because the FCC has not ruled on the meaning of “capacity.” These sorts of litigation traps are plainly inconsistent with the purpose and legislative history of the TCPA, and clarification is needed to prevent further abuse of the statute.

D. Manual Calls Will Not Protect Against Having to Defend Frivolous Litigation

As stated above, ATDS is defined 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.”²⁵ Critically, “capacity” is not defined in either the statute or the regulations. Despite the very clear and explicit definition of an ATDS provided by Congress in the statute,²⁶ aggressive plaintiffs are filing lawsuits based on the theory that even if a dialing system does not presently have the statutorily-required elements of an ATDS, it has the requisite “capacity” so long as it can be modified at some hypothetical point in the future to contain those elements.²⁷

There are several petitions before the FCC asking for common sense clarification on the basic notions that (1) “capacity” of an ATDS means present ability, not future hypothetical ability; and (2) in order to be an ATDS under the statute the dialing system must have the

²⁵ 47 U.S.C. § 227(a)(1); *see also* 2003 TCPA Order, 18 FCC Rcd at para. 132.

²⁶ 47 U.S.C. § 227(a)(1) (“The term “automatic telephone dialing system” means 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.”).

²⁷ *Hunt v. 21st Mortgage Corp.*, 2013 U.S. Dist. LEXIS 132574 (D. Ala. Sept. 17, 2013); *Gragg v. Orange Cab Co.*, 2014 U.S. Dist. LEXIS 16648 (W.D. Wa. Feb. 7, 2014).

statutory elements of an ATDS as set forth by Congress.²⁸ Those petitions remain pending. While the issue remains unresolved before the FCC, creditors and other callers could *still be forced to defend frivolous TCPA lawsuits, and may ultimately be held liable, even for making manual calls* to a debtor’s advertised number if, for example, the plaintiff asserts that the manual system used by the caller could be connected or upgraded to an ATDS at some future point in time.²⁹

As a result, plaintiffs can simply set TCPA “litigation traps” by advertising a name and business, listing a cell phone number in connection with that business, and then rack up potential lawsuits as callers contact the cell phone number for any number of non-telemarketing, informational communications. Even if the caller makes a manual call (whether a debt collector, a university or a hospital), the manual call will not necessarily protect the caller from TCPA liability.

E. There is Precedent for the Narrow Clarification Requested by Citizens

The framework proposed by Citizens for the treatment of calls to cell phone numbers that are advertised or otherwise made available for public distribution has already been applied by the Commission to facsimile communications. In 2006, the Commission considered whether TCPA liability should be imposed for facsimiles sent to a number that had been advertised or otherwise made available for public distribution by the number’s owner, where the sender and recipient had an existing business relationship. The Commission unequivocally held that no liability should be

²⁸ See *ACA International, Petition for Rulemaking of ACA International*, CG Docket Nos. 02-278, RM-11712 (filed Jan. 31, 2014); Professional Association for Consumer Engagement (PACE), *Petition for Declaratory Ruling and/or Expedited Rulemaking of PACE*, CG Docket No. 02-278 (filed Oct. 18, 2013); TextMe, Inc., *Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Mar. 18, 2014).

²⁹ See *Hunt*, 2013 U.S. Dist. LEXIS 132574 at *11; *Gragg*, 2014 U.S. Dist. LEXIS 16648 at*8-9.

imposed in part based on a very compelling and common-sense policy rationale: “We determine that a facsimile number obtained from the recipient’s own directory, advertisement or internet site was voluntarily made available for public distribution, unless the recipient has noted on such materials that it does not accept unsolicited advertisements at the facsimile number in question. *For instance, if the sender obtains the number from the recipient’s own advertisement, that advertisement would serve as evidence of the recipient’s agreement to make the number available for public distribution.* []Another example might be a number obtained from the recipient’s own letterhead or fax cover sheet.[]”³⁰ The Commission made clear that the touchstone of the analysis is the fax recipient’s purposeful and affirmative release of the fax number to the public through, for example, advertisements or other conduct inviting normal business communications at the number in question. And, the Commission has defined “advertisements” the same way in both the facsimile and telephone setting – “any material advertising the commercial availability or quality of any property, goods or services.”³¹

While the statute allows for such communications related to facsimiles,³² the same policy rationale for the rule – particularly with respect to non-telemarketing communications – necessarily applies to autodialed calls made to an advertised cell phone number: a called party has provided prior express consent to receive such calls by advertising the cell phone number because such advertisements “would serve as evidence of the recipient’s agreement to make the number available for public distribution.”³³

³⁰ 2006 Junk Fax Order, ¶ 15 & n. 54 (emphasis added). The Commission’s analysis arose in the context of the Junk Fax Prevention Act of 2005, which amended the TCPA to address “junk faxes” and codified the exception for fax numbers obtained through a directory or advertisement. See 47 U.S.C. § 227(b)(1)(C)(ii).

³¹ 47 C.F.R. § 64.1200(f)(1).

³² 47 U.S.C. § 227(b)(1)(C)(ii).

³³ 47 C.F.R. Part 64.

IV. Clarification From the Commission is Needed

Section 1.2 of the Commission's Rules authorizes the Commission to "issue a declaratory ruling terminating a controversy or removing uncertainty" regarding an issue within the Commission's purview. Citizens respectfully requests that the Commission exercise its authority and clarify that where a called party purposefully chooses to make her cell phone number available for public distribution through advertisements or other purposeful and affirmative conduct meant to solicit business communications, the called party has given "her invitation or permission to be called at th[at] number" and has thereby provided prior express consent to receive non-telemarketing, informational calls to the number in question. Imposing liability for these types of invited, non-telemarketing calls is inconsistent with the letter and spirit of the TCPA and with the Commission's implementation of the statute over the last 20 years.

The clarification requested herein would also be fundamentally fair and commercially reasonable: a party should not be able to voluntarily make available his or her cell phone for public distribution, on the one hand, while on the other hand using the TCPA as a shield against lenders seeking to recover on defaulted debts. The TCPA was not enacted to protect such selective indignation.

CONCLUSION

For the foregoing reasons, the Commission should clarify and/or issue a declaratory ruling holding that a called party has provided prior express consent to receive non-telemarketing, auto-dialed calls on a cell phone number where the called party takes purposeful and affirmative steps to advertise her cell phone number to the public for regular use in normal business communications.

Respectfully submitted,

/s/ Monica S. Desai
Monica S. Desai
SQUIRE PATTON BOGGS (US) LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-7535
Counsel to Petitioner Citizens Bank, N.A.

/s/ Martha S. Sullivan
Martha S. Sullivan
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower, 127 Public Square
Cleveland, Ohio 44114
(216) 479-8500
Counsel to Petitioner Citizens Bank, N.A.

/s/ Sean L. McGrane
Sean L. McGrane
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower, 127 Public Square
Cleveland, Ohio 44114
(216) 479-8539
Counsel to Petitioner Citizens Bank, N.A.

January 16, 2015