

**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 on the Citizens Bank NA Petition
for Declaratory Ruling**

I hereby submit these reply comments addressing the comments submitted on the Citizens Bank NA Petition for Declaratory Ruling. Banks and debt collectors support the petition for obvious reasons – they stand to get an exemption from liability for implied consent something the Commission cannot grant. The Commission cannot limit liability from the TCPA¹. The Commission can implement rules based on the TCPA. In cases where a controversy or uncertainty exists the Commission can issue a declaratory ruling. Not one of the commentors has provided any evidence that a controversy or uncertainty exists. Therefore, a declaratory ruling will not terminate a controversy or remove any uncertainty. See 47 C.F.R. §1.2.

Several commentors refer to a recent case in support of their argument for an baseless exemption from liability. The Bank² court was never asked to determine the applicability of providing a cell number as a means of contact to potential customers.

¹ “...the FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action; at most, the FCC can choose not to exercise its own enforcement power.” *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, --- F. Supp. 3d ---, 2014 WL 7109630 (W.D. Mich. Dec. 12, 2014)

² *Bank v. Independence Energy Group LLC and Independent Energy Alliance LLC*, 2014 U.S. Dist. LEXIS 141141 (October 2, 2014)

Commentor Student Loan Servicing Alliance fails to acknowledge that the Bank case dealt with a **residential** telephone number and not a cell number. But then the same argument raised by the petitioner and commentors has been rejected by the courts and the Commission.

A case in Missouri provides a much more compelling analysis of the term residential. In *Margulis*³, the court concluded that basing the characterization of a phone line as residential if it is registered with the telephone company as such “is a reasonable bright line test and consistent with the plain language of the statute.” The same court cited to a Commission determination that rejected an overly restrictive definition of residential telephone number:

Recently, the FCC was encouraged to adopt a definition of "residential subscribers" to mean "telephone service used primarily for communications in the subscriber's residence." In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Red 14014 at ¶34 (2003). The FCC rejected that definition as "is far too restrictive and inconsistent with the intent of section 227. Specifically, there is nothing in section 227 to suggest that only a customer's 'primary residential telephone service' was all that Congress sought to protect through the TCPA." Id. at ¶35. The FCC clearly believes the term cannot be restricted to mean only the customer's "primary residential telephone service." While not dispositive, it seems to indicate that the FCC would reject the argument that Defendant is making in seeking to distinguish between Plaintiffs "main" residential telephone number and other telephone numbers serving Plaintiffs residence.

The same court found that: “Many people conduct some "business" on their residential telephone lines. If a teenager posts signs in the neighborhood advertising babysitting services and includes her parent's phone number, it does not convert the phone at his home into a "business" telephone line.”

³ *Margulis v. Fairfield Resorts, Inc.*, No. 03AC-008703, 2004 TCPA Rep. 1292 (Mo. Ct. App. 2004).

In another case dealing with the same “residential” issue the court found that: “The record further indicates that in previous litigation, AT & T was instructed by the Magistrate to correct its records to reflect the residential nature of the phone number and not to rely on the Dun & Bradstreet report. The court found the evidence from the telephone provider more compelling than the evidence compiled by a service that does not guarantee the reliability of its information.” *Adamo v. AT&T*, (Nov. 8, 2001), Cuyahoga App. No. 79002.

Clearly, a cell number although not tied to any physical location as a residential line deserves more not less protection under the TCPA. As Congress found: “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. *House Report*, 102-317, 1st Sess., 102nd Cong. (1991).

Throughout the comments is the ad nauseam theme that all TCPA litigation is needless or frivolous. For example Consumers Bankers Association refers to a “...flurry of needless litigation.” without any evidence that any “needless litigation” exists. The Consumers Bankers Association also refers to: “...frivolous TCPA litigation.” without any evidence that “frivolous TCPA litigation” exists. The American Financial Services Association refers to: “...having to defend frivolous litigation.” without any evidence that any “frivolous litigation” exists. The Professional Association for Customer Engagement refers to: “...frivolous and abusive TCPA litigation.” without any evidence that “frivolous and abusive TCPA litigation” exists. Such comments do not provide the Commission with a valid basis for a declaratory ruling. Such claims do not establish that a valid controversy or uncertainty exists that the Commission needs to address. The

Consumers Bankers Association comment that “...clarification is needed to prevent further abuse of the statute.” does not present a valid controversy or uncertainty that the Commission can or should address.

After the Mims⁴ decision, TCPA litigation increased in federal courts. It is entirely reasonable for such an increase in TCPA litigation due to Federal courts being opened to TCPA claims. Relative to other consumer protection statutes (e.g., FDCPA and FCRA), TCPA litigation remains a relatively low proportion of a federal court’s docket. There is reason to be optimistic that the TCPA will become more uniformly interpreted as the statute is litigated more frequently in federal courts rather than state courts. For example federal courts are unified in rejecting the “intended” called party defense. See my comments on the Consumer Bankers Association Petition for Declaratory Ruling for a massive list of federal courts rejecting the “intended” called party defense.

Several commentators “muddy the waters” between cell phones and land lines⁵. For example the Independent Bankers Association of Texas claims the Commission is authorized to grant an exemption for calls to cell phones that “do not include the transmission of any unsolicited advertisement.” The claim is a misrepresentation of the statute. The section that provides for that exemption deals specifically with residential lines and not cell phones. See 47 U.S.C. ¶227(b)(1)(B) which clearly states: “...to initiate any telephone call to any **residential** telephone line using an artificial or prerecorded voice to deliver a message... unless the call... is exempted by rule or order by the Commission under paragraph (2)(B) which is where the “do not include the transmission

⁴ *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 565 US ___, 181 L. Ed. 2d 881 - Supreme Court, 2012

⁵ See also petitioner references to the Bank case which clearly dealt with a residential telephone line and not a cell phone number!

of any unsolicited advertisement.” is found. It does not speak well of commentators that purposely mix and mash different parts of the TCPA for their own avaricious purposes.

The same commentator claims that cell phones deserve less protection than residential telephone lines under the TCPA. Contrary to the commentators claims if implied consent becomes the rule there will no doubt be a drastic increase in telemarketing calls to cell numbers. Lastly, the same commentator claims that there is some first amendment right to invade the privacy of cell phone users. This first amendment argument raises its head every few years yet never has any court or the Commission held that callers have a first amendment right that trumps the privacy rights of either a residential or cell phone number subscriber. The entire basis for the commentator’s misrepresentations is support for unfettered debt collection calls to cell numbers. Debt collection calls are not desired or welcomed calls. Automated or prerecorded debt collection calls to any telephone number serve only the caller’s interests and not any public interest.

Not one of the pro petition commentators has established that a valid controversy or uncertainty exists. The commentators spout the same ad nauseam claim that banks and debt collectors need relief from TCPA liability. The Commission is tasked with implementing the TCPA. The Commission is not tasked or empowered to limit liability under the TCPA. “...it is “the Judiciary” that “determines ‘the scope’— including the available remedies” of “statutes establishing private rights of action” and that, consistent with that principle, the Clean Air Act “vests authority over private suits in the courts, not EPA.”⁶

The comments supporting the petition advocate evading the prior express consent requirement of the TCPA. The Commission should reject comments that advocate and

⁶ *Nat. Res. Def. Council v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014)

support evading the prior express consent requirement of the TCPA. The Commission must tread cautiously on any petition and comments supporting any petition that purposely muddies the waters between residential and cell phone numbers.

Respectfully submitted,

_____/s/_____

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