

**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)

**Late Filed Reply Comments of Joe Shields on the Blackboard Inc. Petition for
Declaratory Ruling**

I hereby submit these late filed reply comments addressing the Blackboard Petition for Declaratory Ruling. As a threshold matter the TCPA is to be broadly construed in the protection of consumer privacy and narrowly construed for any business exemption. There are now 4 petitions seeking to have the Commission construe the TCPA to broadly interpret the emergency exemption to apply to all automatically dialed or prerecorded message calls from banks, electricity providers, schools and health care providers.

Yet other petitions ask the Commission to adopt a definition of autodialer that would exempt all dialers in use today. And then there are a half dozen petitions that ask the Commission to create an “intended” called party exemption. At least one of the petitions asks the Commission to entirely eliminate prior express consent and opt out amounting to a tyrannical seizure of private property. See Santander Consumer USA Petition for Expedited Declaratory Ruling.

These petitions that seek a broad “business” construction of the TCPA seek to neuter the TCPA, open the floodgates to telemarketing and nuisance calls from all

manners of businesses and seek to destroy the very medium that businesses are seeking to exploit for their own greedy purposes.

Most if not all of these petitions if granted by the Commission will increase the already unacceptable and ever increasing amount of illegal automatically dialed or prerecorded message calls that consumers receive. The Commission's duty is to protect consumer privacy and not add to the problem. One overwhelming reason for the explosion in legitimate TCPA claims is the utter lack of enforcement by the Commission.

I personally have experienced this explosion in illegal calls to my cell number in the past three (3) years. I have received dozens of automatically dialed "home improvement" calls to my cell number from an Indian telemarketer selling leads to major home improvement companies such as Home Depot and Sears. In the same time frame I have received a half dozen prerecorded message calls from major banks and debt collectors to my cell number.

There is no "gotcha" here! When a person trying to reach an old friend calls me and realizes they have a wrong number they apologize and don't call me again. The same cannot be said for the home improvement, banks, debt collectors, schools and health care providers. These entities do not take any initiative to insure their calls reach their "intended" recipient. The reason is obvious – it's much cheaper to dial numbers than to remove them from the automatic dialer.

Most if not all of these petitions claim they cannot know when a cell number has been reassigned. The claim is baseless, easily dismissed and the solution is so simplistic that even a child understands it. When a cell phone number is disconnected it is not immediately assigned to another consumer. To avoid exactly what petitioners such as

Blackboard are complaining about, wireless carriers keep disconnected numbers in an unassigned pool for a minimum of three (3) months before reassigning the number. Consequently, the responsibility of removing a disconnected number falls on the ones making the automatically dialed or prerecorded message calls not those receiving them.

I ask the Commission, has even one of these petitioners provided any evidence to the Commission that their dialers recognize and act accordingly when reaching a disconnected number. In the same vein, have any of the petitioners offered a solution that does not involve neutering the TCPA.

I have offered a solution which one commentor suggested would be an invasion of privacy. I believe my solution would be much more welcomed by consumers than any proposal from banks, debt collector's health care providers, schools and electricity providers. A monthly message call to those that have opted in to verify the number is not disconnected is entirely workable. Consumers will consider businesses making such calls as acting responsibly vis a vis the trust given to them by consumers that have provided a personal cell phone number to that business.

According to all the petitions that seek to neuter the TCPA it is too much to ask for any businesses to actually act responsible not just claim to do so. What they do is bash those¹ that are trying to protect cell phones from intrusive and illegal calls. They list how many law suits I have filed but utterly and miserably fail to show that any of those law suits were either frivolous or that I was ever sanctioned for filing a frivolous law suit.

The reason for these petitions is clear - the *ad nauseam* claim that all TCPA claims are frivolous. For example in a recent petition for waiver filed by Wells Fargo the petitioner admits that a motivating factor in the Consumer Banking Association,

¹ Footnote 5, Blackboard Reply Comments, Filed May 7th, 2015

American Bankers Association and Citizens Bank NA petitions was the liability risk associated with frivolous TCPA litigation: "...all three petitions indicated that a motivating factor for filing the petition was the liability risk associated with frivolous TCPA litigation." Footnote 17, Wells Fargo Petition for Waiver, Filed April 29, 2015.

The Commission has never had any authority to and is powerless to stop anyone from filing a frivolous law suit. Addressing frivolous law suits is up to the courts and not the Commission. What the petitioners really seek is relief from the liability risk associated with legitimate TCPA litigation.

One commentor, Twitter Inc. openly admits that TCPA litigation is nothing more than a nuisance to them. This comes from a company that makes money off of the volume of tweets Twitter sends with accompanying advertisements. With nearly all of its revenue coming from advertising associated with the volume of activity on Twitter's system, each "STOP" request is a loss of potential recurring revenue. It is no wonder Nunes was forced to file a legitimate TCPA claim against Twitter Inc.

Further, Twitter is fully aware that the courts are not buying into the "intended" called party argument:

"Twitter contends it received consent on the facts alleged in this case because: (i) the complaint alleges that Nunes and other potential class members possess "recycled" cell phone numbers that previously belonged to people who consented to receive texts from Twitter; and (ii) a person who previously possessed the cell phone number, and not the new person who actually received the text, should be considered the "called party" from whom Twitter received "consent." This argument fails for all the reasons provided by Judge Easterbrook in *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637 (7th Cir. 2012)." *Nunes v. Twitter, Inc.*, Dist. Court, ND California 2014

Twitter now presents the same lost *ad nauseam* argument here attacking the Soppet court Order. Why should any business that has clearly violated the TCPA get a 2nd chance with the Commission. Isn't that up to an appellate court and not the Commission.

So where are all these frivolous TCPA law suits? Where are all these lawyers being sanctioned for filing frivolous law suits? They simply do not exist. Consequently the entire basis for all these petitions is groundless and meritless since frivolous TCPA law suits are not being filed. Even if they were, the Commission is powerless to stop anyone from filing a frivolous law suit.

One example of the absurdity of these petitions and comments is Twitter's comment that the TCPA regulates speech. "The TCPA directly regulates speech..." The TCPA regulates automatically dialed or prerecorded message calls regardless of content. Even after 24 years of losing every constitutional challenge the issue is still raised. One does have to give credit to the tenacity of those who fruitlessly continue to bang their heads against a brick wall.

Solutions on avoiding calls to recycled numbers are available to those that act responsibly. The first most important action businesses can take is to remove a number when it is disconnected. A business that waits until an invasion of privacy and consequent injury is caused to someone that has not provided prior express consent deserves to be sued.

The Commission is entrusted with a duty to the public to protect the privacy and safety of cell phone users. The Commission has not been tasked with protecting businesses from legitimate law suits. The Commission should be issuing citations to petitioner's that violate the TCPA and come running to the Commission for protection from legitimate liability instead of mollycoddling them. The Commission needs to start enforcing its rules and tackling the enormous increase in automatically dialed or

prerecorded message calls consumers are getting on their cell phones. The Commission must do so before creating loopholes for even more calls.

Lastly, I would like to remind the Commission of the letter to Commission Chairman Wheeler from the Honorable Senator Markey and thirteen (13) other Senators which stated:

“Unfortunately, today there are efforts to weaken this important law. In response to industry requests, the Federal Communications Commission (FCC) is seeking comment on proposals that would provide exemptions and questionable safe harbors for businesses that utilize auto-dialers to call consumers' mobile devices. We have deep concerns about these proposed changes that undermine the intent and spirit of the TCPA.”

“American consumers have enjoyed the convenience and privacy that the protections the TCPA have provided for more than two decades. These protections should continue for years to come. **The FCC should reject calls to weaken or undermine this effective law.**”

I agree fully with the sentiment of the Honorable Senator Markey and colleague Senators!

Respectfully submitted,

_____/s/_____

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