

**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)

**Written Ex Parte Communication of Joe Shields on Chairman Wheeler’s Proposal
To Protect And Empower Consumers Against Unwanted Robocalls, Texts To
Wireless Phones**

I hereby submit this written ex parte communication on Chairman Wheeler’s Proposal via email to Mignon Clyburn, Jessica Rosenworcel, Ajit Pai, Michael O’Rielly, Mark Stone, Kurt Schroeder, John Adams, Christine Clearwater, Kristi Lemoine, Aaron Garza, Kris Monteith and Kerri Mullen. I respectfully submit this written ex parte communication addressing three (3) of Chairman Wheelers proposals. I am agreement with Chairman Wheeler’s proposals to reject restrictions on revoking consent and permitting the use of robocall blocking technologies.

The three (3) proposals of Chairman Wheeler I am addressing will not “Protect and Empower” consumers. It will accomplish exactly the opposite. It will “Protect” businesses from the TCPA and “Empower” businesses to evade TCPA restrictions on automatically dialed calls to cell numbers!

Creating a new rule that exempts one call to a reassigned cell number or creates a safe harbor for one call to a reassigned cell number effectively eliminates the protection of the TCPA for everyone that is assigned a new cell number. In that regard, the courts will reject any Commission rule that exceeds the authority vested in the Commission by

Congress under the TCPA. “GCS fails to show that the current law is unclear on this question or that the FCC would even have the statutory authority to create the type of safe-harbor sought by ACA International.” *Beiler v. GC Services LP*, Dist. Court, MD North Carolina 2014

The TCPA contains two (2) distinct sections. One deals with telemarketing calls which contains a “one bite at the apple” exemption. See section “c” of the TCPA requiring “...more than one call...” The other section, section “b”, deals with restrictions on the use of automated telephone equipment. . See section “b” of the TCPA.

Chairman Wheeler’s proposal will create a new rule of “one bite at the apple” under section “b” of the TCPA. Creating a “one bite at the apple” exemption under section “b” of the TCPA exceeds the authority vested in the Commission by Congress under the TCPA.

The courts have overwhelmingly rejected an “intended” called party exemption holding that under the strict liability standard of the TCPA even one call without prior express consent of the called party is a violation of the TCPA. Further, the courts have overwhelmingly adopted a definition of called party that is in line with the use of the term “called party” throughout the TCPA.

Such a definition is the only one that makes any sense as an “intended” called party cannot be charged for a call, cannot be provided with the identity of the caller and cannot hang up on the call¹. An “intended” called party does not suffer the invasion of privacy the actual user or subscriber of the cell phone account suffers.

¹There is always the infallible method of removing disconnected numbers before they are reassigned if businesses want to avoid calling reassigned numbers.

Attached is a list of thirty-one (31) cases from Federal district courts and two (2) Federal appellate courts that have defined called party as the **current** user or subscriber of the cell phone number.

The Commission must reject proposals to create an intended called party exemption or intended called party safe harbor exemption.

The proposal to allow “very limited and specific exemptions for urgent circumstances” is a naïve understanding of the motives for the numerous petitions before the Commission. Banks, healthcare providers, electricity providers, education providers and their associations do not now nor have they ever represented consumer interests.

No rational business gives customers free goods and services out of altruistic motives, but rather do so with the calculated aim of enticing the recipient to couple the freebie with the purchase of other items. Consequently, the “emergency” messages businesses are asking the Commission to exempt are meant solely to maximize customer satisfaction.

A recent example of a breach that occurred at the IRS provides a significant reason for rejecting exempting breach notifications. In regard to a "sophisticated" organized crime syndicate that used the IRS website to steal tax forms full of personal financial information on 104,000 taxpayers, the IRS said it will notify **by mail** all 200,000 people who might be affected by this. To assist the victims, the IRS is also offering paid credit protection programs for them².

If the IRS can use mail to notify consumer of a breach then so can banks!

The “remediation” messages are no more an emergency then breach notifications. In fact remediation messages will invariably suggest that consumers make use of paid

² <http://money.cnn.com/2015/05/26/pf/taxes/irs-website-data-hack/index.html>

credit protection programs. Again, these remediation messages are solely to maximize customer satisfaction and drive the customer to purchase services the caller or the callers associates have to offer.

Chairman Wheeler's proposal to exempt urgent messages will convert the TCPA from an opt in to an opt out statute. Chairman Wheeler's proposal to exempt urgent messages will force messages on those that have not provided prior express consent.

Such forcing of messages upon unwilling recipients runs contrary to Congressional intent to protect unwilling recipients from automated calls. Even if the majority wants such urgent messages - that is not justification to force the messages on the minority that expressly do not want them.

Consumers pay for cell phone service in some way. Even if a text message is sent free to end user (FTEU) the called party still pays for the cell phone service. "Testimony that the Browns had a phone plan through a third-party provider for cellular phone services is sufficient to show that they were charged for the calls." *Brown v Enterprise Recovery Systems, Inc.* Case No. 02-11-00436-CV (TX Ct. App. 2, Aug. 22, 2013)

As noted above, no rational business gives customers free goods. Obviously, the true motive for providing FTEU messages is to maximize customer satisfaction and drive future profits.

The Commission must reject proposals to create an exemption for FETU messages whose sole purpose is meant to maximize customer satisfaction and inevitably to lead to future sales.

Chairman Wheeler’s proposal to define autodialer as “...any technology with the *capacity* to dial random or sequential numbers...” will be welcomed by businesses as it will help them manufacture even more confusion on the definition of autodialer..

The TCPA is clear on what constitutes an autodialer. Due to the occurrence of two disjunctive prepositions “store or produce” in the sentence “to store or produce telephone numbers to be called, using a random or sequential number generator” the “...using a random or sequential number generator.” modifies only the production of numbers and not the preceding “storage” disjunctive.

“Under the ‘rule of the last antecedent,’ which provides that, where no contrary intention appears, a limiting clause or phrase should be read as modifying only the noun or phrase that it immediately follows...” *Levy v. Receivables Performance Mgmt. LLC*, -- F.Supp.2d---, 2013 WL 5310166 (E.D.N.Y. Sept. 23, 2013).

Thus, the capacity to store numbers or the capacity to produce numbers are separate conditions. Either condition not both conditions combined defines the capability of an autodialer.

Only one commentor has addressed the ‘rule of the last antecedent’³ as it applies to the TCPA. If one follows the logic of that commentor then the phrase “...for which the called party is charged” would apply to every service listed under 47 U.S.C. §227(b)(1)(A)(iii).

The courts have routinely rejected such an argument in every instance that such an argument has been raised. See *Lynn v. Monarch Recovery Mgmt.*, –F.Supp.2d –, – n. 37, No. WDQ–11–2824, 2013 WL 3071334, *7 n. 37, 2013 U.S. Dist. LEXIS 84841, at *28–29 n. 37 (D.Md. June 17, 2013) *Manfred v. Bennett Law*, No. 12–CV–61548, 2012

3 Sirius XM Radio Inc, Ex Parte Submission, May 15th, 2015, at II

WL 6102071 at *2; *Gutierrez v. Barclays Grp.*, No. 10cv1012 DMS (BGS), 2011 WL 579238, at *5–6; *Lozano v. Twentieth Century Fox Film Corp.*, 702 F.Supp.2d 999, 1009 (N.D.Ill.2010).

The Commission must reject proposals that limit the definition of an autodialer to one with the capacity to dial random or sequential numbers.

Consequently, I respectfully request that the Commission reject Chairman Wheeler’s proposals on these three (3) issues. I respectfully ask the Commission to follow the voluminous court guidance on the definition of called party and reject any “intended” called party call exemption or any “intended” called party safe harbor exemption.

I respectfully ask the Commission to reject Chairman Wheeler’s proposals to exempt FTEU calls which are made solely for maximizing customer satisfaction and to retain the requirement of prior express consent for such calls.

Lastly, I ask the Commission to reject Chairman Wheeler’s proposal to limit the definition of autodialer to requiring the capacity to use a random or sequential number generator. The definition of autodialer must be based on the capacity to store telephone numbers to be called or the capacity to produce telephone numbers to be called using a random or sequential number generator.

The Commission must not be naïve and be deceived by the misrepresentations made by the banks, health care providers, electricity providers, educational providers and their associations in their petitions and comments. These industries do not now nor have they ever represented consumers. Their motives are for their own avaricious interests and not the interests of the consumer!

Maintaining prior express consent is not an evil. It is the only barrier holding back a tsunami of automated calls to cell numbers. Chairman Wheeler's proposals will open the flood gates to more automated calls to cell numbers.

The Commission must strengthen the TCPA by following the burgeoning case law on called party, rejecting FTEU calls that eliminate prior express consent and reject any definition of automatic dialer that limits the definition to technology that has the capacity to dial random or sequential numbers.

_____/s/_____

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Case Law On Called Party Is The Current User or Subscriber Of The Cell Phone Number And Rejecting The “Intended” Called Party Interpretation

1. *Soppet v. Enhanced Recovery Co., L.L.C.*, 679 F.3d 637 (7th Cir. 2007). “Standing to bring a private right of action is recognized for the person who answers a call to their cell phone, even if the caller intended to reach a different person.”
2. *Kane V. National Action Fin. Servs., Inc.*, 2011 WL 6018403 (E.D. Mich. Nov. 7, 2011) ““called party” means the person subscribing to the called number at the time the call was made.”
3. *Harris v. World Financial Network National Bank et al*, 867 F.Supp.2d 888 (2012) WL 1110003] “Like Kane, Plaintiff has received calls on his own cellular phone from a party using an automated dialing system and intending to reach someone else.”
4. *Alea London Ltd. v. American Home Services, Inc.*, 638 F.3d 768, 776 (11 Cir. 2011) “The TCPA is essentially a strict liability statute which imposes liability for erroneous unsolicited [calls].”
5. *Dawson v. Am. Dream Home Loans*, No 06CV000513, 2006 WL 2987104 (Ohio Com. Pl. Oct. 4, 2006) “...provides for a cause of action for any person who receives an unsolicited fax and does not limit the cause of action to the intended recipient of an unsolicited fax.”
6. *Breslow v. Wells Fargo Bank, NA*, 857 F. Supp. 2d 1316 - Dist. Court, SD Florida 2012. “The use of ‘called party’ to unambiguously refer to the actual recipient in another section of the TCPA is compelling evidence that the term carries the same meaning in other provisions.” “Accordingly, the Court finds that the “called party” for the purposes of § 227(b)(1)(A)(iii) was not Former Customer, but the Plaintiffs”
7. *Olney v. Progressive Casualty Ins. Co.*, 2014 WL 294498 (S.D. Cal., Jan. 24, 2014) “Defendant’s position that only the intended recipient has standing to bring a claim under the TCPA **has been squarely rejected in no less than twenty cases**, (emphasis added) cases that are factually similar to the instant case.”
8. *Gutierrez v Barclays* Case No. 10-cv-1012 DMS (BGS) (S.D. Cal. Feb. 9, 2011) “Instead, the Court is persuaded by Plaintiffs’ argument that the TCPA is intended to protect the telephone subscriber, and thus it is the subscriber who has standing to sue for violations of the TCPA.”
9. *Osorio v. State Farm Bank, F.S.B.*, 746 F. 3d 1242 (11th Cir. 2014) “We accordingly reject State Farm’s argument that the “intended recipient” is the “called party” referred to in 47 U.S.C. § 227(b)(1)(A)”.
10. *Swope v. Credit Management LP*, 2013 WL 607830 (E.D. Mo. 2013) “**Numerous courts** that have considered this issue have held a party to be a ‘called party’ if the defendant intended to call the individual’s number, and that individual was the regular user and carrier of the phone.”
11. *Page v. Regions Bank*, 2012 WL 6913593 “...the district court held that the plaintiff qualified as a “called party” because he was “the regular user and carrier of the cellular telephone...” “[t]he fact that the telephone number was registered to [his] fiancée’s name does not change this result.”
12. *Agne v. Papa John’s International, Inc.*, 286 F.R.D. 559, 565 (W.D. Wash. 2012) “... the plaintiff had standing to sue under the TCPA even though she was merely

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- “an authorized user of her shared cellular plan” and “her ex-husband was the primary account holder.”
13. *Manno v. Healthcare Revenue Recovery Group, LLC*, 289 F.R.D. 674 (S.D. Fla. 2013) The thrust of these decisions and others is that a plaintiff’s status as the “called party” depends not on such technicalities as whether he or she is the account holder or the person in whose name the phone is registered, but on whether the plaintiff is the regular user of the phone...” (emphasis added)
 14. *Zybuvo v. NCSPlus, Inc.*, No. 12-cv-6677 (S.D.N.Y. Sept. 15, 2014) "...under the TCPA, the "called party" is the subscriber assigned the cell phone number at the time the allegedly improper calls are made..."
 15. *Jamison v. First Credit Servs., Inc.*, 2013 WL 3872171, (N.D. Ill. July 29, 2013) (noting that Soppet “suggests that the subscriber is the person who pays the bill”).
 16. *Cellco v. Plaza Resorts*, 2013 WL 5436553 (finding that a subscriber who transfers primary use of a cell phone also transfers “the right to consent to the receipt of otherwise prohibited calls,” thus conferring standing to the regular user of the cell phone).
 17. *Nunes v Twitter Inc.*, Case No.: 14-cv-02843-VC (S.D. CA Nov. 26th 2014) 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). Accordingly, Twitter's motion to dismiss is denied.
 18. *Tang v. William W. Siegel & Associates*, 791 F. Supp. 2d 622, 625 (N.D. Ill. 2011) “Even if the TCPA only affords a right of relief to the “called party,” this Court finds that Plaintiff was the called party because Siegel intended to call Plaintiff’s cellular telephone number and Plaintiff is the regular user and carrier of the phone.”
 19. *Warnick v. Dish Network LLC*, Dist. Court, D. Colorado 2014, “I adopt the *Olney* rationale, and find that summary judgment should be denied as to the argument that DISH is not liable because Warnick was not the intended recipient. *See also Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, (7th Cir. 2012) (“The phrase ‘intended recipient’ does not appear anywhere in § 227, so what justification could there be for equating ‘called party’ with ‘intended recipient of the call?’”).
 20. *Brown v. Enterprise Recovery Systems, Inc.*, No. 02-11-00436-CV (Tex. App. Aug. 22, 2013), **We agree with other courts** that have determined that a person has standing even if the person is not the "intended recipient" of the call...”
 21. *Abrantes v Northland Group Inc.*, (N.D. CA April. 13th 2015) “**The fact that numerous courts have interpreted the term “called party”** weighs against a stay on primary jurisdiction grounds.”
 22. *Jordan v. Nationstar Mortgage LLC* No. 14-CV-00787-WHO, 2014 WL 5359000 “...the TCPA requires consent from the person who was actually called, not the person the caller asserts it was attempting to call.” “**That “called party” has been interpreted consistently by multiple courts** suggests that interpretation of the phrase is does not require special expertise.”
 23. *Molnar v. NCO Financial Systems, Inc.*, Dist. Court, SD California 2015 In interpreting the “clear and unambiguous language” of the TCPA, district courts in

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- the Ninth Circuit have repeatedly declined to insulate telemarketers from liability for calling reassigned numbers.
24. *Prater v. Mediacredit Inc.*, 45 F. Supp. 3d 1038 (E.D. Mo. 2014) (refusing to issue stay pending ruling on petitions addressing whether express consent attaches to cellular number or actual recipient of call and whether safe harbor exists for calls to reassigned number)
 25. *Shehan v. Wells Fargo Bank N.A.*, No. 1:14-CV-00900-JHE, 2014 WL 5529365, at *1 (N.D. Ala. Nov. 3, 2014) “As to the second factor, the Eleventh Circuit has spoken directly to this issue, **providing direct guidance for a uniform interpretation of the statute** throughout the Circuit. Wells Fargo has not provided, and the undersigned has not found, any other circuit court that has interpreted "called party" differently or that has created an exception to the rule.
 26. *Helwig v. Diversified Consultants, Inc.*, Dist. Court, WD Wisconsin 2015”... (**courts have ruled consistently** on meanings of statutory terms at issue without need to defer to commission). Citing *Jordan*, 2014 WL 5359000 at *8
 27. *Soulliere v. Central Florida Investments, Inc.*, Dist. Court, MD Florida 2015 “Plaintiff is not precluded from having standing as it is not disputed that he was the primary or regular user of his cell phone and received the calls at issue.
 28. *Sterling v. Mercantile Adjustment Bureau, LLC*, Dist. Court, WD New York 2014 “Thus, the “evil” at which the TCPA was aimed was the “recipients[’] . . . invasion of privacy” (id.). Since Jane Doe no longer uses the cellular telephone number at issue, her privacy cannot possibly be invaded by MAB’s automated calls to that number, nor could her previous consent excuse the invasion of the *current* user’s privacy.
 29. *Beiler v. GC Services LP*, Dist. Court, MD North Carolina 2014, “Finally, GCS seeks a referral for the FCC to determine "whether `wrong number' non-telemarketing calls can give rise to a violation of the TCPA." (Doc. 21 at 3.) But GCS makes no effort to substantiate this request. The ACA International petition does not present this question directly, but seeks a safe harbor for such wrong-number calls. **GCS fails to show that the current law is unclear on this question** or that the FCC would even have the statutory authority to create the type of safe-harbor sought by ACA International.”
 30. *Moore v. Dish Network LLC*, Dist. Court, ND West Virginia 2014, “The TCPA therefore contains no language indicating that one must be the individual the caller intended to reach to sue under it. **A vast majority of the courts** that have addressed this issue have interpreted "called party" in this manner and allowed unintended recipients of calls, like Moore, to recover for violations of § 227(b)(1)(A)(iii).” Citing *Osorio*, 746 F.3d at 1250-52
 31. *Fini v. Dish Network LLC*, 955 F. Supp. 2d 1288 - Dist. Court, MD Florida 2013, “Replacing "called party" in this sentence with "intended party" would render the statute nonsensical. Plaintiff's interpretation — that "called party" refers to the actual recipient of the call — is far superior.”
 32. *Hofer v. Synchrony Bank*, Dist. Court, ED Missouri 2015, “...**at least one Court of Appeals** has already addressed this very issue and held that the “called party” exception in § 227(b)(1) requires the consent of the "person subscribing to the

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- called number at the time the call is made." Citing *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 643 (7th Cir. 2012).
33. *Maraan v. Dish Network, LLC*, Dist. Court, SD Ohio 2014, “...**we join the Moore court, and several others**, that reject the notion that only the "called party"—again defined by Dish as the intended recipient of the call—has standing to sue. See Moore, 2014 WL 5305960, at *7-8 (citing, inter alia, Manno, supra, 289 F.R.D. at 682; Page v. Regions Bank, 917 F. Supp. 2d 1214, 1217 (N.D. Ala. 2012); Harris v World Fin. Network Nat'l Bank, 867 F. Supp. 2d 888, 894 (E.D. Mich. 2012); Swope v. Credit Mgmt., L.P., No. 4:12CV832, 2013 WL 607830, at *3 (E.D. Mo. Feb. 19, 2013)).