

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

Respondent Rusty Payton’s)	
Opposition to the Petition of)	CG Docket No. 02-278
Kale Realty, LLC)	
For Retroactive Waiver of)	
47 C.F.R. 64.1200(a)(2))	

**OPPOSITION TO KALE REALTY, LLC’S
PETITION FOR RETROACTIVE WAIVER OF
47 C.F.R. 64.1200(a)(2)**

I. INTRODUCTION.

There is absolutely no basis for Kale Realty, LLC’s (hereinafter, “Kale”) Petition for Retroactive Waiver of 47 C.F.R. 64.1200(a)(2). Kale sent text message advertisements to Respondent Rusty Payton’s cellular telephone using an automated telephone dialing system (“ATDS”) in violation of the Telephone Consumer Protection Act (“TCPA”), codified in 47 U.S.C. § 227(b)(1)(A)(iii). Kale’s texts were not merely employment “want ads” as Kale has argued, but, rather, were advertisements for Kale’s products and services, making the text messages telemarketing calls. As a telemarketing call, Kale was required to obtain a stricter level of consent from Respondent Rusty Payton—*i.e.*, prior signed written express consent. But Kale did not obtain prior express consent from Respondent, let alone prior signed written express consent. Thus, not only did Kale *not* have prior signed written express consent to send advertisements for Kale’s products and services, Kale had no form of consent *at all* to send such advertisements to Respondent. Moreover, Kale seeks a retroactive waiver for a text message that was improperly sent *after* the cut-off date of the Commission’s prior waiver through October 16, 2013. Thus, Kale seeks an extension of an extension. Therefore, the Commission should enter an order denying Kale’s present Petition for Retroactive Waiver.

II. KEY FACTS

Kale is a real estate company owned solely by Nick Patterson. Kale does not hire real estate agents as employees of Kale. Instead, Kale's contracts with real estate agents explicitly state that the agents are independent contractors.

Using text messages, Kale actively solicits real estate agents to become independent contractors so that Kale can sell a variety of products and services to them. For example, in exchange for a fee or a percentage on all real estate sales, Kale provides lights, rent, secretaries, and legal services. Kale also sells to its independent contractor agents errors and omissions insurance on the independent contractors' real estate transactions. Further, for a fee, Kale sells training sessions, use of Kale's computers and desks, and the ability to use Kale to act as the sponsoring broker of the independent contractors. In addition, Kale sells them business cards, access to Kale's property listings and access to Kale's email marketing program.

From December 2011 through January 2012, Respondent and Kale's owner Nick Patterson discussed merging their companies. The negotiations ended after less than two months. Nearly two years later, on October 17, 2013, Respondent received the following unsolicited text message from Kale:

“Kale Realty named 2013 Top 100 Places to Work by Tribune – We pay 100% on sales – Reply or visitity <http://joinkale.com> to learn more! Rply 68 to unsubscribe.”

Respondent never consented to receive text messages on his cellular phone from Kale that were wholly unrelated to the merger negotiations nearly two years earlier. Rather, because the text message relates to the products and services Kale sells to independent contractor real estate agents—and not to the potential merger negotiations—the text message was sent to Respondent's cellular telephone in violation of the TCPA.

III. ARGUMENT

Kale's position in its Petition is wholly lacking in merit. Kale violated the TCPA, which states, in relevant part:

“It shall be unlawful for any person . . . to make 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 . . . to any telephone number assigned to a . . . cellular telephone service”

47 U.S.C. § 227(b)(1)(A)(iii). Sending a text message to a cellular phone using an ATDS is considered “making a call” under the TCPA. *See Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1009 (N.D. Ill. 2010).

Under the TCPA, a caller must have “prior express consent” from the consumer to make a call using an autodialer. *In re Rules and Regs. Implementing the Tel. Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, 1832 ¶ 4 (Feb. 15, 2012) (“2012 Order”), citing 47 U.S.C. § 227(b)(1)(A). The FCC has established rules and interpretations for determining when a consumer has given prior express consent. The FCC's recent decisions established the requirement that companies obtain a greater level of consent to make a telemarketing call to a consumer's cellphone. *2012 Order*, 27 FCC Rcd. At 1837-38 ¶¶ 18, 20. In this case, Kale's text message was a telemarketing call, and Kale did not obtain the appropriate level of consent to send the text message advertisement to Respondent's cellphone.

The FCC's 2012 Order increased protections provided to consumers under the TCPA by changing the level of consent required to make a telemarketing call to a cellphone using an automated dialer. *2012 Order*, 27 FCC Rcd. At 1839-40 ¶ 25. Prior to this Order, a consumer was considered to have given his consent by merely making his number known to the caller. *See In re Rules and Regs. Implementing the Tele. Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8769 ¶ 30. The 2012 Order changed the consent requirement to obligate callers to obtain a

consumer's prior *signed written* express consent. *2012 Order*, 27 FCC Rcd. At 1844 ¶ 33. The FCC increased the protections to require prior signed written express consent to “better protect consumer privacy because such consent requires conspicuous action by the consumer – providing permission in writing – to authorize autodialed or prerecorded telemarketing calls.”

Id. at 1839 ¶ 33. The FCC's updated rule requires that:

“a consumer's written consent to receive telemarketing robocalls must be signed and be sufficient to show that the consumer: (1) received ‘clear and conspicuous disclosure’ of the consequences of providing the requested consent, *i.e.*, that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates.”

Id. at 1844 ¶ 33. Therefore, the caller carries the burden of showing that “a clear and conspicuous disclosure was provided and that unambiguous consent was obtained.” *Id.* The FCC noted that the Order was such a significant change that the prior signed written express consent requirement would not become effective until October 16, 2013. *Id.* at 1857 ¶ 66; *Zeidel v. YM LLC USA*, 2015 WL 1910456, at *3 (N.D. Ill. 2015). The heightened consent requirement of the 2012 Order applies to this case because Kale sent the text message to Respondent on October 17, 2013 – *after* the effective date of the Order. Kale now baselessly asks for an extension to an extension.

The heightened express consent requirement of the 2012 Order applies to telemarketing. *2012 Order*, 27 FCC Rcd. At 1844 ¶ 33. The FCC defines “telemarketing” as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person. 47 C.F.R. § 64.1200(f)(12). In contrast, non-telemarketing calls are “purely informational” and include calls such as: bank account balance information, credit card fraud alert, school closing information, calls for

political purposes, flight status or utility outage notifications, and appointment reminders. *2012 Order*, 27 FCC Rcd. at 1838 ¶ 21, 1841 ¶¶ 28, 29 fn 79.

An “advertisement” is “any material advertising the commercial availability or quality of any property, goods or services.” 47 CFR § 64.1200(f)(1). Here, Kale’s text message to Respondent contained an advertisement because it advertised the availability and quality of Kale’s products and services for real estate agents. Moreover, Kale’s advertisement was more than a mere help-wanted posting. *See Green v. Time Ins. Co.*, 629 F.Supp.2d 834, 837 (N.D. Ill. 2009) (holding that a message that on its face seemed like an invitation to establish a business relationship was in fact an advertisement because, the court reasoned, the TCPA does not require an advertisement to make “an overt sales pitch.”). *See also Brodsky v. HumanaDental Ins. Co.*, 2014 WL 2780089 (N.D. Ill. 2014) (holding that a job posting message was in fact an unsolicited advertisement containing a sales pitch because it sought consumers to do business with the company and stated that agents could earn rewards for working with the company).

As in *Green* and *Brodsky*, here, Kale’s text message was not merely a help-wanted notice, but, rather, as discussed more fully above, was an advertisement for the sale of Kale’s products and services to potential independent contractor real estate agents. Moreover, Kale’s text message to Respondent went far beyond and was totally unrelated to the limited scope of consent that Respondent had given to Kale to only contact him regarding the potential merger of the two businesses nearly two years earlier. Significantly, in the 2012 Order, the FCC stated that, even when consumers provide their telephone numbers for legitimate, non-telemarketing purposes, the consumers do not expect to receive calls “that go beyond the limited purpose for which . . . consent may have been granted.” *2012 Order*, 27 FCC Rcd. at 1839 ¶ 25. The FCC stated that it is “essential to require prior express written consent for autodialed or prerecorded

telemarketing calls to wireless numbers” so that courts can define the limitations on the scope of consent. *Id.* Consent for one purpose does not equate to consent for all purposes. *Kolinek v. Walgreen Co.*, 2014 WL 3056813, *4 (N.D. Ill. 2014).

Kale’s reliance on the decisions in *Friedman v. Torchmark*, *Lutz v. Curry*, and *Phillips v. Adler-Weiner* is wholly misplaced. *Friedman* involved a “robocall” pre-recorded message inviting the plaintiff to attend a “recruiting webinar”, and *Lutz* involved a message that was, unlike here, simply a “want ad”. Similarly, the *Phillips* case involved a message that, unlike here, did not promote a product or service but, rather, simply invited people to participate in a research study. None of these cases involved advertisements of the availability and quality of someone’s products and services, as here.

IV. CONCLUSION.

For all of the foregoing reasons, the Commission should deny Kale’s petition for a retroactive waiver.

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