

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

In the Matter of )  
 )  
Rules and Regulations Implementing the ) CG Docket No. 02-278  
Telephone Consumer Protection Act of 1991 )  
 )

To: Marlene H. Dortch, Secretary  
Attention: The Commission

OPPOSITION TO PETITIONS FOR RECONSIDERATION

I, Dennis C. Brown, pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. §1.429 and the Commission's Public Notice Report No. 2627 (Released September 8,2003), hereby file the instant Opposition to Petitions for Reconsideration of the Commission's Report and Order (FCC 03-153 Released July 3, 2003) (68 FR 44144 July 25, 2003) (R&O) in the above captioned proceeding. Specifically, I oppose the petitions of American Resort Development Association (ARDA); DialAmerica Marketing, Inc. (Dial); Direct Marketing Association, Inc. (DMA); Infocision Management Corporation (Infocision); National Association of Realtors (Realtors); State and Regional Newspaper Association (Newspapers); Trader Publishing Company (Trader); and Verizon Wireless (Verizon). In support of my position, I show the following.

Preliminary

As the Commission may take administrative notice, more than 50 million telephone numbers have been placed on the National Do-Not-Call List, reportedly including the residential numbers of some executives of telemarketing businesses. Of the remaining 142 million telephone consumers, *not one* filed a timely petition for reconsideration in the above

captioned matter demanding, “Hey, what are you doing to me?! I want to receive more telemarketing calls! I especially like it when a machine mindlessly rings my number, then hangs up on me.” No, not one.

### The Three Percent Non-Solution

In my petition for reconsideration in the instant matter, I demonstrated arithmetically that if telemarketers are permitted to abandon three percent of their calls, then each residence can be expected to suffer one abandoned call every other day. My own record confirms the prediction. Between October 1 and October 12, I received six abandoned calls to my residential number which was on the National Do-Not-Call List. Not one of them provided the required disclosure of source and purpose. The Commission’s providing a safe harbor of three percent abandonment was clearly unreasonable and arbitrary and capricious. On one thing, DMA and I agree: “Consumers will not realize an appreciable reduction in abandoned calls imposing the lower [three percent] limit” on call abandonment, DMA at 16 n. 9 under the Commission’s Rules, as adopted. I also agree with Infocision that the Commission’s rules on abandoned calls will provide “little gain in consumer privacy or prevention of fraud,” Infocision at 4. If Infocision is correct that “there is no additional gain [to consumers] caused by the 3% standard rather than the 5% standard,” Infocision at 5, then the only obvious solution is for the Commission to reduce the safe harbor percentage further, to zero, and provide complete, effective protection to consumers.

DMA and I also agree that the predictive dialer rules should be modified, DMA at 22. Simply prohibiting all call abandonment will solve the constitutional problem which DMA believes exists in the Commission’s prescribing the text of a call abandonment message. To

protect consumers adequately, the only reasonable action for the Commission is to close and drain the safe harbor, remove the sharks, and prohibit all call abandonment. No abandoned call. No, not one.

Infocision may be correct that imposing a limit on call abandonment will cause its efficiency to decrease, however, its proposed response to that situation would not be reasonable. Infocision suggested that if it had to abandon no more than three percent of its calls, it might have to reduce employment. The more reasonable response would seem to be to hire additional personnel so that fewer calls are abandoned and more calls have a chance of making a sale instead of being abandoned. More calls connect, more sales can be made.

#### The Caller's Intent Is The Key

As the Commission has made clear, the test of whether a call is a telephone solicitation for a commercial purpose is the intent of the caller. Therefore, it is not possible for a person who intends to engage in a commercial transaction not to be making a telephone solicitation and delivering an unsolicited advertisement for a commercial purpose. ARDA explained that it desires to “identify those potential customers who may be most likely to want to purchase a resort timeshare,” ARDA at 3, and call them with “information”. When a call is made to person whom the caller has identified as a potential customer with the intent of making the person an actual customer then that call is a telephone solicitation for a commercial purpose. Since the intent of the call is to engage in a commercial transaction, the Commission was entirely reasonable in banning such prerecorded calls to all numbers.

ARDA argued that the Commission's Order "prevents consumers who have opted *not* to exercise their do-not-call rights from deciding whether they want to receive prerecorded 'information only' calls," ARDA at 13 (emphasis in original). The Commission may note that *not one* telephone consumer filed a timely petition for reconsideration demanding that the Commission give him the right to receive the type of calls desired by ARDA. More than 7,000 persons were heard from in the above captioned proceeding. More than 50 persons filed timely petitions for reconsideration. Not one petitioner was a telephone consumer seeking calls such as ARDA would make. No, not one.

#### Charity Begins At Home

Dial requested an exemption for telemarketers which make charitable contributions. The Commission does not have the authority to adopt the exemption requested by Dial. Section 227(a)(3) of the Communications Act, 47 U.S.C. §227(a)(3), provides an exemption for a call made by a "tax exempt nonprofit organization." An entity has to meet all three elements to qualify for an exemption, namely, being tax exempt, nonprofit, and an organization." No matter how much philanthropy persons such as Bill Gates and Ted Turner engage in, they do not qualify for an exemption, and neither does Dial.

#### Residence And Beyond

DMA would like to be able to call a person who has a home-based business and it raised the question of what constitutes a "residential subscriber". There are two reasonable tests which the Commission could apply. First, does the telephone consumer pay the telephone company at the residential rate for service? Second, does the number appear at the

subscriber's residence? If either test is met, then the number is that of a residential subscriber.<sup>1</sup>

Both DMA and Verizon discussed a problem, but neither provided a full discussion nor an appropriate solution. The problem is two-fold and it revolves around the definition of "assigned to . . . any service for which the called party is charged for the call," 47 U.S.C. §227(b)(1)(A)(iii). First, is the developing problem of wireless local number portability. When a telephone consumer ports a number from wireline service to wireless service, there does not appear to be any established means of a telemarketer's knowing that the number has been assigned by the telephone companies to a wireless service. Second, when a telephone consumer (rather than the telephone companies or the administrator of the North American Numbering Plan) assigns a number to wireless service, as by using call forwarding from a wireline number to wireless service, there does not appear to be any established means by which a telemarketer can be informed of the assignment. In view of the strong public interest in protecting consumer privacy and in view of the harm which could be done to consumers if telemarketers were permitted to shoot into the wireless darkness, the Commission should declare that no person may make any call using any automatic telephone dialing system or an artificial or prerecorded voice to any telephone number for which the called party is charged for the call and let the caller take the risk of violating the statute. Alternatively, to protect

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<sup>1</sup> The Commission may note the policy of the Internal Revenue Service not to allow an income tax deduction for one line used by a home-based business on the premise that one line is used for residential purposes. Accordingly, at least one line of a home-based business must be deemed to be a residential subscriber number.

consumer privacy and prevent financial abuse of the consumer, the Commission should simply adopt the safest harbor for both telemarketers and consumers of permitting not one call with the use of any automatic dialing system or artificial or prerecorded voice. No, not one.

The problem of which DMA complained concerning the placement of wireless numbers on the Do Not Call list is trivial. If a wireless number is in the DMA data base and on the National Do Not Call list, DMA members will simply have two ways of assuring that they won't call that number. Alternatively, telemarketers can process its lists to eliminate duplicates – a trivial operation in any computer language.

#### No Crack In The Door; No Relationship Forwarding

Realtors suggested that the advertisement of a residential telephone number for the purpose of receiving calls inquiring about the purchase of residential property should be deemed to be consent to be called for a different purpose. Trader expressed a similar desire. The distinction is clear. If a person advertises a home for sale, he is seeking calls from persons who desire to buy the home. He is not seeking offers of a commercial brokerage service, however tangentially that service might be related to the purpose of the consumer's advertisement. The exemption suggested by Realtors would expand without limit to swallow a consumer's do-not-call rights if he once gave his phone number to anyone. Were the Commission to accept the suggestions of Realtors and Trader, the next call would come from a painter who said, "Hey, I see you're selling your home. It would sell better with a new paint job. How 'bout it?" or a call from an auto dealer, "Hey, I see you're moving. Your next home will look a lot better with a new car in front of it. And, hey, okay, not just one new home. You also need a resort timeshare. ARDA will call you in a minute to inform you

about that, too.” No, the disclosure of a residential telephone number for one purpose is not an invitation to receive even one call for a different purpose. No, not one.

Want to buy my house? Give me call. Want to sell me goods or services, don't call. Ever. The disclosure of a residential telephone number to one person cannot be reasonably interpreted as establishing a business relationship with any other person. No, not one.

#### Full Name; First Name First

The Commission should continue to require that a business making a telemarketing call state the legal name under which the business is registered to operate. In many cases, only by knowing the legal name of the telemarketer can a consumer obtain enough information to make an actionable complaint to the Commission or take other legal action against the caller. Acknowledging the “d/b/a” situation raised by Verizon, the Commission may be well advised, if not simply flatly banning the use of predictive dialers or providing no safe harbor for abandonments, to require a telemarketer to provide the consumer with both its legal name and the name under which it does business, using the common and plain expression, “doing business as”.

#### All The News That's Fit To Phone

The Commission's rules do not impose any burden on the circulation of news. They may increase the cost of a newspaper's finding subscribers. They do not impair the circulation of news. Newspapers are free to circulate the news as widely as they desire. Nothing prohibits a newspaper from making a telephone call to anyone to deliver news, be it headlines, long form stories, think pieces, or opinion. There is no reason, however, to permit a for-

profit newspaper to call a number which is on the Do-Not-Call list with the intent of engaging in a commercial transaction. No, not one.

Conclusion

For all the foregoing reasons, the Commission should reconsider its action in the above captioned matter and revise its Rules as requested herein and in my petition for reconsideration.

Respectfully submitted,

/s/ Dennis C. Brown

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Dated: October 13, 2003