



2550 M Street, NW
Washington, DC 20037
202-457-6000

Facsimile 202-457-6315
www.pattonboggs.com

June 21, 2012

Monica S. Desai
202-457-7535
mdesai@pattonboggs.com

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Notice – SoundBite Communications, Inc., Petition for Declaratory Ruling in CG Docket No. CG 02-278

Dear Ms. Dortch:

On June 21, 2012, Monica Desai, counsel to SoundBite Communications, Inc. (“SoundBite”) contacted Mark Stone (Deputy Bureau Chief, Consumer and Governmental Affairs Bureau); Michael Jacobs (Senior Legal Advisor to the Bureau Chief, Consumer and Governmental Affairs Bureau); Marcus Maher (Assistant General Counsel, Office of General Counsel) and Raelynn Remy (Attorney-Advisor, Office of General Counsel) to alert them to a court decision issued on Tuesday holding that a one-time confirmatory opt-out text message does not violate the Telephone Consumer Protection Act (“TCPA”).

In *Ibey v. Taco Bell Corp.*,¹ the court squarely addressed and supported the position taken by SoundBite in its Petition for Declaratory Ruling.² In granting Taco Bell Corporation’s Motion to Dismiss, the court stated:

¹ *Ibey v. Taco Bell Corp.*, Case No. 12-CV-0583-H (WVG)(S.D. Cal. 2012)(granting Defendant’s Motion to Dismiss and granting Plaintiff 30 days leave to amend its Complaint).

² *SoundBite Communications, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Feb. 16, 2012) (“Petition”); *see also* Comments of SoundBite

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Defendant argues that the legislative history of the TCPA indicates that the statute cannot be read to impose liability for a single, confirmatory opt-out message. (Doc. No. 15.) The Court agrees. **The Court concludes that the TCPA does not impose liability for a single, confirmatory text message.** The TCPA's statutory and legislative history emphasize that the statute's purpose is to prevent unsolicited automated telemarketing and bulk communications. Further, the Ninth Circuit has explained that "the purpose and history of the TCPA indicate that Congress was trying to prohibit use of ATDSs in a manner that would be an invasion of privacy." Here, Plaintiff expressly consented to contact by Defendant when he initially texted 91318 to Defendant. When Plaintiff decided he no longer wanted to receive in text communications, Plaintiff allegedly notified Defendant that he wished to stop communications, and Defendant allegedly confirmed its receipt of the message and Plaintiff's removal from Defendant's text-message communication list. **Defendant's single, confirmatory text message did not constitute unsolicited telemarketing;** Plaintiff had initiated contact with Defendant. Further, Defendant's sending a single, confirmatory text message in response to an opt-out request from Plaintiff, who voluntarily provided his phone number by sending the initial text message, does not appear to demonstrate an invasion of privacy contemplated by Congress in enacting the TCPA. **To impose liability under the TCPA for a single, confirmatory text message would contravene public policy and the spirit of the statute—prevention of unsolicited telemarketing in a bulk format.**³

The court also questioned whether a single text message sent by Taco Bell in direct response to a specific user's request for an opt-out was placed via an "automatic telephone dialing system" as required by the TCPA. The court emphasized that under the TCPA, the equipment "must have the capacity to store or produce telephone numbers."⁴ Noting that "the text message did not appear to be random but in direct response to Plaintiff's message" and that a lack of "human intervention on the part of the Defendant" is insufficient to meet the requirements of the statute, the court concluded without making a final determination that "it appears Defendant could be entitled to summary judgment because there does not appear to be a genuine dispute of material fact."⁵ As

Communications, Inc., CG Docket No. 02-278 (filed Apr. 30, 2012); *see also* Reply Comments of SoundBite Communications, Inc., CG Docket No. 02-278 (filed May 15, 2012).

³ *Ibey v. Taco Bell Corp.*, at 4-5 (citations omitted)(emphasis added).

⁴ *Id.* at 5 (citing 47 USC Sec. 227(a)(1)).

⁵ *Id.* at 6. Despite this, the court allowed the Plaintiff 30 days leave to amend to correct the deficiencies of the Complaint, including the failure to sufficiently plead the use of an ATDS within the meaning of the TCPA.

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SoundBite has similarly explained, a confirmatory text message sent through a system that is programmed only to send a targeted response to an individual's specific request, is neither "randomly" nor "sequentially" generated, nor is sent through equipment with the capacity to generate or dial random or sequential numbers.⁶

SoundBite urges the Commission to expeditiously follow the court's lead and issue a narrow ruling clarifying that a single confirmation text of an opt-out is not a violation of the TCPA or Section 64.1200 of the Commission's rules.

Respectfully submitted,



Monica S. Desai
Patton Boggs, LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-7535

Counsel to SoundBite Communications, Inc.

cc: Mark Stone
Michael Jacobs
Marcus Maher
Raelynn Remy

⁶ See Letter from Monica S. Desai, Counsel, SoundBite Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, Notice of Ex Parte in CG docket no. 02-278, dated May 29, 2012 (providing detailed explanation of the multi-step four to eighteen-month process that would be involved in order to develop such capacity).