

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Petition for Declaratory Ruling of
Communications Innovators

CG Docket No. 02-278

**Supplemental Comments of Robert Biggerstaff on the Petition of Communications
Innovators.¹**

**Supplemental Comments of Robert Biggerstaff on the Petitions regarding
“Automated Telephone Dialing System” and “capacity” in the TCPA and Commission’s
TCPA rules.**

There are multiple petitions pending before the Commission that regard the construction and application of the definition of “automated telephone dialing system” (“ATDS”) and “capacity” as used in that definition.² Please consider these comments on all such related petitions.

I wish to make the Commission aware of a recent decision by the Federal District Court for the Northern District of Illinois in the matter of *Sterk v. Path, Inc.*³ This case is notable for a number of reasons.

¹ *Consumer and Governmental Affairs Bureau Seeks Comment on Petition For Expedited Declaratory Ruling From Communication Innovators, Inc.*, DA 12-1653 (FCC, October 16, 2012).

² *E.g.*, Petitions of TextMe, Inc, Professional Association of Customer Engagement (PACE), ACA International, GlideTalk, Ltd., and Communication Innovators, Inc.

³ *Sterk v. Path, Inc.*, No. 13 C 2330 (N.D. Ill. May 30, 2014).

First, the court noted the appropriateness of the Commission's existing guidance with respect to "ATDS" and the recognition that automatically dialing multiple numbers from a list without human intervention is properly construed as an ATDS even absent the Commission's guidance. The court rejected the notion that such a construction might improperly encompass cell phones by noting the truism that:

If a person used a cell phone to [automatically] send countless unsolicited text messages that harmed the public welfare in such a fashion, it would not be an absurd result to find that the cell phone user had violated the TCPA. Thus, even if the FCC's rulings were not controlling on this court, this court concurs with such rulings.

More interestingly, however, this decision reveals the absurd degree of contortions that those wishing to violate the TCPA will go to couch their actions as permissible. As the Commission has noted, and previous comments have suggested,⁴ the most appropriate test is a test of "human intervention" (where a single direct human action results in a single telephone call or text message) as one element⁵ of the bright-line test for violative-versus-nonviolative use of an autodialer.

However, Path actually argued to the court that a single human act of uploading a list of phone numbers that were subsequently dialed *en masse*, satisfied the "human intervention" test:

Path argues that when Path users choose through clicking prompts to upload their phone contacts, such actions constitute "human intervention." (Ans. PSJ 13-14). However, such conduct by Path users merely relates to the collection of numbers for Path's database of numbers. The undisputed evidence shows that the equipment used by Path's agent made calls from the list without human intervention.

⁴ See *Notice of Ex Parte Presentation of Robert Biggerstaff*, CG Docket No. 02-278, pp. 1-6, dated May 2, 2014.

⁵ *Id.*, p. 3.

Such contortions must be emphatically repudiated by the Commission or they will be repeated. In adjudicating the petitions regarding the construction of ATDS, and in its guidance regarding the direct human intervention test, the Commission should explicitly reject such tenuous claims of compliance. Otherwise, miscreants will simply claim that loading a predictive dialer with a list of numbers satisfies the “human intervention” element.

In addition, this case demonstrates yet another example of “spam-viting” which is the bane of millions of cell phone subscribers.⁶ After extracting a list of contacts from the Path customer’s cellphone, Path then sent text messages **authored by Path** to advertise Path itself, to those contacts, *en masse*.

Finally, I attach an expert report filed in the Path litigation,⁷ which cogently explains some of the technical relationships between Value Added Service Providers (“VASPs”) like Path and Glide, a cellular network’s Short Message Service Center (“SMSC”), and SMS aggregators. While the Commission obviously has technical resources at its disposal to explore these topics, it may benefit others to place such materials in the record on this docket.

Respectfully submitted, this the 9th day of June, 2014.

/s/ Robert Biggerstaff

⁶ A recent study by Adaptive Mobile showed exponential growth and abuse from spam-viting apps. See Parmy Olson, *Playing Dirty In The Messaging Wars*, Forbes, available at <<http://onforb.es/1jnYEcO>>. A copy is attached hereto. See also *Growth Hacking and the App-Spam Scam*, Direct Marketing News, available at <<http://www.dmnews.com/growth-hacking-and-the-app-spam-scam/article/344015/>>. See also *Reply Comments of Robert Biggerstaff on the Petition of TextMe, Inc.*, dated May 22, 2014.

⁷ *Second Amended Expert Witness Report of Randall A. Snyder*, dated January 24, 2014.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

KEVIN STERK,)	
)	
Plaintiff,)	
)	
v.)	No. 13 C 2330
)	
PATH, INC.,)	
)	
Defendant.)	

MEMORANDUM OPINION

SAMUEL DER-YEGHIAYAN, District Judge

This matter is before the court on Plaintiff Kevin Sterk’s (Sterk) partial motion for summary judgment and motion to strike, and on Defendant Path, Inc.’s (Path) motion for summary judgment and motion to strike. For the reasons stated below, Sterk’s partial motion for summary judgment is granted and his motion to strike is granted, and Path’s motion for summary judgment is denied and its motion to strike is denied.

BACKGROUND

Sterk contends that Path operates one of the largest social networks in the United States. Sterk claims that through the Short Messaging Service on his mobile phone, he received an unsolicited promotional text message (Text) from Path. Sterk

claims that Path has used automated machines to send such unsolicited text messages to consumers nationwide, inconveniencing consumers, and causing such consumers to bear the burden of paying for the text message calls. Sterk includes in his complaint a claim alleging a violation of the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227. The court allowed the parties to conduct limited discovery on the issue of whether the Text was transmitted via an automatic telephone dialing system (ATDS) under the TCPA. Sterk now moves for partial summary judgment and moves to strike certain evidence presented by Path. Path moves for summary judgment and moves to strike certain evidence presented by Sterk.

LEGAL STANDARD

Summary judgment is appropriate when the record, viewed in the light most favorable to the non-moving party, reveals that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Smith v. Hope School*, 560 F.3d 694, 699 (7th Cir. 2009). A “genuine issue” of material fact in the context of a motion for summary judgment is not simply a “metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, a genuine issue of material fact exists when “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 599 (7th Cir. 2000). In

ruling on a motion for summary judgment, the court must consider the record as a whole, in the light most favorable to the non-moving party, and draw all reasonable inferences in favor of the non-moving party. *Anderson*, 477 U.S. at 255; *Bay v. Cassens Transport Co.*, 212 F.3d 969, 972 (7th Cir. 2000). When there are cross motions for summary judgment, the court should “construe all inferences in favor of the party against whom the motion under consideration is made.” *Mote v. Aetna Life Ins. Co.*, 502 F.3d 601, 606 (7th Cir. 2007)(internal quotations omitted); *see also Krieg v. Seybold*, 481 F.3d 512, 516 (7th Cir. 2007).

DISCUSSION

I. Sterk’s Motion to Strike

Sterk moves to strike David Strandness’ (Strandness) declaration (Strandness Declaration) submitted by Path with its motion for summary judgment. Sterk contends that the statements included in paragraphs 5 and 7 of the Strandness Declaration constitute inadmissible hearsay. In ruling on a motion for summary judgment, “the court may consider any evidence that would be admissible at trial.” *Harney v. City of Chicago*, 702 F.3d 916, 922 (7th Cir. 2012). The evidence produced at the summary judgment stage need not itself be the evidence that would be presented at trial. *Id.* It need only “be admissible in content.” *Id.* (internal quotations omitted)(quoting *Stinnett v. Iron Works Gym/Exec. Health Spa, Inc.*, 301 F.3d 610, 613 (7th Cir. 2002))(stating that “for example, affidavits are not normally

admissible at trial”). Pursuant to Federal Rule of Civil Procedure 56(c), “[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated,” and “[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.” Fed. R. Civ. P. 56(c).

Strandness states that on October 22, 2013, he called Elizabeth Howell (Howell) who was listed in Path’s user database. (Str. Decl. Par. 2). Strandness claims that when he was finally able to talk to Howell, he told Howell that he is an attorney representing Path in this action and that Sterk has asserted in this action that he had received the Text from Howell inviting him to use Path’s social networking service. (Str. Decl. Par. 2-4). Strandness also claims that he asked Howell if she knew Sterk. (Str. Decl. Par. 4). In paragraph 5 of the Strandness Declaration, which Sterk seeks to bar, Strandness states: “Ms. Howell explained that she had exchanged phone numbers with Mr. Sterk about three years ago when he helped her plan her birthday party in Chicago.” (Str. Decl. Par. 5). According to Strandness, Howell also “said that after they exchanged phone numbers, they subsequently corresponded by cell phone and text message.” (Str. Decl. Par. 5). Strandness indicates that he then viewed the Pinterest webpage of a Pinterest user identified as Kevin Sterk. (Str. Decl. Par. 6-7). In paragraph 7 of the Strandness Declaration, which Sterk objects to, Strandness states that “[a]ccording to this webpage one of the Pinterest users that Mr.

Sterk is following is Elizabeth Howell. . . .” (Str. Decl. Par. 7).

Sterk contends that the statements allegedly made by Howell that are included in paragraphs 5 and 7 of the Strandness Declaration are inadmissible hearsay. Pursuant to Federal Rule of Evidence 802, “[h]earsay is not admissible unless” a federal statute, the Federal Rules of Evidence, or “other rules prescribed by the Supreme Court” “provide otherwise.” Fed. R. Evid. 802. Hearsay is defined as “a statement that . . . the declarant does not make while testifying at the current trial or hearing,” and which is offered “in evidence to prove the truth of the matter asserted in the statement.” Fed. R. Evid. 801; *see also Stollings v. Ryobi Technologies, Inc.*, 725 F.3d 753, 761 (7th Cir. 2013)(stating that a “classic hearsay” is “an out-of-court statement offered to prove its truth”).

The statements made by Howell would constitute statements made by a declarant outside of a court hearing. Thus, if Path sought to introduce such statements to establish the truth of the facts relating to Howell’s relationship with Sterk, such statements would constitute hearsay. Path points to no exceptions to the hearsay rule that would be applicable. *See* Fed. R. Evid. 803 (listing hearsay exceptions). Path argues that such evidence would be admissible for impeachment purposes if Sterk claimed that he had a different relationship with Howell. However, as Path acknowledges, the statements in the Strandness Declaration relate to a potential consent defense, which does “not bear on the ATDS question” at issue in the instant dispositive motions. (Ans. Sterk Strike 3). Thus, Path improperly

presented the statements in paragraphs 5 and 7 of the Strandness Declaration in support of its summary judgment motion relating to the limited ATDS issue now before this court. Therefore, Sterk's motion to strike is granted, and paragraphs 5 and 7 of the Strandness Declaration are stricken.

II. Path's Motion to Strike

Path moves to strike the following presented by Sterk in support of his partial motion for summary judgment: (1) portions of the Second Amended Expert Witness Report (Snyder Report) of Sterk's proposed expert Randall A. Snyder (Snyder), (2) three articles, and (3) documents produced by Neustar, Inc. (Neustar Documents).

A. Snyder Report

Path seeks to strike Sections II.B, II.D, II.E, II.F, and II.G of the Snyder Report. As explained above, in ruling on a motion for summary judgment, a court should consider only admissible evidence or at least materials that represent the content of the admissible evidence that would be presented at trial. *Harney*, 702 F.3d at 922. Federal Rule of Evidence 702 provides the following:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Path argues that in the portions of the Snyder Report objected to by Path, Snyder offers his opinion as to what he believes the TCPA prohibits, how FCC rulings should be interpreted, and whether certain legal standards have been met in this case. However, Snyder merely discusses the law and facts to give a background and overview for his report. Also, pursuant to Federal Rule of Evidence 704, Snyder is not barred from giving an opinion as to the ultimate issue before the trier of fact. Fed. R. Evid. 704. Path has not shown that Snyder has overstepped his bounds as an expert witness or that Snyder is attempting to instruct the court as to the law as a legal expert. Therefore, no section of the Snyder Report is stricken.

B. Articles

Path moves to strike the Articles presented by Sterk in support of his partial motion for summary judgment. Path contends that the statements made in such articles are inadmissible hearsay. Sterk argues that he would not introduce the Articles to show the truth of the statements contained in the Articles. Sterk has provided a legitimate basis for the potential introduction of the Articles at trial. Therefore, the Articles are not stricken.

C. Neustar Documents

Path moves to strike the Neustar Documents on the basis that they are not properly authenticated and are inadmissible hearsay. Sterk has cured any potential deficiency in authentication with a later filed declaration. Sterk has also shown that

the Neustar Documents that are computer records fall under the business records hearsay exception. Path also moves to strike an email (Email) in the Neustar Documents on the basis that it was not properly authenticated and is inadmissible hearsay. Sterk has properly authenticated the Email and has indicated that he is not going to introduce the Email to establish the truth of any facts contained in the Email. Path has not shown at this juncture that the Neustar Documents are inadmissible for all purposes at trial. Therefore, the Neustar Documents are not stricken. Based on the above, Path's motion to strike is denied.

III. Motions for Summary Judgment

Sterk has filed a partial motion for summary judgment on the issue of whether the Text was sent via an ATDS. Path moves for summary judgment on that same issue. Path also moves for summary judgment as to Sterk's entire claim in this action.

A. Use of ATDS

The parties both argue that they are entitled to judgment as a matter of law as to whether Path used an ATDS to send the Text. The TCPA defines the term "automatic telephone dialing system" as "equipment which has the capacity-- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1); *see also Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009)(noting that

the FCC has confirmed that the ATDS restriction applied to text messages).

It is undisputed that when an individual creates a Path account, the user makes his or her phone contacts available to Path and that such contacts are then uploaded onto Path's system. (R DSF Par. 7-10). Path contends that Sterk admits: (1) that "Path does not have any equipment with the capacity to generate random phone numbers," (2) that "Path does not have equipment with the capacity to generate sequential phone numbers," and (3) that "Path does not possess a number generator, i.e. equipment that can generate random or sequential numbers." (R DSF Par. 15-17). Path contends that based on such admissions, Sterk cannot succeed on his TCPA claim. However, the Federal Communications Commission (FCC) has issued decisions stating that an ATDS may include equipment that automatically dials numbers from a stored list without human intervention, even when the equipment lacks the capacity to store or produce telephone numbers to be called, using a random or sequential number generator. *See Legg v. Voice Media Group, Inc.*, 2014 WL 2004383, at *3 (S.D. Fla. 2014)(noting that "[t]he FCC determined that predictive dialers fall within the definition of an ATDS" and citing *In re Rules & Regulations Implementing the TCPA*, 18 FCC Rcd. 14014 (FCC 2003)); *Gragg v. Orange Cab Co., Inc.*, 2014 WL 494862, at *2 (W.D. Wash. 2014)(stating that the definition of an ATDS includes equipment that is "a predictive dialer with the capacity to dial telephone numbers from a list without human intervention" and citing *In the Matter of Rules & Regulations Implementing the TCPA of 1991*, 23 F.C.C.R. 559, 566 ¶ 14 (FCC 2008)); *Jamison v. First Credit Services, Inc.*, 290 F.R.D. 92, 101 (N.D. Ill.

2013)(stating that the “FCC has already ruled that a predictive dialer constitutes automatic telephone dialing equipment three times” and citing *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 19 FCC Rcd. 19215, 19215, n. 1 (2004)); *Vance v. Bureau of Collection Recovery LLC*, 2011 WL 881550, at *2 (N.D. Ill. 2011)(stating that “the FCC has indicated, and other courts have held, that predictive dialing systems do meet the definition of devices prohibited by the TCPA”). The FCC decisions regarding predictive dialers are final decisions by the FCC. *See Bennett v. Spear*, 520 U.S. 154, 177-178 (1997)(explaining requirements for an agency decision to be deemed final).

In general, a district court gives great weight, if not controlling weight, to final decisions of the FCC implementing and interpreting the TCPA. *CE Design, Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010)(stating that “[i]n passing the Hobbs Act, Congress vested the power of agency review of final FCC orders exclusively in the courts of appeals” and that “[t]he Hobbs Act’s jurisdictional bar thus does not leave private parties without a mechanism for judicial review of agency action; it merely requires litigants to seek review through its specific procedural path”); *Jamison*, 290 F.R.D. at 97 (stating in a TCPA case that the court is “bound by the FCC’s orders, which are final and controlling”). The undisputed facts show that Path acquires a stored list of phone numbers from users. The undisputed facts also show that Path’s agent then uses automated equipment to make calls from that list. The FCC found that a predictive dialer, which makes calls from a database of numbers constitutes an ATDS. *In re Rules & Regulations Implementing*

the TCPA, 18 FCC Rcd. at 14091-92, 14143 n.31 (stating that “[a] predictive dialer is an automated dialing system that uses a complex set of algorithms to automatically dial consumers’ telephone numbers in a manner that ‘predicts’ the time when a consumer will answer the phone and a telemarketer will be available to take the call”); *see also Legg*, 2014 WL 2004383, at *3 (stating that the FCC has held that “[p]redictive dialers are automated systems that call telephone numbers stored in pre-programmed lists or databases in a manner designed to maximize the efficiency of call centers”). The FCC emphasized that the main requirement for an ATDS is not the capacity to generate random or sequential numbers, but rather to be able to “dial numbers without human intervention.” *In re Rules & Regulations Implementing the TCPA*, 18 FCC Rcd. at 14092. The undisputed facts show that the equipment used by Path, which makes calls from a stored list without human intervention is comparable to the predictive dialers that have been found by the FCC to constitute an ATDS. The uploading of call lists from Path users is essentially the same as when a call list is entered by a telemarketer in a database. It is the ultimate calling from the list by the automated equipment that is the violation of the TCPA.

Path argues that when Path users choose through clicking prompts to upload their phone contacts, such actions constitute “human intervention.” (Ans. PSJ 13-14). However, such conduct by Path users merely relates to the collection of numbers for Path’s database of numbers. The undisputed evidence shows that the equipment used by Path’s agent made calls from the list without human intervention. It is such calling that the section of the TCPA at issue in this case covers, not the

collection of numbers for storage.

Path also points to the 2012 FCC decision in *In re Rules & Regulations Implementing the TCPA*, 27 FCC Rcd. 15391 (FCC 2012), contending that the FCC indicated that it was not removing the requirement for a random or sequential number generator. (Ans. PSJ 6). However, in the portion of the FCC ruling cited by Path, the FCC merely reiterated that the equipment used does not have to actually have made a call using a random or sequential number generator, and that it only needs the capacity to do so. *In re Rules & Regulations Implementing the TCPA*, 27 FCC Rcd. at 15391 n.5. The FCC did not indicate that it was withdrawing its prior decisions providing an alternative basis for an ATDS if the equipment constitutes a predictive dialer. The FCC in fact supported its prior decisions by stating that an ATDS covers “any equipment that has the specified *capacity* to generate numbers and dial them without human intervention. . . .” *Id.* Thus, the FCC did not, as Path asserts, reaffirm the requirement for a random or sequential number generator capacity. Therefore, Sterks’ partial motion for summary judgment is granted and Path’s motion for summary judgment is denied.

The court also notes that even if the FCC rulings were not controlling in this case, this court agrees with the reasoning set forth in such rulings. The congressional history of 47 U.S.C. § 227(a)(1) shows that Congress envisioned that the language in the TCPA might not be able to account for future changes in technology, and that the FCC might need to interpret the TCPA to account for changes in technologies. *In re Rules & Regulations Implementing the TCPA*, 18 FCC Rcd. at 14092-93. The FCC

explained in 2003 that “[i]n the past, telemarketers may have used dialing equipment to create and dial 10-digit telephone numbers arbitrarily,” but that “the evolution of the teleservices industry has progressed to the point where using lists of numbers is far more cost effective.” *Id.* The interpretation of the TCPA by the FCC is well-reasoned and is appropriate to address the well-founded concerns by the FCC as to the threats posed to the public welfare and safety by certain telemarketing practices. Path also argues that the FCC’s interpretation leads to absurd results where even a cell phone could constitute an ATDS if able to make calls from a list. However, as Plaintiffs point out, the TCPA does not bar the ownership of an ATDS. The TCPA bars the improper use of an ATDS to harass unsuspecting consumers and place the public safety at risk. If a person used a cell phone to send countless unsolicited text messages that harmed the public welfare in such a fashion, it would not be an absurd result to find that the cell phone user had violated the TCPA. Thus, even if the FCC’s rulings were not controlling on this court, this court concurs with such rulings.

Path also argues that the FCC’s rulings are unconstitutionally overbroad and vague. Generally, when a party challenges a governmental action on its face based on “vagueness and overbreadth grounds, the ‘court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected’ speech.” *Wisconsin Right To Life, Inc. v. Barland*, 2014 WL 1929619 (7th Cir. 2014)(quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)). In the instant action, there has been no showing by Path that

the FCC's rulings would limit a substantial amount of constitutionally protected speech. In fact, the FCC explained in its rulings that "[t]he TCPA does not ban the use of technologies to dial telephone numbers," and that it "merely prohibits such technologies from dialing emergency numbers, health care facilities, telephone numbers assigned to wireless services, and any other numbers for which the consumer is charged for the call." *In re Rules & Regulations Implementing the TCPA*, 18 FCC Rcd. at 14092-93. The FCC's rulings provide clear guidance to telemarketers and are not overly broad. Telemarketers do not have a constitutionally protected right to foist their operating costs on unsuspecting members of the public or to place the public's safety at risk. Path has thus failed to show that any of the FCC's rulings were unconstitutional.

B. TCPA Claim

Path moves for summary judgment on Sterk's entire TCPA claim, arguing that no such claim can stand in the absence of the use of an ATDS. Since the undisputed facts show that Path used an ATDS to send the Text, Path's motion for summary judgment is denied.

CONCLUSION

Based on the foregoing analysis, Sterk's partial motion for summary judgment is granted and his motion to strike is granted, and Path's motion for summary judgment is denied and its motion to strike is denied.



Samuel Der-Yeghiayan
United States District Court Judge

Dated: May 30, 2014

Parmy
Olson**Parmy Olson** Forbes Staff
I cover agitators and innovators in mobile.

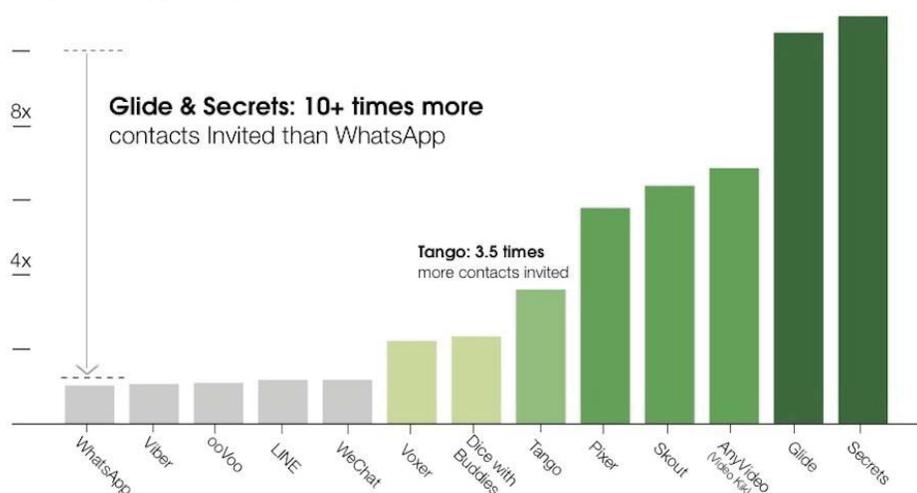
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Playing Dirty In The Messaging Wars

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Breakdown, in North America, of average number of Contacts sent an Invite once a Growth Hacking App is installed on a mobile device.

12x Number of Contacts Invited
(times WhatsApp Baseline)



Messaging apps that have resorted to growth hacking or spamming to quickly grow their user base (Source: Adaptive Mobile)

Last February, an app called Secrets started going viral. The app was a competitor to the similarly-named “Secret” and allowed users to publish incognito messages that others in their contacts list or in the near vicinity could read. While Secret had started growing its users base a month earlier by word of mouth and lots of press, the “me-too” Secrets was riding its predecessor’s coattails.

In a possibly-desperate attempt to grow its user base, Secrets forced its early adopters to invite everyone in their address book to download the app too.

That became a problem when Secrets hit 2,000 downloads. Not only was the spam annoying, it was clogging up the [mobile](#) network. Secrets had started sending invites over-and-over to numbers like 2383, the ATM pins that people were putting in their address books, and the resulting flood of text

messages turned into a classic a distributed-denial-of-service (DDoS) attack on local carriers. In one case, an oblivious Secrets user sent more than 30,000 invites to invalid numbers on their address book over the course of two days, according to AdaptiveMobile, a Dublin, Ireland-based security company that studies mobile spam.

Secrets, whose developers did not respond to a request for comment, ultimately fixed the flaw. But while this was an extreme case of spamming, some say it's part of a growing problem.

A flood of new money into the mobile messaging space, spearheaded by [Facebook's](#) mega \$19 billion [acquisition](#) of WhatsApp, has put much more pressure on apps that fall even vaguely into the messaging space to scale up whatever the cost. In the world of app development, the process is known as growth hacking, and is a gray area controversially trodden by the social network Path, RapGenius and Glide. Users of the latter video-messaging app on Android have complained it was next to impossible, at one point, to stop the app from sending invites to their entire contacts list.

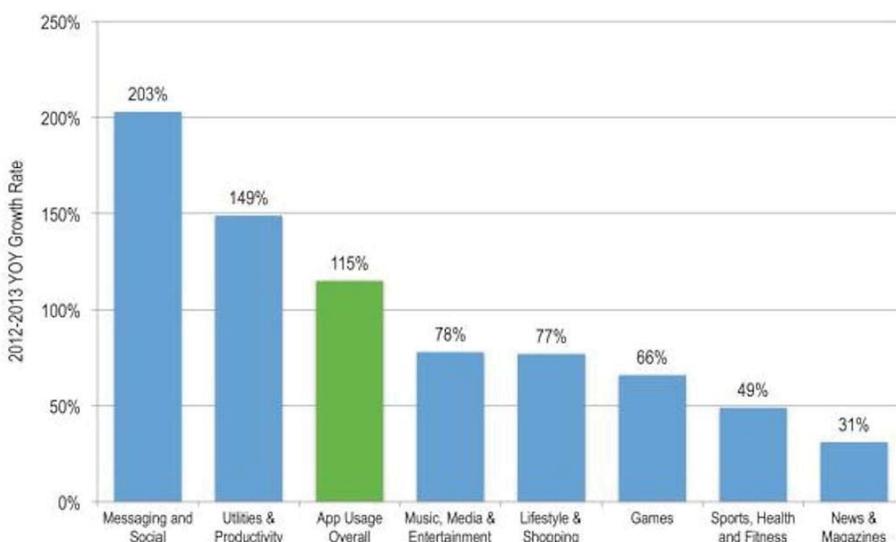
Messaging apps are becoming the worst offenders of this invasive form of mobile marketing, according to Adaptive Mobile's director Cathal McDaid, who claims the number of forced invites from more than a dozen popular messaging apps had grown by an extraordinary 850% between Sept. 2013 and March 2014. "There's 10 or 12 companies doing most of it," he says. A big part of the reason is these apps are "all of a sudden worth so much money."

(Note that AdaptiveMobile counts mobile carriers like Orange as its main clientele, and that it's not only in carriers' interests to find out who might be clogging up their bandwidth, but to call out the upstarts blasting away their SMS revenues.)

Google recently gave Android developers a deadline of April 16 to stop spammy marketing practices. A week after the deadline, Glide had decreased its daily app invites by 30%, while Tango's invites have fallen by 60% and anonymous messaging app Meow's by 91%, according to Adaptive Mobile's research.

That's encouraging, but McDaid expects messaging apps to continue cutting corners to artificially inflate growth. While top messaging platforms like LINE, WhatsApp and WeChat are largely well behaved, the problems lie with smaller messaging peers eager to jump into a lucrative industry. Messaging apps have seen the greatest growth in activity in the last year according to Flurry, a mobile analytics and advertising company (see chart below).

Mobile Use Grows 115% in 2013, led by Messaging and Social Apps



Source: Flurry Analytics.

www.flurry.com

Source: Flurry

Little wonder that venture capital investors are putting more pressure than ever on such startups to grab users in the mist of major deals such as Rakuten's \$900 million [acquisition](#) of Viber and Alibaba's [\\$215 million investment](#) into Tango, which valued the messaging platform at more than \$1 billion. Impressive user numbers — even when they appear as just registrations rather than active users — are crucial contributors to such lofty valuations.

Deep in the gray zone, McDaid points to Smug Messenger, which gives users incentives like in-game rewards and even Amazon gift cards to invite their friends. Clever marketing? “It’s bulk and unsolicited,” he argues. “An artificial type of growth. Some of these had user interfaces that made it hard to opt out of making invites. It’s all interesting social engineering.”

He cites another case where the messaging platform Tango, which has 200 million registered downloads, asked users if they wanted to invite friends every time they took a photo on the app. Yet another messaging app would select all the users’ friends at once, just for a moment, and then unselect them. “That had a demonstrable, psychological effect,” says McDaid. He believes upstart messaging apps are becoming more creative with their growth-hacking tactics, and like the “broken windows” theory, are aping the peers that get away with it.

Ironically, messaging leader WhatsApp shunned artificial growth strategies to reach the scale it has today. It benefited, for one, from being on one of the first free-messaging apps on the scene in 2009, but its founders also

restricted their user growth in the first year after it launched to keep user growth organic, going back and forth between making WhatsApp free and giving it a 99 cent price tag.

“We wanted to make sure that we could absorb the people joining our network and provide the quality of service that they deserved,” co-founder Jan Koum said during an interview at WhatsApp’s Mountain View, Calif.-headquarters in December 2013. “Instead of getting a hundred emails, we would get ten emails, and we would be able to respond to all of those. This artificial throttle of the network actually paid in the long term because people were much happier with the quality of service and support.”

“Instead of the standard mentality of ‘get big fast’ we took the slow path approach,” added co-founder Brian Acton. (Read the [full story here](#) of how WhatsApp was built from the ground up.)

Emulating WhatsApp’s early strategy would be hard today when mobile apps now make up a winner-takes-all market, where the top grossing players account for the vast majority of revenues. “It’s like the music business,” says Ilkka Teppo, a Finnish developer who is working on a photo messaging app to be released this summer. “Only a few bands get into the top and they take all the money.”

The fact that most messaging platforms refuse to give their “active user” numbers, he adds, illustrates how hard it is to get people regularly using their services.

That may actually speak to the fallacy of artificial growth. The real value in a messaging app isn’t so much in how many times it’s been registered, since millions of people can download an app but never use it. What matters is the so-called “retention” metric, of how often people continue to open and use a service.

For now at least, that’s something you can’t hack.



Welcome, Guest!



Facebook Video Adds Call-to-Action Feature



Omnichannel Totally Rules at Nickelodeon



DIRECT LINE BLOG
DMN EDITORS SOUND OFF ON MARKETING



Al Urbanski, Senior Editor



Next Article in Direct Li



Growth Hacking and the App-Spam Scam

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The pressure on legitimate apps to blow out their user bases has spawned a form of quasi-hacking that has become accepted as a bona fide growth strategy. “Growth hacking” is a practice employed by popular networking, gaming, and directions apps such as Glide, Meow, Skout, and Tango, whose terms include permission to send SMS texts to the downloader’s entire contact list. And it’s a growth strategy that’s growing at an alarming rate. A [study](#) conducted by security firm AdaptiveMobile discovered mobile players sending 8.5 more invitations per app in the past six months.

“We did the study because we started coming across a lot more complaints from people receiving texts asking them to join an app,” says Cathal McDaid, head of data intelligence and analytics at AdaptiveMobile. “App companies approach it in different ways, but it can be very difficult for installers to avoid texting all of their contacts. And because so many mobile numbers are recycled, people are receiving texts from other people they don’t know.”

Glide, a video texting app, and Tango, which allows video calling, are the chief offenders. AdaptiveMobile’s investigation uncovered that Glide was responsible for 57% of the SMS invites texted by app companies during February and March. Tango sent 20%. By contrast, [WhatsApp](#), the company acquired by Facebook for \$19 billion in February, sent one tenth as many invitations as did Glide. Though Tango allows users to easily opt out of inviting contacts when installing, the app has an “Invite on Activity” feature that leads to invitations being sent when, for instance, a user takes a photo using Tango.

AdaptiveMobile identified 15 apps as being responsible for the majority of the 5 million to 6 million “app-spam” texts sent each day. The explosion of text invitations led Google to update Google Play terms with a condition that apps in the store must not be involved in “unsolicited promotion via SMS” services. More such restrictions are sure to follow.

“The messaging wars are only getting started, and this practice will continue because it’s so effective when the text comes from the phone of a friend,” McDaid says. “The thing is, this is an artificial form of growth. To truly grow, apps have to look at giving users value rather than using them as conduits for expansion.”

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8 Ways to Succeed

Exhibit 11

Submitted Under Seal

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

KEVIN STERK, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

PATH, INC., a Delaware corporation,

Defendant.

Case No. 1:13-cv-02330

Hon. Samuel Der-Yeghiayan

Action Filed: March 28, 2013

SECOND AMENDED EXPERT WITNESS REPORT OF RANDALL A. SNYDER

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Second Amended Expert Witness Report of Randall A. Snyder

Prepared Pursuant to Fed. R. Civ. P. 26(a)(2)(B)

I, Randall A. Snyder, have prepared this Second Amended Expert Witness Report (“Report”) pursuant to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure for the purpose of summarizing my forthcoming expert opinion testimony to be offered in the instant matter captioned *Sterk v. Path, Inc.*, No. 1:13-CV-02330 (N.D. Ill.).

I. QUALIFICATIONS.

I am an independent telecommunications technology consultant and the President of Wireless Research Services, LLC, a company that specializes in wireless cellular telecommunications consulting. I have over 28 years of experience in telecommunications network and system architecture, engineering, design and technology. I am an expert in the fields of both wireline and wireless telecommunications networking technology. I have been retained as a testifying or consulting expert in 65 cases regarding cellular telecommunications technology, including 42 cases regarding Short Message Service (“SMS”) technology and 36 cases regarding the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”) and associated regulations. In addition, I have been retained as an expert by both plaintiffs and defendants in cases regarding the TCPA.

I have taught many classes and seminars on both wireline and wireless telecommunication network technologies and have been a panelist and speaker at numerous conferences at the Institute of Electrical and Electronics Engineers (“IEEE”), the Personal Communication Society (“PCS”), and the Cellular Telecommunications and Internet Association (“CTIA”) as an expert in telecommunication networks. I spent seven years developing standards within the American National Standards Institute’s subsidiary organization, the

Telecommunications Industry Association (“TIA”), providing technical contributions and authoring and editing telecommunications proposed standards documents. Most notably, I authored and oversaw the standardization of Interim Standard 93, providing interconnection technology between wireline and wireless networks, which is a fully accredited national standard of the American National Standards Institute (“ANSI”). I am the co-author of the McGraw-Hill books “Mobile Telecommunications Networking with IS-41,” and “Wireless Telecommunications Networking with ANSI-41, 2nd edition” published in 1997 and 2001, respectively. These books have sold several thousand copies and were required reading for wireless engineers at AT&T Wireless and Motorola for several years. The latter book has also been relied upon and cited numerous times as a reference for various patents in the telecommunications industry. I have been issued 16 patents myself on telecommunications networking technology and currently have seven additional published patents pending. I have also authored several articles on telecommunications technology and have been quoted numerous times in industry trade publications. I have consulted for and been employed by many wireline and wireless telecommunications companies including McCaw Cellular, AirTouch, AT&T Wireless, AT&T Mobility, Lucent, Nokia, Ericsson, Nextwave, MCI, Sprint and other telecommunications technology vendors and service providers. I was also nominated in 2006 for a National Television Arts Emmy Award for Outstanding Achievement in Advanced Media Technology for unique wireless content distribution technology I designed while employed at Entriq, Inc. In addition, in 2002, I was co-founder of m-Qube, Inc., one of the first text message based mobile marketing companies in North America. m-Qube founded and established the Mobile Marketing Association (*see* <http://www.mmaglobal.com>) which subsequently established the technology and methodology for the use of text message based short codes within North

America.

I have been issued four patents on SMS technology, including the invention of short code technology, and my books have been cited in four additional issued patents on SMS technology. Still more detail, as well as details of publications that I have authored or co-authored within at least the past 10 years, are provided in my attached *curriculum vitae* (a true and accurate copy of which is attached hereto as Exhibit A) along with a list of cases where I served as a testifying or consulting expert.

II. STATEMENT OF OPINIONS TO BE EXPRESSED AT TRIAL AND THE BASES OR REASONS FOR THOSE OPINIONS.

A. Bases for opinions.

My opinions summarized below, which I expect to provide further testimony about in this matter, are based on my knowledge, education, experience, training and my review of the following documents in this case: Class Action Complaint; Memorandum of Law in Support of Path, Inc.'s ("Path") Motion to Dismiss and/or Stay; Declaration of Kimberly Jabal in Support of Defendant Path's Motion to Dismiss and/or Stay; Plaintiff's Response in Opposition to Defendant's Motion to Dismiss; Reply in Support of Path's Motion to Dismiss; Path's Rule 26(a)(1) Initial Disclosures; the Court's September 26, 2013 Memorandum Opinion; Defendant Path's Objections and Responses to Plaintiff's First Set of Interrogatories; Defendant Path's Objections and Responses to Plaintiff's First Set of Requests for Production of Documents; Defendant Path's Objections and Responses to Plaintiff's Second Set of Interrogatories; Defendant Path's Objections and Responses to Plaintiff's First Set of Requests to Admit; Plaintiff Sterk's Answers to Defendant Path's First Set of Interrogatories; Plaintiff Sterk's Answers to Defendant Path's First Set of Requests for Admission; Plaintiff Sterk's Responses to Defendant Path's First Set of Requests for Production; Amended Answer of Defendant Path;

Defendant Path's Amended Objections and Responses to Plaintiff's First Set of Interrogatories; December 11, 2013 Deposition of Michael DiCarlo; Text Message Transmission Record of Message Sent to Mr. Kevin Sterk (Bates No. PATH000096); Text Message Transmission Records (Bates Nos. PATH000097 – PATH000319); Path Source Code of Application Program Interface (Bates Nos. PATH000004 – PATH000010); Amazon Web Services Customer Agreement (Bates Nos. PATH000011 – PATH000017); Path Requested NUX Flows (Bates Nos. PATH000076 – PATH000090); Path User Profile of Ms. Elizabeth Howell (Bates Nos. PATH000091 – PATH000095); Common Short Code Association ("CSCA") Short Code Registration for Common Short Code ("CSC") 59730 (Bates Nos. Sterk 0001 – Sterk 0006); Neustar CSC Invoices to Twilio, Inc. ("Twilio") for CSC 59730 (Bates Nos. Sterk 0007 – Sterk 0020); CSCA Order Management History for CSC 59730 (Bates Nos. Sterk 0021 – Sterk 0032); Neustar CSC Sales Receipts to Twilio for CSC 59730 (Bates Nos. Sterk 0033 – Sterk 0040); CSCA Order Review History for CSC 59730 (Bates Nos. Sterk 0041 – Sterk 0073); Change Request for CSC 59730 to Transfer Short Code Registration from Twilio to Path (Bates Nos. Sterk 0074 – Sterk 0078); Screenshots of Text Messages Received by Mr. Sterk (Bates Nos. Sterk 0079 – Sterk 0080); Online Article: Path is Racking Up a \$500,000 Per Month Spam Bill (Bates Nos. Sterk 0081 – Sterk 0083); Online Article: Path is Spamming Address Books with Unwanted Texts and Robocalls – Again (Bates Nos. Sterk 0084 – Sterk 0087); Online Article: Users Complain Path Sending Spam Messages to Contacts, Company Says it's a Feature not a Bug (Bates Nos. Sterk 0088 – Sterk 0091); Twilio Website Pages, User Guide, Tutorial, Feature Descriptions, Pricing, etc. (Bates Nos. Sterk 0092 – Sterk 0141); LinkedIn Message from Mr. Rarig Ross to Mr. Sterk (Bates No. Sterk 0142); Mobile Marketing Association, U.S. Consumer Best Practices for Messaging, Version 7.0 (dated October 16, 2012); Mobile Marketing

Association, Global Code of Conduct (dated July 15, 2008); the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* and regulations promulgated thereunder; the Federal Communications Commission’s (“FCC”) Report and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 dated October 16, 1992; 2003 TCPA Order, 18 FCC, July 25, 2003; the FCC’s Report and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 dated January 4, 2008; the Appeal from the United States District Court for the Northern District of California, No. 07-16356, D.C. No. CV-06-02893-CW Opinion, filed June 19, 2009; the FCC’s Report and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 dated February 15, 2012; and the FCC’s Declaratory Ruling in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling dated November 29, 2012.

B. Background about the TCPA and automatic telephone dialing systems.

The TCPA prohibits, among other things, unsolicited voice and text calls to cellular telephone numbers using an automatic telephone dialing system (“ATDS”), which the statute defines as “equipment which has the capacity – (i) to store or produce telephone numbers to be called, using a random or sequential number generator; and (ii) to dial such numbers.”

The FCC has held that prohibitions under the TCPA apply equally to both voice calls and SMS text message calls to cellular telephone numbers. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, February 15, 2012.

Furthermore, the FCC has held that prohibitions under the TCPA apply to equipment that store and dial lists of telephone numbers without human intervention as well as random or sequentially

generated numbers. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, January 4, 2008.

C. Background about text messaging, Value Added Service Providers, and SMS aggregators.

SMS is a communications system and method designed to enable an individual cellular telephone subscriber to send a short text message communication (typically no more than 160 characters) from his or her cellular telephone to another individual's cellular telephone (*i.e.*, the message recipient). SMS text messages are typically sent individually from one subscriber to another using a cellular telephone number as the destination address of the message. The sender's cellular telephone number is preserved as part of the message so that the message recipient knows the cellular telephone number of the sender.

Over the past several years many companies have emerged that provide what is known as value-added text messaging services using SMS technology, meaning that they provide a variety of text messaging services (*i.e.*, SMS) that are not strictly peer-to-peer in the sense of subscriber-to-subscriber manual communications; rather, these are companies use automated computer equipment to send and receive text messages using SMS to and from individual cellular telephone subscribers. They are technically referred to as Value Added Service Providers ("VASPs") and many of them are external entities to the cellular network carriers.

VASPs are typically in the business of creating and operating text message-based applications in order to develop and maintain communication with cellular telephone subscribers for commercial purposes. The automated computer equipment that these VASPs utilize is used for a variety of text messaging applications, marketing campaigns and dialogs to communicate with cellular subscribers. Common applications are voting (the most popular example being the text message voting used to vote for contestants on the *American Idol* television program) as

well as receiving news alerts, informative notifications, coupons and sports scores where short messages are sent to cellular subscribers on a regular basis.

Moreover, these VASPs utilize equipment that has the ability to send any number of text messages *en masse* to cellular telephone subscribers as well as receive individual text messages from those subscribers. Messages sent from the branded company to a cellular subscriber are termed “mobile-terminated” and messages sent from a cellular subscriber to a branded company are termed “mobile-originated.”

VASPs send and receive text messages by connecting to the cellular carrier networks using internet-based connections and communications protocols. The primary protocol used is known as the Short Message Peer-to-Peer (“SMPP”) protocol. SMPP is an internet-based communications protocol specifically designed for communications between a VASP and a cellular network’s Short Message Service Center (“SMSC”). SMSCs are network entities that are maintained and controlled within the cellular carriers’ networks and are the store and forward repositories for text messages to be both delivered to and sent from mobile subscribers.

VASPs’ connections to the cellular network carriers are internet connections and use a special number as the address by which cellular text messages are sent and received in order to communicate with cellular subscribers. All messages sent to a particular subscriber are delivered to that subscriber’s “home” SMSC within the subscriber’s home cellular network. Since VASPs are not mobile subscribers, they are not identified by a mobile telephone number; rather, VASPs use a special number as an originating address for short text messages sent to mobile subscribers. This number is known as a “short code.” A short code is a special and unique 5- or 6-digit number that is obtained from an independent agency, the CSCA wholly owned and operated by Neustar, Inc. (“Neustar”), that manages and assigns these number resources in the U.S. on behalf

of the cellular network carriers. Individual short code numbers are leased by the VASPs to run automatic mobile text messaging applications. These numbers are provisioned (*i.e.*, programmatically stored) by the cellular network carriers so that “mobile-originated” messages can be properly sent from cellular subscribers to the correct VASP platform applications.

The short code numeric value is a virtual number and when provisioned (*i.e.*, programmatically stored) in the cellular networks, must be associated with a computing platform identified by an internet protocol (“IP”) address. In this way, these text messages can be sent from a particular VASP, identified by a particular IP address, to a particular SMS aggregator and subsequently to the wireless networks for delivery to cellular telephone subscribers. The cellular subscribers see the associated short code numeric address as the originating address of the message. Conversely, text messages can be sent from a particular cellular subscriber to a VASP, using a particular numeric short code address as the destination address of the message. The wireless networks subsequently forward that text message to the SMS aggregator and then the VASP using an IP address associated with the numeric short code.

In many cases, VASPs do not connect directly to the cellular carrier networks (*e.g.*, Verizon Wireless or AT&T Mobility). Establishing and maintaining direct connections to individual carrier networks is expensive, time consuming and technically difficult. Because of business and technical barriers, VASPs are only able to connect indirectly to the carrier networks through intermediary companies known as SMS aggregators. These SMS aggregators are in the business of connecting to multiple cellular carrier networks and reselling that connectivity to VASPs.

Aggregation of multiple cellular carrier network connections into a single connection to a VASP is highly advantageous to the VASP. First, it enables a VASP to send and receive text

messages to and from cellular telephone subscribers quickly and easily. Second, it enables the VASP to send and receive text messages to and from all mobile subscribers in the U.S. at once, regardless of which cellular carrier serves them. And third, SMS aggregators can assist in the application approval process with the cellular carriers as well as ensuring that any short codes used to access SMS applications are provisioned on all the cellular carrier networks.

D. Background about Defendant Path's and Twilio's Role in this case.

Path is a company that provides social networking services to consumers through a mobile application designed exclusively for use on cellular telephones (the "Path application"). (See <https://www.path.com>; see also Memorandum of Law in Support of Path, Inc.'s Motion to Dismiss and/or Stay, Dkt. 16; Exhibit B, Declaration of Kimberly Jabal in Support of Defendant Path, Inc.'s Motion to Dismiss and/or Stay [cited as "Jabal Decl."].) As part of its service, Path transmitted text messages to cellular telephone subscribers promoting the Path application. (See Memorandum of Law in Support of Path, Inc.'s Motion to Dismiss and/or Stay, Dkt. 16 at 4-5; see also Exhibit B, Jabal Decl., ¶¶ 10-11; Exhibit C, December 11, 2013 Deposition of Michael DiCarlo [cited as "DiCarlo Dep."], at 88:16-17, 91:8-25, 92:1-10.) In order for Path to transmit such text messages, Path integrated its servers with those of Twilio by using Twilio's application programming interface ("API").¹ (See *id.*) In these roles, Path acted as a VASP and Twilio acted as an SMS aggregator.

E. Background about Plaintiff Sterk and the text messages at issue.

On March 21, 2013, Plaintiff Sterk received a text message from the numeric short code "59730." A true and correct copy of the message is attached hereto as Exhibit D (Bates No. Sterk 0079), which reads:

¹ An "API" is essentially a programmatic method of communication between two computer systems.

Elizabeth Howell wants to
show you photos on Path.
Get the app:
<https://path.com/i/2Mt2p6>

[REDACTED]

[REDACTED]

[REDACTED]

On June 17, 2013, Plaintiff received another text message from the numeric short code “59730.” A true and correct copy of the message is attached hereto as Exhibit F (Bates No. Sterk 0080), which reads:

Kevin - Cassie Gregerson
wants to share personal
photos with you on Path!
<https://path.com/i/29ZD0M>

At the time that the above text messages were sent, short code “59730” was leased from and registered with Neustar’s CSCA by Twilio as the SMS aggregator on behalf of Path as the mobile content provider. (See Exhibit G, Bates Nos. Sterk 0001 – Sterk 0006, Sterk 0074 – Sterk 0078; see also Exhibit H, Resp. to Req. No. 9 of Defendant Path’s Objections and Responses to Plaintiff’s First Set of Requests to Admit.)

- F. Overview of intended testimony and analysis of the transmission of the text messages at issue.
-

As described further below, at any hearing in which I am called to testify, I will be prepared to testify on whether such equipment had the capacity to dial telephone numbers from lists without human intervention in a sequential manner, whether such equipment did, in fact, dial telephone numbers from lists without human intervention in a sequential manner, and whether such equipment was, in fact, used to transmit the text messages at issue. [REDACTED]

[REDACTED]

i. The Path Application.

In order to use the Path application, a mobile subscriber must first download the mobile application onto a smartphone. The application is available from the Google Play mobile application store² for Android-based smartphones and from the iTunes mobile application store³ for Apple iOS-based iPhones. Once the application is downloaded onto the user's mobile phone, the user is required to create an account, or register, with Path's central backend server (Exhibit I, Bates No. PATH000078). As part of the registration process, the Path application attempts to find family or friends to join the user's new social network by uploading contacts from various sources on the mobile device (Exhibit I, Bates Nos. PATH000079-PATH000080). These sources include contacts (*i.e.* cellular telephone numbers) from the electronic address book on the mobile phone and contacts who are associated with the user on Facebook.

According to Ms. Jabal, in her declaration, “[a] Path user may [then] choose to invite friends who are already on Path or may invite friends who are not yet on Path...” (Exhibit B, Jabal Decl., ¶10.) In order to “invite friends who are not yet on Path,” “the user can allow Path to access contact information for all of his or her friends and family and initiate text message or email invitations to more than one contact (effectively, the user can scroll through his or her contacts and select phone numbers to send multiple invitations at once). When this is done, any phone numbers selected by the user receive a text message invitation initiated by that particular user to join Path. In this group invitation scenario, the text message is delivered through an SMS

² See <https://play.google.com/store/apps/details?id=com.path>.

³ See <https://itunes.apple.com/us/app/path/id403639508?mt=8>.

short code by Twilio, a third-party vendor which provides connectivity to mobile telephone networks....” (Exhibit B, Jabal Decl., ¶11.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The text message

contained an invitation to join Path along with a hyperlink to download the Path mobile

application. (*Id.*)

[REDACTED]

G. Summary of anticipated testimony.

[REDACTED]

III. COMPENSATION

I am compensated at a rate of \$400.00 per hour for my work on this case, including for my study, analysis, and testimony in this case. To date, I have invoiced the firm \$9,480,00 for my work on this case.

IV. TESTIMONY

During the previous four years, I have testified as an expert at trial or by deposition in the following cases: *Keen v. Delta Outsource Group, Inc.*, No. 3:13-cv-00078 (M.D. Fl.); *Gragg v. Orange Cab Company, Inc.*, No. C-13-80109-JSW (DMR) (N.D. Cal.); *Benzion et al. v. Vivint, Inc.*, No. 12-cv-61826 (S.D. Fl.); *N5 Technologies LLC v. Capital One, N.A., et al.*, No. 2:12-cv-00686 (E.D. Tex.); *Wanca v. LA Fitness International, LLC*, No. 11 CH 4131 (Cir. Ct. Lake Cnty., Ill.); *Manno v. Healthcare Revenue Recovery Group, LLC*, No. 11-cv-61357 (S.D. Fl.);

Connelly, et al. v. Hilton Grant Vacations Company, LLC, No. 12CV599 JLS (KSC) (S.D. Cal.);
Lee v. Stonebridge Life Insurance Company, No. 3:2011-cv-00043 (N.D. Cal.); *Cricket
Communications, Inc. v. HipCricket, Inc.*, No. 2:08-cv-00908-MJP (W.D. Wash.); *Walker v.
Motricity, Inc.*, No. 3:08-cv-03648 (N.D. Cal.); *Rynearson v. Motricity, Inc.*, No. C08-1138MJP
(W.D. Wash.); *TeleCommunication Systems, Inc. v. Mobile365, Inc.*, No. 3:06-cv-00485 (E.D.
Va.).

Dated: January 24, 2014



Randall A. Snyder