

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

In the Matter of)	
)	
Telephone Consumer Protection Act)	CG Docket No. 02-278
)	
(Milton H. Fried, Jr., and Richard)	
Evans, for themselves and all)	
others similarly situated, Petition)	
for Expedited Declaratory Ruling)	
on Autodialer Issue)	

COMMENTS OF CRUNCH SAN DIEGO, LLC

Crunch San Diego, LLC (“Crunch”) hereby comments on the above-captioned petition for expedited declaratory ruling filed by Milton H. Fried, Jr. and Richard Evans (“Fried/Evans Petition”). By public notice released July 9, 2014, the Commission has invited public comment on the petition.¹

Introduction

Crunch operates fitness clubs in and around San Diego, California. Like many other providers of commercial products and services, Crunch sends text messages to members of its clubs and to prospective members. Crunch has found that SMS text messaging is a convenient and efficient way to communicate with its customers and to notify potential members of its services and programs. As with many such companies, Crunch arranges for a mobile marketing company to send text messages on its behalf. At all times, Crunch has endeavored to comply fully with the letter and the spirit of the Telephone Consumer Protection Act of 1991 (“TCPA”),²

¹ Public Notice – Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling on Autodialer Issue from Milton H. Fried, Jr. and Richard Evans, DA 14-977, released July 9, 2014.

² 47 U.S.C. § 227.

and with the Commission's rules implementing the TCPA.³ Neither Crunch nor any entity involved in mobile marketing on its behalf use an "automatic telephone dialing system" as that term is defined in the Telephone Consumer Protection Act of 1991 and in the Commission's rules.

As described in the Fried/Evans Petition, that petition was filed in response to an order issued by the United States District Court for the Southern Division of Texas (Houston Division).⁴ In the Fried case, plaintiffs, on behalf of themselves and others, brought a class action lawsuit against Sensia Salon, Inc. - the operator of a beauty salon in Houston, Texas, in which it alleged that the salon operator had engaged the services of a mobile technology company to communicate via text messages with existing and former customers of the salon. The complaint alleged, *inter alia*, that defendants had violated the TCPA, specifically, 47 U.S.C. § 227(b)(1)(A)(iii), which prohibits calls made using an automatic telephone dialing system (except for emergency calls and those made with the called party's prior express consent) to any telephone number assigned to a cellular telephone service.⁵ Crunch also has been named in a putative class action law suit against it based upon similar allegations.⁶

Based upon the experience of Sensia and of Crunch, it is becoming apparent that the TCPA is being misinterpreted and is being used as a "full employment act" for the class action

³ 47 C.F.R. § 64.1200.

⁴ Milton H. Fried, Jr., et al v. Sensia Salon, Inc., et al, Civil Action No. 4:13-cv-00312, issued November 27, 2013.

⁵ The Commission and federal courts have held that SMS text messages are "calls" within 47 U.S.C. § 227(b)(1)(A). Crunch does not dispute that text messages are calls for purposes of the TCPA. Of course, since the "calls" at issue are SMS text messages, the final prong of the Section 227(b)(1)(A)(iii) prohibition "using an . . . artificial or prerecorded voice" is not applicable).

⁶ Jordan Marks v. Crunch San Diego, LLC, Case No. 14-CV-0348-JAH-BLM, United States District Court for the Southern District of California.

bar. As a result, rather than protecting consumers from abusive and unwanted telemarketing calls as the TCPA was enacted to do, the TCPA is being used as a means to extort windfall payments from responsible companies who use SMS text messages to communicate with their customers, and with potential customers in an efficient manner and in a manner found desirable and convenient by those consumers.

For example, in one case, a law clerk employed by a law firm who represents plaintiffs in such actions opted in and then opted out of a major restaurant chain's text message marketing program and then commenced a legal action based on receipt of the opt out confirmation text message.⁷ In another case, a lawsuit was commenced based on a single notification message sent for the purpose of reducing unwanted texts (spam) in connection with messages sent using a free service that allows third party users to communicate with their personal contacts by sending instant messages as text messages.⁸ Many other examples could be provided to illustrate how the TCPA prohibition on sending certain SMS text messages using automatic telephone dialing systems is being exploited by the plaintiffs' class action bar to enrich themselves at the expense of responsible businesses which operate in conformance with the letter and the intent of the TCPA and the Commission's implementing rules. Indeed, during 2013 alone, approximately 1,200 putative class action law suits were filed alleging violations of the TCPA's telemarketing restrictions.⁹

⁷ Ibey v. Taco Bell, Inc., Case No. 12-CV-0583-H(WVG), 2012 WL 2401972 (S.D. Cal. June 18, 2012)

⁸ Johnson v. Yahoo! Inc., Case No. 14-cv-2028, United States District Court for the Northern District of Illinois.

⁹ See U.S. Chamber, Institute for Legal Reform, The Juggernaut of TCPA Litigation at 1 (Oct. 2013) ("TCPA Juggernaut"), http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF.

The Commission's role in promulgating regulations to implement the TCPA and in enforcing those regulations is to protect consumers and to advance the public interest. Its role should not be to facilitate an abuse of the statute by overzealous class action litigators. Yet, that is what has happened and will continue to recur until such time as the Commission brings clarity to the meaning of automatic telephone dialing system within the ambit of 47 U.S.C. § 227(a)(1).

The TCPA Prohibition on Calls to Cellular Telephones and Other Wireless Devices Only Applies to Calls Made using Automatic Telephone Dialing Systems

At issue is the meaning of the statutory term “automatic telephone dialing system” as used in the TCPA. Section 227(b)(1)(A)(iii) makes it unlawful for any person within the United States or any person outside the United States if the recipient is within the United States to make any call (other than for emergency purposes or with the called party's prior express consent) “*using any automatic telephone dialing system or an artificial or prerecorded voice*” to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service in which the called party is charged for the call.¹⁰

Importantly, Section 227(b)(1)(A)(iii) does not prohibit all calls to cellular telephone or other wireless services. It only prohibits such calls when made using an “automatic telephone dialing system.” The TCPA defines “automatic telephone dialing system” as follows: “. . . 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.”¹¹

¹⁰ 47 U.S.C. § 227(b)(1)(A)(iii).

¹¹ 47 U.S.C. § 227(a)(1).

This statutory definition of “automatic telephone dialing system” is explicit, specific and clear. There are no ambiguities and no room for modification, contraction or expansion of the term either by the Commission or by courts.

In its petition for declaratory ruling, Fried/Evans rely on an overly expansive interpretation of the Commission’s 2003 determination that the restrictions on calls made using automatic telephone dialing systems should not be circumvented simply by using equipment labeled “predictive dialer” if the system conforms with the statutory definition codified at 47 U.S.C. § 227(a)(1). In In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd 14014 (2003), the Commission concluded on the basis of legislative intent that predictive dialers, which the Commission defined as “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,” are subject to the restrictions on automatic telephone dialing systems under the TCPA.¹² In recognizing the widespread use by telemarketers of predictive dialers, the Commission never stated that predictive dialers need not meet the statutory definition of an “automatic telephone dialing system” and instead offered the following explanation: “We believe that the purpose of the requirement that equipment ‘have the capacity to store or produce telephone numbers to be called’ is to ensure that the prohibition on autodialed calls not be circumvented.”¹³

The technology used to send the text message in the underlying class action is neither a predictive dialer nor an “automatic telephone dialing system” as defined by the TCPA, yet the petition seeks an expansion of the term “automatic telephone dialing system” that goes way

¹² 18 FCC Rcd 14014, at ¶ 8 n.31.

¹³ 18 FCC Rcd 14014, at ¶ 133.

beyond the statutory language. Specifically, Fried/Evans asks the Commission to adopt an overbroad definition of “automatic telephone dialing system” to mean “a system comprised of one or more pieces of equipment that together have the capacity to ‘read’ telephone numbers stored in a list (*e.g.*, spreadsheet) or database and to direct messages to those phone numbers without human intervention.” Fried/Evans Petition at 8. In support, Fried/Evans also rely on a 2011 U.S. District Court decision, Griffith v. Consumer Portfolio Service, Inc., which concluded that the Commission “interpreted ‘automatic telephone dialing system’ to include equipment that utilizes lists or databases of known, nonrandom telephone numbers.”¹⁴ There is a fundamental problem with that conclusion because the definition of “automatic telephone dialing system” offered by Fried/Evans in no way reflects or tracks the clear and express terms of the statute. The analysis offered by the Griffith court also runs counter to the limits on agency deference in matters of statutory interpretation that were imposed by the United States Supreme Court three decades ago in Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The Court in Chevron noted that two questions must be considered by courts in reviewing an agency’s interpretation of the statute it administers. First, the reviewing court must determine whether the legislature (in this case, as in Chevron, Congress) has spoken to the issue. If the intent of the legislature is clear, the agency has no discretion to interpret unambiguously expressed legislation. Second, if it is determined that the legislature has not directly addressed the question at issue, *i.e.*, if the statute is silent or ambiguous, then an agency’s reasonable interpretation of the statute is entitled to deference.¹⁵ Accordingly, when a statute is clear on its face, there is no reason for any court or the agency charged with implementation of that statute to speculate or opine on what might have been the legislature’s purpose in enacting the statute.

¹⁴ 838 F. Supp. 2d 723, 727 (N.D. Ill. 2011).

¹⁵ 467 U.S. at 843.

It is difficult to imagine statutory language more clear and less ambiguous than the statutory definition of automatic telephone dialing system. Indeed other courts, including appellate courts have concluded correctly that the statutory definition of “automatic telephone dialing system” is “clear and unambiguous” and that a court’s analysis (and implicitly, the Commission’s analysis) “begins and ends with the statutory text.” See, e.g., Satterfield v. Simon & Schuster, Inc. 569 F. 3d 946, 951 (9th Cir. 2009).¹⁶ There is nothing ambiguous about “store or produce telephone numbers to be called,” “random or sequential number generator,” or “dial such numbers.” The Supreme Court and virtually all other courts follow the plain meaning rule of statutory construction – where a statute is clear on its face, there is no reason to look beyond the plain meaning of the statutory language to ascertain the legislature’s intent. As recently, as May 27, 2014, the Supreme Court again applied the plain meaning rule in Michigan v. Bay Mills Indian Community.¹⁷ In that case, the Court declined an invitation from the State of Michigan to deviate from the plain meaning of a statute based on the State’s assertion that Congress meant to say something else. In declining that invitation, the Court stated as follows: “[b]ut this Court does not revise legislation as Michigan proposes, just because the text as written creates an apparent anomaly as to some subject it does not address.”¹⁸ The Supreme Court went on to state that “it has no roving license, in even ordinary cases of statutory interpretation, to disregard clear statutory language simply on the view . . . that Congress ‘must have intended’ something broader.”¹⁹

¹⁶ See also Dominguez v. Yahoo, Inc., 2014 W.L. 1096051 (E.D. PA, decided March 20, 2014), a recent federal district court which was decided based on the Ninth Circuit’s rationale in Satterfield.

¹⁷ No. 12-515.

¹⁸ *Id.*, Slip Opinion at 10.

¹⁹ *Id.* At 11.

Notwithstanding the Fried/Evans petition’s expansive reading of the TCPA’s statutory language, the Commission did not at any time purport to modify the statutory definition of automatic telephone dialing system. In fact, the Commission’s definition set forth in its rules is identical to the statutory definition.²⁰ The only way to reconcile the Commission’s 2003 statement regarding predictive dialers with the plain meaning of the statutory definition of “automatic telephone dialing system” is to restrict calls or text messages sent using predictive dialers only when they have the capacity to store or produce numbers to be called using a random or sequential number generator and to dial such numbers.

It may well be the case that automated calling technology has evolved since enactment of the TCPA in 1991 and that the codified definition of automatic telephone dialing system should be changed to reflect current technology rather than 1991 technology. However, given the specificity and clarity of the statutory definition, such changes are within the purview of Congress.²¹ Neither the Commission, the courts, nor class action lawyers, have the authority to revise or expand a clear and unambiguous statutory definition based on their opinion that the definition may no longer be appropriate.²²

²⁰ 47 C.F.R. § 64.1200(f)(2) (“The terms *automatic telephone dialing system* and *autodialer* mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.”).

²¹ Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 376 (1986) (“As we so often admonish, only Congress can rewrite [a] statute.”).

²² An example of the kind of legal mischief which has followed the Commission’s 2003 expansive re-interpretation of the statutorily-defined term “automatic telephone dialing system” occurred on July 22, 2014. On that date, plaintiff filed its opposition to defendant’s motion for summary judgment in Jordan Marks v. Crunch San Diego Case No. 14-cv-00348-BAS-BLM (U.S. District Court for the Southern District of California). On page 2 of its opposition, plaintiff states that the Commission “clarified” the definition of automatic telephone dialing system to include equipment that can automatically dial telephone numbers from a list or database without human intervention. That assertion is specious since the Commission does not have the authority to “clarify” a Congressionally-enacted statutory definition. Only Congress has that authority.

The Commission's 2003 explanation for concluding that predictive dialers are subject to the restrictions of the TCPA is also telling. As noted above, the Commission stated, in part, its belief that the purpose for the Section 227(b)(1)(A)(iii) requirement is to ensure that the "prohibition on *autodialed* calls not be circumvented."²³ Whatever the Commission may have thought about Congressional intent regarding "autodialed" calls is not relevant and provides no basis for abandoning the plain meaning of the statutory definition. "Autodialed" is not a statutory term in the TCPA. Indeed, "autodialed" is not even mentioned in the TCPA. "Automatic Telephone Dialing System" is a statutory term and is defined in the TCPA with precision and specificity. If Congress had intended to prohibit or limit "autodialed" calls rather than only calls made using "automatic telephone dialing systems," it could have done so and defined what it meant by "autodialed" calls. Rather, it explicitly prohibited one certain category of calls – calls made using automatic telephone dialing systems -- and defined that category with clarity and specificity.

When Congress wishes to empower the Commission with authority to decline to apply or enforce statutory provisions or to deviate from statutory requirements, it does so explicitly. For example, Section 10 of the Communications Act²⁴ authorizes the Commission to forbear from application or enforcement of provisions of that act against telecommunications carriers or telecommunications services or classes of telecommunications carriers or telecommunications services. When the requisite showings have been made, the Commission may (in fact, it shall) forbear from imposing statutory requirements on telecommunications carriers and services in specific instances. Congress did not provide the Commission with any such forbearance authority in the TCPA. In the absence of such authority, the Commission must apply and

²³ 18 FCC Rcd 14014 at ¶ 133 (emphasis added).

²⁴ 47 U.S.C. § 160.

enforce the statute as enacted by Congress; not as it believes may be better suited to changes in technology or changes in the marketplace. That is especially so where, as here, the statute contains an explicit and unambiguous definition of the key statutory term.

Finally, it should be noted that the United States Department of Justice has concluded that interpreting the statutory term “automatic telephone dialing system” in a manner consistent with the plain meaning of the statutory definition is necessary to safeguard the statute from unconstitutional overbreadth.²⁵

Conclusion

For the reasons described in these comments, Crunch respectfully urges the Commission to conclude that Congress defined the statutory term “automatic telephone dialing system” clearly and unambiguously in the TCPA, that the Commission under Chevron and decades of judicial adherence to the plain meaning rule of statutory interpretation has no authority to modify that definition, and that prior Commission pronouncements and interpretations of such pronouncements which define “automatic telephone dialing system” in a manner contrary to the plain meaning of the statutory definition should be disavowed.

Respectfully submitted,

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²⁵ De Los Santos v. Millward Brown, Inc., U.S. Dist. LEXIS 88711 (S.D. FL. June 29, 2014).
United States Memorandum In Support of the Constitutionality of the TCPA.