Before the
Federal Communications Commission
Washington, D.C. 20554

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

Comments of Joe Shields on the Petition

For Expedited Declaratory of Milton H. Fried, Jr. and Richard Evans

The Commission seeks comments on the petition filed by Milton H. Fried, Jr. and Richard Evans for themselves and all others similarly situated for an expedited declaratory ruling terminating a controversy or removing uncertainty in an action pending in the United States District Court for the Southern District of Texas regarding whether certain equipment, either individually or combined, constitutes an "auto-dialer" within the meaning of the Telephone Consumer Protection Act ("auto-dialer issue").

Courts that have addressed the issue of whether text messages are "calls" have been unified in their decisions. See *Satterfield v Simon & Shuster Inc*., 569 F.3d 946, 954 (9th Cir.2009); *Joffe v. Acacia Mortgage Corp*., 121 P.3d 831 (Ariz. App. 2005), *Lozano v. Twentieth Century Fox Film Corp*., 702 F. Supp. 2d 999 - Dist. Court, ND Illinois 2010; *Abbas v. Selling Source, LLC*, No. 09-CV-3413, 2009 WL 4884471 (N.D. Ill. Dec. 14, 2009) and *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165 (N.D. Cal. 2010).

The Commission has also held that text messages are calls. "We affirm that under the TCPA, it is unlawful to make any call using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number …This encompasses both voice calls **and text calls to wireless numbers** including, for example,

short message service (SMS) calls, provided the call is made to a telephone number assigned to such service." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd. 14014, 14115 (July 3, 2003).

How a text message originates or is delivered to the wireless carrier is immaterial. The excuse that text message calls are not dialed is a red herring. The issue is how the text message was delivered to the cell phone. For a text message to be delivered to a cell phone the destination address requires a cell phone number. Any reasonable person will agree that an incoming text message causes a cell phone to “ring” just as an incoming call does. Thus the text messages in question are telephone calls made to a cellular telephone number.

Since text messages are calls they fall under the automatic telephone dialing system (hereinafter “ATDS”) requirements of the TCPA. The petition references a case filed in federal court where the Defendant claims that the text message calls in question were not initiated by an ATDS. The Defendant claims that because the text message calls were made by separate “pieces” of equipment the text message calls were not initiated by an ATDS. Even though the excuse is innovative the fact remains that the functions of each piece of equipment must be combined for the initiation of a text message call to occur. If one separates the functions of an automatic dialer one has not changed the overall function or purpose which is to automatically initiate text message calls without human intervention.

The defendant also claims that each piece of equipment does not have the capacity of random or sequential number generation. The definition of what constitutes

an ATDS has been oft misconstrued by those seeking to escape liability under the TCPA. The phrase "…random or sequential number generator…" modifies only the production of telephone numbers[1]. It does not modify the "…storing…" of telephone numbers and then to "…dial…" those stored numbers. A plain reading of the statute, when leaving out the random or sequential production of numbers states: "…has the capacity…to store…telephone numbers to be called and to dial such numbers."

Do the separate "pieces" of equipment have the capacity to store telephone numbers to be called and then to dial such numbers? The answer is yes as the "paired" equipment did in fact initiate text message calls without human intervention. The FCC has stated, in regard to the question of whether a predictive dialer is an ATDS, that: "The hardware, **when paired** with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act Of 1991*, 18 FCC Rcd. 14104, 14091-93 (July 3, 2003). Obviously and as shown in the petition, pieces of hardware and software were paired for the purpose of transmitting text message calls. This occurred without human intervention. Thus it is crystal clear that the system used to transmit the text message calls was an ATDS.

As technology advances so do the innovative attempts to circumvent the TCPA. Some petitioners are relentless and file petitions every 2 years seeking to circumvent the definition of ATDS. The ACA, a debt collection special interest group, has blatantly asked the Commission to provide them with a predictive dialer configuration that the Commission will not consider an ATDS[2]. The claims that text messages calls are not

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[1] See last antecedent rule.
[2] ACA International's Petition for Rulemaking, CG Docket No. 02-278 (Jan. 21, 2014)

dialed or that they are not made by an ATDS when spread across separate pieces of equipment although innovative is a similar attempt to circumvent the TCPA. "…the TCPA is a remedial consumer protection statute and "should be liberally construed and interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers." *Scarborough v. Atlantic Coast Line R. Co.* 178 F.2d 253, 258 (4th Cir. 1950) [see Heydon] "Exemptions from provisions of remedial statutes "are to be construed narrowly to limit exemption eligibility" *Hogar v Suarez-Medina* 36 f3rd, 177, 182 (1st circ 1994). "To suppress subtle inventions and evasions for continuance of the mischief" *Cummings v Kansas City Public Service Co.* 334 Mo 672,698-99.

The Commission has acted wisely in their prior determinations on what constitutes an ATDS and that text messages are calls. There is no reason here to walk back those determinations. The Commission should rule in favor of the petitioner and hold that a device that: "…has the capacity…to store…telephone numbers to be called and to dial such numbers…" is an ATDS. Further, the Commission should maintain its determination that text messages are calls. The Commission should side with the petitioner on the issues raised by the petition.

Respectfully submitted,

_____/s/_____

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