flowroute

COLLEEN MARTIN
GENERAL COUNSEL

+1 (206) 641-8081
cmartin@flowroute.com

May 30, 2014

SENT VIA PRIORITY MAIL

Mr. Joe Shields
16822 Stardale Lane
Friendswood, Texas 77546

Re: Demand Letter

Dear Mr. Shields:

We are in receipt of your letter dated May 19, 2014 (the "Demand Letter") to Messrs. Towfiq, Hsieh and Levy of Flowroute LLC ("Flowroute"), containing a settlement demand and attaching an unfiled Complaint For Civil Damages And Permanent Injunctive Relief (the "Complaint"). In the Letter, you threaten to file the Complaint unless Flowroute pays you the sum of $2,000.

We hereby inform you that, as applied to Flowroute and Messrs. Towfiq, Hsieh and Levy (collectively, the "Flowroute Defendants"), the allegations and theories in the Complaint are meritless,[1] and accordingly Flowroute rejects your offer for settlement. Indeed, those allegations and theories are so deficient that they are frivolous and reflect your failure to perform a reasonable inquiry prior to filing the Complaint, as required under F.R.C.P. Rule 11. If you file the Complaint and commence process against the Flowroute Defendants, then Flowroute will use all legal means necessary to defend the Flowroute Defendants and seek all available remedies against you.

A brief response to some of the fatally flawed factual and legal assertions in the Complaint is as follows:

1. In acting solely as a network service provider, Flowroute is not liable for any alleged violation by its customers of the Telephone Consumer Protection Act ("TCPA").

Although the Complaint names the Flowroute Defendants as defendants, there are no factual allegations and/or legal theories that would properly form the basis of a TCPA violation against the Flowroute Defendants. In paragraph 19 of the Complaint, you summarily assert that "Flowroute need not be the one that actually initiate the robocalls to be equally and severally liable for the violation of the TCPA. The TCPA, the FCC and the courts hold that under the strict vicarious liability of Federal law those that benefit from violations of the TCPA are liable for such violation(s)." You do not cite, nor could you cite, any legal authority that supports your assertion. In contrast, the FCC has clearly stated that network providers that merely provide use of their networks to customers are not liable for any TCPA violations of their customers. *See, e.g., In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,*

[1] We express no opinion herein regarding the accuracy or validity of facts and theories in the Complaint as applied to Avatar Technologies, Phl. Inc. ("Avatar").

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Report and Order, 18 FCC Rcd 14014 (2003). That is the case here: Flowroute does nothing more than provide digital voice transport services to Avatar. Flowroute does not engage in any telemarketing, does not operate an automatic telephone dialing system or predictive dialer, and does not make or initiate calls; Flowroute is a mere conduit. Flowroute has no agreement with Avatar other than for the provision of those digital voice transport services. In January 2014, the United States District Court for the Southern District of Texas Houston Division held that the TCPA does not impose secondary liability on a defendant other than the one who violated the statute. Under the TCPA, it is unlawful to "make any call" that otherwise violates the statute. The TCPA does not impose liability on a party that did not "make any call." *See Clark v. Avatar Technologies Phl, Inc.*, at page 6-7. (For your convenience, I am enclosing a copy of the Memorandum and Order issued by the Court.) *See also Baltimore-Washington Tel. Co. v. Hot Leads Co., LLC,* 584 F. Supp. 2d 736 (D. Md. 2008). In *Clark v. Avatar Technologies Phl, Inc.*, the Court dismissed with prejudice the TCPA claims against Flowroute. *See Clark v. Avatar Technologies Phl, Inc.*, at page 8.

You also misconstrue 47 U.S.C. § 206. "The Communications Act, §§ 206, 207, provides that a suit may be brought in federal court for damages resulting from a *common carrier's violation* of the Act . . . ." *See Ivy Broadcasting Company, Inc. v. American Telephone and Telegraph Company,* 391 F.2d 486 (1968), at 489 (emphasis added). As explained above, Flowroute has not violated any provision of the Act, so cannot be held liable under 47 U.S.C. § 206.

You cite no legal authority, nor could you cite any legal authority, for imposing liability on Messrs. Towfiq, Hsieh and Levy.

2. <u>In acting solely as a network service provider, Flowroute is not liable for any alleged violation by its customers of Section 305 of the Texas Business and Commerce Code ("TBCC").</u>

Section 305.053 of the TBCC clearly states that a person who receives a communication that violates Section 227 of the TCPA may bring an action against "the person *who originates* the communication . . . ." See TBCC § 305.053 (emphasis added). As explained above, Flowroute does not make or originate calls. Section 305 of the TBCC does not impose secondary liability on a common carrier. In fact, Section 305.051 states that "a telephone company serving the caller or the called person is not responsible for investigating a complaint or keeping records relating to this chapter." See TBCC § 305.051(b).

3. <u>You have failed to make even a cursory investigation of the underlying facts and therefore are acting in bad faith in sending the Demand Letter.</u>

In Paragraph 9 of the Complaint you summarily assert that "Flowroute is the subscriber to the telephone numbers used by the Defendant Avatar." However, we have no record of the phone numbers 281-315-1008 or 847-600-4906 ever having been assigned to Flowroute and you provide no such evidence. As you will recall, on September 27, 2013 Flowroute responded to a subpoena issued on September 23, 2013 by the United States District Court of the Southern District of Texas at your behest seeking the full name and contact information for telephone number 281-674-7327 as of September 12, 2013. In its response to the subpoena, Flowroute

identified Avatar as the subscriber to such phone number. Upon receipt of your Demand Letter, we investigated our call records and have determined that there was no call made from 281-674-7327 to 281-468-9701 using Flowroute's network on September 12, 2013. Additionally, Flowroute does not configure its system to route second calls to a CID number used by Avatar (or any other customer) to a not in service recording and you have no foundation for asserting such.

4. The Do Not Call rules and the Telemarketing Sales Rule ("TSR") do not apply to Flowroute because Flowroute was acting as a common carrier.

In the Demand Letter, you order Flowroute to place your cellular telephone numbers on Flowroute's do-not-call list. However, as stated above Flowroute does not engage in any telemarketing, does not operate an automatic telephone dialing system or predictive dialer, and does not make or initiate calls; Flowroute is a mere conduit. Consequently, the do not call rules do not apply to Flowroute. As a courtesy to you, we have asked Avatar to place your cell phone numbers (281-468-9701 and 281-455-9402) on its do not call list and Avatar has confirmed that it has placed the number on its do not call list.

The Demand Letter implies that Flowroute violated the TSR by "assisting and facilitating" a telemarketer. However, the Federal Trade Commission (the "FTC"), when adopting the TSR, specifically excepted activities outside the FTC's jurisdiction. *See Telemarketing Sales Rule*, 60 Fed. Reg. 43842, 43843 (1995). The FTC lacks jurisdiction to regulate telecommunications common carriers such as Flowroute. In *Clark v. Avatar Technologies Phl, Inc.*, the Court held that the TSR does not apply to Flowroute and dismissed with prejudice any such claims against Flowroute. *See Clark v. Avatar Technologies Phl, Inc.*, at page 8.

The discussion above is certainly not exhaustive, and Flowroute will bring all other appropriate defenses and counter claims if your Complaint is filed and served. Your Complaint against Flowroute is so meritless that it is obvious you did not perform a reasonable inquiry into the factual contentions and legal claims therein and as such will fail.

If you have any questions, please contact the undersigned at (206) 641-8081.

Very truly yours,

Colleen Martin
General Counsel

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