

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
MILTON H. FRIED, JR., and) CG Docket No. _____
RICHARD EVANS, for themselves)
and all others similarly situated,)

**FIRST AMENDED
PETITION FOR EXPEDITED DECLARATORY RULING
ON AUTODIALER ISSUE**

In accordance with section 5(d) of the Administrative Procedure Act and Section 1.2 of the Federal Communications Commission (“the Commission”), Petitioners Milton H. Fried, Jr. and Richard Evans, for themselves and all others similarly situated, move the Commission 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”).

Pursuant to the terms of a settlement agreement with one of the parties to the underlying litigation, Messrs. Fried and Evans amend their petition to remove any reference to the identity of the settling defendant. Otherwise, the Petition is the same as the original in all aspects.

Referral Order

This Petition is filed pursuant to the Memorandum and Order of the Honorable Nancy F. Atlas, United States District Judge, in *Fried v. Sensia Salon, Inc.*, No. 4:13-cv-00312 (S.D. Tex) (Docket Entry 85, filed Nov. 27, 2013) (“underlying litigation”). In the Order, Judge Atlas refers the auto-dialer issue to the primary jurisdiction of the Commission. A copy of the Order is attached hereto as **Exhibit A** and is incorporated herein by this reference. The Order succinctly describes the background and positions of the parties interested in the declaration that Petitioners seek from the Commission.

Equipment at Issue

In the course of the underlying litigation, Defendants described their equipment and its functions in several sworn statements. These statements are attached hereto as **Exhibit B, Exhibit C, Exhibit D, and Exhibit E**, and are incorporated herein by this reference. Also, see Order at 12.

Related Petitions Now Pending

Petitioners’ research shows that the following six pending petitions raise issues related to the dialer issue presented in this Petition:

Proceeding Number: [RM-11712](#)
Name of Filer: ACA International
View Filing: [View \(23\)](#)
Type of Filing: PETITION FOR RULEMAKING
Date Received: 02/11/2014
Date Posted: 02/12/2014

Proceeding Number: [PRM13CG](#)
Name of Filer: Professional Association for Customer Engagement
View Filing: [View \(13\)](#)

Type of Filing: PETITION
Date Received: 10/18/2013
Date Posted: 11/18/2013

Proceeding Number: [02-278](#)
Name of Filer: Communication Innovators
View Filing: [View \(26\)](#)
Type of Filing: PETITION
Date Received: 06/07/2012
Date Posted: 06/08/2012

Proceeding Number: [02-278](#)
Name of Filer: GroupMe, Inc./Skype Communications S.A.R.L
View Filing: [View \(24\)](#)
Type of Filing: PETITION
Date Received: 03/01/2012
Date Posted: 03/07/2012

Proceeding Number: [02-278](#)
Name of Filer: Glide Talk, Ltd
View Filing: [View \(21\)](#)
Type of Filing: PETITION
Date Received: 10/28/2013
Date Posted: 11/05/2013

Proceeding Number: [02-278](#)
Name of Filer: YouMail, Inc.
View Filing: [View \(22\)](#)
Type of Filing: PETITION
Date Received: 04/22/2013
Date Posted: 04/22/2013

Related Rulings

2003 TCPA Order, 18 FCC Rcd at 14091, para. 131: Explaining that "a predictive dialer is equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. 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... [i]n most cases, telemarketers program the numbers to be called into the

equipment, and the dialer calls them at rate to ensure that when a consumer answers the phone, a sales person is available to take the call."

FCC 07-232, Declaratory Ruling on Request of ACA International (Released Jan. 4, 2008), at 8: Affirming that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA's restrictions on the use of autodialers.

Discussion

In efforts to promote the sale of salon and spa products and services and to promote its trade name generally, ~~Defendant Sensia Salon, Inc.~~, a beauty salon and spa located in Houston, Texas, engaged mobile technology company Defendant Textmunications, Inc., ("Textmunications") to conduct an especially pernicious form of marketing: the unauthorized transmission of advertisements and other messages in the form of "text message" calls to the cellular telephones of consumers throughout Texas.

In turn, Textmunications contracted or was under contract with Defendant Air2Web, a division of Velti, Inc. ("Air2Web") to transmit or cause to be transmitted to cellular telephones via the equipment of Air2Web data and messages obtained from customers of Textmunications, ~~like Sensia~~, that Textmunications stored in its databases and then uploaded to Air2Web's equipment. Whether or not ~~Sensia~~ the salon, Textmunications or Air2Web ultimately "dialed" the consumer's phone number, each had a high degree of involvement in the transmissions.

The customer data of ~~Sensia~~ the salon was transmitted to Textmunications and stored in its computer equipment and databases. Textmunications used its access to Air2Web's equipment and systems to upload ~~Sensia's~~ the salon's customer data and

advertising or other messages into Air2Web's equipment from which it was blasted directly or indirectly in the form of SMS text messages to the cellular telephones of Sensia's former or current customers through a common carrier such as Verizon.

The arrangement between Textmunication and Air2Web was designed to circumvent the regulations of the Federal Communications Commission and/or the Federal Trade Commission that implement the TCPA. FCC regulations implementing the TCPA forbid the transmission of SMS text calls to cellular phones via automatic telephone dialing systems without the express prior consent of the recipient.

Automatic telephone dialing systems ("ATDS") are defined in terms of data storage and transmission capabilities. The separated equipment of Textmunications and Air2Web were established by them to divide the data storage and data transmission functions of SMS text message transmission equipment between these two companies so that no single company possessed all the necessary capacities to meet the definition of an automatic telephone dialing system.

Alternatively, the combined equipment and capacities of Textmunication, Air2Web, and various mobile telecommunication carriers constitute an automatic telephone dialing system within the meaning of the TCPA and FCC regulations.

Petitioners Milton H. Fried, Jr., and Richard Evans are former customers of ~~Sensia Salon, Inc.~~ ("Sensia")the salon. Petitioners received unsolicited text messages from ~~Sensia~~the salon on their cell phones and did not consent to receive such messages.

The TCPA applies to text messages. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952–53 (9th Cir.2009).¹ In order to establish a violation of the TCPA, a plaintiff must demonstrate that a defendant called or texted a number assigned to a cellular telephone service using an automatic telephone dialing system. See *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316, 1319 (S.D. Fla. 2012).

Textmunications and Air2Web argued in the underlying action that they did not use an ATDS to call Petitioners, because “the hardware utilized by Air2Web does not have the capacity to *store or produce numbers and dial those numbers at random, in sequential order*, or from a database of numbers, with or without human intervention.”

This is a crafty but inaccurate argument both because the ability of an ATDS to produce numbers at random or in sequential order is completely irrelevant under the applicable FCC regulations, and also because this argument focuses only on the ability of Air2Web’s equipment to store numbers but ignores the ability of Textmunications’ equipment to store them. As there is no requirement that the “dialer” itself store the called numbers, *Griffith v. Consumer Portfolio Serv., Inc.*, 838 F. Supp. 2d 723, 727 (N.D. Ill. 2011), the arrangement between Textmunications and Air2Web must be examined to

¹ The TCPA makes it unlawful “to make any call” using an ATDS. 47 U.S.C. § 227(b)(1)(A). While the TCPA does not define “call,” the FCC has explicitly stated that the TCPA’s prohibition on ATDSs “encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls....”

Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 952 (9th Cir. 2009) (citing *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd. 14014, 14115 (July 3, 2003)). Because the statute addresses “calls,” the fact that a messaging system does not “dial” a telephone number is irrelevant.

determine whether their combined equipment and efforts for Sensia constituted the use of an ATDS.

The *Griffith* case is the only recent case located by Petitioners that discusses in detail the kinds of equipment that constitute an ATDS within the meaning of the TCPA. In that case, the court was presented with a “predictive dialer” system that did not call randomly or sequentially produced telephone numbers. Instead, it culled information including phone numbers from a company computer’s “Customer Information File” and loaded those data fields into a new temporary computer file called the “Dialer File.” *Id.* at 724. A supervisor established criteria for a calling campaign, and then a computer program reviewed the Dialer File for accounts that satisfied the criteria and copied those accounts and associated telephone numbers into a new file called the “Logical View File.” A separate piece of equipment (the “dialer”) then “read” information stored in the Logical View File and placed calls to customers. *Id.*

The *Griffith* court reviewed the TCPA and the FCC regulations implementing it. The court noted that, while the TCPA defines an ATDS in terms of the technology that existed at the time of its enactment, FCC regulations have interpreted it to reach evolving equipment that did not perform the same tasks as the obsolete equipment. *Id.* at 725. In *Griffith*, predictive dialers were argued not to be within the TCPA because they call, as in the case at bar, intended numbers from a database instead of unintended numbers produced randomly or sequentially. *Id.* at 726.

The *Griffith* court wrote:

The FCC effectively rejected these [arguments], concluding that “a predictive dialer falls within the meaning and statutory definition of ‘automatic telephone dialing equipment’ and the intent of Congress.” *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14093 (July 3, 2003). The technology had changed, but the basic function of such equipment—“the *capacity* to dial numbers without human intervention”—had not. *Id.* at 14092 (emphasis in original).

838 F. Supp. 2d at 726.

In a subsequent request for clarification, the FCC again rejected the argument that a predictive dialer meets the definition of autodialer only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists. *Id.* (citing *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd 559, 566 (Jan. 4, 2008)). The current FCC interpretation of “automatic telephone dialing system” includes equipment that utilizes lists or databases of known, nonrandom telephone numbers. 838 F. Supp. 2d at 727.

Likewise, the *Griffith* court found no support in the statute or the FCC’s rulings for the argument that the dialer itself must “store” telephone numbers and/or predictive dialing software.

The statute regulates “equipment,” not “dialers,” so it is irrelevant for our purposes that the Castel dialer works in tandem with CPS’s Collections System. *** Indeed, the FCC plainly intended to prevent companies from circumventing the statute in this fashion. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd at 14092–93.

Id. (citation omitted).

Accordingly, the applicable law defines an automatic telephone dialing system as 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. For this reason, Petitioners contend that Sensia, through Textmunications and Air2Web, used an auto-dialer within the meaning of the TCPA to send them unsolicited SMS text messages.

CONCLUSION

For all of these reasons, Petitioners ask the Commission to issue a declaratory ruling that Sensia-the salon used an auto-dialer to send SMS text messages to Petitioners.

Dated: ~~May 27~~August, 2014

Respectfully submitted,

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