

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CODEBROKER, LLC)

Plaintiff,)

v.)

FEDERAL COMMUNICATIONS)
COMMISSION)

Respondent.)

Civil Case No. 15-1278

PETITION FOR REVIEW

ORIGINAL

Pursuant to 5 U.S.C. § 706, 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344, and Federal Rule of Appellate Procedure 15(a), Petitioner CodeBroker, LLC (“Petitioner”) hereby petitions this Court for review of the Federal Communications Commission’s (“Respondent’s”) order captioned *In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72 (released July 10, 2015) (the “Declaratory Ruling and Order”). A copy of the Declaratory Ruling and Order is attached to this Petition as Attachment A. Pursuant to 28 U.S.C. § 2343 venue for this proceeding is proper in this Court.

The Declaratory Ruling and Order’s treatment of “prior express written consent,” particularly with respect to its treatment of reassigned wireless telephone numbers and the means through which such consent may be revoked and further the burden placed upon the caller is arbitrary, capricious, an abuse of Respondent’s discretion, and in conflict with a caller’s right of due process.

Specifically and further, with respect to the Declaratory Ruling and Order, Petitioner seeks relief on the following grounds:

1) The Declaratory Ruling and Order's allowance for the revocation of prior express written consent through "through any reasonable means" by a consumer is arbitrary, capricious, an abuse of Respondent's discretion, and in conflict with a caller's right of due process, *See* Declaratory Ruling and Order ¶¶ 63 – 64.

2) The Declaratory Ruling and Order's treatment of "prior express written consent," especially with respect to its requirement that callers obtain new prior express written consent for *each* call or text message made to a wireless number is confusing and such that it may be interpreted in more than one manner. The language specifically as issue states

"that our prior-express-written-consent requirements apply for each call made to a wireless number, rather than to a series of calls to wireless numbers made as part of, for example, a marketing or advertising campaign as a whole. . . . It follows that the rule applies per call and that telemarketers should not rely on a consumer's written consent obtained before the current rule took effect if that consent does not satisfy the current rule[]"

id. ¶ 100. The potential interpretation of this "clarification" that the Declaratory Ruling and Order would require a new consent for each text message to a wireless number for each message sent in the second sentence of ¶ 100 conflicts directly with the fourth sentence of ¶ 100 and with the Commission's reiteration of the 2012 TCPA Order¹ in ¶ 101 and confirmation that written consent once obtained remains valid for subsequent contacts to a consumer on the same wireless phone number. Because this section is confusing and does not clarify the previous language of the TCPA it is therefore arbitrary, capricious, an abuse of Respondent's discretion, and in conflict with a caller's right of due process, *id.* ¶¶ 101.

¹ *Report and Order*, 27 FCC Rcd 1857, para. 68 (2012) (2012 TCPA Order).

3) The Declaratory Ruling and Order improperly define the term “called party” for the purposes of the consent provisions under the TCPA as the “current subscriber (or non-subscriber customer user of the phone)” rather than the “intended recipient” *id.* ¶ 72, and gives the caller a single call before imposing liability for any calls made to numbers that have been reassigned to other consumers, who have not have previously expressly consented, by the carrier without notice to the caller, *id.* ¶¶ 85-97.

4) The Declaratory Ruling and Order is contrary to the Constitution of the United States and is arbitrary, capricious, and an abuse of Respondent’s discretion in that it disregards Congress’s findings in the Telephone Consumer Protection Act, the statute under which Respondent’s authority and jurisdiction over the matters at issue arise.

WHEREFORE, Petitioner respectfully requests that this Court:

1) hold unlawful and set aside Respondent’s treatment of text messages sent to reassigned wireless telephone numbers and compel Respondent to treat callers who send text messages in a way that comports with a caller’s rights of due process and freedom of speech; and

2) hold unlawful and set aside Respondent’s treatment of prior express consent in the Declaratory Ruling and Order, including Respondent’s determinations relating to the unlimited “any reasonable” means for the revocation of prior express written consent, requiring at a minimum that such revocation be made via a means through which the caller communicates to the consumer; and

3) hold unlawful and set aside Respondent’s treatment of prior express written consent in the Declaratory Ruling and Order, including Respondent’s determinations relating to the requirement that caller’s seek prior express written consent for each call or text message sent to a wireless number; and

4) hold unlawful and set aside Respondent's treatment of prior express written consent in the Declaratory Ruling and Order, including the Respondent's treatment of reassigned numbers, and compel the Respondent to either:

a) establish a viable safe harbor for text messages sent to reassigned wireless telephone numbers from callers who send such messages without knowledge of reassignment and with a reasonable basis to believe that they have valid consent to send such messages, and

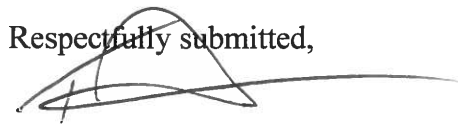
b) define "called party" as a call's (and by, extension a text message's) intended recipient;

5) vacate the Declaratory Ruling and Order; or

6) provide such other relief as this Court may deem appropriate.

Dated: August 13, 2015

Respectfully submitted,



Thomas M. Dunlap (D.C. Bar 471319)

David Ludwig (D.C. Bar 471319)

Dunlap Bennett & Ludwig PLLC

211 Church Street, SE

Leesburg, VA 20175

Tel: (703) 777-7319

Fax: (703) 777-3656

tdunlap@dbllawyers.com

Counsel for Petitioner CodeBroker, LLC

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1, CodeBroker respectfully submits the following corporate disclosure statement:

CodeBroker, LLC is a Massachusetts limited liability company that provides SMS and mobile marketing solutions to retailers. CodeBroker has no parent company, and no publicly held company owns 10 percent or more of Code Broker.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that within one business day of this petition for review being filed:

- a) I will also send the document by certified mail, postage prepaid to the following
counsel of record:

Office of General Counsel
Federal Communications Commission
Eight Floor
445 Twelfth Street, SW
Washington, DC 20554

Loretta E. Lynch
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

- b) I will cause a copy of this petition for review to be served by first-class mail, postage
prepaid, on these parties admitted to participate in the agency proceedings:

Mark W. Brennan
Hogan Lovells US LLP
555 13th Street, NW
Washington, DC 20004
*Counsel for the American Association of
Healthcare Administrative Management,
RTF International; and
United Healthcare Services, Inc.*

Virginia O'Neil
Vice President & Assistant Chief
Compliance Counsel
American Bankers Association
1120 Connecticut Avenue, NW
Washington, DC 20036

Charles H. Kennedy
The Kennedy Privacy Law Firm
1050 30th Street, NW
Washington, DC 20007
*Counsel for American Bankers Association
and Consumer Bankers Association*

Paul D. S. Edwards
Unit 203
713 Wheat Ridge Lane
Las Vegas, NV 89145

Charles H. Kennedy
The Kennedy Privacy Law Firm
1050 30th Street, NW
Washington, DC 20007
*Counsel for American Bankers Association
and Consumer Bankers Association*

Paul D. S. Edwards
Unit 203
713 Wheat Ridge Lane
Las Vegas, NV 89145

Monica S. Desai
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037
*Counsel for A Coalition of Mobile
Engagement Providers,
Retail Industry
Leaders Association, and
ACA International*

Debra Brewer Hayes
Charles Clinton Hunter
The Hayes Law Firm, PC
Suite 210
700 Rockmead
Kingwood, TX 77339
*Counsel for Milton H. Fried, Jr., and
Richard Evans*

Kate Larson
David Pommerehn
Consumer Bankers Association
Suite 550
1225 Eye Street, NW
Washington, DC 20005

Natalie G. Roisman
Phillip R. Marchesiello
Joshua M. Bercu
Wilkinson Barker Knauer, LLP
Suite 700
2300 N Street, NW
Washington, DC 20037
Counsel to Glide Talk, Ltd.

Michael A. Signorelli
Venable LLP
575 Seventh Street, NW
Washington, DC 20004
*Counsel for Direct
Marketing Association*

Jerry Cerasale
Senior Vice President,
Government Affairs
Direct Marketing Association
Suite 1100
1615 L Street, NW
Washington, DC 20036

Cheire R. Kiser
Cahill Gordon & Reindel LLP
Suite 950
1990 K Street, NW
Washington, DC 20006
*Counsel for Global Tel*Link
Corporation*

Dorothy E. Cukier
Corporate Counsel, Executive Director
External Affairs
Global Tel *Link Corporation
Suite 100
12021 Sunset Hills Road
Reston, VA 20190

Phillip J. Grudzinski
President and CEO
Professional Association for
Customer Engagement
Suite 480
8500 Keystone Crossing
Indianapolis, IN 46240

Joseph E. Sandler
Elizabeth L. Howard
Sandler Reiff Young & Lamb
Suite 300
1025 Vermont Avenue, NW
Washington, DC 20002
*Counsel for Revolution
Messaging, LLC*

Joseph Oliva
Oliva & Associates
Suite 350
11770 Bernardo Plaza Court
San Diego, CA 92128
Counsel for Rubio's Restaurant, Inc.

N. Martin Stringer
Michael F. Smith
McAfee and Taft
Suite 900
1717 South Boulder
Tulsa, OK 74119
Counsel for Stage Stores, Inc.

Burton D. Brillhart
McGlinchey Stafford PLLC
Suite 2750
2711 North Haskell Avenue
Dallas, TX 75204
*Counsel for Santander
Consumer USA, Inc.*

National Association of
Attorneys General
Eighth Floor
2030 M Street, NW
Washington, DC 20036

Susan Webb,
President ABIL Employment
Services
Suite 200
5025 East Washington
Phoenix, AZ 85034
*National Employment Network
Association*

Michele A. Shuster
Nicholas R. Whisler
Mac Murray, Petersen and Shuster
LLP
Suite 210
6530 West Campus Oval
New Albany, OH 43054
*Counsel for Professional Association
for Customer Engagement*

James D. Snell
Ronald W. Del Sesto, Jr.
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006-1806
Counsel for TextMe, Inc.


Lauren E. Campisi
McGlinchey Stafford PLLC
Twelfth Floor
601 Poydras Street
New Orleans, LA 70130
*Counsel for Santander
Consumer USA, Inc.*

Dustin D. Godenswager
McGlinchey Stafford PLLC
Suite 406
25550 Chagrin Boulevard
Cleveland, OH 44122
*Counsel for Santander
Consumer USA, Inc.*

Lauren Lynch Flick
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037
*Counsel for YouMail, Inc.,
3G Collect Inc., 3G Collect LLC*

Chad R. Fuller
Troutman Sanders LLP
Suite 400
11682 El Camino Real
San Diego, CA 92130
*Counsel for Santander
Consumer USA, Inc.*

Andrew D. Bluth
Pillsbury Winthrop Shaw
Pittman LLP
Suite 300
2600 Capitol Avenue
Sacramento, CA 95816-5930
*Counsel for 3G Collect Inc.,
3G Collect LLC*



Thomas M. Dunlap

Counsel for CodeBroker, LLC