

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

RECEIVED

CONSUMER BANKERS)
ASSOCIATION,)

Petitioner,)

v.)

FEDERAL COMMUNICATIONS)
COMMISSION,)

Respondent.)

Case No. 15-1304

PETITION FOR REVIEW

Pursuant to 5 U.S.C. § 706, 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1), 2343 and 2344, and Federal Rule of Appellate Procedure 15(a), the Consumer Bankers Association (CBA) hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the Declaratory Ruling and Order (“Order”) released July 10, 2015 by the Federal Communications Commission (FCC) captioned *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, FCC 15-72 (rel. July 10, 2015). A copy of the Order is attached as Attachment A to this petition.

A. NATURE OF THE PROCEEDINGS

The Order, which was adopted by the FCC on June 18, 2015 and released on July 10, 2015, was issued by the FCC to address certain “requests for clarification or other action regarding the [Telephone Consumer Protection Act] or the [FCC’s] rules and orders[.]” Order ¶ 2. The Telephone Consumer Protection Act (TCPA) was enacted by Congress in 1991 and is codified at 47 U.S.C. § 227; the FCC’s implementing rules are codified at 47 C.F.R. § 64.1200. *See* 47 U.S.C. § 227; 47 C.F.R. § 64.1200.

In relevant part to these proceedings, the TCPA specifies various prohibitions and conditions on the making of telephone calls using an “automatic telephone dialing system” or an “artificial or prerecorded voice.” *See* 47 U.S.C. § 227(b)(1)(A). The TCPA exempts from liability calls made with the “prior express consent of the called party.” *See* 47 U.S.C. § 227(b)(1)(A).

The Order addresses petitions related to the TCPA filed by various entities, including a Petition for Declaratory Ruling filed by CBA. Order ¶¶ 3, 71-97, 169. The Petition for Declaratory Ruling of CBA – filed with the FCC September 19, 2014 in CG Docket No. 02-278 – was denied by the FCC. Order ¶ 169. Now, CBA hereby petitions the Court for review of the Order.

B. FACTS ON WHICH VENUE IS BASED

Venue is necessarily proper in the Court pursuant to 28 U.S.C. § 2343, which states that a petition for review may be brought “in the United States Court of Appeals for the District of Columbia Circuit.” 28 U.S.C. § 2343. On July 24, 2015, the United States Judicial Panel on Multidistrict Litigation consolidated petitions for review of the Order in the United States Court of Appeals for the District of Columbia Circuit Court. Thus venue is proper in the Court.

C. GROUNDS ON WHICH RELIEF IS SOUGHT

- (1) The FCC abused its discretion and acted arbitrarily and capriciously, and otherwise not in accordance with the protections contained in the First and Fifth Amendments of the Constitution, the TCPA, and other laws, in finding that the “capacity” of an automatic telephone dialing system (“ATDS”) “is not limited to its current configuration but also includes its potential functionalities” and that an ATDS is any equipment that has “more than a theoretical potential” of being “modified to satisfy the [ATDS] definition” at an undefined future point in time. *See* 47 U.S.C. §§ 227(a)(1), (b)(1); Order ¶¶ 10, 15, 16, 18.
- (2) The FCC abused its discretion and acted arbitrarily and capriciously, and otherwise not in accordance with the protections contained in the

First and Fifth Amendments of the Constitution, the TCPA, and the Administrative Procedure Act, in finding that “called party” for purposes of the TCPA’s exemption for calls made with the “prior express consent of the called party” (47 U.S.C. § 227(b)(1)(A)) means the “subscriber” or the “non-subscriber customary user of a telephone number included in a family or business calling plan[,]” rather than “intended recipient” or “expected recipient.” Order ¶ 73.

- (3) The FCC abused its discretion and acted arbitrarily and capriciously, and otherwise not in accordance with the protections contained in the First and Fifth Amendments of the Constitution, the TCPA, and other laws including the requirements for rulemaking under the Administrative Procedure Act, in establishing a “one-call” exemption from TCPA liability for calls made to a telephone number for which the caller has been provided “prior express consent” but which has been reassigned to a new subscriber, and imposing liability for every call made by the caller to that phone number thereafter, whether or not the call was answered, or whether or not the caller had knowledge that the telephone number has been reassigned. Order ¶ 90.
- (4) The FCC abused its discretion and acted arbitrarily and capriciously, and otherwise not in accordance with the protections contained in the

First and Fifth Amendments of the Constitution, the TCPA, and other laws, in prohibiting callers from establishing the means by which “prior express consent” may be withdrawn, even where the means established are reasonable. Order ¶ 47.

- (5) The FCC abused its discretion and acted arbitrarily and capriciously, and otherwise not in accordance with the law, in finding that “text messages” are “calls” for purposes of the TCPA, and that there should be no distinctions between text messages and telephone calls when assessing TCPA liability and applicability. Order ¶ 107.

D. RELIEF PRAYED

Consumer Bankers Association respectfully requests that the Court:

- (1) Hold that the FCC’s findings that the “capacity” of an ATDS is “not limited to its current configuration but also includes its potential functionalities” and that “ATDS” is defined as any equipment for which “there is more than a theoretical potential that the equipment could be modified to satisfy the [ATDS] definition” are arbitrary and capricious or otherwise unlawful;
- (2) Hold that the FCC’s definition of “called party” within the context of the TCPA exemption from liability for calls made with the “prior express consent of the called party” as “subscriber” or the “non-

subscriber customary user of a telephone number included in a family or business calling plan” is arbitrary and capricious or otherwise unlawful;

- (3) Hold that the “one-call” exemption for reassigned numbers established by the FCC is arbitrary and capricious or otherwise unlawful;
- (4) Hold that the FCC’s finding that callers are prohibited from establishing the means by which consent given under the TCPA may be withdrawn, even if those means are reasonable, is arbitrary and capricious or otherwise unlawful;
- (5) Hold that the FCC’s finding that “text messages” are “calls” for TCPA purposes is arbitrary and capricious or otherwise unlawful;
- (6) Hold that the FCC’s finding that there should be no distinctions between text messages and telephone calls when assessing TCPA liability and applicability is arbitrary and capricious or otherwise unlawful;
- (7) Vacate those portions of the Order the Court finds to be arbitrary and capricious or otherwise unlawful or defective;
- (8) Remand to the FCC for proceedings consistent with the Court’s findings; and/or

(9) Provide such other relief as the Court deems appropriate.

Dated: September 1, 2015

Respectfully Submitted,

A handwritten signature in black ink, reading "Monica S. Desai", is written over a horizontal line.

Monica S. Desai
Amy L. Brown
Jonathan Jacob Nadler
SQUIRE PATTON BOGGS (US) LLP
2550 M Street NW
Washington, DC 20037
Tel: (202) 457-6000
Fax: (202) 457-6315
Monica.Desai@squirepb.com

*Counsel for the Consumer Bankers
Association*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and the Court's Rule 26.1, Consumer Bankers Association (CBA) respectfully submits the following corporate disclosure statement.

Founded in 1919, CBA is a non-profit corporation and trade association representing the retail banking industry – banking services geared toward consumers and small businesses. CBA's members are established financial institutions that play a pivotal role in the U.S. economy and collectively hold well over half of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business. CBA has no parent corporation and no publicly held company owns more than 10% interest in CBA.

CERTIFICATE OF SERVICE

Within one business day of this petition for review being filed:

- a) I will cause a copy of this petition to be served by first-class mail, postage prepaid, on these parties:

Counsel for Petitioner ACA International
Brian Melendez
Dykema Gossett PLLC
4000 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

*Counsel for Petitioners Professional Association of Customer
Engagement, Sirius XM Radio*
Shay Dvoretzky
Jones Day
51 Louisiana Ave, NW
Washington, DC 20001

Counsel for Petitioner CodeBroker, LLC
Thomas Mansfield Dunlap
Dunlap Bennett & Ludwig PLLC
1725 Pennsylvania Ave, NW
Suite 1025
Washington, DC 20006

Counsel for Petitioner salesforce.com inc. and ExactTarget, Inc.
Tonia Ouellete Klausner
Wilson Sonsini Goodrich & Rosati, P.C.
1301 Avenue of the Americas, 40th Floor
New York, NY 10019

*Counsel for Intervenors Council of American Survey Research
Organizations, Marketing Research Association*
Steven A. Augustino
Kelley Drye & Warren LLP
3050 K Street, NW

Suite 400
Washington, DC 20007

Counsel for Intervenors MRS BPO LLC, Cavalry Portfolio Services, LLC, Diversified Consultants, and Mercantile Adjustment Bureau, LLC

Thomas Collier Mugavero
Whiteford Taylor & Preston, LLP
3190 Fairview Park Drive
Suite 300
Falls Church, VA 22042

- b) I will cause a copy of this petition to be served by hand on these persons:

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

Jonathan Sallet
General Counsel
Federal Communications Commission
445 12th Street, S.W., 8th Floor
Washington, DC 20554

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

America's Health Insurance Plans
Thomas Wilder
America's Health Insurance Plans
601 Pennsylvania Avenue, NW
South Building
Suite Five Hundred
Washington, DC 20004

AFL-CIO
Laurence E. Gold
Associate General Counsel
AFL-CIO
815 16th Street, NW
Washington, DC 20006

A Better 401k Plan, Inc.
John Lowrey
President
A Better 401k Plan, Inc.
15 Kirkbrae Drive, Lincoln RI 02865

Allied Global Holdings, Inc.
Brian Rae
Vice President of Compliance
Allied Global Holdings, Inc.
16635 Yonge Street Suite 26
Newmarket, DC

American Revenue Management
Allan Strucksberg
President/CEO
American Revenue Management
675 Hegenberger Road, Suite 20
Oakland, CA 94621

Aspect Software, Inc.
Stephen J. Beaver
SVP and General Counsel
Aspect Software, Inc.
2325 Camelback Road
Suite 700
Phoenix, AZ 85016

BetterWRX
G.L. Scott Murray
CEO
BetterWRX
5973 Avenida Encinas, #202
Carlsbad, CA 92008

BOOM 702
Joshua Satterlee
Owner
BOOM 702
10909 S Eastern Ave
Henderson, NV 89052

*North Carolina Association of
Broadcasters, Ohio Association of
Broadcasters, Virginia Association of
Broadcasters*
Stephen Hartzell
Brooks, Pierce, McLendon,
Humphrey & Leonard LLP
Wells Fargo Capitol Center, Suite
1600
150 Fayetteville Street (27601)
Post Office Box 1800
Raleigh, North Carolina

*Lydia Security Monitoring d/b/a
C.O.P.S. Monitoring*
James McMullen
President/COO
P.O. Box 836
Williamstown, NJ 08094

*California & Nevada Credit Union
Leagues*
Diana Dykstra
President & CEO
California & Nevada Credit Union
Leagues
2855 E. Guasti Road Suite 600
Ontario, CA 91761-1250

Ceannate
Elizabeth Sage
Podesta Group
1001 G Street, NW
Suite 1000
Washington, DC 20001

Ceannate
Walter Pryor
Ceannate Corp.
1701 W. Golf Rd., Tower 2
Rolling Meadows, IL 60008

*Coalition of Higher Education
Assistance Organizations*
Harrison M. Wadsworth
Executive Director
Coalition of Higher Education
Assistance Organizations
1101 Vermont Avenue, NW Suite 400
Washington, DC 20005

Consumer Action
Linda Sherry
Director, National Priorities
Consumer Action
PO Box 70037
Washington, DC 20024

Consumers Union
Delara Derakhshani
Policy Counsel
Consumers Union
1101 17th Street NW
Washington DC 20005

*National Association of Consumer
Advocates*
Ira Rheingold
Executive Director
National Association of Consumer
Advocates
1730 Rhode Island Ave., Suite 710
Washington, DC 20036

*National Consumer Law Center,
Public Citizen, U.S. Public Interest
Research Group, Consumer Action,
Consumer Federation of America,
National Association of Consumer
Advocates, Americans for Financial
Reform*
Margot Saunders
Counsel
National Consumer Law Center
1001 Connecticut Avenue, NW
Suite 510
Washington, DC 20036

*County of San Diego's Office of
Revenue and Recovery*
County of San Diego's Office of
Revenue and Recovery
5530 Overland Avenue Suite 310
San Diego, CA 92123

Credit Bureau Data, Inc.
Stacy Lockington
PO Box 2288
La Crosse, Wisconsin 54602-2288

Credit Union National Association
Mary Mitchell Dunn
Senior Vice President and Deputy
General Counsel
Credit Union National Association
601 Pennsylvania Avenue NW
Washington, DC 20004

PSCU
Steven A Salzer
SVP, Legal and General Counsel
PSCU
560 Carillon Parkway
St. Petersburg, FL 33716

*Independent Bankers Association of
Texas*
Christopher Williston
President and CEO
Independent Bankers Association of
Texas
1700 Rio Grande St. Suite 100
Austin, TX 78701

Iowa Credit Union League
Patrick S. Jury
CEO/President
Iowa Credit Union League
1500 NW 118th Street
Des Moines, IA 50325

SAFE Credit Union
Jennifer Martin
Card Services Manager
SAFE Credit Union
2295 Iron Point Road
Folsom, CA 95630

*Staff of the Federal Trade
Commission*
Jessica L. Rich
Francine Lafontaine
Suzanne Munck
600 Pennsylvania Avenue, NW
Washington, DC 20580

Fresno Credit Bureau
Carol Capriotti
President
Fresno Credit Bureau
757 L St.
Fresno, CA 93721
Hilton Worldwide
Jonas Neihardt
Sr. Vice President, Government
Affairs
Hilton Worldwide
7930 Jones Branch Drive
McLean, VA 22102
The Identity Theft Council
Neal O'Farrell
The Identity Theft Council
1990 North California Boulevard
8th Floor
Walnut Creek, CA 94596

InCharge Systems, Inc.
Michael D. Hamilton
President
InCharge Systems
1128 20th Street
West Des Moines, IA 50265

iPacesetters, LLC
Michael Bennett
109 West 8th Street
Monroe, WI 53566

Joe Shields
16822 Stardale Lane
Friendswood, TX 77546

Gerald Roylance
1168 Blackfield Way
Mountain View, CA 94040

Phil Charvat
636 Colony Drive
Westerville, OH 43081

Robert Biggerstaff
PO Box 614
Mt. Pleasant, SC 29465
The Marketing Arm
Jesse Smith
Sr. Manager, Business Affairs
The Marketing Arm
1999 Bryan Street
Suite 1800
Dallas, TX 75201

mBlox Incorporated
Richard Purdy
General Counsel
mBlox Incorporated
430 North Mary Avenue, Suite 100
Sunnyvale, CA 94085

Merchants Credit Association, Inc.
J. Holland
Merchants Credit Association, Inc.
4126 Clemson Boulevard
Suite 1-A
Anderson, SC 29625

Mid Continent Credit Services
Christina Rodriguez
Mid Continent Credit Services
12506 W Kellogg
Wichita, Kansas 67275

Mr. Alan's Elite
Rebecca Thomason
Mr. Alan's Men's Bootery
14177 Telegraph Rd.
Redford, Michigan 48239

Noble Systems Corporation
Karl Koster
Counsel
Noble Systems Corporation
1200 Ashwood Parkway
Suite 300
Atlanta, GA 30338
Online Trust Alliance
Craig D. Spiegle
Executive Director and President
Online Trust Alliance
989 122nd Ave NE
Suite 201
Bellevue, WA 98004

Phunware
Alan Knitwoski
Phunware
7800 Shoal Creek Boulevard
Austin, TX 78757

Pindrop Security
David Dewey
Director of Research
Pindrop Security
817 West Peachtree Street
Suite 770
Atlanta, GA 30308

PocketSpammers.com
Scott Goodstein
PocketSpammers.com
1730 Rhode Island Ave. NW
Suite 610
Washington, DC 20036

Recovery One
Geoff Cameron
Recovery One
5100 Parkcenter Ave
Dublin, OH 43017

*Rhode Island Broadcasters
Association*
Lori Needham
Executive Director
Rhode Island Broadcasters
Association
11 South Angell Street
Providence, Rhode 02906

Counsel for Rite Aid
Brad D. Weimer
Sheppard, Mullin, Richter &
Hampton LLP
2099 Pennsylvania Avenue, NW
Suite 100
Washington, DC 20006

Rock the Vote
Heather Smith
Rock the Vote
1001 Connecticut Ave. NW
Suite 640
Washington, DC 20036

The Silver Users Association
Paul Miller
Silver Users Association
3930 Walnut Street
Suite 210
Fairfax, VA 22030

Sprint Nextel Corporation
J. Breck Blalock
Director – Government Affairs
Sprint Nextel Corporation
900 7th Street, NW
Suite 700
Washington, DC 20001

Telephone Science Corporation
Aaron Foss
President
Telephone Science Corporation
5507-10 Nesconset Highway, #201
Mt. Sinai, NY 11766

The CBE Group, Inc.
Thomas R. Penaluna
President & CEO
The CBE Group, Inc.
131 Tower Park Drive Suite 100
Waterloo, Iowa 50701

Wireless Research Services
Randall A. Snyder
Wireless Research Services
8113 Bay Pines Avenue
Las Vegas, NV 89128

West Asset Management, Inc.
Mitchell D. Bluhm
West Asset Management
2253 Northwest Parkway
Marietta, GA 30067

ZipDX LLC
David Frankel
CEO, ZipDX LLC
17554 Via Sereno
Monte Sereno, CA 95030

Counsel for The Internet Association
Markham C. Erickson
Steptoe & Johnson
1330 Connecticut Avenue NW
Washington, DC 20036

United Services Automobile Association
Linda G. King
Vice President, Executive Attorney
United Services Automobile Association
9800 Fredericksburg Road
San Antonio, TX 78288

Counsel for United Parcel Service, Inc.
Marianne Roach Casserly
Alston & Bird LLP
950 F Street, NW
Washington, DC 20004

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

Counsel for A Coalition of Mobile Engagement Providers; Abercrombie & Fitch Co.; ACA International, Cannon & Associates LLC d/b/a Polaris Group; Citizens Bank, N.A.; Retail Industry Leaders Association; SoundBite Communications; Wells Fargo; Genesys Communications Laboratories

Monica Desai
Squire Patton Boggs LLP
2550 M Street NW
Washington, DC 20037

Counsel for ACA International; American Bankers Association; U.S. Chamber of Commerce
Howard W. Waltzman
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006-1101

Counsel for Acurian, Inc.; Anda, Inc.; Time Warner Cable Inc.
Matthew A. Brill
Latham & Watkins LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

Counsel for Affiliated Health Care Associates, P.C.; Balmoral Home, Inc.; Wholesale Point, Inc.

Daniel A. Edelman
Edelman, Combs, Lattuner & Goodwin, LLC
20 South Clark Street
Suite 1500
Chicago, IL 60603

Counsel for Alarm Industry Communications Committee
John A. Prendergast
Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP
2120 L Street, NW
Suite 300
Washington, DC 20037

Counsel for American Association of Healthcare Administrative Management, CARFAX, Inc.; Cargo Airline Association; Communication Innovators; Global Connect LLC; RTI International; United Healthcare Services, Inc.; United HealthGroup Incorporated; Varolii Corporation
Mark W. Brennan
Hogan Lovells
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

*Counsel for American Bankers
Association*

Charles H. Kennedy
The Kennedy Privacy Law Firm
1050 30th Street, NW
Washington, DC 20007

*Counsel for Brand Activation
Association, Inc.*

Marc S. Roth
Manatt, Phelps & Phillips, LLP
7 Times Square
New York, NY 10036

American Insurance Association

Angela M. Gleason
Associate Counsel
American Insurance Association
2101 L Street, NW
Suite 400
Washington, DC 20037

Brandtone, Inc.

Karl Walsh
General Manager
Brandtone North America
35 West 9th Street
Unit 3A
New York, NY 10011

Counsel for Dialing Services, Inc.

Mitchell N. Roth
Roth Doner Jackson, PLC
8200 Greensboro Drive
Suite 820
McLean, VA 22102

Counsel for ACA International

Brian Melendez
Dykema Gossett PLLC
4000 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

Edison Electric Institute

Aryeh B. Fishman
Associate General Counsel,
Regulatory Legal Affairs
Edison Electric Institute
701 Pennsylvania Avenue, NW
Washington DC 20004-2696

*Counsel for Call-Em-All, LLC;
CallFire, Inc.; Club Texting, Inc.;*
mobileStorm, Inc.; Twilio Inc.

Michael B. Hazzard
Arent Fox
1717 K Street, NW
Washington, DC 20006-5344

AT&T Services Inc.

William L. Roughton, Jr.
1120 20th Street, NW
Suite 1000
Washington, DC 20036

Counsel for Carl Holshouser, Sr.
Director; Global Government
Relations, Visa, Inc.
Ky Tran-Trong
Vice President, Regulatory Visa Inc.
900 Metro Center Blvd
Foster City, CA 94404

Counsel for CBE Companies, Inc.;
Direct Marketing Association
Ian D. Volner
Venable LLP
575 Seventh Street NW
Washington, DC 20004

Counsel for ccAdvertising
Ronald M. Jacobs
Venable LLP
575 Seventh Street, NW
Washington, DC 20004

Counsel for Center for Democracy &
Technology; Common Cause
Meredith Whipple
One Farragut Square South
1634 I St NW #1100
Washington, DC 20006

Counsel for CenturyLink
Kathryn Marie Krause
Suite 250
1099 New York Avenue, NW
Washington, DC 20001

US Chamber of Commerce
Jason Goldman
Senior Telecom Policy Counsel
US Chamber of Commerce
1615 H St NW
Washington, DC 20062

Counsel for American Bankers
Association
Virginia O'Neill
Center for Regulatory Compliance,
ABA
1120 Connecticut Avenue, NW
Washington, DC 20036

National Council of Higher Education
Resources
Harrison Wadsworth III
Executive Director of Coalition of
Higher Education Assistance
Organizations
1101 Vermont Avenue NW
Suite 400
Washington, DC 20005-3586

American Financial Services
Association
Bill Himpler
Executive VP of American Financial
Services Association
919 18th St, NW
Suite 300
Washington, DC 20006

*National Association of College and
University Business Officers*

Anne Gross
VP, Regulatory Affairs
National Association of College and
University Business Officers
1110 Vermont Ave NW
Suite 800,
Washington, DC 20005

*The Virginia Chapter of the American
Association of Healthcare*

Administrative Management

David Nicholas
President
Virginia Chapter of AAHAM
3902 Lavaine Ct
Annandale, VA 22003

Waverly Health Center

Becky David
Waverly Health Center
312 Ninth Street SW
Waverly, IA 50677

Voter Participation Center

Page Gardner
President
Voter Participation Center
1640 Rhode Island Avenue SW
Suite 825
Washington, DC 20036

American Gas Association

Andrew K. Soto
VP Reg Affairs
American Gas Association
400 North Capitol St NW
Suite 450
Washington, DC 20001

*Pharmaceutical Care Management
Association*

Andy Cosgrove
Vice President
Pharmaceutical Care Management
Association
601 Penn Ave NW
7th Floor
Washington, DC 20004

*National Council of Higher Education
Resources; National Council of
Higher Education Loan Programs*

Shelly Repp
President, National Council of
Higher Education Resources
1100 Connecticut Ave. NW
Suite 1200
Washington, DC 20036-4110

*Student Loan Servicing Alliance,
SLSA Private Loan Committee (SLSA)
PLC*

Winfield P. Crigler
Exec. Director of Student Loan
Servicing Alliance
1850 M Street, NW
Suite 920
Washington, DC 20036

*Counsel for CallAssistant, LLC;
Professional Association for
Customer Engagement (PACE)*
Michele A. Shuster
Mac Murray, Petersen & Shuster LLP
6530 West Campus Oval
Suite 210
New Albany, OH 43054

*Counsel for Clark County Collection
Service, LLC*
Mary Brennan
Clark County Collection Service
Director of Operations
8860 W. Sunset Rd.
Las Vegas, NV 89148

Counsel for Comcast Corporation
Mary McManus
Executive Director, Reg Affairs
Comcast Corporation
300 New Jersey Avenue, NW
Suite 700
Washington, DC 20001

*Computer & Communications
Industry Association (CCIA)*
Ali Sternburg
Public Policy & Regulatory Counsel
900 17th Street, NW
Suite 1100
Washington, DC 20006

*Counsel for Consolidated Edison
Company of New York, Inc.; Orange
and Rockland Utilities*
Harold Mordkofsky
Blooston, Mordkofsky, Dickens,
Duffy & Pendergrast LLP
2120 L Street, NW
Washington, DC 20037

Consumers Union
Tim Marvin
Consumers Union
1101 17th Street NW
Suite 500
Washington, DC 20036

*Counsel for Crunch San Diego, LLC;
TracFone Wireless, Inc.*
Mitchell F. Brecher
Greenberg Traurig, LLP
2101 L street NW
Suite 1000
Washington, DC 20037

CTIA-The Wireless Association
Krista L. Witanowski
Assitant VP Reg. Affairs
CTIA
1400 16th Street, NW
Suite 600
Washington, DC 20036

Counsel for DialAmerica Marketing, Inc.

Arthur W. Conqay
President & CEO
DialAmerica Marketing, Inc.
960 Macarthur Boulevard
Mahwah, NJ 07495

Counsel for DIRECTV, LLC

Becca Wahlquist
Manatt, Phelps, & Phillips LLP
11355 W. Olympic Blvd.
Los Angeles, CA 90064

Counsel for Dominion Enterprises of Virginia General Partnership

William Baker
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006

Counsel for EatStreet, Inc.; Forest Pharmaceuticals; Gilead Sciences & Purdue Pharma; Portfolio Recovery Associates LLC; Unique Vacations, Inc.

Yaron Dori
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
202-662-6000

Counsel for Edison Electric Institute; American Gas Association; The Nielsen Company, U.S., LLC

Scott Blake Harris
Harris, Wiltshire & Grannis LLP
1919 M Street
Eighth Floor
Washington, DC 20036

Counsel for ExactTarget, Inc.

Tonia Ouellette Klausner
Wilson Sonsini Goodrich & Rosati
1301 Avenue of the Americas
40th Floor
New York, NY 10019-6022

Financial Services Roundtable

Anne Wallace
ITAC President
P.O. Box 9952
Washington, DC 20016

Future of Privacy Forum

Jules Polonetsky
Co-Chair and Director
919 18th Street, NW
Suite 901
Washington, DC 20006

Verizon

Ian Dillner
Verizon
1300 I Street, NW
Suite 400 West
Washington, DC 20005

Counsel for Vibes Media, LLC
Jennifer Bagg
Harris, Wiltshire & Grannis LLP
1919 M Street
Eighth Floor
Washington, DC 20036

Counsel for Glide Talk, Ltd
Natalie G. Roisman
Wilkinson Barker Knauer, LLP
2300 N Street, NW Suite 700
Washington, DC 20037

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

*Counsel for GroupMe, Inc.;
TextMe, Inc.*
Ronald W. Del Sesto, Jr.
Bingham McCutchen LLP
2020 K Street NW
Washington, DC 20006-1806

*InfoCision Management Corporation,
Inc.*
Steve Brubaker
Chief of Staff
Info Cision Management Corp
325 Springside Drive
Akron, OH 44333

International Bancshares Corporation
Dennis E. Nixon
IBC Houston
5615 Kirby Dr.
P.O. Box 6568
Houston, TX 77005

Marketing Research Association
Howard Fienberg, PLC
Marketing Research Association
Washington Office
1001 Connecticut Avenue, NW
Suite 510
Washington, DC 20036

MasterCard Incorporated
Jenna Goodfellow
Senior Counsel
MasterCard Incorporated
2000 Purchase Street
Purchase, New York 10577-2509

Counsel for Megan Gold
Alexander H. Burke
Burke Law Offices, LLC
155 N. Michigan Ave.
Suite 9020
Chicago, IL 60601

Mobile Marketing Association
Cara J. Frey
General Counsel
Mobile Marketing Association
770 Broadway, 2nd Floor
New York, NY 10003

Mortgage Bankers Association
Stephen A. O'Connor
Senior VP
Mortgage Bankers Association
1919 M Street NW, 5th floor
Washington, DC 20036

Counsel for National Association of Attorneys General
Jim McPherson
2030 M Street, NW
Eighth Floor
Washington, DC 20036

National Association of Broadcasters
Ann West Bobeck
National Association of Broadcasters
1771 N Street, NW
Sixth Floor
Washington DC 20036

National Association of Chain Drug Stores
Don M. Bell, III
General Counsel
1776 Wilson Blvd.
Suite 200
Arlington, VA 22209

Counsel for National Association of Industrial Bankers
Frank M. Salinger
Salinger Law Firm
1001 G Street, NW
Suite 800
Washington, DC 20001

National Association of Manufacturers
Erik Glavich
Director, Legal & Regulatory Policy
National Association of Manufacturers
733 10th Street NW
Suite 700
Washington, DC 20001

National Association of Regulatory Utility Commissioners
James Bradford Ramsay
General Counsel
National Association of Regulatory Utility Commissioners
1101 Vermont Ave, NW
Suite 200
Washington, DC 20005

National Association of Retail Collection Attorneys
Joann Needleman, President
National Association of Retail Collection Attorneys
601 Pennsylvania Avenue, NW
Washington, DC 20004

National Cable & Telecommunications Association
Stephanie L. Podey
VP and Associate General Counsel
NCTA
25 Massachusetts Avenue, NW
Suite 100
Washington, DC 20001

National Council of Nonprofits
David L. Thompson
VP of Public Policy
National Council of Nonprofits
1200 New York Avenue, NW
Suite 700
Washington, DC 20005

Neustar
Richard L. Fruchterman, III
Associate General Counsel
Neustar, Inc.
1775 Pennsylvania Avenue, NW
4th Floor
Washington, DC 20006

*National Federation of Independent
Business*
Karen R. Harned
Executive Director of NFIB
Small Business Legal Center
1201 F St NW
Suite 200
Washington, DC 20004

*Counsel for Nicor Energy Services
Company*
Todd D. Daubert
Dentons US LLP
1301 K Street, NW
East Tower, Suite 600
Washington, DC 20005

National Retail Federation
Mallory B. Duncan
Senior Vice President
General Counsel
1101 New York Ave, NW
Suite 1200
Washington, DC 20005

*NTCA-The Rural Broadband
Association*
Jill Canfield
NTCA
VP – Legal & Industry
4121 Wilson Boulevard
Suite 1000
Arlington, VA 22203

*Counsel for National Rural Electric
Cooperative Association*
Tracy Marshall
Keller and Heckman LLP
1001 G Street, NW
Suite 500 West
Washington, DC 20001

Counsel for Path, Inc., Twitter, Inc.
David H. Kramer
Wilson Sonsini Goodrich & Rosati
1301 Avenue of the Americas
40th Floor
New York, NY 10019-6022

Counsel for Pay Tel Communications, Inc.

Marcus W. Trathen
Brooks, Pierce, McLendon,
Humphrey & Leonard, LLP
Suite 1600
Wells Fargo Capitol Center
Post Office Box 1800
Raleigh, NC 27602

Counsel for Revolution Messaging, LLC

Elizabeth L. Howard
Sandler, Reiff, Young & Lamb, PC
1025 Vermont Avenue, NW
Suite 300
Washington, DC 20005

Counsel for Santander Consumer USA

Burton D. Brillhart
McGlinchey Stafford
2711 N. Haskell Avenue
Suite 2750, LB 38
Dallas, TX 75204

Securus Technologies, Inc.

Curtis Hopfinger
Director-Regulatory and Gov Affairs
Securus Technologies, Inc.
14651 Dallas Pkwy, 6th Floor
Dallas, TX 75254

Service Employees International Union; CTW; CLC

Alvin Velazquez
Assistant General Counsel
Service Employees
International Union
1800 Massachusetts Ave., NW
Washington, DC 20036

Counsel for Southern California Edison Company

Olivia Samad
2244 Walnut Grove Avenue
PO Box 800
Rosemead, CA 91770

Counsel for Stage Stores, Inc.

N. Martin Stringer
McAfee & Taft
1717 S. Boulder Ave.
Suite 900
Tulsa, OK 74119

The Marketing Arm – Wireless

Jess Smith
Sr. Manager Business Affairs
The Marketing Arm – Wireless
711 Third Avenue, 11th Floor
New York, NY 10017

The Results Companies, LLC

Ms. Gina Gregoletto
The Results Companies
100 NE Third Avenue
Suite 200
Fort Lauderdale, FL 33301

Counsel for Trading Advantage, LLC
Henry T. Kelly
Counsel for Trading Advantage, LLC
333 West Wacker Drive
26th Floor
Chicago, IL 60606

*U.S. Chamber of Commerce; U.S.
Chamber Institute for Legal Reform*
William Kovacs
U.S. Chamber of Commerce
1615 H Street, NW
Washington, DC 20062-2000

United States Telecom Association
Kevin Rupy
United States Telecom Association
607 14th Street NW
Suite 400
Washington, DC 20005

Counsel for William E. Raney
William E. Raney
Copilevitz and Canter, LLC
1900 L St NW
Suite 215
Washington, DC 20036
FirstBank
Brandon Kelly
Fraud Officer, FirstBank
12345 West Colfax Avenue
Lakewood, CO 80215

*First Tennessee Bank National
Association*
Dondi Black
SVP, Retail Payment Strategy, First
Tennessee Bank National Association
165 Madison – 8th Floor
Memphis, TN

FMA Alliance, Ltd.
Loraine E. Lyons
FMA Alliance, Ltd.
11811 North Freeway, Suite 9000
Houston, TX 77060

Kedlin Company (Call Control)
Ben Sharpe
PO Box 53283
Bellevue, WA 98005

Heritage Company
Stephen Dawson
2402 Wildwood Avenue Suite 500
Sherwood, AR 72120

Americans in Contact PAC
Gabriel S. Joseph
PO Box 96064
Washington, DC 20090-6064

*International Brotherhood of
Teamsters*
James P. Hoffa
25 Louisiana Avenue, NW
Washington, DC 20001

Monica Desai

Monica Desai

Counsel for Consumer Bankers Association