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

ACA INTERNATIONAL,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

Case No. 15-1211
(and consolidated cases
15-1218, 15-1244)

MOTION OF MRS BPO LLC, CAVALRY PORTFOLIO SERVICES, LLC, DIVERSIFIED CONSULTANTS, INC., AND MERCANTILE ADJUSTMENT BUREAU, LLC, FOR LEAVE TO INTERVENE OR, IN THE ALTERNATIVE, FOR LEAVE TO PARTICIPATE AS AMICI CURIAE

Pursuant to 28 U.S.C. § 2348, 47 U.S.C. § 402(e), Fed. R. App. 15(d), and D.C. Cir. Rule 15(b), MRS BPO LLC ("MRS"), Cavalry Portfolio Services, LLC ("CPS"), Diversified Consultants, Inc. ("DCI"), and Mercantile Adjustment Bureau, LLC ("MAB"), (jointly referred to herein as "Intervenors"), jointly move for leave to intervene in support of the petitioner, ACA International, in the above-captioned petition for review and all consolidated cases arising from the Federal Communications Commission's final order in the proceedings captioned *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of*

1991, CG Docket No. 02-278 (FCC No. 15-72) (released Jul. 10, 2015). Pursuant to D.C. Cir. Rule 15(b), Intervenors understand that their motion to intervene in this case will also be deemed a motion to intervene in the cases of *Sirius XM Radio, Inc. v. FCC*, D.C. Cir. Case No. 15-1218, *Professional Association for Customer Engagement, Inc. (PACE) v. FCC*, Case No. 15-1244, and any other later filed cases, or other proceedings assigned by lottery procedures under 28 U.S.C. § 2112(a).

In the alternative, pursuant to Fed. R. App. P. 29(a)-(b) and D.C. Cir. Rule 29(b) and (d), Intervenors move for leave to file a brief *amici curiae* in support of petitioner, ACA International.

I. STATEMENT OF THE INTEREST OF THE MOVING PARTIES

Each of the Intervenors -- MRS, CPS, DCI, and MAB -- currently operate, and have over the past two decades operated, as debt collection agencies. The primary tool used in Intervenors' collection operations is the telephone, enabling direct communication with individual consumers obligated to repay debts. Each of the Intervenors has made a substantial financial investment in call center technologies that incorporate hardware and software to maximize productivity in their collection operations, through the use of software designed to place calls at a rate that will minimize calling agent idle time, which are integrated with their recordkeeping systems to facilitate documentation of calling practices. Outbound

calling with such technology increases operator productivity by 200% to 300%. Edward L. Melnick, et al., CREATING VALUE IN THE FINANCIAL SERVICES, STRATEGIES, OPERATIONS AND TECHNOLOGIES, Ch. 18, p. 363 (Springer, 1999). The cost of each such investment varies, but generally the investment in hardware and software for call center operations exceeds $50-100,000 each. DUANE SHARP, CALL CENTER OPERATIONS, p. 65 (Digital Press 2003).

The actions of the Federal Communications Commission ("FCC") in these proceedings significantly affect the ways in which calls can lawfully be made, and make anyone making outbound telephone calls subject to a claim that the calls violated the Telephone Consumer Protection Act ("TCPA"), and expose the caller to spurious class action claims that seek to impose ruinous damages invariably prompting extortionate settlements.[1] See *Campbell-Ewald Co. v. Gomez*, 135 S.Ct. 2311 (2015) (granting *certiorari* to review 768 F.3d 871 (9th Cir. 2014)); petition for writ of certiorari, *Campbell-Ewald Co. v. Gomez*, 2015 WL 241891 at *2 ("the Act has become an extortionist weapon in the hands of class action attorneys seeking to extract lucrative attorneys' fees for class-wide settlements.").

Each of the Intervenors has been subjected to suit under the TCPA for calls made in an attempt to collect debts, premised on the FCC's expansive

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[1] http://www.reuters.com/article/2013/09/30/bankofamerica-robocalls-settle-idUSL1N0HQ0HU20130930

interpretation of what constitutes an "automatic telephone dialing system," referred to as an "ATDS." *See*, *e.g., Echevvaria v. Diversified Consultants, Inc.*, 2014 WL 929275 (S.D. N.Y. Feb. 28, 2014); *Nigro v. Mercantile Adjustment Bureau, LLC,* 769 F.3d 804 (2d Cir. 2014); *Holt v. MRS BPO, LLC*, 2013 WL 5737346 (N.D. Ill. Oct. 21, 2013); *Horton v. Calvalry Portfolio Servs., LLC*, 301 F.R.D. 547, 548 (S.D. Cal. 2014).

Each of the Intervenors is or has been a member of ACA International.

Each of the Intervenors is or has engaged in the business of making telephone calls to collect debt, and has a substantial interest in maximizing productivity of employees involved in such telephone calls.

Intervenors' interests are substantially affected by the FCC's actions and the Court's review of those actions, and each Intervenor is a "party in interest in the proceeding," entitling it to intervene "as of right" in this matter. 28 U.S.C. § 2348; *see also* 47 U.S.C. § 402(e) ("any interested person may intervene and participate in the proceedings had upon said appeal"). *Wold Commc'ns, Inc. v. F.C.C.*, 735 F.2d 1465, 1473, n. 20 (D.C. Cir. 1984) (construing 28 U.S.C. § 2348 and 47 U.S.C. § 402(e) to allow for intervention without the need for petitioning for rehearing, and authorizing "*any* [interested] person" to intervene).

Since enactment of the TCPA in 1991, collection agencies have argued for a categorical exemption for debt collection calls from the restrictions applicable

under the TCPA; the FCC has long adhered to the view that such an exemption was unnecessary "because such calls are adequately covered by exemptions we are adopting here for commercial calls which do not transmit an unsolicited advertisement and for established business relationships." *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8773, 8790-93 (1992) (47 C.F.R. 64.1200(a)(2)(iii) & (iv) (1992)).

These two exemptions "apply where a third party places a debt collection call on behalf of the company holding the debt." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8773, ¶ 39 (July 26, 1995). The FCC also clarified that "all debt collection circumstances involve a prior or existing business relationship." *Id.* at 8771-72, ¶ 36; *see also In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act Of 1991,* 23 FCC Rcd. 559, 565, ¶ 11 (Jan. 4, 2008).

In 2003, the FCC addressed the application of the TCPA's ATDS definition to "predictive dialers." *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014 (2003). The 2003 Order concluded that a predictive dialer amounts to an ATDS even when the equipment does not use a random or sequential number generator, but instead makes calls from a list or database of numbers, because predictive dialers have "the *capacity* to dial numbers

without human intervention." *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14092 (2003); *see In the Matter of Petition for Declaratory Ruling Regarding Non-Telemarketing Use of Predictive Dialers Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 13031, 13036 (2012) ("predictive dialers are autodialers under the TCPA, irrespective of whether such equipment uses a statutorily required random or sequential number generator.").

In 2008, the FCC "clarified" that debt collection calls made to cellular telephones were not subject to the exemptions adopted for calls to residential telephone lines, and that ATDS or prerecorded message calls to cell numbers were permissible only if they could be shown to have been made with prior express consent. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C. Rcd. 559, 564 (2008).

In *ACA International Petition for Rulemaking*, CG Docket No. 02-278 (filed February 11, 2014), the ACA requested the FCC clarify its rules to: "(1) confirm that not all predictive dialers are categorically automatic telephone dialing systems ('ATDS' or 'autodialers'); (2) confirm that 'capacity' under the TCPA means present ability; (3) clarify that prior express consent attaches to the person incurring a debt, and not the specific telephone number provided by the debtor at

the time a debt was incurred; and (4) establish a safe harbor for autodialed 'wrong number' non-telemarketing calls to wireless numbers."

The ACA's petition for review here seeks to: "(1) hold unlawful and set aside the Federal Communications Commission's treatment of 'capacity' within the definition of an 'automatic telephone dialing system' under the Telephone Consumer Protection Act, and compel the Commission to treat 'capacity' in a way that comports with a caller's rights of due process and freedom of speech; (2) hold unlawful and set aside the Commission's treatment of predictive dialers, and compel the Commission to treat them in a way that does not expand the statutory definition of an 'automatic telephone dialing system' under the Telephone Consumer Protection Act beyond the definition that Congress enacted; (3) hold unlawful and set aside the Commission's treatment of prior express consent, including the Commission's treatment of reassigned numbers, and compel the Commission to either - (A) establish a viable safe harbor for autodialed 'wrong number' non-telemarketing calls to reassigned wireless numbers, or (b) define 'called party' as a call's intended recipient." Intervenors' interests are substantially affected by a decision on each of these issues.

II. GROUNDS FOR INTERVENTION

None of the Intervenors participated directly in the proceedings below; however, both 28 U.S.C. § 2348 and 47 U.S.C. § 402(e) allow persons whose

interests are affected to intervene in this action, as long as the Intervenors have Article III standing. *Rio Grande Pipeline Co. v. F.E.R.C.*, 178 F.3d 533, 539 (D.C. Cir. 1999); *Deutsche Bank Nat. Trust Co. v. F.D.I.C.*, 717 F.3d 189, 193-95 (D.C. Cir. 2013); *Noel Canning v. N.L.R.B.*, 705 F.3d 490, 514-15 (D.C. Cir. 2013), *aff'd*. 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014).

To have standing, the Intervenors must show: "(1) injury-in-fact, (2) causation, and (3) redressability." *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 11 (D.C. Cir. 2011) (citation omitted). "'Thus, to establish standing, a litigant must demonstrate a personal injury fairly traceable to the [opposing party's] allegedly unlawful conduct [that is] likely to be redressed by the requested relief.'" *Id*. (citation omitted); *see also Sierra Club v. E.P.A.*, 755 F.3d 968, 973 (D.C. Cir. 2014) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992)).

Each of the Intervenors is eligible to intervene in this proceeding because each currently uses (or has used) equipment and software to make telephone calls from a list of numbers derived from a database, rather than numbers that are randomly or sequentially generated, stored, or dialed.

Because of the FCC's action, every call made by Intervenors over the past four years and every call Intervenors make in the future with their equipment may now be subject to challenge in a TCPA action. By failing to define an ATDS in a way that permits a categorical classification of calling equipment as not qualifying

as an ATDS when it does not have the current capacity to make automated calls without human intervention, and instead concluding that "[h]ow the human intervention element applies to a particular piece of equipment is specific to each individual piece of equipment, based on how the equipment functions and depends on human intervention, and is therefore a case-by-case determination," the FCC has effectively allowed any one claiming he or she received a call to attempt to persuade a Court that the call was made with an ATDS. FCC Order, ¶ 17.

Moreover, because telephone numbers are not transfixed to consumers like social security numbers are, one can change his or her phone number as often as one likes. See Alyssa Abkowitz, "Wrong Number? Blame Companies' Recycling," The Wall Street Journal (Dec. 1, 2011);[2] Craig Stroup, John Vu, FCC, Industry Analysis and Technology Division, Numbering Resource Utilization in the United States, pp. 5, 20-24, Table 7 (Apr. 2013) (discussing churn rates).[3] The transitory nature of the debtor population, along with their even more transient telephone numbers, has created substantial difficulties and unique problems for Intervenors in implementing the requirements of the TCPA. Consent to make ATDS calls under

[2] Available online at http://online.wsj.com/news/articles/SB10001424052970204012004577070122687462582

[3] Available online at http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0405/DOC-319997A1.pdf.

the TCPA has been interpreted by the FCC to exists when the consumer knowingly releases his or her phone number as part of a credit application. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8773, 8790-93 (1992). Debt collection calls to the number given, however, cannot continue to be made after the consumer is no longer using the phone number called. *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 639-40 (7th Cir. 2012). What TCPA consequence falls on the caller, the former user of the number, and the person actually receiving the call, were addressed by the FCC in its recent Declaratory Ruling. In framing its response to these problems, the FCC added a new layer of strict liability for calls reaching someone other than the intended recipient of any given call.

Each of the Intervenors is adversely impacted by the FCC's declaratory ruling, and exposed to a very substantial and concrete risk of harm by the FCC's action, because Intervenors' businesses and activities depend upon the use of equipment used to make telephone calls that is swept under the FCC's extraordinarily expansive interpretation of the statutory term "automatic telephone dialing system" under 47 U.S.C. § 227(a)(1), and the FCC's narrow interpretation of "prior express consent of the called party" under section 227(b)(1)(A).

If the Court were to affirm the FCC's ruling, each of the Intervenors would: (a) become subject to an ever increasing number of claims of TCPA liability for

any calls made over the past four years in pending civil litigation; (b) be forced to abandon hundreds of thousands of dollars of investment in call center equipment, software, and infrastructure in order to comply with the TCPA, and (c) lose employee productivity gained by the use of calling equipment and software platforms currently in operation, in order to comply with the FCC order.

In essence, according to the FCC, the only apparent phone system that does not amount to an ATDS is a rotary-dial phone. But even there, the FCC noted it was "theoretically possible" to modify a rotary dial phone to constitute an ATDS. FCC Order, ¶ 18.

The FCC's action has caused and will continue to cause injury to Intervenors who are forced to defend lawsuit after lawsuit claiming that their telephone calls were made with an ATDS, and only a favorable decision by this Court invalidating the FCC's action would redress the Intervenors' injuries.

In the process of attempting to recover outstanding accounts and balances, Intervenors act as an extension of businesses in every community. They represent local mom and pop stores, family doctors, retailers, state and national banks, insurers, and governmental agencies owed money. Intervenors work with these businesses, large and small, to obtain payment for the goods and services delivered to consumers. Each year, the combined effort of Intervenors and other members of the collection industry result in the recovery of billions of dollars that are returned

to business. Without an effective collection process, the economic viability of these businesses and, by extension, the local and national economies in general are threatened; at the very least, citizens would be forced to pay inflated prices to compensate for uncollected debts.

Without any effective way to reach and communicate with consumers to persuade repayment, many of whom have abandoned their once ubiquitous home phones for the convenience and portability of cellular phones, many debts will go uncollected, at the expense of all.

For these reasons, Intervenors have the requisite interests to intervene in this action.

III. ALTERNATIVE REQUEST TO PARTICIPATE AS AMICI CURIAE

Even if the respondents were to disagree with the sufficiency of Intervenors' claims of Article III standing, Intervenors should nonetheless be permitted to participate in these proceedings as amici curiae in support of petitioner, pursuant to Fed. R. App. P. 29(a)-(b) and D.C. Cir. Rule 29(b) and (d). Counsel for Intervenors has gained substantial experience and expertise in the area of the TCPA, call technology, and regulation of calling practices by debt collectors, and allowing Intervenors to participate in these proceedings will significantly aid the Court in resolving this action.

IV. CONCLUSION

For all the foregoing reasons, MRS BPO LLC, Cavalry Portfolio Services, LLC, Diversified Consultants, Inc., and Mercantile Adjustment Bureau, LLC, respectfully request they be granted leave to intervene in support of petitioner. In the alternative, each of the foregoing request leave to participate as *amici curiae*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 10, 2015, I electronically filed the foregoing, the Certificate as to Parties required by D.C. Cir. Rule 27(a)(4), and the Movants' Corporate Disclosure Statement with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Furthermore, copies of the foregoing Motion and the appended Certificate as to Parties and Corporate Disclosure were served on August 7, 2015 by first class mail and by email to the persons listed below.

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