

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of: Todd C. Bank

Petition for Declaratory Ruling to
Clarify the Scope of Rule 64.1200(a)(2)

Docket Number: _____

**PETITION FOR DECLARATORY RULING TO
CLARIFY THE SCOPE OF RULE 64.1200(a)(2)**

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Pursuant to Section 1.2 of the Commission’s Rules, Todd C. Bank (“Bank”) respectfully requests that the Commission issue a declaratory ruling clarifying that the restrictions of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (“TCPA”), on unsolicited, pre-recorded telephone calls, *i.e.*, 47 U.S.C. § 227(b)(1)(B) and 47 C.F.R. § 64.1200(a)(2) (collectively, the “Robocall Provision” or “Robocall Prohibition”), apply to calls made to home-business telephone lines that are registered with the telephone-service provider as residential lines. This clarification is consistent with the TCPA’s purposes and the Commission’s orders implementing the statute. It would also serve the public interest by enabling individuals who work from home to use their registered residential telephone lines without having to be harassed in the various manners that the TCPA prohibits.

INTRODUCTION AND SUMMARY

Bank is an attorney with a home-based law practice. The telephone number that Bank uses in conducting his law practice is registered with the telephone-service provider as a residential number. The public listings of the telephone number contain listings that identify it as a business number and listings that identify it as a residential number.

As the Commission is well aware, many people work at home and, of those who do, many use a telephone line that is registered with the telephone-service provider as a residential line. Such

lines are registered as residential because the person uses the line for both personal and business purposes, the line is shared by the user with family members who use the line for personal purposes, the user is engaged in a short-term business, the user wishes to avoid the increased charges that are associated with a business listing, the business is limited in scope, and the user does not wish to forgo the protections afforded by the TCPA. Furthermore, there is no public-policy reason why a person who works at home using a telephone line that is registered with the telephone-service provider as a residential line should be inundated with the various types of telephone calls that the TCPA prohibits.

DISCUSSION

POINT I

A TELEPHONE LINE THAT IS REGISTERED AS A RESIDENTIAL LINE WITH THE TELEPHONE-SERVICE PROVIDER FALLS WITHIN THE BROAD TERM “ANY RESIDENTIAL TELEPHONE LINE” REGARDLESS OF WHETHER THE LINE IS USED FOR BUSINESS, WHETHER EXCLUSIVELY OR IN ADDITIONAL BEING USED FOR PERSONAL MATTERS

The Robocall Prohibition applies not to *some* residential telephone lines, but to “*any*” residential telephone line; and the meaning of “any” is clear: “[t]he word ‘any’ means ‘without restriction or limitation.’” *United States v. Cullen*, 499 F.3d 157, 163 (2d Cir. 2007).

A. As the Commission Has Made Clear, a Residential Telephone Line That is Used for Business Purposes Remains Within the Scope of the Term “Any Residential Telephone Line”

In addressing a section of the TCPA that concerns live telemarketing calls, the Commission made clear that the use of a residential line by a home business does not change the status of the line as residential under the statute.

In 2002, the Commission noted that “[t]he TCPA [in Subsection (c)] directs the Commission to ‘compare and evaluate alternative methods and procedures . . . for their effectiveness in protecting

[residential telephone subscribers’] privacy rights’ to avoid receiving unwanted telephone solicitations,” *Notice of Proposed Rulemaking and Memorandum and Order*, 17 FCC Rcd. 17459, ¶ 13 (Sept. 12, 2002) (“2002 TCPA NPRM”) (ellipsis and brackets in original), citing, in a footnote to this quotation, 47 U.S.C. § 227(c)(1)(A), which states as follows:

... the Commission shall initiate a rulemaking proceeding concerning the need to protect *residential telephone subscribers’* privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall [] compare and evaluate alternative methods and procedures (including ... company-specific ‘do not call’ systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages.

47 U.S.C. § 227(c)(1)(A) (emphasis added). This subsection of the TCPA concerns traditional telemarketing calls, that is, “live voice solicitations,” to residential telephone lines.” 2002 TCPA NPRM, ¶ 3, citing, in a footnote, 47 U.S.C. § 227(c)(1)-(4).

The Commission further observed that, in addition to the fact that the use of “predictive dialers. . . inconveniences and aggravates consumers who are hung up on,” 2002 TCPA NPRM, ¶ 7, such calls “may also be disruptive to the increasing number of *individuals who now work from home* by tying up telephone lines.” 2002 TCPA NPRM, ¶ 15 (emphasis added).¹ Given that the section of the TCPA to which the Commission’s discussion of predictive dialers was addressed (*i.e.*, subsection (c)) concerns only calls that are made to “residential telephone subscribers,” 47 U.S.C. § 227(c)(1)(A), it could not be more clear that the Commission would consider the telephone line

¹ As the Commission explained, “[p]redictive dialers, which initiate phone calls while telemarketers are talking to other consumers, [and thus] frequently abandon calls before a telemarketer is free to take the next call[,] . . . [a] practice [that] inconveniences and aggravates consumers who are hung up on [when a call is abandoned].” 2002 TCPA NPRM, ¶ 7 (footnotes omitted). Specifically, “[a] predictive dialer is an automated dialing system that . . . ‘predicts’ the time when a consumer will answer the phone and a telemarketer will be available to take the call,” *id.* at ¶ 7, n.37, but “[w]hen a predictive dialer simultaneously dials more numbers than the telemarketers can handle, some of the calls are disconnected.” *Id.*, ¶ 26.

at issue in this case to be a residential line. In adopting its predictive-dialer regulation, *i.e.*, 47 C.F.R.

§ 64.1200(a)(7) (formerly (a)(6)), the Commission explained:

Consumers complain that they do not have an opportunity to request placement on a company's do-not-call list when predictive dialers disconnect calls. Abandoned calls can also interfere with Internet usage or simply tie-up telephone lines for people telecommuting *or operating businesses out of the home.*

Report and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 18 F.C.C. Rcd. 14014, 14102-14103, ¶ 147 (July 25, 2003) (emphasis added; footnotes omitted).

Further showing that a residential line does not lose its status by being used for business purposes is another instance of the Commission's addressing of Subsection (c), wherein the Commission *rejected* a request to exempt, from its corresponding do-not-call regulations (*see* 47 C.F.R. § 64.1200(c), (d), and (e)), calls that are made to residential telephone numbers that are used for business purposes. That is, in 2005, the Commission stated that it "*decline[s] to exempt* from the [Commission's] do-not-call rules those calls made to '*home-based businesses*'; rather, we will review such calls as they are brought to our attention to determine whether or not the call was made to a residential subscriber." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 70 Fed. Reg. 19330, 19331 (Apr. 13, 2005).

In addition to the Robocall Prohibition, the TCPA also places restrictions on calls that, even more so than with respect to robocalls to residential telephone lines, concern types of telephone lines whose status might be difficult to obtain; that is, Section 227(b)(1)(A) prohibits non-consensual artificial-voice or prerecorded calls:

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, *cellular telephone service*, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

(emphasis added). As with these various types of telephone lines, just as with residential lines, a telemarketer bears the burden of ensuring that a prerecorded call to a particular telephone line is not prohibited, as the Commission has explained:

The well-established evidentiary value of business records means that callers have reasonable ways to carry their burden of proving consent. We expect that responsible callers, cognizant of their duty to ensure that they have prior express consent under the TCPA and their burden to prove that they have such consent, will maintain proper business records tracking consent. Thus, we see no reason to shift the TCPA compliance burden onto consumers and affirm that they do not bear the burden of proving that a caller did not have prior express consent for a particular call.

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961, 7998, ¶ 70 (F.C.C. July 10, 2015) (footnote omitted).²

In sum, it is clear that, according to the Commission, a residential telephone line that is used for business purposes remains a residential line.

B. The TCPA is a Strict-Liability Statute

If a telephone line is registered as residential, then it is entitled to the protections afforded to residential lines under the TCPA, which is a strict-liability statute. *See Alea London Ltd. v. American Home Servs., Inc.*, 638 F.3d 768, 776 (11th Cir. 2011) (“[t]he TCPA is essentially a strict

¹ The case law has likewise recognized that the burden of showing consent belongs on the caller, such that the existence of consent is an affirmative defense. *See Grant v. Capital Mgmt. Services, L.P.*, 449 Fed. Appx. 598, 600, n.1 (9th Cir. 2011); *Thrasher-Lyon v. Illinois Farmers Ins. Co.*, 861 F. Supp. 2d 898, 905 (N.D. Ill. 2012); *Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316, 1319 (S.D. Fla. 2012), *aff’d*, 755 F.3d 1265 (11th Cir. 2014).

liability statute” that “does not require any intent for liability except when awarding treble damages,” *see* 47 U.S.C. § 227(b)(3)); *Penzer v. Transportation Ins. Co.*, 545 F.3d 1303, 1311 (11th Cir. 2008) (“[t]he TCPA is essentially a strict liability statute where liability can be found for erroneous unsolicited faxes” (citation and quotation marks omitted) (the statute addresses unsolicited-fax advertisements in the same manner (indeed, in the same subsection) in which it addresses prerecorded phone calls, *see* 47 U.S.C. § 227(b)(1))); *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*, 401 F.3d 876, 882 & n.3 (8th Cir. 2005) (“intent is not a prerequisite to liability under the [TCPA]. . . . The [TCPA] . . . makes no exception for senders who mistakenly believe that recipients’ permission or invitation existed. The issue of intent, or more accurately, the issues of knowledge and willfulness, however, clearly are material to the question of treble damages.”).

The statute could have provided that a caller is liable only if he knowingly calls a residential number, but it does not; indeed, as the above cases explain, a defendant’s knowledge is relevant *only* to the amount of damages, not whether it is liable in the first place.

C. The Test of Whether a Telephone Line is Within the Scope of “Any Residential Telephone Line” is Based on an Objective, Bright-Line Rule: a Telephone Line is a “Residential Line” if it is Registered as Such With the Telephone Company

In *Margulis v. Fairfield Resorts, Inc.*, No. 03AC-008703, 2004 WL 5400462 (Mo. Cir. Aug. 3, 2004), which arose under subsection (c) of the TCPA, the defendant had sought to compel the plaintiff to respond to discovery demands regarding “what can generally be described as the details of business activities by [the] [p]laintiff in his residence and what telephone numbers he has used in his business.” *Id.* at *1. The defendant in *Margulis* “argue[d] that because [the] [p]laintiff conducts his law practice out of his home and possibly other business activities, the telephone numbers to which the [defendant’s] calls were placed are ‘business’ telephone numbers[,] . . . [and therefore the] [p]laintiff’s cause of action fails.” *Id.* In response, the “[p]laintiff argue[d] that

regardless of the presence of business activities in his home, it is still his residence, he is a ‘residential telephone subscriber’ and the telephone lines are registered with the telephone company as ‘residential’ telephone numbers. [The] [p]laintiff argue[d] that no amount of ‘business’ activities conducted in the home or on the phone in the home changes the fact that the telephone lines are registered with the telephone company as ‘residential’ telephone numbers or his status as a ‘residential telephone subscriber’ and thus the TCPA applies to the[] calls.” *Id.*

The court found that both the statutory language as well as practicality supported an objective, bright-line test in making the determination of whether a telephone line is residential, and that, accordingly, such determination does not depend on whether a residential telephone line is used for business purposes (either partly or fully). First, the court explained that “the plain language of ‘residential telephone subscriber’ is simply someone who subscribes to telephone service from the *phone company* that serves [] a *residence* and is registered as a ‘residential’ line.” *Id.* (emphases added).

Second, the *Margulis* court explained why, in addition to the bright-line rule’s being supported as a matter of statutory construction, such a rule yields practical benefits:

Besides fitting the *plain language* of the term “residential telephone subscriber,” applying the TCPA to a person who has subscribed to “residential” telephone service *regardless of subjective inquiry into the types of activities taking place in that residence* also makes *practical sense*. Phone listings in directories are generally segregated into *residential* listings and *business* listings. Residences and businesses are registered differently with the *phone company* and charged different rates. How the telephone line is registered *with the telephone company* is a reasonable *bright line test* and *consistent with the plain language of the statute*.

Id. at *2 (emphases added).

Absent an objective, bright-line test, there would often be extensive discovery of not only the plaintiff but also of the other members of his household regarding the use of the telephone line in

question. As a result, the burdens of litigation that would likely ensue based on the results of that discovery, as well as the uncertainty in the law regarding the issue of which residential telephone lines fall within the scope of “any residential telephone line,” would undermine the TCPA’s prohibition against making prerecorded calls to “any residential telephone line” by outweighing the benefits of bringing an action in the first place.

Discovery pertaining to the manner in which a telephone line was used would involve numerous questions (and related document demands), and create significant uncertainty of the law. Such questions would include: did the plaintiff’s tax returns include a deduction relating to the number? What is the proportion of incoming calls, and outgoing calls, that are business-based (thus entitling a defendant to the plaintiff’s itemized telephone bills, and spawning various discovery motions regarding privacy issues related thereto)? What about outgoing calls? What if a telephone line is used by only one family member uses for business purposes; who, if anyone, would have standing? What about a person’s telephone conversations with a business partner who is also the person’s friend or relative; how would the purpose of such calls be determined? In addition, such discovery would not only be part of cases involving the Robocall Provision, but also of cases involving the Commission’s company-specific do-not-call regulations (*see* 47 C.F.R. § 64.1200(c)(2), (d)) and the Commission’s restriction of telemarketing calls to the hours of 8:00 a.m. to 9:00 p.m. (*see* 47 C.F.R. § 64.1200(c)(1)), each of which also applies to calls made to residential telephone lines. Thus, for example, a physician who uses his residential telephone line for patients to contact him in the event of an emergency (or for more routine purposes) would be subject to receiving telemarketing calls outside of the permissible period and also in contrast to a do-not-call request, and, of course, robocalls (at all hours).

Under the bright-line rule, as the *Margulis* court recognized: “the extent of [the] [p]laintiff’s

law practice and other ‘business’ he conducts out of his home. . . . *is simply not relevant*. Whether or how much home business activities are conducted in [the] [p]laintiff’s residence is *completely irrelevant to whether it is his and other family members’ residence*.” *Margulis*, 2004 WL 5400462, *1 (emphases added). Moreover, the *Margulis* court explained, as has the Commission, *see* Point I(A), *supra*, that a residence, with respect to a telephone line that is registered as residential, “*does not lose the character under the TCPA as a residence, on a residential street, where the family resides, merely because any amount of business is conducted there.... no more so than living in the back room of a business complex turns that complex into a residence* for purposes of the TCPA.” *Id.* (all emphases added except of “any”; ellipsis in original).

Even without considering the use of one’s registered residential telephone line, determining whether a telephone numbers falls within the broad scope of “any residential telephone line,” 47 U.S.C. § 227(b)(1)(B), would spawn complex and intrusive discovery, and, again, create significant uncertainty in the law. Such discovery would involve questions (and related document demands) including: how many places list the plaintiff’s telephone number as residential versus business? Did the plaintiff cause his number to be listed as a business number? How long before the defendant’s call did the plaintiff cause his number to be listed as a business number? How widely available were the sources representing the number as residential versus the sources listing it as a business number?.

CONCLUSION

Petitioner respectfully requests that the Commission issue a declaratory ruling clarifying that the restrictions of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, on unsolicited, pre-recorded telephone calls, *i.e.*, 47 U.S.C. § 227(b)(1)(B) and 47 C.F.R. § 64.1200(a)(2), apply to calls made to home-business telephone lines that are registered with the telephone-service provider as residential lines.

Dated: March 7, 2016

s/ Todd C. Bank _____

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(718) 520-7125

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DECLARATION OF TODD C. BANK

1. I am the Petitioner in this matter.

2. I am also the plaintiff-appellant in *Todd C. Bank, Individually and on Behalf of All Others Similarly Situated*, 2d Cir. No. 15-2391, in which, pending before the United States Court of Appeals for the Second Circuit (oral argument was held on March 4, 2016) is an appeal of the granting of summary judgment, by the Eastern District of New York, to the defendants-appellees. The telephone number at issue in that litigation is the one that I use in conducting my law practice, *i.e.*, the number described in the Petition.

3. For the convenience of the Commission, attached hereto as Exhibit "A" is a copy of the order granting summary judgment.

4. The factual assertions stated within are accurate to the best of my knowledge.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

s/ Todd C. Bank
Todd C. Bank
Executed on March 7, 2016

EXHIBIT “A”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FOR ONLINE PUBLICATION

TODD C. BANK,

Plaintiff,

- versus -

INDEPENDENCE ENERGY GROUP LLC
and INDEPENDENT ENERGY ALLIANCE
LLC,

Defendants.

MEMORANDUM

AND ORDER

12-CV-1369 (JG)(VMS)

A P P E A R A N C E S:

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By: Todd C. Bank
Pro Se Plaintiff

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By: Dana B. Klinges
Kevin P. Potere
Attorneys for Defendants

JOHN GLEESON, United States District Judge:

Todd Bank, proceeding *pro se*, brings this purported class action alleging that the defendants violated the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227(b)(1)(B), by calling his residential telephone line without his consent using an artificial or prerecorded voice that delivered a message advertising goods or services. On October 2, 2014, I denied defendants’ motion to dismiss because I found I did not have enough information to decide whether Bank’s telephone line was a business or residential line for purposes of the

TCPA. *See Bank v. Independence Energy Grp. LLC*, No. 12-CV-1369, 2014 WL 4954618 (JG), at *1 (E.D.N.Y. Oct. 2, 2014) (ECF No. 37) (the “October 2 Opinion”). Now that the parties have conducted discovery on the topic, the defendants have moved for summary judgment on that issue and on the ground that their offer of judgment mooted Bank’s claim. For the reasons stated below, the defendants’ motion for summary judgment is granted.

BACKGROUND

I assume familiarity with my October 2 Opinion denying the defendants’ motion to dismiss. What follows is a summary of the facts relevant to the issue of whether Bank’s telephone line is residential. Unless otherwise noted, the facts set forth here are either undisputed, or, if disputed, are viewed in the light most favorable to Bank, the nonmoving party. *See Abramson v. Pataki*, 278 F.3d 93, 101 (2d Cir. 2002).

Bank is an attorney practicing in Kew Gardens, New York. On January 17, 2012, Bank received a pre-recorded voice message on (718) 520-7125 (the “Subject Telephone”). Def. Rule 56.1 Stmt ¶ 3. Bank had previously registered the Subject Telephone with his service provider as a residential line. Pl. Rule 56.1 Stmt at ¶ 3. The pre-recorded voice message was delivered by an individual with whom the defendants had contracted to promote the retail electricity provided by Independence Energy. Pl. Rule 56.1 Stmt ¶ 5; *see also* Bank Decl. ¶ 5, Ex. C (Stark Dep.) at 31:17-32:11. The defendants assert that the call was made by individuals who “were not under contract or agreement with Defendants nor were they in any way otherwise employed by or agents of Defendants.” Def. Rule 56.1 Stmt. ¶¶ 4-5.

Bank used the number for the Subject Telephone as his law office telephone number in pleadings and court filings, in professional correspondence, on his business card, and on his attorney registration form with the New York State Unified Court System. Def. Rule 56.1

Stmnt ¶¶ 7-10. Bank also lists that number on tax returns for his law practice. *See id.* ¶ 12. Finally, the Subject Telephone has been listed on Avvo, a directory of attorneys, as Bank’s contact number. *Id.* ¶ 16. Bank does not deny that he has used the Subject Telephone in these ways. *See* Pl. Rule 56.1 Stmnt; *see also* Bank Decl. ¶ 3 (“Prior to, at the time of, and since the time of my receipt of Defendants’ prerecorded telephone call . . . I have used the [Subject Telephone] for both personal and business purposes.”).

DISCUSSION

A. *The Standard of Review*

A court may grant summary judgment if the moving party shows that “there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “A fact is ‘material’ for these purposes when it ‘might affect the outcome of the suit under the governing law.’” *Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 104 (2d Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute is genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* (quoting *Anderson*, 477 U.S. at 248).

In order to “[t]o survive summary judgment . . . the non-moving party must come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Reiseck v. Universal Commc’ns of Miami*, No. 06-CV-777 (TPG), 2012 WL 3642375, at *2 (S.D.N.Y. Aug. 23, 2012) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11 (1986)). “Conclusory allegations, conjecture, and speculation . . . are insufficient to create a genuine issue of fact.” *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998), and the “mere existence of a scintilla of evidence” is not sufficient to defeat summary judgment. *Anderson*, 477 U.S. at 252. Conversely, summary judgment is appropriate if the evidence produced would not allow a

reasonable juror to find in favor of the nonmoving party. *See Mitchell v. Shane*, 350 F.3d 39, 47 (2d Cir. 2003).

B. *Whether the Subject Telephone is “Residential”*

In my October 2 Opinion, I denied the defendants’ motion to dismiss because “I [did] not have sufficient evidence before me to determine whether the line at issue is ‘residential’ for purposes of § 227(b)(1)(B).” *Bank*, 2014 WL 4954618, at *1. I wrote that while a telephone subscriber can have a telephone number registered as “residential” with the telephone company, “if the subscriber holds out such a telephone number to the general public as a business line, the line should not be considered ‘residential’ for the purposes of the TCPA—even if it is registered as ‘residential’ with the telephone company.” *Id.* at *3.

As detailed above, the defendants have presented ample evidence that Bank held out the Subject Telephone to the public as a business line. Specifically, Bank provides the Subject Telephone number on his business card, professional letterhead for his law practice, and in pleadings and court filings, and he provides it to clients, prospective clients, other attorneys, and business contacts. He also maintains his attorney registration through the New York Unified Court System utilizing the Subject Telephone number as his contact number.

I conclude based on the evidence in the record that no reasonable juror could find that the Subject Telephone is residential, and for the reasons stated in my October 2 Opinion, summary judgment is appropriate. *See Bank*, 2014 WL 4954618, at *2-3.¹

CONCLUSION

For the reasons set forth above, defendants’ motion is granted, and the case is dismissed.

¹ I need not consider the defendants’ additional argument in support of their motion.

So ordered.

John Gleeson, U.S.D.J.

Dated: July 23, 2015
Brooklyn, New York