ConsumersUnion®

POLICY & ACTION FROM CONSUMER REPORTS

December 11, 2017

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ContextMedia, Inc. d/b/a Outcome Health Petition for Clarification or Declaratory Ruling Under the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278

Dear Ms. Dortch:

Consumers Union, the policy and mobilization division of Consumer Reports,[1] welcomes the opportunity to comment on the petition of ContextMedia, Inc. d/b/a Outcome Health ("Outcome") to the Federal Communications Commission ("Commission") to exempt messages sent in violation of the Telephone Consumer Protection Act (TCPA) as a result of a "technical error."[2] We agree with the position taken in comments by the National Consumer Law Center, Consumer Action, Consumer Federation of America, National Association of Consumer Advocates, Public Citizen, Public Knowledge, and U.S. PIRG ("Consumer Group Comments"),[3] and recommend that the Commission deny the petition. We are concerned that Outcome is inappropriately seeking relief from the Commission for alleged violations of the TCPA for which it is a defendant in pending litigation in federal court. Moreover, granting the petition would inappropriately undermine consumers' ability to limit the calls that they receive, thus compromising the TCPA's purpose, and one of our primary policy goals.

---

[1] Consumers Union is the policy and mobilization division of Consumer Reports, an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. It conducts its policy work in the areas of food and product safety, financial reform, privacy and data security, telecommunications reform, health care reform, antitrust and competition policy, and other areas. Consumer Reports is the world's largest independent product-testing organization. Using its more than 60 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications.

[2] Fed. Commc'ns Comm'n, Consumer and Governmental Affairs Bureau Seeks Comment on ContextMedia, Inc. d/b/a Outcome Health Petition for Clarification or Declaratory Ruling Under the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (Oct. 27, 2017), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-17-1054A1.pdf.

[3] Comments of the Nat'l Consumer Law Ctr. et al., In Opposition to the Petition for Declaratory Ruling Filed by ContextMedia, Inc., d/b/a Outcome Health, CG Docket No. 02-278 (Nov. 27, 2017), *available at* https://ecfsapi.fcc.gov/file/11270126922157/Comments%20on%20Outcome%20Health%20.pdf [hereinafter "Consumer Group Comments"].

As Outcome notes in its petition, it is a defendant in a putative class action lawsuit over robotexts sent after consent to receive them had been revoked.[4] The plaintiff alleges that dozens of messages were sent her despite repeated requests to stop.[5] Outcome chalks up the unwanted messages to technical problems deriving from their transition from one text message vendor to another. It claims that, because of an "unknown and inadvertent technical error," consumers who signed up for the messages with the original vendor were not able to opt-out through the new one.[6] While Outcome describes this as a "glitch,"[7] plaintiff's counsel suggests that the error "was the result of Outcome's own negligent decisions in the development process."[8]

As an initial matter, the question of whether these messages were sent due to excusable error or due to negligence should be determined in the pending case before the court, not by the Commission. (We note that under the applicable court decisions, proof of negligence is not required; the question is whether the calls were made, and whether there was consent for them.)[9] Consumers Union has long defended consumers' legal right to bring joint legal action in appropriate cases. It can be the most effective way for consumers to hold a company accountable for practices that cause widespread harm, and to get the company to change those practices. Should the Commission intervene to grant an exemption here, rather than allow the courts to decide the case, that would rob consumers of their right to full consideration consistent with due process. It could also spur other companies to seek to preempt ongoing TCPA suits by petitioning the Commission, potentially opening a floodgate. As noted in the Consumer Group Comments, it could have the effect of disrupting and undermining currently pending TCPA cases.[10]

Further, Outcome has not presented any legal justification for exempting these messages from liability. First, Outcome requests that the Commission fundamentally reinterpret the *SoundBite* decision to "clarify or declare" that it exempts from TCPA liability messages made after revocation of consent, if made as a result of an "unknown and inadvertent technical error."[11] However, *SoundBite* addresses only one very specific type of automated message made

---

[4] Petition of ContextMedia, Inc. d/b/a Outcome Health For Clarification, or, in the Alternative, for Declaratory Ruling, CG Docket No. 02-278 at 6 (Oct. 20, 2017), *available at* https://ecfsapi.fcc.gov/file/1020387607949/Outcome%20Petition%2010-20-17.pdf [hereinafter "Outcome Petition"]; Griffith v. ContextMedia, LLC, d/b/a Outcome Health, Second Amended Class Action Complaint and Jury Demand, 1:16-cv-02900, (N.D. Ill) (Aug. 20, 2017), *available at* https://www.courtlistener.com/docket/4263552/59/griffith-v-contextmedia-inc/; Plaintiff's Amended Memorandum in Support of Plaintiff's Motion for Class Certification (Aug. 10, 2017), *available at* https://www.courtlistener.com/docket/4263552/61/griffith-v-contextmedia-inc/.

[5] Glapion Law Firm, Notice of Ex Parte Presentation, CG Docket No. 02-278, in relation to Petition of ContextMedia, Inc. d/b/a Outcome Health For Clarification, or, in the Alternative, for Declaratory Ruling at 2 (Dec. 4, 2017), https://ecfsapi.fcc.gov/file/12040454129021/Ex%20Parte%20Filing.pdf [hereinafter "Glapion Ex Parte"].

[6] Outcome Petition, *supra* note 4, at 6.

[7] *Id.*

[8] Glapion Ex Parte, *supra* note 5, at 6.

[9] See, e.g., Alea London Ltd. v. Am. Home Servs., Inc., 638 F.3d 768, 776 (11th Cir. 2011), cert. denied, 565 U.S. 1014 (2011), https://www.leagle.com/decision/infco20110413076; Morgan v. Branson Vacation Travel, L.L.C., 2013 WL 5532228 (W.D. Okla. Oct. 4, 2013), https://cases.justia.com/federal/district-courts/oklahoma/okwdce/5:2013cv00188/86157/23/0.pdf; Harrington v. RoundPoint Mortg. Servicing Corp., 163 F. Supp. 3d 1240, 1243 (M.D. Fla. 2016), https://scholar.google.com/scholar_case?case=3277847834061821843.

[10] Consumer Group Comments, *supra* note 3, at 3.

[11] Outcome Petition, *supra* note 4, at 7.

after revocation of consent: a one-time confirmation message to inform the consumer that the revocation of consent had been received and would be honored.[12] This specific one-time message not only assures the consumer that the revocation request has been received and processed; it could even alert a consumer who did *not* actually send a revocation request that one had been mistakenly recorded as having been received. The *SoundBite* decision thus provides absolutely no support for exempting from the consent requirement the kinds of messages at issue here.

Second, Outcome requests that the Commission decree that messages sent in error qualify for a safe harbor.[13] But the TCPA only gives the Commission the authority to exempt robocalls (or texts) to cell phones if they "are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect"[14]—not to create a safe harbor for calls made purportedly in error—even assuming those calls would be consistent with those privacy rights.

Fundamentally, we are concerned that granting Outcome's petition could cause many consumers to receive more unwanted automated messages with no viable way to stop them. As the Commission is aware, unwanted automated calls and texts are a top consumer concern. Nearly three quarters of a million consumers—over 740,000—have joined Consumers Union's End Robocalls campaign to push for the ability to protect themselves from unwanted automated calls. Although Outcome describes its robotexts as informational messages that "consumers find highly desirable and … do not want to discourage,"[15] consumers have a right to privacy from unwanted messages, regardless of their content. Granting this petition would erode their ability to exercise that right.

For these reasons, we respectfully request that the Commission deny Outcome's petition. We believe that rejecting Outcome's request will help ensure that consumers have the strongest possible protections from these intrusive messages. We thank the Commission for its continued work to protect consumers from unwanted robocalls.

Sincerely,

Maureen Mahoney, Policy Analyst
Consumers Union
San Francisco, CA

George P. Slover, Senior Policy Counsel
Consumers Union
Washington, DC

---

[12] Fed. Comm'cns Comm'n, Declaratory Ruling, *SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (Nov. 29, 2012), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-12-143A1.pdf.

[13] Outcome Petition, *supra* note 4, at 10.

[14] 47 U.S.C. § 227(b)(2)(C), *available at* https://www.law.cornell.edu/uscode/text/47/227.

[15] Fed. Comm'cns Comm'n, Report and Order, CG Docket No. 02-288, ¶29 (Feb. 15, 2012), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-12-21A1.pdf, quoted in Outcome Petition, *supra* note 4, at 1.