



Federal Communications Commission
Washington, D.C. 20554

February 24, 2015

Ms. Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals
for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, N.Y. 10007

**Re: *Paul Sterling v. Mercantile Adjustment Bureau, LLC*, No. 14-1247-cv
(oral argument scheduled for March 17, 2015)**

Dear Ms. Wolfe:

By letter dated February 3, 2015, the Court asked the Federal Communications Commission to submit a letter brief setting forth the agency's views on the following question:

Does the Telephone Consumer Protection Act's prohibition on automated calls, absent prior consent from the called party, apply to a new and non-consenting user of a cellular telephone number previously assigned to a consenting user?

We would like to assist the Court, as we did in another case when we submitted a letter brief in response to a different question from the Court concerning the Telephone Consumer Protection Act. *See* Letter Brief for Federal Communications Commission, *Nigro v. Mercantile Adjustment Bureau, LLC*, Second Circuit No. 13-1362 (filed June 30, 2014). Unfortunately, for the reasons

discussed below, at this time we are unable to address the question that the Court poses here.

First, the Commission has not directly spoken to this question in any of its rules or orders. Therefore, the agency's litigation counsel is not now in a position to speak authoritatively to this issue. *See* Letter Brief of FCC, *AT&T Corp. v. Core Commc'ns Inc.*, 3d Cir. Nos. 14-1499 & 14-1664 (filed Nov. 4, 2014) (declining to answer a question that the Commission had not yet addressed); Amicus Brief of FCC, *New Cingular Wireless PCS, LLC v. Finley*, 4th Cir. Nos. 10-2221 & 10-2243 (filed Oct. 20, 2011) (same).

Second, we cannot address the question posed by the Court for the additional reason that precisely the same question is now pending before the FCC in an administrative proceeding. Three different companies have petitioned the agency for a declaratory ruling to clarify whether a caller, having obtained prior consent to call a wireless telephone number, is liable under the Telephone Consumer Protection Act for placing autodialed calls to that number after the number has been reassigned from the consenting consumer to another consumer without the

caller's knowledge.¹ Over the course of the past year, the Commission's Consumer and Governmental Affairs Bureau has solicited public comment on each of these petitions.² The Commission has not yet ruled on the issue presented by these petitions. We believe it would be inappropriate for FCC litigation counsel to prejudge the agency's ultimate disposition of this question in an amicus brief.

¹ See Petition for Expedited Declaratory Ruling of Rubio's Restaurant, Inc., CG Docket No. 02-278 (filed Aug. 11, 2014), available at <http://appsint.fcc.gov/ecfs/comment/view?id=6018269132>; Petition for Expedited Declaratory Ruling of Stage Stores, Inc., CG Docket No. 02-278 (filed June 3, 2014), available at <http://appsint.fcc.gov/ecfs/comment/view?id=6017795155>; Petition for Expedited Declaratory Ruling of United Healthcare Services, Inc., CG Docket No. 02-278 (filed Jan. 16, 2014), available at <http://appsint.fcc.gov/ecfs/comment/view?id=6017584805>.

² See Public Notice, 29 FCC Rcd 10106 (2014) (seeking comment on the Rubio's Restaurant petition); Public Notice, 29 FCC Rcd 8220 (2014) (seeking comment on the Stage Stores petition); Public Notice, 29 FCC Rcd 1160 (2014) (seeking comment on the United Healthcare petition).

In sum, although we would like to assist the Court in this matter, regrettably, under current circumstances we are unable to do so.

Respectfully submitted,

/s/ James M. Carr

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No. 14-1247

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PAUL STERLING,
PLAINTIFF-APPELLEE,
V.
MERCHANTILE ADJUSTMENT BUREAU, LLC,
DEFENDANT-APPELLANT.

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on February 24, 2015, I electronically filed the foregoing Letter Brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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