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January 4, 2024

Steve Cortez
Arch Telecom, Inc.
12600 Hill Country Blvd
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VIA E-MAIL stevec@archtelecom.com

Re: Updated opinion on the application of the TCPA and state laws to your dialing system

Dear Steve:

You have requested an updated opinion on whether the dialing system that Arch Telecom (“Arch”) uses to send texts or make calls is an “automatic telephone dialing system” (“ATDS”) under the Telephone Consumer Protection Act (“TCPA”) or an “automated system” under the Florida and Oklahoma “mini-TCPA” laws.

This opinion supersedes our previous opinion of May 20, 2022.

These statutes allow private causes of action and potentially class actions for failure to comply, so it is important that you review your system on an ongoing basis. As set forth below, it is our opinion that your dialing system complies with these laws.

Please contact me if any of the facts in this letter are incorrect or change as our opinion is based on this scenario.

I. TCPA

The TCPA prohibits any person from making any call using an ATDS or prerecorded message to any cell phone or other service for which the called party is charged without the prior express consent of the called party. 47 U.S.C. § 227(b)(1). “Calls” include texts. *See In re Rules & Regulations Implementing the TCPA of 1991*, 27 FCC Rcd 1830, 1832 (Feb. 15, 2012).

The TCPA defines an ATDS as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers”. § 227(a)(1).

Prior to *Facebook v. Duguid*, 141 S. Ct. 1163, 1167 (2021), plaintiffs argued that even if equipment has the *future capacity* to store or produce random or sequentially-generated numbers (even if the capacity was contingent upon the installation of hardware or software in the future), it should be considered an ATDS because it can dial a stored number automatically.

However, the Supreme Court ruled that “[t]o qualify as an ‘automatic telephone dialing system’ under the TCPA, a device must have the capacity either to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator.” *Id.*

In other words, “Congress’ definition of an autodialer requires that in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator.” *Id.* at 1170.

Many district courts have ruled post-*Facebook* that the equipment must *use* a random or sequential number generator to either store or produce phone numbers to be called. *See e.g., Jiminez v. Credit One Bank, N.A.*, No. 17 CV 2844-LTS-JLC, 2022 U.S. Dist. LEXIS 179434, at *17 (S.D.N.Y. Sep. 30, 2022) (granting summary judgment for defendant because the proper question was whether the ATDS actually employed the ATDS’ capability to use a random or sequential number generator when placing calls. “[E]ven if Defendant’s LiveVox system theoretically had the capacity to store or produce lists of random or sequential phone numbers to be called, there is no evidence showing that Defendants made the subject calls to Plaintiff’s cell phone number using such a technique. Instead, the undisputed evidence shows that Defendants only placed phone calls sourced from a curated, pre-approved list of customers.”); *Barnett v. First Nat’l Bank of Omaha*, No. 3:20-cv-337-CHB, 2022 U.S. Dist. LEXIS 37563, at *12 (W.D. Ky. Mar. 3, 2022) (“even if LiveVox did have the capacity to store telephone numbers using a random or sequential number generator, as Barnett claims, capacity alone is not enough to establish liability under the TCPA”); *Panzarella v. Navient Sols., Inc.*, 37 F.4th 867 (3d Cir. 2022) (same); *Grome v. USAAA Sav. Bank*, 557 F. Supp. 3d 931 (D. Neb. 2021) (same); *Pascal v. Concentra, Inc.*, No. 19-cv-02559-JCS, 2021 U.S. Dist. LEXIS 239583 (N.D. Cal. Dec. 14, 2021) (same).

The Supreme Court also refused to adopt a “human intervention” test when assessing the TCPA’s ATDS definition.

[A]ll devices require some human intervention, whether it takes the form of programming a cell phone to respond automatically to texts received while in “do not disturb” mode or commanding a computer program to produce and dial phone numbers at random. We decline to interpret the TCPA as requiring such a difficult line-drawing exercise around how much automation is too much.

Facebook, 141 S. Ct. at 1171 n. 6. The “human intervention” test had been used by some courts in the past but is no longer applicable to this issue or the definition of ATDS. As set forth below, however, “human intervention” is still relevant to compliance with Florida and Oklahoma laws.

The *Facebook* decision did not affect the TCPA restrictions on use of prerecorded or artificial voices.

On December 28, 2023, you provided me an explanation of the equipment, which you demonstrated over Zoom. Our conversation confirmed that the equipment used by Arch does not work in concert with any other equipment, whether owned by Arch, its affiliates, or any third party,

which individually or taken as a whole, would have any present or future capacity to store or produce, and dial random or sequential numbers.

Specifically, real estate agents or other subscribers that sign up for an account are required to login in with their username and password. Once logged in, agents can review properties and contact information of individuals that are likely to sell their properties based on Arch's internal algorithms.

Agents must manually select which properties they want to call based on the parameters they set and click "start session" to begin dialing phone numbers based on the list they created. Calls cannot be automatically dialed, and agents can manually select different properties at any time. Agents can only call one number at a time. Agents cannot make prerecorded or artificial voice calls.¹ The system cannot initiate a call in any other way and cannot generate numbers to be called using a random or sequential number generator.

Based on your explanation, and the sources cited above, it is our opinion that your dialing system is not an ATDS under the TCPA, nor do your calls or texts use a prerecorded or artificial voice. As such, you can use this system to make calls and send texts in compliance with the TCPA.

II. Florida

On May 26, 2023, Florida amended the Florida Telephone Solicitation Act ("FTSA"). The law now prohibits "mak[ing] or knowingly allow[ing] a telephonic sales call² to be made if such call involves an automated system for the selection and dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called." Fla. Stat. Ann. § 501.059(8)(a) (emphasis added). The statute exempts calls with prior express written consent. *Id.* at (1)(g).³

¹ The TCPA prohibits calls to cell phones using an artificial or prerecorded voice for marketing purposes unless the caller has obtained the prior express written consent of the called party. 47 U.S.C. § 227(b)(1)(A)(iii).

² A "telephonic sales call" is defined as "a telephone call, text message, or voicemail transmission to a consumer for the purpose of soliciting a sale of any consumer goods or services, soliciting an extension of credit for consumer goods or services, or obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes." Fla. Stat. Ann. § 501.059(1)(j).

³ "Prior express written consent" means a written agreement that: 1. Bears the signature of the called party; 2. Clearly authorizes the person making or allowing the placement of a telephonic sales call by telephone call, text message, or voicemail transmission to deliver or cause to be delivered to the called party a telephonic sales call using an automated system for the selection or dialing of telephone numbers, the playing of a recorded message when a connection is completed to a number called, or the transmission of a prerecorded voicemail; 3. Includes the telephone number to which the signatory authorizes a telephonic sales call to be delivered; and 4. Includes a clear and conspicuous disclosure informing the called party that: a. By executing the agreement, the called party authorizes the person making or allowing the placement of a telephonic sales call to deliver or cause to be delivered a telephonic sales call to the called party using an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called; and b. He or she is not required to directly or indirectly sign the written agreement or to agree to enter into such an agreement as a condition of purchasing any property, goods, or services. Fla. Stat. Ann. § 501.059(1)(g).

Previously, the FTSA prohibited calls “for the selection or dialing of telephone numbers”, which caused a huge spike in class action litigation. The Florida Senate Rules Committee emphasized the change from “or” to “and”, thus limiting the scope of the statute. [Florida Senate, Bill Analysis and Economic Impact Statement](#), Rules Committee et al., p. 15 (Apr. 25, 2023).

While the amendment stops short of adopting the ATDS definition from *Facebook*, it clarifies that a calling technology must meet a two-part test to qualify as an “automated system” by both selecting and dialing telephone numbers. *Id.*

In our opinion, you can call or text numbers in compliance with the FTSA (even without prior express written consent) because your system places calls only with human intervention and thus your system does not use an automated system to select or dial telephone numbers

As explained above, real estate agents or other subscribers that sign up for an account are required to login in with their username and password. Once logged in, agents can review properties and contact information of individuals that are likely to sell their properties based on your internal algorithms.

Agents must manually select which properties they want to call based on the parameters they set and click “start session” to begin dialing phone numbers based on the list they created. Calls cannot be automatically dialed, and agents can manually select different properties at any time. Agents can only call one number at a time. Agents cannot make prerecorded calls. The system cannot initiate a call in any other way and cannot generate numbers to be called using a random or sequential number generator.

Based on your explanation, and the sources cited above, it is our opinion that the equipment is not an “automated system” under Florida law.

Finally, the recently amended version of the law provides a safe harbor for sending texts. Before filing a lawsuit, the recipient of a text must respond “STOP” and allow the telephone solicitor 15 days to stop sending additional texts. § 501.059(10)(c). A private right of action can only be brought if texts are continued to be sent after the 15-day period.

III. Oklahoma

The Oklahoma Telephone Solicitation Act (“OTSA”) prohibits “a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called without the prior express written consent⁴ of the called party.” Okla. Stat. tit. 15, § 775C.3(A).

⁴ “Prior express written consent” means a written agreement that: a. bears the signature of the called party, b. clearly authorizes the person making or allowing the placement of a commercial telephonic sales call by telephone call, text message, or voicemail transmission to deliver or cause to be delivered to the called party a commercial telephonic sales call using an automated system for the selection or dialing of telephone numbers, the playing of a recorded message when a connection is completed to a number called, or the transmission of a prerecorded voicemail, c. includes the telephone number to which the signatory authorizes a commercial telephonic sales call to be delivered,

The OTSA does not define “automated system” and recreates many of the problems with the TCPA’s restrictions on calls to cell phones using an ATDS before the Supreme Court resolved the term’s definition in *Facebook v. Duguid*.

“Telephonic sales call” is also not defined but based on the similarity of the law to the Florida statute, it likely applies only to calls made for the purpose of soliciting a sale of any consumer goods or services.

In our opinion, you can call or text numbers in compliance with the OTSA (even without prior express written consent) because your system places calls only with human intervention and thus your system does not use an automated system to select or dial telephone numbers

As explained above, real estate agents or other subscribers that sign up for an account are required to login in with their username and password. Once logged in, agents can review properties and contact information of individuals that are likely to sell their properties based on your internal algorithms.

Agents must manually select which properties they want to call based on the parameters they set and click “start session” to begin dialing phone numbers based on the list they created. Calls cannot be automatically dialed, and agents can manually select different properties at any time. Agents can only call one number at a time. Agents cannot make prerecorded calls. The system cannot initiate a call in any other way and cannot generate numbers to be called using a random or sequential number generator.

Based on your explanation, and the sources cited above, it is our opinion that the equipment is not an “automated system” under Oklahoma law.

IV. Conclusion

Based on your explanation, and the sources cited above, it is our opinion that your dialing system is not an ATDS under the TCPA. It is also not an “automated system” under Florida and Oklahoma laws. Your clients can use this system to make calls and send texts in compliance with these laws.

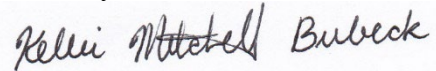
As a reminder, callers must still comply with the federal “do-not-call” list rules. To call numbers on the federal “do-not-call” list, the TCPA requires “prior express invitation or permission”, *see* 47 C.F.R. § 64.1200(c)(2)(ii), or an “established business relationship”, *see* 47 C.F.R. §

and d. includes a clear and conspicuous disclosure informing the called party that: (1) by executing the agreement, the called party authorizes the person making or allowing the placement of a commercial telephonic sales call to deliver or cause to be delivered a commercial telephonic sales call to the called party using an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called, and (2) he or she is not required to sign the written agreement directly or indirectly or to agree to enter into such an agreement as a condition of purchasing any property, goods, or services; and 4. “Signature” includes an electronic or digital signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law. Okla. Stat. tit. 15, § 775C.2(3).

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January 4, 2024
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64.1200(f)(15)(ii). Both of these requirements are less stringent than the requirements to obtain prior express written consent. Please contact us if you would like more information on this.

Sincerely,

A handwritten signature in black ink that reads "Kellie Mitchell Bubeck". The signature is written in a cursive style and is placed on a light-colored rectangular background.

Kellie Mitchell Bubeck
Attorney for the Firm

Cc: William Raney braney@clrkc.com