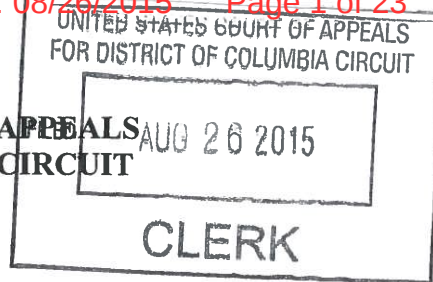


IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT



SALESFORCE.COM INC., and)
EXACTTARGET, INC.,)

Petitioner,)

v.)

FEDERAL COMMUNICATIONS)
COMMISSION, and UNITED STATES OF)
AMERICA,)

Respondents.)

Case No. 15-1290

PETITION FOR REVIEW

Pursuant to 5 U.S.C. § 706, 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344, and Federal Rule of Appellate Procedure 15(a), salesforce.com inc. and its wholly-owned subsidiary ExactTarget, Inc. (collectively "Petitioners") hereby petition this Court for review of the order of the Federal Communications Commission ("FCC") captioned *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order (Released July 10, 2015) ("Order"). A copy of the full text of the Order is attached as Exhibit A.

Venue is proper in this Court pursuant to 28 U.S.C. § 2343.

The Order resolves multiple petitions for clarification, declaratory ruling, exemptions, rulemaking, and/or for special relief under FCC dockets CG Docket No. 02-278 and WC Docket No. 07-135. All of these filings implicated various aspects of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), and the FCC's TCPA regulations, 47 C.F.R. § 64.1200. Among other things, the Order addresses the meaning of the TCPA's statutory definition of "automatic telephone dialing system," 47 U.S.C. § 227(a)(1), and the term "called

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party” within the TCPA’s provision prohibiting any call meeting certain conditions “other than a call made . . . with the prior express consent of the called party,” *id.* §§ 227(b)(1)(A), (B).

Petitioners participated in the proceedings by filing comments on the Milton H. Fried, Jr., and Richard Evans Petition for Expedited Declaratory Ruling, and an *ex parte* letter and comments in response to Chairman Wheeler’s summary of the (then) proposed Declaratory Ruling. As reflected in those filings, ExactTarget and its customers have been sued in putative class actions for alleged violations of the TCPA. Accordingly, Petitioners are aggrieved by the Order.

Among other things, the Order, in one section, vastly, unlawfully, and exceeding the FCC’s authority, purports to expand the scope of the TCPA and the FCC’s regulations by concluding that “automatic telephone dialing system” covers equipment that cannot, without modification, “store or produce telephone numbers to be called, using a random or sequential number generator” and “dial such numbers.” In another section, the Order reaffirms Congress’s statutory definition of “automatic telephone dialing system,” which only covers equipment that “has” the requisite “capacity.” And elsewhere the Order seems to endorse an entirely different view of what qualifies as an “automatic telephone dialing system,” invoking “without human intervention” language found nowhere in the statute. The Order also defines the phrase “called party” within the TCPA’s provision prohibiting any call meeting certain conditions “other than a call made . . . with the prior express consent of the called party,” in a way that is inconsistent with other portions of the Order, and that makes it impossible for callers to ensure that at the time of any call or text, the prior express consent they obtained for that number remains valid. The Order also treats “prior express written consent” and revocation of consent in a way that is inconsistent with prior FCC statements, exceeds the FCC’s authority, and puts an undue and excessive burden on callers, and particularly those communicating by text message.

Petitioners seek relief on the grounds that, among other things:

(1) The FCC's Order is arbitrary and capricious, without or in excess of the FCC's authority, and otherwise contrary to the Constitution and other law, including but not limited to with respect to its treatment of the terms "automatic telephone dialing system," and "called party" within the TCPA's provision prohibiting any call meeting certain conditions "other than a call made . . . with the prior express consent of the called party," and its treatment of "prior express written consent" and revocation of consent.

(2) The TCPA, as explained in the FCC's Order, violates the Due Process rights of persons and entities communicating by phone or text message using modern technology, is unconstitutionally vague, and violates the First Amendment of the United States Constitution.

Petitioners therefore respectfully request that this Court:

(1) Either find unlawful and set aside the unlawful portions of the Order, including but not limited to the portions of the Order addressed at: the TCPA's definition of "automatic telephone dialing system"; the term "called party," within the TCPA's provision prohibiting any call meeting certain conditions "other than a call made . . . with the prior express consent of the called party"; "prior express written consent," and revocation of consent;

(2) Or declare the TCPA unconstitutional; and

(3) Grant such further and other relief as the Court deems appropriate.

Dated: August 25, 2015

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: 

Tonia Ouellette Klausner (admission pending)
Wilson Sonsini Goodrich & Rosati, P.C.
1301 Avenue of the Americas, 40th Floor
New York, NY 10019
Telephone: (212) 497-7706

Facsimile: (212) 999-5899
tklausner@wsgr.com

Keith E. Eggleton (admission pending)
Wilson Sonsini Goodrich & Rosati, P.C.
650 Page Mill Rd.
Palo Alto, CA 94304
Telephone: (650) 493-9300
Facsimile: (650) 565-5100
keggleton@wsgr.com

*Counsel for Petitioners salesforce.com inc. and
ExactTarget, Inc.*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1, salesforce.com, inc. ("Salesforce"), and ExactTarget, Inc. ("ExactTarget") respectfully submit the following corporate disclosure statement:

ExactTarget is wholly owned by Salesforce. Salesforce has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Salesforce, based in San Francisco, California, is a leading provider of enterprise cloud computing solutions. ExactTarget, based in Indianapolis, Indiana, is a provider of on-demand software solutions. Retailers and other businesses subscribe to use ExactTarget's solutions to send personalized communications to consumers who have asked to receive them.

AUG 26 2015

FILED
AUG 26 2015
CLERK

CERTIFICATE OF SERVICE

RECEIVED
Within one business day of this petition for review being filed:

a.) I will cause a copy of this petition to be served by certified mail on these parties:

The Honorable Loretta E. Lynch
The Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Office of the General Counsel
Federal Communications Commission
Eighth Floor
445 12th Street, S.W.
Washington, DC 20554

b.) I will cause a copy of this petition to be served by first-class mail, postage prepaid, on these parties admitted to participate in the agency proceedings:

Natalie G. Roisman
Wilkinson Barker Knauer, LLP
2300 N Street, NW Suite 700
Washington, DC 20037

Counsel for Glide Talk, Ltd

Cherie R. Kiser
Cahill Gordon & Reindel LLP
1990 K Street, NW Suite 950
Washington, DC 20006

*Counsel for Global Tel *Link Corporation*

Claudia Callaway
Katten Muchin Rosenman LLP
2900 K Street, NW, Suite 200
Washington, DC 20007

Counsel for Greenway Health, LLC; RadNet Management, Inc.

Ronald W. Del Sesto, Jr.
Bingham McCutchen LLP
2020 K Street NW
Washington, DC 20006-1806

Counsel for GroupMe, Inc.; TextMe, Inc.

Erin A. Walsh
Smith Amundsen, LLC
150 North Michigan Avenue,
Suite 3300
Chicago, IL 60601

*Counsel for 2217044 Ontario Inc.;
Hydropool Inc.; La-Z-Boy Global Limited
and La-Z-Boy Incorporated; American
Homepatient, Inc.; First Index, Inc.;
Integrated Pain Management, S.C.; Tian
Medical, LLC; Tian Medical Inc.; Dr. Tian,
International Dental Supply Co., Navinet,
Inc.; Power Liens, LLC; UBM LLC*

Lauren Lynch Flick
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037

Counsel for 3G Collect, Inc.; YouMail, Inc.

Monica Desai
Patton Boggs LLP
2550 M Street NW
Washington, DC 20037

*Counsel for A Coalition of Mobile
Engagement Providers; Abercrombie &
Fitch Co.; ACA International, Cannon &
Associates LLC d/b/a Polaris Group;
Citizens Bank, N.A.; Monica S. Desai; Retail
Industry Leaders Association; SoundBite
Communications; Wells Fargo*

David M. Greenwald
Jenner & Block LLP
353 N. Clark St.
Chicago, IL 60654

*Counsel for Healthways, Inc.; Healthways
WholeHealth Networks, Inc.*

Judith L. Harris
Reed Smith LLP
1301 K Street, NW
Washington, DC 20005

*Counsel for Henry Schein Practice
Solutions, Inc.*

Suzanne S. Goodspeed
Goodspeed & Merrill
7000 E. Belleview Avenue
Suite 355
Greenwood Village, CO 80111

Counsel for Heska Corporation

David Lender
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

*Counsel for Houghton Mifflin Harcourt
Publishers, Inc.; Houghton Mifflin Harcourt
Publishing*

Howard W. Waltzman
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006-1101

*Counsel for ACA International; American
Bankers Association; U.S. Chamber of
Commerce*

Robert. A. Burgoyne
Fulbright & Jaworski LLP
801 Pennsylvania Avenue, NW
Washington, DC 20004

Counsel for ACT, Inc.

Matthew A. Brill
Latham & Watkins LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004

*Counsel for Acurian, Inc.; Anda, Inc.; Time
Warner Cable Inc.*

David C. Layden
Jenner & Block LLP
353 N. Clark St.
Chicago, IL 60654

Counsel for AEP Energy, Inc.

Daniel A. Edelman
Edelman, Combs, Lattuner & Goodwin,
LLC
20 South Clark Street, Suite 1500
Chicago, IL 60603

*Counsel for Affiliated Health Care
Associates, P.C.; Balmoral Home, Inc.;
Wholesale Point, Inc.*

Anthony J. Anscombe
Sedgwick LLP
One North Wacker Drive, Suite 4200
Chicago, IL 60606

Counsel for Howmedica Osteonics Corp

Steve Brubaker
Chief of Staff
Info Cision Management Corp
325 Springside Drive
Akron, OH 44333

*Counsel for InfoCision Management
Corporation, Inc.*

Dennis E. Nixon
President
IBC Houston
5615 Kirby Dr.
P.O. Box 6568
Houston, TX 77005

Counsel for International Bancshares Corporation

Peter Blenkinsop
Drinker Biddle & Reath LLP
1500 K Street NW
Washington, DC 20005-1209

Counsel for IPPC; MDPC

Laura Zepeda
Director of Corporate Affairs
AGR Group, LLC
13100 56th Court, Suite 705
Clearwater, FL 33760

Counsel for AGR Group, LLC; AGR Group, Inc.; AGR Group California, LLC; AGR Group Nevada, LLC

John A. Prendergast
Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP
2120 L Street, NW, Suite 300
Washington, DC 20037

Counsel for Alarm Industry Communications Committee

Anthony J. Bolognese
Two Penn Center
1500 John F. Kennedy Blvd., Suite 320
Philadelphia, PA 19102

Counsel for Alco Industries, Inc.

Joshua C. Dickinson
Spencer Fane Britt & Browne LLP
12925 West Dodge Road, Suite 107
Omaha, NE 68154

Counsel for All Granite & Marble Corp.

Joanne M. O'Connor
Jones, Foster, Johnston & Stubbs, P.A.
505 South Flagler Drive, Suite 1100
West Palm Beach, FL 33401

Counsel for J.L. Barnes Insurance Agency, Inc.

Jennifer S. Moore
Mid American Energy Company
106 East Second Street
P.O. Box 4350
Davenport, IA 52808

Counsel for Jennifer S. Moore

Joseph A. Mullaney, III
Law Office of Dimitrios Kolovos, LLC
211 West State Street, Suite 204
Media, PA 19063

Counsel for Joseph A. Mullaney, III

Husch Blackwell LLP
190 Carondelet Plaza #600
St. Louis, MO 63105

Counsel for Kaberline Healthcare Informatics, Inc.

Debra R. Bernard
Perkins Coie, LLP
131 S. Dearborn Street, Suite 1700
Chicago, IL 60603

Counsel for Kirby Lester, LLC

Christine M. Reilly
Manatt, Phelps & Phillips, LLP
10100 Santa Monica Blvd., Suite 2200
Los Angeles, CA 90067

Counsel for Allscripts-Misy's Healthcare Solutions, Inc.; Allscripts, LLC; Allscripts Healthcare, Christine M. Reilly; Key Health Group, Inc.; Key Health Medical Solutions, Inc.; Key Health Management

Mark W. Brennan
Hogan Lovells
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

*Counsel for American Association of
Healthcare Administrative Management,
CARFAX, Inc.; Cargo Airline Association;
Communication Innovators; Global Connect
LLC; RTI International; United Healthcare
Services, Inc.; United HealthGroup
Incorporated; Varolii Corporation*

Charles H. Kennedy
The Kennedy Privacy Law Firm
1050 30th Street, NW
Washington, DC 20007

Counsel for American Bankers Association

Laurence E. Gold
Associate General Counsel
AFL-CIO
815 16th Street, NW
Washington, DC 20006

Counsel for Laurence E. Gold

Lawrence A. Baratta, Jr.
1901 Roxborough Road, Suite 250
Charlotte, NC 28211

Counsel for Lawrence A Baratta, Jr.

Stephen H. Turner
Lewis Brisbois Bisgaard & Smith LLP
8 West 38th Street, Suite 201
New York, NY 10018

Counsel for Logistic Innovations, LLC

Joseph P. Kincaid
Swanson, Martin & Bell, LLP
330 North Wa'bash, Suite 3300
Chicago, IL 60611

Counsel for Magna Chek, Inc.

Angela E. Giancarlo
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006-1101

*Counsel for Mammoth Mountain Ski Area,
LLC*

Eileen M. Patt
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036

American CareSource Holdings, Inc.

Joseph Hartsoe
Managing Director, Federal Policy
American Electric Power
801 Pennsylvania Ave NW #320
Washington, DC 20004

Counsel for American Electric Power

Samuel Feldman
Orloff, Lowenbach, Stifelman & Siegel,
P.A.
101 Eisenhower Parkway, Suite 400
Roseland, NJ 07068-1097

*Counsel for American Institute for Foreign
Study, Inc.; Five-M Software Systems Corp.*

Angela M. Gleason
Associate Counsel
American Insurance Association
2101 L Street, NW
Suite 400
Washington, DC 20037

Counsel for American Insurance Association

Howard Fienberg, PLC
Marketing Research Association
Washington Office
1001 Connecticut Avenue, NW
Suite 510
Washington, DC 20036

Counsel for Marketing Research Association

Kourtney Keough
President/CEO
Marketlink, Inc.
4305 Fleur Drive
Des Moines, IA 50321

Counsel for Marketlink, Inc.

Michael Beder
Covington & Burling LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004

Counsel for Masimo Corporation

Jenna Goodfellow
Senior Counsel
MasterCard Incorporated
2000 Purchase Street
Purchase, New York 10577-2509

Counsel for MasterCard Incorporated

Max G. Margulis
Margulis Law Group
28 Old Belle Monte Rd.
Chesterfield, MO 63017

Counsel for Max G. Margulis

Mark E. Sobel
Law Offices of Gerald P. Gross, P.C.
366 Pearsall Avenue, Suite 5
Cedarhurst, New York 11516

*Counsel for American Power & Gas LLC;
AP&G Holdings LLC; Tom Cummins*

Mitchell N. Roth
Roth Doner Jackson, PLC
8200 Greensboro Drive, Suite 820
McLean, VA 22102

Counsel for Dialing Services, Inc.

Geraldine A. Cheverko, Esq.
Fidelity National Law Group
350 Fifth Avenue, Suite 3000
New York, NY 10118

*Counsel for Amicus Mediation &
Arbitration Group, Inc*

Judith L. Harris
Reed Smith LLP
1301 K Street, NW
Suite 1100 – East Tower
Washington, DC 20005

*Counsel for McAllister Software Systems,
LLC*

Joseph R. Palmore
Morrison & Foerster LLP
2000 Pennsylvania Ave., NW,
Suite 6000
Washington, DC 20006-1888

Counsel for McKesson Corporation

Geoffrey M. Klineberg
Kellogg, Huber, Hansen, Todd, Evans &
Figel, PLLC
1615 M Street, NW, Suite 400
Washington, DC 20036

*Counsel for Meadowbrook Insurance
Group, Inc.; Meadowbrook, Inc.*

Matthew H. Geelan
Donahue, Durham & Noonan, PC
741 Boston Post Road
Guilford, CT 06437

*Counsel for Medica, Inc.; MedLearning,
Inc.*

Brian J. Wanca
Anderson & Wanca
3701 Algonquin Road, Suite 760
Rolling Meadows, IL 60008

*Counsel for Anderson & Wanca; Beck
Simmons LLC; CE Design Ltd.; J. Barrett
Company; Radha Geismann, MD., P.C.;
Central Alarm Si, Christopher Lowe
Hicklin, DC, PLC; North Branch Pizza and
Burger Company; True Health
Chiropractic, Inc.; Alan Pres, Physicians
Healthsource, Inc.; Sandusky Wellness
Center, LLC; Alan L. Laub DDS, Inc.;
Physicians Healthsource, William P.
Sawyer; MD., Douglas Burik, St. Louis
Heart Center, Inc.; Medical Wellness*

Brian D. Weimer
2099 Pennsylvania Ave. NW
Suite 100
Washington, DC 20006

*Counsel for Apex Energetics, Inc.;
Electronic Funds Source LLC; EXP
Pharmaceutical Services Corp.; Premier
Healthcare Exchange, Inc.; Rite Aid Hdqtrs.
Corp.; TruckersB2B, LLC*

John T. Nakahata
Harris, Wiltshire & Grannis LLP
1919 M Street, Eighth Floor
Washington, DC 20036

*Counsel for Arbitron, Inc.; T-Mobile USA,
Inc.*

Tanya L. Forsheit
Baker & Hostetler LLP
11601 Wilshire Boulevard, Suite 1400
Los Angeles, CA 90025-0509

*Counsel for Medversant Technologies,
L.L.C.*

Alexander H. Burke
GoumailBurke Law Offices, LLC
155 N. Michigan Ave., Suite 9020
Chicago, IL 60601

Counsel for Megan Gold

Kim E. Rinehart
Wiggin and Dana LLP
One Century Tower
PO Box 1832
New Haven, Connecticut 06508-1832

Counsel for Merck & Co., Inc.

Randall W. Slade
Franco & Moroney, LLC
500 West Madison Street, Suite 2440
Chicago, IL 60661-2593

Counsel for Microwize Technology, Inc.

Philip A. Bock
Bock & Hatch, LLC
134 N. La Salle St., Suite 1000
Chicago, IL 60602

*Counsel for Arwa Chiropractic, P.C.; Dr.
Robert L. Meinders, DC, Ltd.; Grind Lap
Services, Inc.; St. Louis Heart Center, Inc.;
Urban Elevator Service, LLC; Wilder
Chiropractic Inc.*

Aryeh B. Fishman
Associate General Counsel,
Regulatory Legal Affairs
Edison Electric Institute
701 Pennsylvania Avenue, NW
Washington DC 20004-2696

*Counsel for Aryeh B. Fishman; Edison
Electric Institute*

Eric L. Samore
SmithAmundsen LLC
150 N. Michigan Avenue, Suite 3300
Chicago, IL 60601

Counsel for A-S Medication Solutions, LLC

William L. Roughton, Jr.
1120 20th Street, NW, Suite 1000
Washington, DC 20036

Counsel for AT&T Services Inc.

Cara J. Frey
General Counsel
Mobile Marketing Association
770 Broadway, 2nd Floor
New York, NY 10003

*Counsel for Mobile Marketing Association,
et al.*

Stephen A. O'Connor
Senior VP
Mortgage Bankers Association
1919 M Street NW, 5th floor
Washington, DC 20036

Counsel for Mortgage Bankers Association

Jim McPherson
2030 M Street, NW
Eighth Floor
Washington, DC 20036

Counsel for National Association of Attorneys General

Ann West Bobeck
National Association of Broadcasters
1771 N Street, NW, Sixth Floor
Washington DC 20036

Counsel for National Association of Broadcasters

Aytan T. Bellin
Bellin & Associates LLC
85 Miles Avenue
White Plains, NY 10606

Counsel for Aytan Y. Bellin, Bais Yaakov of Spring Valley, P & S Printing LLC

Bart Murphy
Ice Miller LLP
2300 Cabot Drive, Suite 455
Lisle, IL 60532

Counsel for Bart Murphy; Northwood, Inc.; Valeant Pharmaceuticals North America, LLC

Beth-Ann Krimsky
Greenspoon Marder, P.A.
200 East Broward Boulevard, Suite 1800
Fort Lauderdale, FL 33301

Counsel for Beth-Ann E. Krimsky

Martin L. Daesch
Sandberg, Phoenix & Von Gontard, PC
600 Washington — 15th Floor
St. Louis, MO 63101-1313

Counsel for Be-Thin, Inc.; Kevin Eberly

Don M. Bell, III
General Counsel
1776 Wilson Blvd., Suite 200
Arlington, VA 22209

Counsel for National Association of Chain Drug Stores

Ira J. Rheingold
Executive Director
National Association of Consumer Advocates
1730 Rhode Island Ave., Suite 710
Washington, DC 20036

Counsel for National Association of Consumer Advocates

Frank M. Salinger
Salinger Law Firm
1001 G Street, NW, Suite 800
Washington, DC 20001

Counsel for National Association of Industrial Bankers

Erik Glavich
Director, Legal & Regulatory Policy
National Association of Manufacturers
733 10th Street NW, Suite 700
Washington, DC 20001

Counsel for National Association of Manufacturers

William H. Latham
Nelson Mullins Riley & Scarborough LLP
1320 Main Street/17th Floor
Columbia, SC 29201

Counsel for Big Hairy Dog Information Systems Inc.; Retail Pro International, LLC

Dean Newton
Associate General Counsel
Blackboard Inc.
1518 Wesley Court
Brentwood, TN 37027

Counsel for Blackboard, Inc.

Cynthia B. Harris
Senior Assistant General Counsel
1 North Dearborn – Suite 900
Chicago, IL 60602

Counsel for Board of Education of the City of Chicago (Chicago Public Schools)

Thomas D. Goldberg
Day Pitney LLP
One Canterbury Green
201 Broad Street
Stamford, CT 06901

*Counsel for Boehringer Ingelheim
Pharmaceuticals, Inc., and Boehringer
Ingelheim Corporation*

James Bradford Ramsay
General Counsel
National Association of Regulatory Utility
Commissioners
1101 Vermont Ave, NW, Suite 200
Washington, DC 20005

*Counsel for National Association of
Regulatory Utility Commissioners*

Joann Needleman, President
National Association of Retail Collection
Attorneys
601 Pennsylvania Avenue, NW
Washington, DC 20004

*Counsel for National Association of Retail
Collection Attorneys*

Stephanie L. Poday
VP and Associate General Counsel
National Cable & Telecommunications
Association
25 Massachusetts Avenue, NW, Suite 100
Washington, DC 20001

*Counsel for National Cable &
Telecommunications Association*

Marc S. Roth
Manatt, Phelps & Phillips, LLP
7 Times Square
New York, NY 10036

*Counsel for Brand Activation Association,
Inc.*

Karl Walsh
General Manager
Brandtone North America
35 West 9th Street, Unit 3A
New York, NY 10011

Counsel for Brandtone, Inc.

Bradley M. Baglien
Edelson McGuire LLC
350 North LaSalle St., Suite 1300
Chicago, IL 60654

Counsel for Brian Glauser

Brian Melendez
Dykema Gossett PLLC
4000 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

Counsel for Brian Melendez

Stuart M. Richter
Katten Muchin Rosenman LLP
2029 Century Park East, Suite 2600
Los Angeles, CA 90067

*Counsel for Business Financial Services,
Inc.*

Margot Saunders
Of Counsel National Consumer Law Center
1001 Connecticut Avenue, NW
Suite 510
Washington, DC 20036

Counsel for National Consumer Law Center

David L. Thompson
VP of Public Policy
National Council of Nonprofits
1200 New York Avenue, NW, Suite 700
Washington, DC 20005

Counsel for National Council of Nonprofits

Paul Luttrell, NENA Chairman
Adelante Enterprises
1618 1st St NW
Albuquerque, NM 87102

*Counsel for National Employment Network
Association*

Karen R. Harned
Executive Director of NFIB Small Business
Legal Center
1201 F St NW #200
Washington, DC 20004

*Counsel for National Federation of
Independent Business*

Seth L. Williams
Marashlian & Donahue, LLC
1420 Spring Hill Road, Suite 401
McLean, VA 22102

Counsel for Business Promotion, LLC

Michele A. Shuster
Mac Murray, Petersen & Shuster LLP
6530 West Campus Oval, Suite 210
New Albany, OH 43054

*Counsel for CallAssistant, LLC;
CompliancePoint*

Michael B. Hazzard
Arent Fox
1717 K Street, NW
Washington, DC 20006-5344

*Counsel for Call-Em-All, LLC; CallFire,
Inc.; Club Texting, Inc.; mobileStorm, Inc.;
Twilio Inc.*

Ky Tran-Trong
Vice President, Regulatory
Visa Inc.
900 Metro Center Blvd
Foster City, CA 94404

*Counsel for Carl Holshouser, Sr. Director;
Global Government Relations, Visa, Inc.*

Marianne R. Casserly
Alston & Bird LLP
The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404

Counsel for National Grid

Patrick F. Philbin
Kirkland & Ellis LLP
655 15th Street, NW
Washington, DC 20005

*Counsel for National Pen Co. LLC;
National Pen Holdings, LLC*

Mallory B. Duncan
Senior Vice President
General Counsel
1101 New York Ave, NW #1200
Washington, DC 20005

Counsel for National Retail Federation

Tracy Marshall
Keller and Heckman LLP
1001 G Street, NW
Suite 500 West
Washington, DC 20001

*Counsel for National Rural Electric
Cooperative Association*

Ian D. Volner
Venable LLP
575 Seventh Street NW
Washington, DC 20004

*Counsel for CBE Companies, Inc.; Direct
Marketing Association*

Ronald M. Jacobs
Venable LLP
575 Seventh Street, NW
Washington, DC 20004

Counsel for ccAdvertising

Marion H. Little Jr.
Zeiger, Tigges & Little LLP
3500 Huntington Center
41 South High Street
Columbus, OH 43215

*Counsel for CCI Investments, LLC; d/b/a
Care Works Consultants, Inc.*

Meredith Whipple
One Farragut Square South
1634 I St NW #1100
Washington, DC 20006

*Counsel for Center for Democracy &
Technology; Common Cause*

Kathryn Marie
Krause Suite 250
1099 New York Avenue, NW
Washington, DC 20001

Counsel for CenturyLink

Al Mottur
Shareholder
Brownstein Hyatt Farber Schreck, LLP
1350 I Street, NW, Suite 510
Washington, DC 20005

Counsel for Nelnet

Richard L. Fruchterman, III
Associate General Counsel
Neustar, Inc.
1775 Pennsylvania Avenue, NW
4th Floor
Washington, DC 20006

Counsel for Neustar

Todd D. Daubert
Dentons US LLP
1301 K Street, NW
East Tower, Suite 600
Washington, DC 20005

*Counsel for Nicor Energy Services
Company*

Jill Canfield
NTCA
VP – Legal & Industry
4121 Wilson Boulevard, Suite 1000
Arlington, VA 22203

*Counsel for NTCA-The Rural Broadband
Association*

Joseph E. Wolfson, Esquire
620 Freedom Business Center
Suite 200
King of Prussia, PA 19406

*Counsel for Cephalon, Inc.; Cephalon
Clinical Partners, L.P.; Cephalon
Development Corp.*

Marjorie Salem Hensel
Chappell Roberts, Inc.
100 South Ashley Drive, Suite 500
Tampa, FL 33602

Counsel for Chappell Roberts, Inc.

Debra Brewer Hayes
The Hayes Law Firm, PC
700 Rockmead, Suite 210
Kingwood, TX 77339

Counsel for Charles Clinton Hunter

Jason Goldman
Senior Telecom Policy Counsel
US Chamber of Commerce
1615 H St NW
Washington, DC 20062

Counsel for US Chamber of Commerce

David H. Kramer
Wilson Sonsini Goodrich & Rosati
1301 Avenue of the Americas
40th Floor
New York, NY 10019-6022

Counsel for Path, Inc.; Twitter, Inc_

Marcus W. Trathen
Brooks, Pierce, McLendon, Humphrey &
Leonard, LLP
Suite 1600
Wells Fargo Capitol Center
Post Office Box 1800
Raleigh, NC 27602

Counsel for Pay Tel Communications, Inc.

Jennifer Kashatus, Esq.
DLA Piper LLP
500 8th Street, NW
Washington, DC 20004

*Counsel for Philadelphia Consolidated
Holding Company*

Karen L. Mayfield-Jones
Evans & Dixon, LLC
211 North Broadway, Suite 2500
St. Louis, MO 63102

*Counsel for Practice Recruiters, LLC and its
agents*

Paul Miller
Miller/Wenhold Capitol Strategies, LLC
3930 Walnut St #210
Fairfax, VA 22030

Virginia O'Neill
Center for Regulatory Compliance
1120 Connecticut Avenue, NW
Washington, DC 20036

Counsel for American Bankers Association

Harrison Wadsworth III
Executive Director of Coalition of Higher
Education Assistance Organizations
1101 Vermont Avenue NW, Suite 400
Washington, DC 20005-3586

*Counsel for National Council of Higher
Education Resources*

Bill Himpler
Executive VP of American Financial
Services Association
919 18th St, NW, Suite 300
Washington, DC 20006

Jeff Bloch
Assoc. Gen. Counsel
Consumer Bankers Association
1225 Eye Street, NW, Suite 550
Washington, DC 20005

Counsel for Consumer Bankers Association

Sheree L. Kelly
Associate General Regulatory Counsel
Law Department
80 Park Plaza, T5G
Newark, NJ 07102-4194

*Counsel for Public Service Electric and Gas
Company*

Richard W. Silbert
VP and Associate General Counsel
Purdue Pharma LP
One Stamford Forum
Stamford, CT 06901

Counsel for Purdue Pharma L.P.

Brian Shank
Evans & Dixon, LLC
Metropolitan Square
211 North Broadway, Suite 2500
Saint Louis, MO 63102

Counsel for Rehab Missouri, LLC, et al.

Elizabeth L. Howard
Sandler, Reiff, Young & Lamb, PC
1025 Vermont Avenue, NW, Suite 300
Washington, DC 20005

Counsel for Revolution Messaging LLC

Anne Gross
VP, Regulatory Affairs
National Association of College and
University Business Officers
1110 Vermont Ave NW, Suite 800
Washington, DC 20005

*Counsel for National Association of College
and University Business Officers*

Andrew K. Soto
VP Reg Affairs
American Gas Association
400 North Capitol St NW #450
Washington, DC 20001

Counsel for American Gas Association

Shelly Repp
President, National Council of Higher
Education Resources
1100 Connecticut Ave. NW
Suite 1200
Washington, DC 20036-4110

*Counsel for National Council of Higher
Education Resources*

Winfield P. Crigler
Exec. Director of Student Loan Servicing
Alliance
1850 M Street, NW, Suite 920
Washington, DC 20036

*Counsel for Student Loan Servicing
Alliance, SLSA Private Loan Committee
(SLSA) PLC*

Stephen D. Raber
Williams & Connolly LLP
725 Twelfth St., NW
Washington, DC 20005

Counsel for Royal Canin U.S.A., Inc.

Joseph L. Oliva
Oliva & Associates, ALC
11770 Bernardo Plaza Court, Suite 350
San Diego, CA 92128

Counsel for Rubio's Restaurant, Inc.

Claire Loehwing
VP of Finance
Sales Verification Company, LLC
13100 56th Court #707
Clearwater, FL 33760

*Counsel for Sales Verification Company,
LLC*

Burton D. Brillhart
McGlinchey Stafford
2711 N. Haskell Avenue,
Suite 2750, LB 38
Dallas, TX 75204

Counsel for Santander Consumer USA

Michele A. Shuster
Mac Murray, Petersen & Shuster LLP
6530 West Campus Oval, Suite 210
New Albany, OH 43054

*Counsel for CallAssistant, LLC;
Professional Association for Customer
Engagement (PACE)*

Mary Brennan
Clark County Collection Service
Director of Operations
8860 W. Sunset Rd.
Las Vegas, NV 89148

*Counsel for Clark County Collection
Service, LLC*

Mary McManus
Executive Director, Reg Affairs Comcast
Corporation
300 New Jersey Avenue, NW
Suite 700
Washington, DC 20001

Counsel for Comcast Corporation

Charles S. Fiedler
Nossaman LLP
777 S. Figueroa Street, 34th Floor
Los Angeles, CA 90017

Counsel for Competitive Health, Inc.

Anthony S. Mendoza
Mendoza Law Office, LLC
790 Cleveland Ave. S., Suite 206
St. Paul, MN 55116

Counsel for SatCom Marketing, LLC

Curtis Hopfinger
Director-Regulatory and Gov Affairs
Securus Technologies, Inc.
14651 Dallas Pkwy, 6th Floor
Dallas, TX 75254

Counsel for Securus Technologies, Inc.

Sen. Ed Markey
255 Dirksen Senate Office Bldg
Washington, DC 20510

Sen. Charles E. Schumer
322 Hart Senate Office Bldg
Washington, DC 20510

Sen. Ron Wyden
221 Dirksen Senate Office Bldg
Washington, DC 20002

Sen. Claire McCaskill
506 Hart Senate Office Bldg
Washington, DC 20510

Sen. Richard Blumenthal
724 Hart Senate Office Bldg
Washington, DC 20510

Ali Sternburg
Public Policy & Reg Counsel
900 17th Street, NW, Suite 1100
Washington, DC 20006

*Counsel for Computer & Communications
Industry Association (CCIA)*

Congressman Scott R. Tipton
218 Cannon House Office Building
Washington, DC 20003

Harold Mordkofsky
Blooston, Mordkofsky, Dickens, Duffy &
Pendergrast LLP
2120 L Street, NW
Washington, DC 20037

*Counsel for Consolidated Edison Company
of New York, Inc.; Orange and Rockland
Utilities*

Kate Larson
Regulatory Counsel
Consumer Bankers Association
1225 Eye Street NW, Suite 550
Washington, DC 20005

Counsel for Consumer Bankers Association

John K. Londot, Esq.
Greenberg Traurig, PA
101 East College Avenue
Tallahassee, FL 32301

*Counsel for Consumer Energy Solutions,
Inc.*

Sen. Elizabeth Warren
317 Hart Senate Office Bldg
Washington, DC 20510-2105

Sen. Amy Klobuchar
302 Hart Senate Office Bldg
Washington, DC 20510

Sen. Tammy Baldwin
717 Hart Senate Office Bldg
Washington, DC 20510-4906

Sen. Al Franken
309 Hart Senate Office Bldg
Washington, DC 20510

Sen. Jeff Merkley
313 Hart Senate Office Bldg
Washington, DC 20510

Alvin Velazquez
Assistant General Counsel
Service Employees International Union
1800 Massachusetts Ave., NW
Washington, DC 20036

*Counsel for Service Employees International
Union; CTW; CLC*

Nicholas W. Allard
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037

Counsel for Silverlink Communications, Inc.

Tim Marvin
Consumers Union
1101 17th Street NW #500
Washington, DC 20036

Counsel for Consumers Union

Gerald J. Waldron
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004

Counsel for Covington & Burling LLP

Scott Z. Zimmermann
Law offices of Scott Z. Zimmerman
601 S. Figueroa St. Suite 2610
Los Angeles, CA 90017

*Counsel for Craftwood Lumber Company;
Edward Simon*

William B. Hayes
257 Jackson Street
Denver, CO 80206

*Counsel for Creditsmarts Corp.; Grey
House Publishing Inc; Park Surgical
Company Inc; Saratoga Aesthetics LLC,
Westfax, Inc.*

James C. Vlahakis
Hinshaw & Culbertson LLP
222 N. LaSalle Street, Suite 300
Chicago, IL 60601-1081

Counsel for Crown Mortgage Company

Kacey L. Faughnan
Wyatt, Tarrant & Combs, LLP
1715 Aaron Brenner Drive
Suite 800
Memphis, TN 38120

Counsel for Smith & Nephew, Inc.

William T. Green, III
11 Greenway Plaza, Suite 2820
Houston, TX 77046

*Counsel for Social UPS, LLC, Virtual
Lending Source, LLC; Telnform, LLC*

Olivia Samad
2244 Walnut Grove Avenue
PO Box 800
Rosemead, CA 91770

*Counsel for Southern California Edison
Company*

Elizabeth Gray Nunez
30 Ivan Allen, Jr. Blvd. NW, Suite 700
Atlanta, GA 30308

Counsel for Southern Company

N. Martin Stringer
McAfee & Taft
1717 S. Boulder Ave., Suite 900
Tulsa, OK 74119

Counsel for Stage Stores, Inc.

Mitchell F. Brecher
Greenberg Traurig, LLP
2101 L Street NW, Suite 1000
Washington, DC 20037

*Counsel for Crunch San Diego, LLC;
TracFone Wireless, Inc.*

Krista L. Witanowski
Assistant VP Reg. Affairs
CTIA
1400 16th Street, NW, Suite 600
Washington, DC 20036

Counsel for CTIA-The Wireless Association

Frank E. Pasquesi
Foley & Lardner LLP
321 North Clark Street, Suite 2800
Chicago, IL 60654-5313

*Counsel for CVS Health Corporation;
Caremark, L.L.C.*

David J. Kaminski
Carlson & Messer LLP
5959 W. Century Boulevard, Suite 1214
Los Angeles, CA 90045

Counsel for David J. Kaminski

Helgi C. Walker
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306

Counsel for Staples Inc.; Quill Corporation

Raymond J. Etcheverry
Parsons Behle & Latimer
201 S. Main St., Suite 1800
Salt Lake City, Utah 84111

Counsel for Stericycle, Inc.

Ronald J. Eisenberg
Schultz & Associates LLP
640 Cepi Drive, Suite A
Chesterfield, MO 63005-1221

Counsel for Suzanne Degnen, D.M.D., P.C.

Jill R. Rembusch
Summers Compton Wells PC
8909 Ladue Road
St. Louis, MO 63124

Counsel for TechHealth, Inc.

Thomas A. Roberts
Barrasso Usdin Kupperman Freeman &
Sarver, LLC
909 Poydras Street, 24th Floor
New Orleans, LA 70112

*Counsel for Telecommunications Risk
Management Association*

Arthur W. Conqay
President & CEO
DialAmerica Marketing, Inc.
960 Macarthur Boulevard
Mahway, NJ 07495

Counsel for DialAmerica Marketing, Inc.

David L. Harsell
McGuire Woods LLP
77 W. Wacker Drive, Suite 4100
Chicago, IL 60601-1818

*Direct Energy Services, LLC: Direct Energy
Business, LLC; Direct Energy, LP*

Becca Wahlquist
Manatt, Phelps, & Phillips LLP
11355 W. Olympic Blvd.
Los Angeles, CA 90064

Counsel for DIRECTV, LLC

William Baker
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006

*Counsel for Dominion Enterprises of
Virginia General Partnership*

Aaron Foss
President
Telephone Science Corporation
5507-10 Nesconset Highway, Suite 201
Mt. Sinai, NY 11766

Counsel for Telephone Science Corp.

Jess Smith
Sr. Manager Business Affairs
The Marketing Arm – Wireless
711 Third Avenue, 11th Floor
New York, NY 10017

Counsel for The Marketing Arm – Wireless

Matthew McCaffree
Director of State Regulatory Relations
The National Association of Water
Companies
2001 L. St. NW
Washington, DC 20036

*Counsel for The National Association of
Water Companies*

Ms. Gina Gregoletto
The Results Companies
100 NE Third Avenue, Suite 200
Fort Lauderdale, FL 33301

Counsel for The Results Companies, LLC

Samuel L. Feder
Jenner & Block LLP
1099 New York Avenue NW
Washington, DC 20001

*Counsel for Douglas Walburg; Richie
Enterprises, LLC; Futuredontics, Inc.;
Futuredontics, Inc.; Nomax Inc.;
SmartHealth, Inc.*

Yaron Dori
Covington & Burling LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
202 662-6000

*Counsel for EatStreet, Inc.; Forest
Pharmaceuticals; Gilead Sciences & Purdue
Pharma; Portfolio Recovery Associates
LLC; Unique Vacations, Inc.*

Scott Blake Harris
Harris, Wiltshire & Grannis LLP
1919 M Street, Eighth Floor
Washington, DC 20036

*Counsel for Edison Electric Institute;
American Gas Association; The Nielsen
Company, U.S., LLC*

Jarret S. Cummings
Director, Policy and External Relations
Educase
Washington, DC Office
1150 18th Street, NW, Suite 900
Washington, DC 20036

Counsel for EDUCAUSE

Shawn A. Heller, Esq.
Social Justice Law Collective, PL
PO Box 70327
Washington, DC 20024

Counsel for Timothy Blake

Henry T. Kelly
Counsel for Trading Advantage, LLC
333 West Wacker Drive, 26th Floor
Chicago, IL 60606

Counsel for Trading Advantage, LLC

William Kovacs
U.S. Chamber of Commerce
1615 H Street, NW
Washington, DC 20062-2000

*Counsel for U.S. Chamber of Commerce;
U.S. Chamber Institute for Legal Reform*

Kevin Rupy
United States Telecom Association
607 14th Street NW, Suite 400
Washington, DC 20005

*Counsel for United States Telecom
Association*

Mac B. Greaves
Jones Walker LLP
1819 5th Avenue North, Suite 1100
Birmingham, AL 35203

Counsel for Emily Sides Bonds

Michele C. Farquhar
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Counsel for Encore Capital Group, Inc.

Laura H. Phillips
Drinker Biddle & Reath LLP
1500 K Street, NW
Washington, DC 20005-1209
202 842-8800

Counsel for Endo, Exelon Corporation

Eileen M. Hunter
Faegre Baker Daniels LLP
90 S. 7th St.
2200 Wells Fargo Center
Minneapolis, MN 55402

*Counsel for Esaote North America, Inc.;
Solutions on Hold, LLC*

Steven A. Augustine
Kelley Drye & Warren LLP
3050 K Street, NW, Suite 400
Washington, DC 20007-5108

*Counsel for United Stationers, Inc.; United
Stationers Supply Co.; Lagasse, LLC*

Mark M. Miller
Barnes & Thornburg, LLP
One North Wacker Drive, Suite 4400
Chicago, IL 60606

Counsel for USI, Inc.

Stephen Hartzell
Brooks, Pierce, McLendon LLP
Wells Fargo Capitol Center, Suite 1600
150 Fayetteville Street
Raleigh, NC 27602

Counsel for VAB, OAB, NCAB

Ian Dillner
Verizon
1300 I Street, NW
Suite 400 West
Washington, DC 20005

Counsel for Verizon

Anne Wallace
ITAC President
P.O. Box 9952
Washington, DC 20016

Counsel for Financial Services Roundtable

Charles S. Fieldler
Nossaman LLP
777 S. Figueroa Street, 34th Floor
Los Angeles, CA 90017

Counsel for First Access, Inc.

Brandon Kelly
Fraud Officer
FirstBank
12345 W Colfax Ave
Lakewood, CO 80215

Counsel for FirstBank

Paul E. Greenwalt
Schiff Hardin LLP
233 South Wacker Drive, Suite 6600
Chicago, IL 60606

Counsel for Francotyp-Postalia, Inc.

Andrew J. Scavotto
Stinson Leonard Street LLP
7700 Forsyth Blvd, Suite 1100
St. Louis, MO 63105

*Counsel for Free Continuing Education
Association, LLC d/b/a FCEA*

Andrew M. Schwartz
Marshall Dennehey Warner Coleman and
Goggin PC
2000 Market Street, Suite 2300
Philadelphia, PA 19103

Counsel for Versa Cardio, LLC

Jennifer Bagg
Harris, Wiltshire & Grannis LLP
1919 M Street, Eighth Floor
Washington, DC 20036

Counsel for Vibes Media, LLC

Henry Goldberg
Goldberg, Godles, Wiener & Wright LLP
1229 19th Street, NW
Washington, DC 20036

Counsel for VoApps, Inc.

Page Gardner
The Voter Participation Center
1640 Rhode Island Avenue NW
Suite 825
Washington DC 20036

Counsel for Voter Participation Center

William E. Raney
Copilevitz and Canter, LLC
1900 L St NW #215
Washington, DC 20036

Counsel for William E. Raney

Rebecca J. Schwartz
Shook, Hardy & Bacon LLP
2555 Grand Blvd.
Kansas City, MO 64108-2613

*Counsel for Zoetis Inc., formerly known as
Pfizer Animal Health; Zoetis LLC; Zoetis
Prod.*

Jules Polonetsky
Co-Chair and Director
919 18th Street, NW, Suite 901
Washington, DC 20006

Counsel for Future of Privacy Forum

Henry Pietrkowski
Reed Smith LLP
10 S. Wacker Dr., 40th Floor
Chicago, IL 60606

*Counsel for GE Healthcare, Inc.; Salix
Pharmaceuticals*

Matthew J. Lang
Gilead Sciences, Inc.
Associate General Counsel
333 Lakeside Drive
Foster City, CA 94404

*Counsel for Gilead Sciences, Inc.; Gilead
Palo Alto, Inc.*

By: 

Tonia Ouellette Klausner (admission pending)
Wilson Sonsini Goodrich & Rosati, P.C.
1301 Avenue of the Americas, 40th Floor
New York, NY 10019
Telephone: (212) 497-7706
Facsimile: (212) 999-5899
tklausner@wsgr.com

*Counsel for Petitioners salesforce.com inc. and
ExactTarget, Inc.*