Case No. 16-10498
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EMILY SCHWEITZER,
Plaintiff-Appellant,

vs.

COMENITY BANK,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

Case No.: 9:15-CV-80665

PETITION FOR REHEARING EN BANC

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APPELLEE'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Local Rule 26.1-1, the undersigned certifies that the following is a complete list of the trial judges, all attorneys, person, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publically held corporations that owns 10% or more of the party's stock and other identifiable legal entities related to a party:

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STATEMENT PURSUANT TO FED.R.APP.P.35(b) AND CIRCUIT RULE 35

Defendant-Appellee Comenity Bank, LLC ("Comenity") respectfully requests, pursuant to Fed. R. App. P. 40 and 35, panel rehearing and rehearing en banc of this Court's decision of August 10, 2017, on grounds that the Panel opinion conflicts this Court's prior rulings and that the appeal presents questions of exceptional importance:

1. The Court's opinion indirectly conflicts with a prior decision of this Court in *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1121 (11th Cir. 2014). In *Mais*, the Court correctly held FCC Rulings have "the force of law and [are] reviewable [only] under the Hobbs Act in the courts of appeals." In the instant case, there was no Hobbs Act challenge presented, yet the Court refused to follow the 2012, 2014, and 2015 FCC Rulings.
2. The Panel's opinion indirectly conflicts with this Court's prior decision in *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255 (11th Cir. 2014). The Court's decision in this case creates a right for consumers to *partially* revoke prior express consent in conflict with *Osorio*'s holding the TCPA was designed to allow consumers the option of *stopping* the automated calls, as opposed to empowering consumers to unilaterally impose conditions on the continuation of automated calls.
3. The Panel opinion raises issue of extreme importance. The ruling is likely

to create ambiguity amongst both consumers and callers regarding the ability of consumers to impose arbitrary limits on communications (whether they be by facsimile, text/SMS, or ATDS) despite the FCC's consistent and unwavering proclamation that in order to revoke consent, consumers must clearly request no further communications.

ARGUMENT

I. The Panel Decision Conflicts with FCC Rulings Having the Force of Law under *Mais*.

In *Mais*, this Court recognized "Congress has conferred upon the FCC general authority to make rules and regulations necessary to carry out the provisions of the TCPA." *Id.*, 768 F.3d 1110, 1117 (11th Cir. 2014). This Court further held, as a result "Congress has conferred upon the FCC general authority to make rules and regulations necessary to carry out the provisions of the TCPA." *Id.* This specific empowerment of the FCC implicates the Hobbs Act, which "expressly confers on the federal courts of appeals 'exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of' such FCC orders." *Id.* To be sure, neither party made a Hobbs Act challenge to any of the FCC's rulings relative to revocation, and the Panel undertook no Hobbs Act analysis.

In 2012 in the *Soundbite* ruling, the FCC held:

> neither the text of the TCPA nor its legislative history

> directly addresses the circumstances under which prior express consent is deemed revoked. Where a statute's plain terms do not directly address the precise question at issue and the statute is ambiguous on the point, the Commission can provide a reasonable construction of those terms.

In the Matter of Rules & Regulations Implementing the TCPA, 27 F.C.C. Rcd. 15391, 15394 (2012). The Commission "provide[d] a reasonable construction of" revocation in 2012, 2014, and 2015, i.e. revocation requires a clear request for no further communication.

In order to create the concept of partial revocation and use its new creation to defeat Comenity's arguments, the Panel ignored binding FCC Ruling and instead, relied entirely on "common law." That the Panel was intent on creating "partial revocation" is evidenced by the fact it claims Comenity made the legal argument "that the TCPA does not permit partial revocations of consent." Op. at p. 5. In fact, Comenity never made a "partial revocation" argument. Instead, Comenity's argument was and is simple: the FCC has consistently and unwaveringly held that consent can be revoked only if he consumer "clearly requests no further communications." As there is no Hobbs Act challenge being made with respect to the relevant FCC Rulings in this case, the Panel was required to follow the FCC's Rulings on revocation of consent.

Interestingly, the Panel's offered reason for discounting the explicit language in the 2015 Ruling was that Comenity had taken the FCC's repeated

findings that revocation exists only where the consumer clearly expresses a desire for no further calls "out of context." The Panel's reasoning is undercut by the lack of ambiguity in the 2015 Ruling itself (as well as similar language in the 2012 and 2014 Rulings).

Moreover, in reaching its conclusion the Panel itself utilized a phrase from the 2015 Ruling "out of context" to rule against Comenity. The Panel cited the FCC's statement, "callers may not control consumers' ability to revoke consent" as supporting its creation of partial revocation. Op. at p. 9. However, FCC's statement had nothing to do with the *scope* of revocation. Instead, it related exclusively to the *means* of revocation as evidenced by the statement leading up to the language cited by the Panel: "We next turn to whether a caller can designate the exclusive *means* by which consumers must revoke consent. We deny Santander's request on this point, finding that callers may not control consumers' ability to revoke consent." *In the Matter of Rules & Regulations Implementing the TCPA*, 30 F.C.C. Rcd. 7961, 7996 (2015) (emphasis added). As detailed more below, in the same Ruling the FCC reiterated its Rulings from 2012 and 2014, stating consumers can revoke consent: "in any manner that clearly expresses a desire not to receive further messages." *Id.*, 30 F.C.C. Rcd. 7963.

The *Mais* decision made clear this Court's ability to rule in a manner contrary to FCC Rulings on the TCPA. Simply stated, it has none. The Panel Decision

violates the precedent established in *Mais* by failing to apply the 2012, 2014, and 2015 FCC Rulings to the facts of this case.

II. The Panel Decision Creating "Partial Revocation" Conflicts with *Osorio*.

This Panel Decision is based, in part, on it finding in *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014) that "absent a contractual restriction to the contrary, the TCPA allows a consumer to orally revoke her consent to receive automated calls." *See,* Order at p. 2. Comenity does not take issue with *Osorio* as it is entirely consistent with FCC Rulings on the revocation issue.

In reaching its conclusion in *Osorio*, the Court focused on the statements by Senator Hollings, the TCPA's sponsor, describing automated calls as "the scourge of modern civilization." According to the Court, the Senator "presumably intended to give telephone subscribers… [the option of] telling the autodialers to *simply stop calling*." *Id.* at 1255 – 1256.

There is nothing in *Osorio* supporting the notion of *partial* revocation. As the Court noted in *Osorio*, the TCPA was enacted to *stop* calls that were seen as "the scourge of modern civilization." The Panel's decision in this case endorses a view that some consumers want "scourge" in their lives, but only a little. To steal a phrase from the Panel, the Panel Decision supports the ill-conceived notion of

"Scourge me maybe."[1]

III. Limited Consent and Partial Revocation are not the Same.

The Panel Decision improperly relies on common-law principles of partial *consent* rather than partial *revocation*. Specifically, this Court's Opinion identified two cases, *Watkins* and *Jimeno,* which the Panel acknowledges stand for "the notion of limited *consent*." *Id.* at p. 7 (emphasis added). However, unlike the instant case, neither *Watkins* nor *Jimeno* involved revocation and neither involved giving "force of law" to decisions from the FCC.

The bigger problem is the Panel Decision in this regard is its completed disregard for case law relied on by the FCC in issuing its 2015 Ruling on revocation. Those decisions are more instructive than the cases cited by the Panel as each involved revocation of consent previously given and rest on the bedrock principle of "leave me alone."

The FCC specifically cited:

- *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1978) for the general recognition of "the individual's right to be left alone;"
- *Frisby v Schultz*, 487 U.S. 474 (1988), (Supreme Court recognized the "important aspect of [residential] privacy is the protection of unwilling listeners within their homes from the intrusion of objectionable or unwanted speech."); and

[1] "A jury could certainly find that Ms. Schweitzer—like the protagonist of a recent hit song—was too equivocal, *cf.* Carly Rae Jepsen, *Call Me Maybe*, on Curiosity (Universal Music Canada 2012)." Op. at p. 12.

- *Martin v City of Struthers*, 319 U.S. 141 (1943) (mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer.)

Analogizing the "mailer's right to communicate" to a business's right to communicate via calls to a cellular telephone, the Commission stated: "*Rowan* supports our finding that the government may protect a consumer's right to revoke consent and stop future communications from businesses." *Id.*, 30 F.C.C. Rcd. 7961. The language in the FCC's 2015 Opinion is unambiguous and recognizes revocation *only* where the called party "clearly expresses his or her desire not to receive further calls." The Commission's reliance on Supreme Court cases that recognize the "right to be left alone[, period]," an "unwilling[ness to] be disturbed[, period]", and the right to provide "notice that [one] wishes no further mailings[, period]" evidences the FCC's intent to create a bright-line "no further calls, period" standard for revoking consent under the TCPA.

The 2015 Ruling built off similar Rulings by the FCC in the context of faxes and text messages. In its 2012 Ruling, the FCC addressed revocation in the context of marketing text messages. *See, In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 15391 (2012). Generally, a recipient can request to opt-out of receiving

marketing text messages by replying "STOP" or something similar.[2] *Id.*, 27 F.C.C. Rcd. at 15396. The FCC held "STOP" prevented future texts messages other than one additional text to confirm the opt-out request. In reaching its decision, the FCC relied on the dissimilarity between revocation in the context of a two-way argument and the one-way medium of text messages:

> Unlike requests to stop receiving voice calls, which can be confirmed during the same call in which a consumer has expressed a desire to opt out, confirmation of a request to stop text messages necessarily requires a two- part exchange between the consumer and the sender of such messages. As a result, such confirmation can only be made after the consumer's opt-out request, in a separate and final text message.

Id., 27 F.C.C. Rcd. 15398.

The FCC's 2012 Ruling like the 2014 and 2015 Rulings contemplates finality in terms of communication. Valid revocation, i.e. an opt-out "request to stop text messages", prevents any future text messages "other than one confirmation of the opt-out request." *Id.*, 27 F.C.C. Rcd. at 153987.

The 2014 Ruling dealt with unsolicited marketing facsimiles. *See, In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 F.C.C. Rcd. 13998 (2014). Again in that Ruling, the FCC recognized

[2] As discussed below, the Panel Decision implicates text messaging as well and telephone calls. The Decision provides no guidance regarding partial revocation of consent to receive text messages.

"some fax recipients, after initially consenting to receive fax ads, will decide they *no longer wish to receive future faxes*." 29 F.C.C. Rcd. at 14007 (emphasis added). The TCPA contains an explicit requirement that the fax sender include a notice indicating:

> the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time…with such a request…is unlawful.

47 U.S.C. § 227(b)(2)(D)(ii).

The FCC's 2014 Ruling, like its 2012 Ruling and its later 2015 Ruling, envisions an unambiguous revocation rule prohibiting futher communication. "The opt-out notice requirement ensures that the recipient has the necessary contact information to opt out of future fax ads." *Id*, 29 F.C.C. Rcd. 14007.

The Panel Decision failed to substantively address any of these Rulings despite them having the "force of law."

IV. The Panel Decision Undermines the FCC's Ability to Provide Clarity with Respect to the TCPA.

As this Court has recognized, "Congress has conferred upon the FCC general authority to make rules and regulations necessary to carry out the provisions of the TCPA." *See, Mais*, 768 F.3d at 1117. Businesses and consumers

alike have come to rely on the FCC to clarify uncertainties that exist with respect to TCPA compliance. Many businesses, including Comenity, have drafted policies and trained employees based on the FCC's unwavering rulings that revocation exists only where a consumer clearly requests no further communications. The Panel Decision not only writes out of existence the clarity created by the FCC on the revocation issue, but undermines the legitimacy of the FCC's rulemaking authority. In addition to undoing the work performed by the FCC in reaching its 2012, 2014, and 2015 decisions, the Panel Decision creates more questions than it answers.

There is no doubt the Panel Decision would apply not only to telephone calls, but also facsimiles and text messages that implicate the TCPA. In addressing the District Court's concerns about "logistical and technical challenges" that could be created if anything less than the FCC has ruled is required to revoke consent was created by the judiciary, the Panel broadly surmised, "it is technologically feasible (though maybe more expensive) to program the industry's sophisticated software to place calls to a consumer only during certain times." Op. at p. 10. As an initial matter, the Panel's generalized statement regarding what the "industry" is or is not capable of doing with respect to acting on a consumer's request for limited calls has no evidentiary support. In addition, the Decision provides no context for "industry." Does the panel mean only creditors, like Comenity? Does

"industry" include debt collection agencies? Does it include loan services? The Panel's sweeping generalization portends to place substantial burdens on the "industry" without even defining the term.

As a large publicly-traded creditor, Comenity is more economically able to sustain the financial burden associated with the Panel's determination the FCC's rulings on revocation no longer provide a basis upon which those in the "industry" can rely to attempt to comply with the TCPA than would be a small collection agency. The Panel's Decision creates no margin for smaller companies.

More importantly, the Panel Decision essentially ignores the fact the TCPA applies not only to telephone calls, but to faxes and text messages as well. Again, the FCC Rulings have been clear regarding revocation of consent with respect to those mediums and those rulings have been in place for years. None of the Rulings recognize the Panel's newly-created concept of "partial revocation."

In fact, the Panel's Decision conflicts with FCC regulatory language with respect to facsimiles the recipient has consented to receive. In 2006, the FCC promulgated the "Solicited Fax Rule," codified at 47 C.F.R. § 64.1200(a)(4)(iv). Under the Solicited Fax Rule, solicited faxes must include the opt-out notice described in the TCPA. In order to revoke consent to receive faxes, the recipient is required to "make a request to the sender of the advertisement not to send any future advertisements." *See*, 47 C.F.R. § 64.1200(a)(4)(iii). Under the Panel

Decision, notwithstanding the clear language of the regulatory rule, a recipient could "make a request to the sender of the advertisement not to send any future advertisements" during specific indiscriminate times on specific indiscriminate days. For example, a recipient could send a request indicating: "only send faxes between 8:47 a.m. and 10:16 a.m. on Mondays and Thursday." The Panel Decision would recognize this as effective partial revocation notwithstanding the Regulations unambiguous language regarding revocation.

More troubling is the Panel's one-size-fits-all notion that "it is technologically feasible (though maybe more expensive) to program the industry's sophisticated software to place calls to a consumer only during certain times." Op. at p. 10. Although the Panel Decision would apply equally to faxes, there is nothing from which it could be concluded the "fax industry" has the same "sophisticated software" the Panel assumes the "industry" in which Comenity operates (whatever that means) possesses. To be sure, the Panel has imposed a requirement on fax senders without any knowledge or regard for their respective abilities to comply and without any opportunity to be heard.

The same can be said with respect to text messages. In 2012, the FCC confirmed Consumers can simply text "STOP" or a similar message to opt-out of future messages. *See, In the Matter of Rules & Regulations Implementing the TCPA*, 27 F.C.C. Rcd. 15391, 15401 fn. 12 (2012). This simple all-or-nothing

revocation concept provided a bright-line rule allowing those sending text messages to manage risk. The Panel Decision not only writes out of the existence the FCC's 2012 Ruling, but exposes senders of telemarketing text messages to requests for partial revocation that "industry" may not be equipped to handle. Again, there is no evidence "it is technologically feasible (though maybe more expensive) to program the [text messaging] industry's sophisticated software" to recognize any other than a "STOP" request. Op. at p. 10. Despite the FCC's clear Rulings on the issue of revocation of consent with respect to text messaging, the Panel has now created a situation in which text messengers will likely be faced with responses other than "STOP." Again, a text recipient could send a response stating: "only send texts between 8:47 a.m. and 10:16 a.m. on Mondays and Thursday." The Panel Decision would recognize this as effective partial revocation despite the fact such a request would fail to meet the FCC's Rulings and Regulations.

CONCLUSION

For the foregoing reasons, Defendant-Appellee Comenity Bank requests that the Court grant its petition for rehearing and rehearing *en banc*.

Dated: August 31, 2017

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the type-volume limitation of Rule 32(a)(7), Federal Rules of Appellate Procedure, in that it contains 3508 words (including words in footnotes) according to Microsoft Word 2010, the word-processing system used to prepare this Petition.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served by operation of the court's electronic filing system, or in the alternative, via US Mail, this 31st day of August 2017, addressed to:

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