

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
Kenneth Moser dba Marketing Support Systems) File No.: EB-TCD-18-00028267

CITATION AND ORDER

PRERECORDED VOICE MESSAGE VIOLATIONS

Adopted: December 13, 2019

Released: December 13, 2019

By the Chief, Enforcement Bureau:

I. NOTICE OF CITATION

1. Today the Federal Communications Commission’s Enforcement Bureau (Bureau) takes another step in the Commission’s ongoing effort to crack down on illegal telephone calls. This CITATION AND ORDER (Citation) notifies Kenneth Moser doing business as Marketing Support Systems or in any other capacity, including any entity controlled by Kenneth Moser (Moser)1 that Moser violated the law by making unauthorized and disruptive prerecorded voice message calls without the required identification information intended to protect American consumers’ privacy. Moser also violated the law by making prerecorded voice message calls to wireless phone numbers without an emergency purpose or consent.

2. We direct Moser to take immediate steps to comply with the Communications Act of 1934, as amended (Act), including the Telephone Consumer Protection Act (TCPA), and the Federal Communications Commission’s (Commission) rules (Rules), which prohibit (1) making artificial or prerecorded voice message calls without identifying the caller at the beginning of the message and providing the contact number of the caller during or after the message, and (2) making artificial or prerecorded voice message calls to wireless phones unless the calls are made for emergency purposes or with the prior express consent of the called party. If Moser fails to comply with these requirements, Moser may be liable for significant fines.

3. Notice of Duty to Comply with the Law: We must first issue a Citation for the violations at issue here before we may impose a monetary fine. We issue this Citation pursuant to section 503(b)(5) of the Act, which states that the Commission may not impose monetary forfeitures against non-regulatees who violate the Act or the Rules unless and until (a) the Commission issues a citation to the violator, (b) the Commission provides the violator a reasonable opportunity to respond, and (c) the violator subsequently engages in conduct described in the citation.2 Accordingly, Moser is hereby on notice that

1 Marketing Support Systems, Document No. 2015-013003, County of San Diego, Recorder/County Clerk (May 14, 2015) (on file in EB-TCD-18-00028267); see also Better Business Bureau, Marketing Support Systems, https://www.bbb.org/us/ca/san-diego/profile/telemarketing-services/marketing-support-systems-1126-1014054 (last visited Dec. 4, 2019) (Marketing Support Systems BBB Profile); LinkedIn, Kenneth Moser Profile, https://www.linkedin.com/in/kenneth-moser-3199a24 (last visited Dec. 4, 2019). Marketing Support Systems provides telemarketing services, offering “lead generation and marketing campaigns.” Marketing Support Systems BBB Profile.

2 47 U.S.C. § 503(b)(5).

he must comply with section 227 of the Act and section 64.1200 of the Rules.³ If Moser subsequently engages in any conduct of the type this Citation describes—including specifically any violation of the Act or Rules that govern telephone number identification requirements for prerecorded voice message calls and artificial/prerecorded voice message calls to wireless telephone numbers—Moser may be subject to further legal action, such as civil penalties, including, but not limited to, substantial monetary forfeitures. In assessing such forfeitures, the Commission may consider both the conduct that led to this Citation and the conduct following it.⁴

II. BACKGROUND

4. The Commission is charged with protecting consumers from the intrusion of unwanted, unlawful calls. Artificial or prerecorded voice message calls—commonly known as robocalls—are particularly troublesome because they often do not provide the consumer any mechanism to determine their origin or to contact the caller. The Act and Rules, however, require callers to provide specific identification information in all prerecorded voice message calls and also to seek consumer consent prior to making robocalls, unless for an emergency purpose, to consumers’ wireless phones.

A. Moser’s Prerecorded Voice Message Calls

5. On May 30 and 31, 2018, the phones of thousands of residents of the California 76th State Assembly District in San Diego County received a prerecorded voice message call that described in graphic detail an alleged sexual assault involving Philip Graham (Graham), one of eight candidates for the open State Assembly seat.⁵ The allegations in the prerecorded message, however, had already been disproven by law enforcement; indeed, the San Diego County Sheriff’s Department conducted an investigation into the incident and publicly announced by May 29, 2018, that the alleged sexual assault never occurred.⁶ None of the prerecorded message calls received on May 30 and 31, 2018, included the telephone number of the party responsible for initiating the call or otherwise accurately identified that party.

B. FCC Investigation of Moser

6. Graham filed a complaint about the prerecorded voice message calls with California authorities. Steve Reyes, Chief Counsel to the California Secretary of State, referred Graham’s complaint

³ 47 U.S.C. § 227; 47 CFR § 64.1200. Section 227 was added to the Communications Act by the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227), and is most commonly known as the TCPA. The TCPA and the Commission’s rules restrict a variety of practices that are associated with telephone solicitation and the use of the telephone network to deliver unsolicited advertisements or prerecorded/artificial voice and autodialed telephone calls.

⁴ See S. Rep. No. 95-580, 95th Cong., 1st Sess. at 9 (1977) (If a person or entity that has been issued a citation by the Commission thereafter engages in the conduct for which the citation of violation was sent, the subsequent notice of apparent liability “would attach not only for the conduct occurring subsequently *but also for the conduct for which the citation was originally sent.*”) (emphasis added).

⁵ Jesse Marx, *How a Strange Accusation Caught Fire and Took Down an Assembly Candidate*, Voice of San Diego (Jan. 2, 2019), <https://www.voiceofsandiego.org/topics/politics/how-a-strange-accusation-caught-fire-and-took-down-an-assembly-candidate>.

⁶ San Diego County Sheriff’s Department, News Release Information Sheet, rel. May 29, 2018 (on file in EB-TCD-18-00028267); see also Brie Stimson, *Battery Allegations Against Assembly Candidate Phil Graham Unfounded: SDO Investigation*, NBC San Diego (May 29, 2018), <https://www.nbcsandiego.com/news/local/Battery-Allegations-Against-Assembly-Candidate-Unfounded-SDSO-Investigation-484009451.html>. Graham’s accuser, Nichole Burgan, was later criminally charged for making a false report of a crime; she pleaded guilty and was sentenced in February 2019. Aaron Burgin, *Burgan to serve two days in jail for false accusation against Phil Graham*, The Coast News (Feb. 5, 2019), <https://www.thecoastnews.com/burgan-to-serve-two-days-in-jail-for-false-accusation-against-phil-graham>.

to the Commission on June 2, 2018.⁷ Based upon the referred complaint from the California Secretary of State, the Bureau initiated an investigation. Bureau staff traced the calls to a third-party dialing platform⁸ and discovered that Moser and Marketing Support Systems,⁹ a business that provides “lead generation and marketing campaigns,”¹⁰ conducted the prerecorded message calling campaign.¹¹

7. Moser made 47,610 prerecorded message calls on May 30 and 31, 2018.¹² The prerecorded message stated:¹³

Creepy Alert. ABC and NBC News are reporting that 76th Assembly candidate Phil Graham is being investigated by the San Diego Sheriff’s Department for alleged sexual harassment of a woman. She claims that he forcibly pulled her hair, kissed her, and placed her hand on his private part after drinking into the early hours of the morning at a local bar. Phil Graham was allegedly

⁷ Letter from Steven J. Reyes, Chief Counsel to California Secretary of State, to Rosemary Harold, Chief, FCC Enforcement Bureau et al. (Jun. 2, 2018) (on file in EB-TCD-18-00028267). Reyes forwarded to the Commission a letter and accompanying exhibits from Thomas W. Hiltachk complaining about the robocalls. Letter from Thomas W. Hiltachk, Counsel to State Assembly candidate Philip Graham, to Alex Padilla, California Secretary of State (Jun. 1, 2018) (on file in EB-TCD-18-00028267) (Hiltachk Letter). On June 7, 2018, Graham’s legal counsel separately requested that the Commission investigate the May 30 and 31, 2018 prerecorded message calling campaign. Letter from Brian T. Hildreth, Counsel to State Assembly candidate Philip Graham, to Rosemary Harold, Chief, FCC Enforcement Bureau (Jun. 7, 2018) (on file in EB-TCD-18-00028267).

⁸ Letter from Kristi Thompson, Division Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to [REDACTED] (Nov. 14, 2018) (on file in EB-TCD-18-00028267). The letter also requested a copy of the prerecorded message. The third-party dialing platform, [REDACTED], provides a web-based application that allows customers to make inbound or outbound automated calls. This service allows customers to upload call lists and automated messages and to make associated calls. *See also* Letter from Kristi Thompson, Division Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to [REDACTED] [REDACTED] (Aug. 17, 2018); E-mail from [REDACTED] to Sonja Rifken, Attorney, Telecommunications Consumers Division, FCC Enforcement Bureau (Aug. 21, 2018, 15:32 EDT) ([REDACTED] is a company that provides telecommunications services, and provided such services to [REDACTED]; [REDACTED] identified [REDACTED] as the third-party dialing platform used to make the calls at issue and identified Kenneth Moser as the client of [REDACTED] who made the calls.).

⁹ According to [REDACTED], the contact for the account associated with the calls is Marketing Support Systems and owner Kenneth Moser with the address of [REDACTED]. Marketing Support Systems has been registered in San Diego County, California as a “fictitious business name” to Kenneth Moser since 1993 at the same address, although the zip code listed with San Diego County is [REDACTED]. Marketing Support Systems, Document No. 2015-013003, County of San Diego, Recorder/County Clerk (May 14, 2015) (on file in EB-TCD-18-00028267). The state of California permits individuals and partnerships to do business under “fictitious business names,” as defined by California law, provided that the individual or partnership files a “fictitious business name certificate . . . designed to make available to the public the identities of persons doing business under the fictitious name.” Cal. Bus. & Prof. Code § 17900.

¹⁰ *Marketing Support Systems BBB Profile*, <https://www.bbb.org/us/ca/san-diego/profile/telemarketing-services/marketing-support-systems-1126-1014054> (last visited Dec. 4, 2019).

¹¹ E-mail from [REDACTED], to Parul Desai, Deputy Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (Dec. 12, 2018, 12:38 EST) (on file in EB-TCD-18-00028267) (providing call detail records and certain other relevant information regarding Moser); E-mail from [REDACTED], [REDACTED] to Sonja Rifken, Attorney, Telecommunications Consumers Division, FCC Enforcement Bureau (Feb. 27, 2019, 12:19 EST) (on file in EB-TCD-18-00028267) (updating call records with times of calls) (collectively, Dialing Platform Response).

¹² Dialing Platform Response at Files 6192231022 and Copy of 6192231022 with call times (Call Detail Records).

¹³ Dialing Platform Response at File PHILGRAHAM_REV_VO.MP3 (on file in EB-TCD-18-00028267). In response to the subpoena, the third party dialing platform company provided the referenced voice file and averred that it was not aware of any other recorded messages or other sound files associated with the calling campaign. Dialing Platform Response at File Response 5.

so drunk that he could not calculate the tip. Shouldn't he have been at home sleeping? Vote carefully on June 5th. We don't need any more creeps in Sacramento. Don't vote for Phil Graham. #justsayno. Paid for by Jennifer Jones.¹⁴

8. Bureau staff confirmed that more than 11,000 of the 47,610 prerecorded voice message calls made by Moser were made to wireless phones.¹⁵ Bureau staff contacted multiple recipients of the prerecorded voice message call at issue to confirm that: (1) at least since the date of the prerecorded message calling campaign, they were the subscriber of the called number; (2) they received the call(s); and (3) they had not given Moser, Marketing Support Systems, or Jennifer Jones permission to call them on the affected phone number. Of the 44 people with whom Bureau staff spoke, none recalled giving Marketing Support Systems, Moser, or Jennifer Jones¹⁶ permission to call them on their wireless phones, and nine affirmatively stated that they did not.¹⁷

III. APPLICABLE LAW AND VIOLATIONS

9. Identification Requirements for Prerecorded Voice Messages. Section 227(d)(3)(A) of the Act and section 64.1200(b) of the Rules require all artificial or prerecorded voice message calls to meet certain standards. First, all prerecorded voice message calls must, “at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call”¹⁸ Second, prerecorded voice message calls must, “during or after the message, state clearly the telephone number or address of [the] business, other entity, or individual”¹⁹ The Rules require a prerecorded call to state the telephone number of the party responsible for initiating the call and such telephone number must be a number other than that of the autodialer or prerecorded message player that placed the call.²⁰

10. Moser's prerecorded voice message calls failed to include the required telephone number of the party responsible for initiating the call.²¹ Indeed, the message failed to include any telephone number. Instead, the only number made available to call recipients was the phone number displayed in the caller ID information: 619-223-1022. That number belongs to another company, HomeyTel, with no association with the calls.²²

¹⁴ Although the message stated that it was paid for by “Jennifer Jones,” that name appears to be a pseudonym. Bureau staff has been unable to identify a specific person named “Jennifer Jones” associated with Moser or the robocalls in question.

¹⁵ Bureau staff used an industry standard, commercially available software database of known assigned and ported wireless numbers to determine whether any of the robocalls were made to wireless phone numbers. Interactive Marketing Solutions, *EasyID*, <https://www.ims-dm.com/mvc/page/easyid> (last visited Dec. 4, 2019). EasyID is Interactive Marketing Solution's software that allows clients to eliminate wireless numbers from calling lists. *Id.* Interactive Marketing Solutions, Inc. is a member of the Direct Marketing Association and bills itself as the country's largest single-source supplier of data identifying telephone numbers that have been assigned or ported to wireless devices, to help businesses comply with state and federal legislation. *Id.*

¹⁶ *Supra* note 14.

¹⁷ Declaration of [REDACTED], dated Apr. 5, 2019 (on file in EB-TCD-18-00028267) and Declaration of [REDACTED], dated Mar. 27, 2019 (on file in EB-TCD-18-00028267).

¹⁸ 47 U.S.C. § 227(d)(3)(A). *See also* 47 CFR § 64.1200(b)(1). If a business or other corporate entity is responsible for the call, the prerecorded message must contain that entity's official business name. 47 CFR § 64.1200(b)(1).

¹⁹ 47 U.S.C. § 227(d)(3)(A). *See also* 47 CFR § 64.1200(b)(2).

²⁰ 47 CFR § 64.1200(b)(2).

²¹ Dialing Platform Response at File PHILGRAHAM_REV_VO.MP3 (on file in EB-TCD-18-00028267).

²² The Commission has issued a Notice of Apparent Liability against Moser for unlawfully using HomeyTel's telephone number in violation of the Truth in Caller ID Act. *Kenneth Moser dba Marketing Support Systems*, Notice of Apparent Liability for Forfeiture, FCC 19-135 (2019). Moser was not authorized to use HomeyTel's telephone number or display its caller ID number. E-mail from Conrad Braun, Operations Manager, HomeyTel, to Sonja Rifken, Attorney, Telecommunications Consumers Division, FCC Enforcement Bureau (Feb. 8, 2019, 13:52

11. Moser's prerecorded voice message calling campaign generated numerous consumer complaints. Bureau staff investigated a number of these complaints and found that Moser, not HomeyTel, called all of those complainants.²³ Moser's prerecorded messages also failed to state at the beginning who was responsible for initiating the calls. Thus, we find that Moser violated section 227(d)(3)(A) of the Act and section 64.1200(b) of the Rules by making 47,610 calls with prerecorded messages that failed to contain the identifying information required by the Act and Rules.

12. Prohibition Against Sending Prerecorded Messages to Wireless Phones. Section 227(b)(1)(A)(iii) of the Act and section 64.1200(a)(1)(iii) of the Rules prohibit making any call using an artificial or prerecorded voice to any telephone number assigned to a wireless telephone.²⁴ Two exceptions to these prohibitions are (1) calls made for emergency purposes, and (2) calls made with the prior express consent of the called party.²⁵

13. Moser made more than 11,000 of the prerecorded voice message calls to wireless phones.²⁶ Of the 44 wireless subscribers who received the prerecorded voice message calls and with whom Bureau staff spoke, not a single person stated that he or she had consented to receive these calls from Moser, Marketing Support System, or Jennifer Jones.²⁷ There is no evidence that the calls were made for emergency purposes.²⁸ Thus, we find that Moser violated section 227(b)(1)(A)(iii) of the Act and section 64.1200(a)(1)(iii) of the Rules by making prerecorded voice message calls to wireless phones without prior express consent of wireless subscribers and without an emergency purpose.

14. Finding of Violations. We find that Moser made 47,610 prerecorded voice message calls in violation of section 227 of the Act and section 64.1200 of the Rules. Specifically, we find that Moser made 47,610 calls in violation of section 227(d)(3)(A) of the Act and section 64.1200(b) of the Rules,²⁹ and also made more than 11,000 calls in violation of section 227(b)(1)(A)(iii) of the Act and section 64.1200(a)(1)(iii) of the Rules.³⁰

IV. OPPORTUNITY TO RESPOND TO THIS CITATION

15. Moser may respond to this Citation within 30 calendar days from the release date of this Citation by any of the following methods: (1) a written statement, (2) a teleconference interview, or (3) a

EST) (on file in EB-TCD-18-00028267) (Declaration of Conrad Braun). *See also* Hiltachk Letter, Exhibit B (E-mail from HomeyTel to Brian T. Hildreth, Counsel to State Assembly candidate Philip Graham (May 31, 2018, 19:08 PDT) (stating "[n]either I nor HomeyTel have anything to do with the calls."). Bureau staff also issued a subpoena to the carrier of record for the number displayed as Caller ID information, who confirmed that the phone number is assigned to HomeyTel. Letter from Kristi Thompson, Division Chief, Telecommunications Consumer Division, FCC Enforcement Bureau, to [REDACTED] (Mar. 4, 2019) (on in file EB-TCD-18-00028267); E-mail from [REDACTED] to [REDACTED], Senior Analyst, Telecommunications Consumer Division, FCC Enforcement Bureau (Mar. 5, 2019, 9:28 am EST) (on file in EB-TCD-18-00028267).

²³ Call Detail Records.

²⁴ 47 U.S.C. § 227(b)(1)(A)(iii); 47 CFR § 64.1200(a)(1)(iii).

²⁵ 47 U.S.C. § 227(b)(1)(A)(iii); 47 CFR § 64.1200(a)(1)(iii). The TCPA also exempts from this prohibition calls made solely to collect a debt owed to or guaranteed by the United States. 47 U.S.C. § 227(b)(1)(A)(iii). There is no evidence that the calls were made for this purpose.

²⁶ *Supra* note 15.

²⁷ *Supra* note 17.

²⁸ *See* 47 C.F.R. 64.1200(f)(4) (defining "emergency purposes" as "calls made necessary in any situation affecting the health and safety of consumers").

²⁹ 47 U.S.C. § 227(d)(3)(A); 47 CFR § 64.1200(b).

³⁰ 47 U.S.C. § 227(b)(1)(A)(iii); 47 CFR §§ 64.1200(a)(1)(iii).

personal interview at the Commission Field Office nearest to Moser's place of business. The Commission Field Office nearest to Moser is located in Los Angeles, CA.

16. If Moser requests a teleconference or personal interview, contact Kristi Thompson at (202) 418-1318. We note that such teleconference or interview must take place within 30 calendar days of the release date of this Citation. If Moser prefers to submit a written response with supporting documentation, a response must be sent within 30 calendar days of the release date of this Citation to the contact and address provided in paragraph below.

17. All written communications should be sent to the address below.

Kristi Thompson, Chief
Telecommunications Consumers Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, SW, Rm 4-C220
Re: EB-TCD-18-00028267

18. Upon request, the Commission will make reasonable accommodations for persons with disabilities. If applicable, Moser should provide a description of the accommodation required, and include as much detail as possible, and also provide a telephone number and other contact information. Moser should allow at least five business days advance notice; last minute requests will be accepted, but may be impossible to fill. Moser should send an e-mail to fcc504@fcc.gov or call the FCC's Consumer & Governmental Affairs Bureau:

For sign language interpreters, CART, and other reasonable accommodations:
202-418-0530 (voice), 202-418-0432 (tty);

For accessible format materials (braille, large print, electronic files, and audio format):
202-418-0531 (voice), 202-418-7365 (tty).

19. We advise Moser that it is a violation of section 1.17 of the Rules³¹ for any person to make any false or misleading written or oral statement of fact to the Commission. Specifically no person shall:

(1) In any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading; and

(2) In any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.

20. Further, the knowing and willful making of any false statement, or the concealment of any material fact, in reply to this Citation is punishable by fine or imprisonment.³²

21. Violations of section 1.17 of the Rules or the criminal statute referenced above may result in further legal action, including monetary forfeitures pursuant to section 503 of the Act.

22. Finally, we warn Moser that, under the Privacy Act of 1974,³³ Commission staff will use all relevant material information before it, including information disclosed in interviews or written

³¹ 47 CFR § 1.17.

³² 18 U.S.C. § 1001.

³³ 5 U.S.C. § 552a(e)(3).

statements, to determine what, if any, enforcement action is required to ensure Moser's compliance with the Act and the Rules.

V. FUTURE VIOLATIONS

23. If, after receipt of this Citation and the foregoing opportunity to respond, Moser again violates sections 227(b)(1)(A)(iii) and (d)(3)(A) of the Act and/or sections 64.1200(a)(1)(iii) and 64.1200(b)(1) and (b)(2) of the Rules by engaging in conduct of the type described herein, the Commission may impose sanctions for each such violation.³⁴ For example, the Commission may impose monetary forfeitures of up to \$20,134 per violation of section 227.³⁵ The Commission may further adjust the forfeiture reflecting enumerated statutory factors, which include the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.³⁶ Further, the Commission may assess forfeitures on both the conduct that led to this Citation and the conduct following it.³⁷

VI. ORDERING CLAUSES

24. Accordingly, **IT IS ORDERED** that, pursuant to sections 4(i) and 4(j) of the Act,³⁸ Kenneth Moser doing business as Marketing Support Systems must cease and desist from making autodialed, artificial or prerecorded voice message calls in violation of section 227 of the Act and section 64.1200 of the Rules.³⁹

25. **IT IS FURTHER ORDERED** that a copy of this Citation and Order shall be sent by first class mail and certified mail, return receipt requested, to Kenneth Moser and Marketing Support Systems at [REDACTED].

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold
Chief
Enforcement Bureau

³⁴ Any entity that is a "Small Business Concern" as defined in the Small Business Act (Pub. L. 85-536, as amended) may avail itself of rights set forth in that Act, including rights set forth in 15 U.S.C. § 657, "Oversight of Regulatory Enforcement," in addition to other rights set forth herein.

³⁵ See 47 U.S.C. § 503; 47 CFR § 1.80(b). *Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, 33 FCC Rcd 12278 (EB 2018).

³⁶ 47 U.S.C. § 503(b)(2)(E); 47 CFR § 1.80(b)(8).

³⁷ See S. Rep. No. 95-580, 95th Cong., 1st Sess. at 9 (1977) (If a person or entity that has been issued a citation by the Commission thereafter engages in the conduct for which the citation of violation was sent, the subsequent notice of apparent liability "would attach not only for the conduct occurring subsequently *but also for the conduct for which the citation was originally sent.*") (emphasis added).

³⁸ 47 U.S.C. §§ 154(i), 154(j).

³⁹ 47 U.S.C. § 227; 47 CFR § 64.1200.