



## TABLE OF CONTENTS

I. Introduction and Summary .....	1
II. Background .....	2
A. ccAdvertising's Telemarketing Activities .....	2
B. Applicability of the TCPA to ccAdvertising's Activities .....	4
C. North Dakota's Regulation of Prerecorded Messages .....	6
D. The Commission's Treatment of Inconsistent State Laws Under the TCPA .....	7
III. Argument .....	9
A. As Applied to ccAdvertising's Interstate Political Polling Calls, N. D. Cent. Code § 51-28-02 is Inconsistent with 47 U.S.C. § 227(a) and 47 C.F.R. § 64.1200.....	9
B. The Commission Should Declare That The TCPA Preempts The Applicability Of N. D. Cent. Code § 51-28-02 To ccAdvertising's Interstate Political Polling Calls.....	11
IV. The Need for Expedited Relief in Light of Election 2004.....	11
V. Conclusion .....	12



the federal objective of creating uniform national rules. Thus, the Commission urged states to avoid subjecting businesses to rules that are inconsistent with the Commission's rules.

Directly contrary to the Commission's exhortation, North Dakota, through the attorney general's office, has notified Petitioner that the company's use of autodialed, prerecorded message technology in connection with interstate political polling calls is regulated by the state's telemarketing statute, and that it intends to enforce North Dakota's statute against Petitioner. North Dakota's telemarketing statute authorizes courts to award to the attorney general potentially millions of dollars in civil penalties.

Petitioner requests that the Commission declare that North Dakota's inconsistent regulation of the use of automatic telephone dialing systems or prerecorded voice messages in making interstate political polling calls is preempted. Petitioner further requests that the Commission expedite the issuance of its declaratory ruling in light of North Dakota's potential ability to block Petitioner from conducting interstate political polling calls during the weeks leading up to the November 2004 elections. In the absence of expedited relief, the prosecution of an action in state court improperly applying state law to Petitioner's interstate political polling calls, notwithstanding Petitioner's good faith reliance upon and compliance with this Commission's rules, will diminish this Commission's authority and chill the First Amendment speech rights of the Petitioner and its clients.

## **II. Background**

### **A. ccAdvertising's Telemarketing Activities**

Founded in the late 1990s, and located in Herndon, Virginia, ccAdvertising has evolved primarily into a survey and database company that relies upon an interactive voice response speech recognition ("TVRSR") technology on outbound calls using pre-recorded messages to

reach households, which usually have been targeted based upon location or anticipated household demographics. The broad utility of the unique IVRSR technology has been recognized by the Consumer Products Safety Commission, which lists ccAdvertising among the companies capable of quickly delivering recall or public safety messages to America's households.<sup>1</sup> All of ccAdvertising's calls are made from facilities in Ashburn, Virginia.

Through its FEC Research.com brand, ccAdvertising has been active in many campaigns and political initiatives. In November 2003, for example, it was involved in over 50 races where candidates were running for election or re-election. Lists of sample campaigns are posted at the ccAdvertising's web site.<sup>2</sup>

Political campaigns typically use ccAdvertising's IVRSR technology to make outbound calls to reach households and, using pre-recorded messages, find supporters through survey polls and subsequently turn them out to vote, or to work for, the campaign (hereinafter "political polling calls"). Most of ccAdvertising's political polling involves interstate calls. Examples of polls conducted in the past can be downloaded from ccAdvertising's web site; a copy of the script of the poll at issue in this Petition is attached as Exhibit 1.

ccAdvertising maintains an internal do-not-call list, and scrubs all telephone numbers dialed for political polling calls against that list.

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<sup>1</sup> See [www.cpsc.gov/businfo/recallcompanies.html](http://www.cpsc.gov/businfo/recallcompanies.html) (listing FreeEats.com, Inc.).

<sup>2</sup> See [www.ccadvertising.biz](http://www.ccadvertising.biz).

## B. Applicability of the TCPA to ccAdvertising's Activities

By operation of federal exemptions – some of which protect important First Amendment rights – ccAdvertising's use of IVRSR technology to conduct interstate political polling calls is lawful under the TCPA and the Commission's telemarketing rules.

First, ccAdvertising's interstate political polling calls are lawful under the Commission's rules prohibiting certain prerecorded-message calls. The Commission's rules generally prohibit initiating residential telephone calls using artificial or prerecorded messages without the prior express consent of the called party.<sup>3</sup> However, the rule specifically exempts from this prohibition non-commercial calls. As described in the Commission's 2003 *TCPA Order*: "In its 1992 proceeding, the Commission determined to exempt calls that are non-commercial and commercial calls that do not contain an unsolicited advertisement, noting the messages that do not seek to sell a product or service do not tread heavily upon the consumer interests implicated by section 227."<sup>4</sup> These exemptions remain in effect.<sup>5</sup>

In its 1992 order, the Commission stated: "[T]he exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, political polling or similar activities which do not involve solicitation as defined by our rules. We thus reject as unnecessary the proposal to create specific exemptions for such

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<sup>3</sup> "No person or entity may [i]nitiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call: (i) [i]s made for emergency purposes, (ii) Is not made for a commercial purpose, (iii) [i]s made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation, (iv) [i]s made to any person with whom the caller has an established business relationship at the time the call is made, or (v) [i]s made by or on behalf of a tax-exempt nonprofit organization." 47 C.F.R. §64.1200(a)(2)(ii).

<sup>4</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Dkt. No. 02-278, *Report and Order*, 18 FCC Rcd 14014 ¶ 136 (2003) ("*TCPA Order*").

activities.”<sup>6</sup> ccAdvertising’s interstate political polling calls fall squarely within the scope of this non-commercial exemption.

Second, ccAdvertising’s interstate political polling calls are lawful under the Commission’s rules prohibiting certain autodialed calls. The Commission prohibits the use of automatic telephone dialing systems (and artificial or prerecorded voice messages) to make telephone calls to certain numbers including emergency telephone lines, hospital lines, and cellular and paging lines.<sup>7</sup> The prohibition applies only to those particular classes of calls and does not cover ccAdvertising’s interstate political polling calls. In the *TCPA Order*, the Commission describes the policy rationale for prohibiting the use of autodialers only with respect to a particular class of calls: “The legislative history also suggests that through the TCPA, Congress was attempting to alleviate a particular problem — an increasing number of automated and prerecorded calls to certain categories of numbers. The TCPA does not ban the use of technologies to dial telephone numbers. It merely prohibits such technologies from dialing emergency numbers, health care facilities, telephone numbers assigned to wireless services, and any other numbers for which the consumer is charged for the call. Such practices

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(footnote continued from previous page)

<sup>5</sup> *Id.*

<sup>6</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Dkt. No. 92-90, *Report and Order*, 7 FCC Rcd 8752 ¶40 (1992). Cf. H. Rep. No. 317, 102d Cong., 1<sup>st</sup> Sess. (1991) (“the Committee does not intend the term ‘telephone solicitation’ to include public opinion polling, consumer or market surveys, or other surveys conducted by telephone”).

<sup>7</sup> 47 C.F.R. § 64.1200(a)(1).

were determined to threaten public safety and inappropriately shift marketing costs from sellers to consumers.”<sup>8</sup>

C. North Dakota’s Regulation of Prerecorded Messages

North Dakota, through the office of the state’s attorney general, has notified Petitioner that ccAdvertising’s use of IVRSR technology in connection with interstate political polling calls is regulated by a state telemarketing statute. Specifically, the attorney general of North Dakota takes the position that N. D. Cent. Code § 51-28-02 regulates ccAdvertising’s interstate political polling calls placed into North Dakota during early August 2004 and, presumably, any future such calls that ccAdvertising may make during the remainder of this election year and future election years. A copy of the script of the poll that ccAdvertising conducted during the early August 2004 interstate calls placed into North Dakota is attached as Exhibit 1.

Section 51-28-02 governs the use of prerecorded or synthesized voice messages with respect to telephone calls to North Dakota subscribers. It provides:

**Use of prerecorded or synthesized voice messages.** A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber’s consent before the message is delivered.<sup>9</sup>

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<sup>8</sup> *TCPA Order* ¶ 133.

<sup>9</sup> North Dakota’s statute defines the terms used in section 51-28-02 broadly. For example, “caller” is defined to mean any “person, corporation, firm, partnership, association, or legal or commercial entity that attempts to contact, or that contacts, a subscriber in this state by using a telephone or telephone line. N. D. Cent. Code § 51-28-01(2). The term “automatic dialing-announcing device” is defined to mean “a device that selects and dials telephone numbers and that, working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called.” *Id.* § 51-28-01(1).



Section 51-28-02 proceeds to exempt from its scope "messages from school districts to students, parents, or employees, messages to subscribers with whom the caller has a current business relationship, or messages advising employees of work schedules." It contains no exemptions for surveys or political calls.<sup>10</sup>

The office of the attorney general of North Dakota has notified ccAdvertising of its intention to take enforcement action to recover monetary remedies and to prevent ccAdvertising from making interstate political polling calls into North Dakota during the weeks leading to the November 2004 elections, and thereafter. See Exhibit 2. The North Dakota statute authorizes courts to award the attorney general civil penalties of \$2,000 per violation,<sup>11</sup> with each message constituting a separate violation.<sup>12</sup>

D. The Commission's Treatment of Inconsistent State Laws Under the TCPA

The TCPA's "savings clause" preserves the ability of states to impose more restrictive intrastate requirements upon telemarketing, or upon the use of automatic telephone dialing systems or prerecorded voice messages, or to prohibit these activities altogether:

[N]othing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

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<sup>10</sup> Chapter 51-28 does contain an exclusion from the definition of "telephone solicitation" for certain communications by or on behalf of tax-exempt charitable organizations. These include communications by or on behalf of: (1) a person engaging solely in polling, unless the communication is made through an automatic dialing-announcing device "in a manner prohibited by section 51-28-02"; and (2) a political party or group. *Id.* § 51-28-01(7)(c)(2)(d) & (f). These exclusions appear not to apply to section 51-28-02 because this provision governing the use of prerecorded or synthesized voice messages does not use, contain, or rely upon the term "telephone solicitation."

<sup>11</sup> *Id.* §§ 51-28-15, 51-28-17.

<sup>12</sup> *Id.* § 51-28-19.

- (B) the use of automatic telephone dialing systems;
- (C) the use of artificial or prerecorded voice messages; or
- (D) the making of telephone solicitations.<sup>13</sup>

In considering revisions to its telemarketing rules, the Commission in 2002 solicited comments regarding “[w]hat conflicts between state telemarketing laws and federal law might warrant preemption.”<sup>14</sup> The Commission last year then concluded that it “will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis,” and “encourage[d] states to avoid subjecting telemarketers to inconsistent rules.”<sup>15</sup> The Commission warned that “any state regulation of interstate telemarketing that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted.”<sup>16</sup>

The Commission explained that more restrictive state efforts to regulate “interstate calling” would almost certainly be preempted because:

Although section 227(e) gives states authority to impose more restrictive *intrastate* regulations, we believe that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. We conclude that inconsistent *interstate* rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. The record in this proceeding supports the finding that application of inconsistent rules for those that telemarket on a

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<sup>13</sup> 47 U.S.C. § 227(e)(1).

<sup>14</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Dkt. No. 02-278 & CC Dkt. No. 92-90, *Notice of Proposed Rulemaking*, 17 FCC Rcd 17459 ¶ 48 (2002).

<sup>15</sup> *TCPA Order* ¶ 84.

<sup>16</sup> *Id.*

nationwide or multi-state basis creates a substantial compliance burden for those entities.<sup>17</sup>

Finally, the Commission invited “any party that believes a state law is inconsistent with section 227 or our rules [to] seek a declaratory ruling.”<sup>18</sup>

### III. Argument

#### A. As Applied to ccAdvertising’s Interstate Political Polling Calls, N. D. Cent. Code § 51-28-02 is Inconsistent with 47 U.S.C. § 227(a) and 47 C.F.R. § 64.1200

At issue in this proceeding is Petitioner’s use of prerecorded messages to conduct *interstate* political polling calls to households that have not previously consented to such calls. Under the Commission’s rules, these calls are lawful.<sup>19</sup> The Commission’s decision not to forbid or restrict this particular activity does not yield to the states the right to regulate the activity. To the contrary, the Commission’s decision not to forbid or restrict this particular activity remains an agency decision about a matter within the agency’s jurisdictional sphere, promoting federal interests with which the states are not free to interfere.

North Dakota’s regulation of ccAdvertising’s use of prerecorded messages to conduct interstate political polling calls to households that have not previously consented to such calls differs from the Commission’s rules. Whereas such calls are lawful under 47 C.F.R. § 64.1200, they are presumptively unlawful under N. D. Cent. Code § 51-28-02. As noted above, a court may award the attorney general civil penalties of \$2,000 per violation,<sup>20</sup> with each message

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<sup>17</sup> *Id.* ¶ 83 (emphasis supplied).

<sup>18</sup> *Id.* ¶ 84.

<sup>19</sup> *See supra* part II.B.

<sup>20</sup> N. D. Cent. Code §§ 51-28-15, 51-28-17.

constituting a separate violation.<sup>21</sup> Attempts by ccAdvertising to poll the political views of a North Dakota's households could potentially expose it to thousands if not millions of dollars in civil penalties, in addition to attorneys' fees and costs.<sup>22</sup>

Facing substantial civil penalties for making interstate political polling calls into North Dakota that are in compliance with the Commission's telemarketing rules certainly subjects ccAdvertising to inconsistent regulations. Exposing a company that complies with the TCPA to substantial civil penalties, and potentially private causes of actions,<sup>23</sup> for making interstate political polling calls into North Dakota imposes "burdensome compliance costs for telemarketers," confuses consumers, and thereby "frustrate[s] the federal objective of creating uniform national rules."<sup>24</sup>

North Dakota declines to recognize the Commission's rules regarding (i) the scope of the prohibition on autodialed calls and (ii) the exemptions for non-commercial calls from the prohibition on prerecorded messages to residences – the controlling federal authority that renders lawful ccAdvertising's use of IVRSR technology in connection with interstate political polling calls. As a result, in circumstances such as this, North Dakota's regulation of automatic telephone dialing systems or of artificial or prerecorded voice messages frustrates the federal objective of creating and promoting a uniform regulatory scheme.

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<sup>21</sup> *Id.* § 51-28-19.

<sup>22</sup> *Id.* § 51-28-18.

<sup>23</sup> *Id.* § 51-28-11.

<sup>24</sup> TCPA Order ¶ 83.

**B. The Commission Should Declare That The TCPA Preempts The Applicability Of N. D. Cent. Code § 51-28-02 To ccAdvertising's Interstate Political Polling Calls**

In the *TCPA Order*, the Commission concluded that the section 227(e)(1) language of the “savings clause” preceding subparagraphs (A) – (D) giving states the authority to impose more restrictive requirements, or to prohibit related activities, applies solely to *intrastate* calls.<sup>25</sup> The Commission concluded that section 227(e)(1) reserved for the agency the determination of uniform national rules that apply to *interstate* calls.

For purposes of preemption, neither Congress nor the Commission distinguished among the four activities covered in subparagraphs (A) – (D). This is because the reasoning underlying the federal interest in promoting uniformity is just as compelling for preempting inconsistent regulation of the use of automatic telephone dialing systems or prerecorded voice messages in making interstate calls as it is for preempting inconsistent state do-not-call rules for interstate calls.

Thus, the Commission should declare that North Dakota’s more restrictive regulation of the use of automatic telephone dialing systems or prerecorded voice messages in making interstate political polling calls is preempted.

**IV. The Need for Expedited Relief in Light of Election 2004**

Petitioner ccAdvertising seeks relief only after the office of the attorney general of North Dakota made clear its intention of bringing an enforcement action against ccAdvertising, which potentially could prevent ccAdvertising from making interstate political polling calls into North Dakota during the weeks leading to the November 2004 elections, and thereafter. *See Exhibit 2.*

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<sup>25</sup> *Id.*

Petitioner seeks expedited relief to avoid extensive litigation in North Dakota, in a forum in which ccAdvertising could be enjoined from conducting interstate political polling calls during the weeks leading up to the November 2004 elections in North Dakota.

In the absence of the requested relief, the office of North Dakota's attorney general has indicated that it will commence an enforcement action against ccAdvertising for violations of N. D. Cent. Code § 51-28-02 notwithstanding Petitioner's good faith reliance upon and compliance with this Commission's rules and rulings. The attorney general's prosecution of an action improperly applying N. D. Cent. Code § 51-28-02 to ccAdvertising's interstate calls, and disregard for the federal interest in uniformity, diminishes the Commission's authority. The attorney general's actions make clear that, at least in North Dakota, the Commission's request that states avoid subjecting telemarketers to inconsistent rules will be disregarded.

Petitioner and its clients also are immediately and irreparably harmed in that First Amendment speech rights, acknowledged and protected by the TCPA and applicable Commission rules, have been and continue to be chilled by the attorney general's prosecution of its action against ccAdvertising. In the absence of the requested relief, vindication of ccAdvertising's rights may come far too late – after the November 2004 elections and after the campaign season for which Petitioner is engaging in interstate political polling calls.

## V. Conclusion

The state law that the attorney general of North Dakota has alleged is violated every time ccAdvertising uses its IVRSR technology to make interstate polling calls to North Dakota residential subscribers is clearly preempted by the TCPA and the Commission's rules. In order to avoid the chilling effects and unjust results associated with having to defend against prosecution of an enforcement action improperly applying state law to Petitioner's interstate

political polling calls, notwithstanding Petitioner's good faith reliance upon and compliance with this Commission's rules, the Commission should expeditiously declare that North Dakota's more restrictive regulation of the use of automatic telephone dialing systems or prerecorded voice messages in making interstate political polling calls is preempted.

Respectfully submitted,



Emilio W. Cividanes  
E. Ashton Johnston  
PIPER RUDNICK LLP  
1200 Nineteenth Street, N.W.  
Washington, D.C. 20036  
Telephone (202) 861-3900  
Facsimile (202) 223-2085

Attorneys for ccAdvertising

September 13, 2004

**DECLARATION**

I, Gabriel Joseph, hereby declare the following under penalty of perjury under the law of the United States of America:

1. I am the President of FreeEats.com.
2. I have reviewed and am familiar with the foregoing Petition for Expedited Declaratory Ruling, to which this Declaration is attached.
3. To the best of my knowledge, information, and belief, all statements of fact set forth in the Petition are true and correct.

  
Gabriel Joseph

September 12, 2004



# **Exhibit 1**

# NORTH DAKOTA SURVEY - AUGUST 16, 2004

## KEY:

Y = Yes  
N = No  
? = Undecided  
S = Skip  
U = Unknown (DNU message plays once and if there is no intelligible response the call terminates.)

DNU = Did Not Understand Message

# = Next segment that plays upon receiving a particular response. For example, Y = 3 means on Yes go to Segment 3.

1 Registered? - (Yes, No)

THIS IS FEC RESEARCH WITH A 45-SECOND PUBLIC SURVEY. ARE YOU REGISTERED TO VOTE IN NORTH DAKOTA?

(This question plays on all live voice detections.)

Y: 3  
N: 3  
U: 3  
DNU1: 14

2 Ans-Registered? - (Yes, No)

THIS IS FEC RESEARCH WITH A 45-SECOND PUBLIC SURVEY. ARE YOU REGISTERED TO VOTE IN NORTH DAKOTA?

(This question plays on all answering machine detections to re-confirm that we've reached a machine and not a person. If the question is answered, the live survey proceeds. If no answer is received, the answering machine message plays.)

Y: 3  
N: 3  
U: 17

3 Pro-Life? - (Yes, No)

ON THE ISSUE OF ABORTION, DO YOU CONSIDER YOURSELF TO BE PRO-LIFE?

Y: 4  
N: 4  
U: 4  
DNU1: 14

4 Support Traditional Marriage? - (Yes, No)

DO YOU AGREE THAT ONLY MARRIAGE BETWEEN ONE MAN AND ONE WOMAN SHOULD BE LEGAL AND BINDING IN AMERICA?

Y: 5  
N: 5  
U: 5

5 Taxes Cut? - (Yes, No)

CONCERNING TAXES, WOULD YOU PREFER TO HAVE YOUR TAXES NOT RAISED AND IF POSSIBLE CUT?

Y: 6  
N: 6  
U: 0  
DNU1: 15  
DNU2: 16

6 Agree With US in Iraq? - (Yes, No)

DO YOU AGREE WITH THE UNITED STATE'S EFFORTS IN IRAQ?

Y: 7  
N: 7  
U: 7

7 Support Tuition Tax Credits? - (Yes, No)

WOULD YOU SUPPORT A TUITION TAX CREDIT THAT WOULD ALLOW PARENTS TO CHOOSE THE BEST SCHOOL FOR THEIR CHILDREN?

Y: 8  
N: 8  
U: 8

8 Agree with NRA? - (Yes, No)

DO YOU AGREE WITH THE NRA AND ITS STRONG SUPPORT OF GUN OWNERS RIGHTS?

Y: 9  
N: 9  
U: 0  
DNU1: 15  
DNU2: 16

9 Frivolous Lawsuits/Cost All? - (Yes, No)

DO YOU BELIEVE THAT FRIVOLOUS AND ABUSIVE LAWSUITS END UP COSTING ALL OF US TOO MUCH MONEY?

Y: 10  
N: 10  
U: 10

10 Attend Services Once/Week? - (Yes, No)

YOU ATTEND CHURCH, MASS, SYNAGOGUE, OR OTHER RELIGIOUS SERVICES AT LEAST ONCE PER WEEK?

Y: 11  
N: 11  
U: 11  
DNU1: 14

11 Male? - (Yes, No)

ARE YOU MALE?

Y: 12

N: 12

U: 12

12 Historical Contributor? - (Yes, No)

HAVE YOU EVER CONTRIBUTED TO OR FINANCIALLY SUPPORTED A POLITICAL CAMPAIGN OR A RELIGIOUS OR NON-PROFIT ORGANIZATION?

Y: 13

N: 13

U: 13

13 Thank You - Goodbye? - (Play Only)

THANK YOU FOR YOUR TIME AND VIEWS. THIS SURVEY WAS AUTHORIZED BY HELPING HANDS SUPPORT. GOODBYE.

S: 0

14 DNU - (DNU Prompt)

PLEASE SAY YES OR NO NOW.

15 DNU1 - (DNU Prompt)

THIS SURVEY WILL END WITHOUT A YES OR NO RESPONSE NOW.

16 DNU2 - (DNU Prompt)

THANK YOU FOR YOUR TIME AND VIEWS. THIS SURVEY WAS CONDUCTED BY HELPING HANDS SUPPORT. GOODBYE.

17 Ans-Device - (Play Only)

THIS WAS A PUBLIC SURVEY CALL. WE MAY CALL BACK LATER.

S: 0

**Exhibit 2**



STATE OF NORTH DAKOTA  
OFFICE OF ATTORNEY GENERAL

STATE CAPITOL  
600 E BOULEVARD AVE DEPT 125  
BISMARCK, ND 58505-0040  
(701) 328-2210 FAX (701) 328-2228  
www.ag.state.nd.us

Wayne Stenehjem  
ATTORNEY GENERAL

040345.001

September 10, 2004

VIA FACSIMILE (202) 223-2088 & FIRST-CLASS MAIL

Emilio W. Civdanes, Esq.  
Piper Rudnick  
1200 Nineteenth St NW  
Washington, DC 20036-2430

RE: State of North Dakota ex rel. Wayne Stenehjem, Attorney General v. Freecate.com, Inc. dba re Advertising, et al.

Dear Mr. Civdanes:

Thank you for your letter of September 3, 2004. The State's position has not changed.

The offer to accept the Assurance of Voluntary Compliance forwarded to you on August 23, 2004 will remain open until the close of business September 17, 2004. After that time this Office will commence its formal investigation and enforcement process. Please advise if you are able to accept service of a Civil Investigative Demand, if necessary.

I look forward to hearing from you.

Sincerely,

James Patrick Thomas  
Assistant Attorney General  
Consumer Protection & Antitrust Division  
Office of Attorney General  
4206 State Street  
P.O. Box 1064  
Bismarck, ND 58502-1054  
Telephone (701) 328-5570  
Facsimile (701) 328-5668

Enclosure

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**CERTIFICATE OF SERVICE**

I, Jennifer Short, hereby certify that on this 13th day of September 2004, a true and correct copy of the foregoing Petition for Expedited Declaratory Ruling was sent via U.S. first class mail, postage prepaid, or by hand, to the following:

\* Honorable Michael K. Powell  
Chairman  
Federal Communications Commission  
445 12th Street, SW  
Room 8-B201  
Washington, DC 20554

\* Honorable Kathleen Q. Abernathy  
Commissioner  
Federal Communications Commission  
445 12th Street, SW  
Room 8-B115  
Washington, DC 20554

\* Honorable Michael J. Copps  
Commissioner  
Federal Communications Commission  
445 12th Street, SW  
Room 8-A302  
Washington, DC 20554

\* Honorable Kevin J. Martin  
Commissioner  
Federal Communications Commission  
445 12th Street, SW  
Room 8-A204  
Washington, DC 20554

\* Honorable Jonathan S. Adelstein  
Commissioner  
Federal Communications Commission  
445 12th Street, SW  
Room 8-C302  
Washington, DC 20554

\* Marlene H. Dortch  
Secretary  
Federal Communications  
Commission  
445 12th Street, S.W.  
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Washington, DC 20554

\* John A. Rogovin, General Counsel  
Office of the General Counsel  
Federal Communications  
Commission  
445 12<sup>th</sup> Street, SW  
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\* Christopher Libertelli  
Senior Legal Advisor  
Office of Chairman Michael Powell  
Federal Communications  
Commission  
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\* Matthew Brill  
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\* By hand

  
Jennifer Short





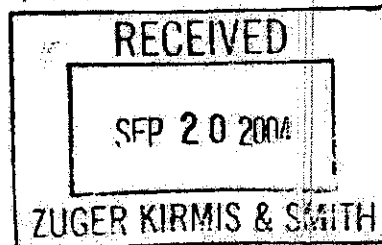
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040345.001

September 17, 2004



Mr. Lawrence E. King  
Zuger, Kermis and Smith  
316 North 5th Street  
PO Box 1695  
Bismarck, ND 58502-1695

RE: State of North Dakota ex rel. Stenehjem v. FreeEats.com, Inc.  
Burleigh County Case No. 04-C-01694

Dear Mr. King:

Enclosed, as indicated in my facsimile of today, are the originals of the Summons, Complaint and Notification of Assignment and Case Number faxed to you.

Sincerely,

James Patrick Thomas  
Assistant Attorney General  
Consumer Protection & Antitrust Division  
Office of Attorney General  
4205 State Street  
PO Box 1054  
Bismarck, ND 58502-1054  
Telephone (701) 328-5570  
Facsimile (701) 328-5568

lkh  
Enclosures

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STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

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IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

STATE OF NORTH DAKOTA EX REL.  
WAYNE STENEHJEM,  
ATTORNEY GENERAL,

Plaintiff,

-vs-

FREEEATS.COM, INC.,  
dba  
THE FREEEATS COMPANIES,  
CCADVERTISING,  
CCADVERTISING.BIZ,  
CCADVERTISING.INFO,  
ELECTIONRESEARCH.COM,  
FECADS.COM AND  
FECRESEARCH.COM

Defendant.

SUMMONS

0401694

Civil No. \_\_\_\_\_

OAG 040345.001

THE STATE OF NORTH DAKOTA TO THE ABOVE-NAMED DEFENDANT(S):

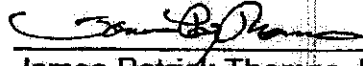
You are hereby summoned and required to appear and defend against the Complaint in this action, which is herewith served upon you, by serving upon the undersigned an Answer or other proper response within twenty (20) days after the service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

RECEIVED & FILED  
SEP 17 2004  
Clk of Ct. Burleigh Co

Dated this 17th day of September, 2004.

STATE OF NORTH DAKOTA  
Wayne Stenehjem  
Attorney General

By:

  
James Patrick Thomas, NDBN 6014  
Todd A. Sattler, NDBN 5718  
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Attorneys for Plaintiff

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Plaintiff,

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THE FREEEATS COMPANIES,  
CCADVERTISING,  
CCADVERTISING.BIZ,  
CCADVERTISING.INFO,  
ELECTIONRESEARCH.COM,  
FECADS.COM AND  
FECRESEARCH.COM

Defendant.

COMPLAINT

Civil No. 04C1694

OAG 040345.001

Plaintiff State of North Dakota ex rel. Wayne Stenehjem, Attorney General ("North Dakota") brings this cause against defendant FreeEats.com, Inc. doing business as The FreeEats Companies, ccAdvertising, ccAdvertising.biz, ccAdvertising.info, ElectionResearch.com, FECads.com, FECResearch.com ("FreeEats") alleges as follows:

INTRODUCTION

1. The State of North Dakota brings this action on the relation of Wayne Stenehjem, the duly-elected and acting Attorney General of the State of North Dakota, in the public interest pursuant to North Dakota Century Code ch. 51-28. Pursuant to N.D.C.C. § 51-28-13 this action seeks to restrain and enjoin violations of N.D.C.C. § 51-28-13

FILED

SEP 17 2004

Clk. of Ct. Burleigh Co.

28-02. This action also seeks, under N.D.C.C. § 51-28-17, penalties of not more than \$2,000 per violation of the provisions of ch. 51-28. The Attorney General also seeks, under § 51-28-18, to recover investigation fees, costs, expenses and attorney fees incurred by the Attorney General in the investigation and prosecution of this action.

#### JURISDICTION AND VENUE

2. FreeEats transacted business in this State and repeatedly directed prerecorded or synthesized voice messages to North Dakota telephone subscribers using an automatic dialing-announcing device in violation of the laws of North Dakota.

3. Venue of this action in Burleigh County is proper under N.D.C.C. § 51-28-22 and further because FreeEats directed calls into Burleigh County.

#### PARTIES

4. Plaintiff North Dakota is a sovereign State of the United States of America, admitted to the Union on November 2, 1889.

5. FreeEats.com, Inc. doing business as The FreeEats Companies, ccAdvertising, ccAdvertising.biz, ccAdvertising.info, ElectionResearch.com, FECads.com, FECResearch.com, is a Virginia corporation with Virginia State Corporation Commission Corporate Identification Number F143302, with its principal place of business being 13800 Coppermine Road, Herndon, Virginia 20171-3408, and its president being Gabriel S. Joseph III.

VIOLATIONS OF N.D.C.C. §§ 51-28-02

6. Section 51-28-02 of the North Dakota Century Code reads:

**51-28-02. Use of prerecorded or synthesized voice messages.** A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 51-28-05 do not apply to messages from school districts to students, parents, or employees, messages to subscribers with whom the caller has a current business relationship, or messages advising employees of work schedules.

7. Section 51-28-01 of the North Dakota Century Code reads, in pertinent part:

\* \* \*

1. "Automatic dialing-announcing device" means a device that selects and dials telephone numbers and that, working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called.

2. "Caller" means a person, corporation, firm, partnership, association, or legal or commercial entity that attempts to contact, or that contacts, a subscriber in this state by using a telephone or a telephone line.

\* \* \*

4. "Established business relationship" means a relationship between a seller and consumer based on a free-trial newspaper subscription or on the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the twenty-four months immediately preceding the date of a telemarketing call.

\* \* \*

6. "Subscriber" means a person who has subscribed to residential telephone services from a telephone company or the other persons living or residing with the subscribing person, or a person who has subscribed to wireless or mobile telephone services.

8. In or about August 2004, FreeEats used or connected to a telephone line or lines and repeatedly attempted to contact, or contacted, subscribers in this State by using a telephone or a telephone line and using an automatic dialing-announcing device caused prerecorded or synthesized voice messages to be directed to North Dakota telephone subscribers.

9. FreeEats calls used recorded or synthesized voice messages and voice-recognition technology to query telephone subscribers whether they wished to participate in a poll.

10. The FreeEats telephone messages were totally automated and were not immediately preceded by a live operator who obtained the subscriber's consent before the message was delivered.

11. The subscribers receiving the FreeEats messages had not knowingly requested, consented to or authorized receipt of the FreeEats message.

12. In some instances, where the subscriber did not answer the telephone, FreeEats left a recorded message on the subscriber's answering machine.

13. The FreeEats messages were not messages from school districts to students, parents, or employees, messages to subscribers with whom FreeEats had a current business relationship, or messages advising employees of work schedules.

14. By its above-described conduct, FreeEats engaged in acts or practices in violation of N.D.C.C. § 51-28-02 for which the Court:

A. May order injunctive relief as provided in N.D.C.C. § 51-28-13;

B. May order FreeEats to pay North Dakota a civil penalty of up to \$2,000 for each violation as provided in N.D.C.C. 51-28-17;

C. May order FreeEats pay to North Dakota the costs, expenses and attorney fees incurred by the Attorney General in the investigation and prosecution of this action as provided in N.D.C.C. § 51-28-18; and

D. May order such other relief as may be necessary to prevent further violations of North Dakota law, as provided in N.D.C.C. § 51-28-13.

WHEREFORE, THE ATTORNEY GENERAL PRAYS for judgment against FreeEats as follows:

1. That FreeEats be adjudged in violation of N.D.C.C. § 51-28-02 for engaging in the acts and practices alleged herein;
2. That pursuant to N.D.C.C. § 51-28-13 FreeEats and its officers, directors, agents, employees, representatives, assigns and all other persons in active concert or participation with them, be permanently enjoined and restrained from directly or indirectly violating N.D.C.C. § 51-28-02;
3. That FreeEats, pursuant to N.D.C.C. § 51-28-17 be assessed a civil penalty of \$2,000 for each violation of N.D.C.C. § 51-15-02;
4. That the Attorney General, pursuant to N.D.C.C. § 51-28-18, be awarded all costs, expenses, investigation fees and attorneys fees incurred by the Attorney General in the investigation and prosecution of this action; and
5. That the Attorney General be given such other and further relief as the nature of this case may require and this Court may determine to be fair, just and equitable.



Dated this 17th day of September, 2004.

STATE OF NORTH DAKOTA  
Wayne Stenehjem  
Attorney General

By:



James Patrick Thomas, NDBN 6014  
Todd A. Sattler, NDBN 5718  
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