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Lawsuit Abuse and the Telephone Consumer Protection Act

The House Judiciary Committee

Subcommittee on the Constitution and Civil Justice

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Written Testimony of Rob Sweeney, Founder/CEO, Mobile Media Technologies LLC

Mobile Media Technologies LLC ("MMT") is a small business located in Kansas City that I started in 2003. It provides a hosted communication technology called TextCaster that enables MMT's customers to send non-commercial text messages to their patrons who opt-in and specifically ask to receive that information. Those customers include television stations, newspapers, schools, local governments and businesses, like hospitals and hotels, as well as not-for-profit organizations like the Susan G Komen Foundation Race for the Cure.

As part of its hosted technology, TextCaster includes a process that enables patrons to opt-in from our customers' websites to request the particular non-commercial text message content they wish to receive, and to authenticate use of their personal mobile devices. The method and process used to opt-in is a core element of US Patent 7,197,324 entitled "Permission-based Text Messaging," which I was awarded in March of 2007.

Every MMT customer uses this two-step opt-in process to ensure that their patrons provide the affirmative written consent to receive the content they specify. Patrons may use the same web-based process to opt-out (revoke consent) any time. This web-based process was incorporated in to the Mobile Marketing Association (MMA) Best Practices for managing opt-in and opt-out for receiving text messages.

For 14 years, this process has protected wireless subscribers from the unauthorized use of cell phone numbers by others to sign up people unknowingly to receive text messages without their consent. MMT regularly scrubs its TextCaster database to eliminate numbers that have been listed by the wireless carriers as inactive, so that reissued numbers have already been removed from the database.

Incorporated in the FCC's July 2015 TCPA Declaratory Ruling Order (DRO) was an agency determination that allowed for anyone receiving text messages to use any reasonable means to revoke their prior express consent to be texted. This "any reasonable means" standard was incredibly broad, and made it difficult to ensure that any technology was in full compliance. Although TextCaster's original technology platform did not support bilateral (two-way) texting and the wireless carriers did not require it under the MMA web-based sign-up guidelines, by early 2015 I had come to believe we needed to support the reply "STOP" process from patrons' mobile device handset, and prior to the issuance of the DRO, my company had already begun the process of enabling the ability to support such requests. With over 100 wireless carriers to work with, the development timetable for that process was projected at 120 days. We began work in early July 2015 to enable STOP requests from the handset, unaware of the FCC's forthcoming TCPA DRO.

Within 60 days of the DRO, I became aware that TextCaster customers had begun receiving demand letters from a single California-based law firm. The demands were based on alleged violations of the TPCA resulting from text messages allegedly sent following revocation of prior express consent, and specifically cited the July 2015 DRO. The letters included demands to pay one of two prospective class action plaintiffs (apparently a husband and wife from New York), a sum of $1,500 per unwanted text message received from the TextCaster customers who received the demands. The TextCaster customers receiving such demand letters were generally larger media companies, and the demands collectively amounted to millions of dollars.

As the CEO, I was apprised of these letters and personally reviewed each one. While these letters were not directed to my company, they were nonetheless quite troubling to me because they represented an unfounded litigation threat against my customers based on their use of TextCaster. I felt the need to, and did, engage legal counsel in order to assess the situation and come alongside my customers and their counsel to offer key defense points responsive to the demands. We engaged Ms. Becky Schwartz, a partner with Shook, Hardy & Bacon, as counsel to lead the defense strategy and affirmatively reach out to each of the legal counsel representing our customers.

After evaluating the data associated with putative Plaintiffs' TextCaster activity, we learned some interesting information:

- Plaintiffs used at least five different cell phone numbers to sign up using the web-based process.
- Plaintiffs used four or five different derivations of their names to sign up using the web-based process.
- Plaintiffs used the web-based process to sign-up to receive non-commercial text alerts from a total of 99 of my company's customers across the United States.
- Plaintiffs' tactic was apparently to sign-up to receive text alerts, then, after receiving one from a TextCaster client, reply "STOP," knowing that (at the time) that action would NOT effectively revoke consent.

As soon as my company was able to identify the putative Plaintiffs by their (various) names and the cell phone numbers they were using to register to receive messages from our customers, TextCaster immediately terminated all of their prior requests and systematically blocked additional registration of their numbers to ensure that no additional messages could be sent to them by *any* TextCaster customers regardless of where they attempted to sign up. We also continued to monitor for new attempted registrations by the Plaintiffs, and through that process discovered that they had in fact continued to try to sign up (unsuccessfully) for still more accounts.

In the meantime, Ms. Schwartz had crafted six solid defense points and was sharing them, along with other information needed to effectively respond to the California law firm's demands, with affected customers' legal counsel. And on behalf of my company filed a petition with the FCC asking them to grant either a declaratory ruling establishing that a means of revocation of consent that never reached the texting party was not "reasonable" under the DRO, or, in the alternative a waiver of the newly-clarified regulation for a limited time covering only the period we needed to complete development and implementation of the reply "STOP" functionality process, which was done by November 2015.

As of June 2017, the waiver has not been granted, and although it was opened for public comment in May 2016, we have no way of knowing whether or when the FCC will actually consider it. An appeal of the text consent "any reasonable means" revocation standard and other aspects of the July 2015 DRO, which we are not involved in, but the outcome of which might nonetheless prove helpful to our customers in responding to the TCPA litigation threat, also remains pending in the U.S. Court of Appeals for the D.C. Circuit. Although that case was argued in October 2016, we also have no way of knowing when it will be decided or whether the FCC's order will be upheld.

Unfortunately, this has all led to a long period of uncertainty by MMT's media clients considering the use of TextCaster at their respective properties, and has caused some to eliminate their text alert programs altogether. We have felt the pain of this uncertainty direct in the form of lost business. My company's revenue has dropped by over $300,000 per year as a direct result of the predatory shake down actions by the California law firm, which has now driven a number of my customers to cancel their TextCaster service – even after we have taken every effort to ensure TCPA compliance. And finally, the cost to my company to engage expert legal counsel to help protect our customers has now grown to over $100,000.

Thus, the total monetary cost to my company, up to this point, amounts to over $400,000 in the last two years. While fortunately this has not proven fatal to my company, it has led to deep cuts, including the reduction in force and the loss of jobs. And all this despite the fact that today, not one lawsuit has ever actually been filed, leading us to believe that this entire exercise by the California law firm was nothing more than a shake down, a use of the TCPA and the regulatory overreach and/or uncertainty to extort money from our customers. To our knowledge, one customer who received a demand letter for more than $1 million ended up settling for $15,000, meaning that the impact of the litigation threat alone has been far more detrimental to my business than beneficial to the putative Plaintiffs or their counsel. To them it is just a numbers game – to me, it is my livelihood.

Bad actors like the California law firm are exploiting the FCC's unpredictable and overbroad TCPA regulations and using them to shake down businesses like my customers, and causing devastating financial hardship on small businesses like mine.