Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
	)	
Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham	)	CG Docket No. 05-338
	)	

COMMENTS OF THE RETAIL INDUSTRY LEADERS ASSOCIATION

Laura H. Phillips
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W., Ste. 1100
Washington, DC 20005-1209
Phone: (202) 842-8800

Meredith C. Slawe
DRINKER BIDDLE & REATH LLP
One Logan Square, Ste. 2000
Philadelphia, PA 19103-6996
Phone: (215) 988-2700

Counsel to the Retail Industry Leaders Association

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EXECUTIVE SUMMARY

The Retail Industry Leaders Association ("RILA") respectfully submits these Comments in opposition to the Petition for Rulemaking and Declaratory Ruling (the "Petition") filed by Craig Moskowitz and Craig Cunningham ("Petitioners"). RILA is the trade association of retailers, product manufacturers, and service suppliers that routinely engage in consumer outreach directly implicated by the Petition. The Petition's proposed changes to the consent regime reflected in the Commission's Telephone Consumer Protection Act ("TCPA") rules are of deep concern to RILA and its members.

The Petition seeks wholesale reconsideration of the longstanding Commission rule that voluntarily providing a telephone number manifests "express consent" to receive informational, non-telemarketing calls, absent instructions to the contrary. This rule has individual consumer preference and choice at its core, as consumers can freely and easily choose to provide, withhold, limit, or revoke consent to such calls.

Without presenting evidence of widespread injury to or uncertainty of consumers, Petitioners seek to initiate a rulemaking to replace this rule with heavy-handed, one-size-fits-all regulations requiring universal written consent. The scope of this proposed change to the consent framework would have disruptive and far-reaching consequences, requiring a complete redesign of TCPA compliance programs. Critically, this change also would create technical pitfalls for companies that would discourage them from offering communications that consumers desire and have requested. But the Petition points to no changed circumstances that would warrant new regulations, particularly ones as massive and dislocating as those proposed.

The Petition also fails to demonstrate that the Commission has in any way misread the statute by consistently maintaining distinctions between different types of calls. Nor does it show that any of the policy rationales identified by the Commission for requiring different kinds

of consent for different kinds of calls are no longer valid. Notably, this is not a question of first impression. When the Commission has previously considered the topic, it has recognized that a universal written consent rule would be contrary to the goals of the TCPA, because it would unnecessarily impede consumer access to desired information. There is no reason to disturb that conclusion. Indeed, the Petition is in essence an untimely petition for reconsideration of the Commission's 1992 and 2008 Orders and should be treated as such.

Finally, Petitioners are not concerned citizens besieged by the type of harassing calls that the TCPA was originally enacted to prevent, but rather professional TCPA plaintiffs. Thus, the real motivation behind the Petition is plain—to enable Petitioners to file more lawsuits. The Commission has recognized the alarming trend line on TCPA litigation and the need to address abusive lawsuits by closing loopholes that have been exploited to target legitimate communications between businesses and consumers. The Petition invites the Commission to kick off a whole new round of activity for professional TCPA plaintiffs. That invitation should be declined. It may be good business for Petitioners and others who make their living by filing TCPA suits, but it would be bad for everyone else, including consumers. RILA therefore opposes the Petition.

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COMMENTS OF THE RETAIL INDUSTRY LEADERS ASSOCIATION

The Retail Industry Leaders Association ("RILA") submits the following comments in response to the Commission's Public Notice[1] and in opposition to the Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham ("Petitioners").[2] RILA respectfully urges the Commission to reject Petitioners' request to initiate a rulemaking designed to impose a heightened, written consent requirement for virtually all calls covered by the Telephone Consumer Protection Act ("TCPA"). Their request is procedurally and substantively deficient and seeks to upend the Commission's longstanding and well-functioning interpretation of "prior express consent."

I. BACKGROUND ON RILA AND ITS MEMBERS

RILA is the trade association of the world's largest and most innovative retail companies. Its more than 200 members include retailers, product manufacturers, and service suppliers that

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[1] *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Rulemaking and Declaratory Ruling Regarding Prior Express Consent Under the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278, 05-338, Public Notice FCC 17-144 (rel. Feb. 8, 2017) ("Public Notice").

[2] *Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham*, CG Docket Nos. 02-278, 05-338 (Jan. 22, 2017) (the "Petition").

collectively account for more than $1.5 trillion in annual sales, millions of American jobs, and more than 100,000 retail stores, manufacturing facilities, and distribution centers in the United States and abroad. Many RILA members engage in important and highly desirable consumer outreach through informational calls and text messages, including customer satisfaction surveys, order confirmations, shipping and delivery notifications, prescription refill reminders,[3] and fraud alerts. These businesses have built robust TCPA compliance regimes in reliance on the clear existing rule—repeatedly reinforced by the Commission and federal courts across the country—that the provision of one's phone number to a business constitutes prior express consent to receive informational communications from or on behalf of that business at the specified phone number, absent instructions by the consumer to the contrary. Without this well-established rule, retailers and other businesses would be unable to meet customers' expectations for rapid and efficient informational messages in the 21st Century communications environment.

II. DISCUSSION

A. The Commission Should Deny Petitioners' Request to Initiate a Rulemaking or Issue a Declaratory Ruling to Overturn the 1992 and 2008 Orders.

Petitioners rely on little more than their own preference in seeking a rulemaking process or a declaratory ruling to change longstanding rules governing prior express consent. The Commission should decline this invitation for at least three reasons. First, the Commission has broad discretion to deny petitions that do not state a case for considering a rule change, and there is every reason to exercise that discretion here. Second, to the extent Petitioners seek a

[3] RILA supports the comments of the National Association of Chain Drug Stores ("NACDS"), also submitted in opposition to the Petition, demonstrating the important benefits for patient health and our national health care system of time-critical health care alerts such as prescription refill reminders. As the NACDS comments demonstrate, upending the Commission's recognition that express consent is granted when a patient voluntarily provides his telephone number to a health care provider would cripple the ability of pharmacists and other health care providers to give patients these important alerts about their health care.

declaratory ruling, they have selected the wrong procedural vehicle for a substantive rule change. Third, the heart of the Petition is an untimely collateral attack on the Commission's 1992 and 2008 Orders governing express consent in the context of non-telemarketing calls.

1. *The Petition Provides No Basis to Initiate a Rulemaking.*

The Commission has broad discretion to determine whether it would advance the public interest to begin a rulemaking process to modify existing rules.[4] The Petition lacks any showing that the Commission's current TCPA rules on express consent are not functioning as intended. To the contrary, those rules have had both the purpose and effect of allowing consumers to receive informational calls at the numbers they provide to businesses. While Petitioners disagree with the Commission's policy choice regarding what should constitute appropriate evidence of express consent, they fail to show that the Commission was mistaken as a matter of law or policy in finding that written consent is not a precondition to placing informational calls that consumers welcome and expect. Thus, there is no need to commence a rulemaking.

The Commission has unambiguously affirmed the propriety of rejecting a request for a rulemaking proceeding where no relevant change in circumstances requires one. For example, the Commission affirmed the Mass Media Bureau's denial of a request for a rulemaking

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[4] This discretion has been expressly and repeatedly reaffirmed. As the D.C. Circuit has explained, "an agency's refusal to institute rulemaking proceedings is at the high end of the range of levels of deference we give to agency action under our arbitrary and capricious review." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 5 (D.C. Cir. 2011) (citation omitted); *accord WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981) ("It is only in the *rarest and most compelling of circumstances* that this court has acted to overturn an agency judgment not to institute rulemaking." (emphasis added)). "Where a plaintiff challenges an agency's decision not to engage in rulemaking in response to a petition to amend an existing rule, the deference due the agency is even greater." *Nat'l Mining Ass'n v. Chao*, 160 F. Supp. 2d 47, 85 (D.D.C. 2001) (quotations omitted), *rev'd in part on other grounds*, 292 F.3d 849 (D.C. Cir. 2002). In addition, the Commission itself has recognized that "[u]nder 47 C.F.R. § 1.401(e), [it possesses] broad authority to summarily deny petitions for rulemaking that plainly do not warrant consideration." *In re Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 5790, 5792 (2004) (internal quotation marks and citation omitted).

proceeding to expand the regulation of network affiliations with foreign stations because "[the petitioner] ha[d] failed to set forth any convincing evidence or reason that would call into question our longstanding refusal to regulate the transport of taped programs across U.S. borders."[5] Likewise, the D.C. Circuit Court of Appeals has observed that it is perfectly appropriate for agencies to decline requests for a rulemaking in the absence of a fundamental change in the circumstances or assumptions underlying the rules, or some other compelling cause.[6] Thus, reexamination is not warranted when the implicated rule advances a statutory scheme and there is no intervening change in circumstances or material shift in a governing legal framework. Indeed, the only circumstance where courts have second-guessed the Commission in this regard is where it failed to acknowledge a radical shift in material facts when rejecting a petition for rulemaking, *i.e.*, where the decision not to initiate was "plainly misguided."[7]

Here, however, it is Petitioners who are misguided. They have advanced no factual justification that calls for reexamination of the rule that the provision of a phone number may constitute express consent for informational calls. The Petition contains no showing of harm to consumers from receiving calls they desire or have invited. Nor does it identify any widespread

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5 *In re Application for Review of McKinnon Broadcasting Company*, Memorandum Opinion and Order, 7 FCC Rcd. 7554, 7554 (1992); *see also In re Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission*, 19 FCC Rcd. at 5792 (declining to initiate a rulemaking where the petitioner "advanced no compelling basis to overturn existing law and practice").

6 *Nat'l Customs Brokers & Forwarders Ass'n v. United States*, 883 F.2d 93, 96–97 (D.C. Cir. 1989) ("We will overturn an agency's decision not to initiate a rulemaking only for compelling cause, *such as plain error of law or a fundamental change in the factual premises previously considered by the agency*." (emphasis added)).

7 *Geller v. FCC*, 610 F.2d 973, 979 (D.C. Cir. 1979). The facts of *Geller* illustrate this rule. There, the Commission had "enacted rules based on a compromise agreement by industry stakeholders" without ever finding that the rules "serve[d] the public interest in any other way." *Id.* at 979–80. That agreement was later abrogated by a change in federal law, but the Commission declined to initiate a rulemaking to replace the rules. *Id.* at 979. The D.C. Circuit held that not even the "generous measure of discretion respecting the launching of rulemaking proceedings" that agencies typically enjoy could save the rules in light of those dramatic changes in circumstances. *Id.*

confusion over the rules or how they work. Rather, the Commission's determination that consent to informational calls can be manifested in more than one way has proven to be straightforward, practical, and comprehensible, and is now relied upon by callers and consumers alike.

The Commission had a rational basis to require written consent for certain kinds of calls (such as telemarketing calls) but not others (such as informational calls). Across this range of communications there is a dramatic variance in urgency, consumer benefits, public interest gains, and other factors that the Commission correctly considered in concluding that some calls should be exempted from a written consent requirement. One of the touchstones of the Commission's approach to informational calls involves the general consumer expectation that, if a phone number is provided, then a call can be made without the introduction of a range of written forms and disclosures because the call is something the recipient would expect to receive. These settled expectations should not be lightly tossed aside. The Commission's current rules on this issue make sense, and Petitioners offer no valid reason to unravel this longstanding regulatory framework and impose burdensome new regulations that the Commission has previously considered and rejected.

2. *The Request for a Declaratory Ruling Is Procedurally Improper and Must Be Dismissed.*

Perhaps recognizing that their request for a rulemaking is weak, Petitioners alternatively seek a declaratory ruling. But there is no basis for the Commission to issue a declaratory ruling, as the Petition asks the Commission to change the substance of a number of TCPA rules, a point that is well illustrated by the fact that Petitioners provide proposed markups of the current rules. That is fatal to their request because "a declaratory ruling may not be used to substantively

change a rule."[8] Indeed, this is not a case where a small clarification of an existing rule or policy would be refined to terminate a controversy or remove uncertainty.[9] On the contrary, Petitioners seek a major substantive change in the Commission's rule-based consent regime. The load they want their requested declaratory ruling to bear is too heavy, and the request must be dismissed.

When faced with such improper requests for declaratory rulings on other TCPA matters, the Commission has rejected them. For example, when commenters sought a declaratory ruling to change the Commission's classification of predictive dialers as autodialers, the agency declined to make that substantive change through a declaratory ruling. There, the Commission explained that the argument presented in the petition for declaratory ruling:

> appears to be a request to adopt an entirely new legal interpretation of the relevant statutory terms rather than a request for declaratory ruling to terminate controversy or remove uncertainty under existing law . . . . This argument presents nothing to suggest that there is any uncertainty or controversy about how to apply our rules and the *2003 TCPA Order*, or that changes in technology compel a different result.[10]

The Commission found significant that it "already ha[d] considered the question twice" and had rejected the commenters' arguments.[11]

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[8] *In re Amendment of Part 15 of the Commission's Rules to Amend the Definition of Auditory Assistance Device in Support of Simultaneous Language Interpretation*, Order and Notice of Proposed Rulemaking, 26 FCC Rcd. 13,600, 13,603 (2011).

[9] The Commission's rules provide that it "may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling *terminating a controversy or removing uncertainty*." 47 C.F.R. § 1.2(a) (emphasis added). Similarly, Section 5(d) of the APA provides that an "agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order *to terminate a controversy or remove uncertainty*." 5 U.S.C. § 554(e) (emphasis added).

[10] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 7977 n.78 (2015) ("2015 Omnibus Order").

[11] *Id*.

The same analysis applies here. Textbook administrative law and Commission precedent confirm that Petitioners' proposed declaratory ruling is fatally flawed, both because a declaratory ruling cannot possibly accomplish the rule change that they seek and because there simply is no controversy or confusion about the TCPA consent rule. The Petition should therefore be denied.

3. *In Addition to Its Other Fatal Flaws, the Petition Is an Untimely Petition for Reconsideration of the Commission's Previous Orders.*

Petitioners also argue that the Commission lacked the authority to promulgate the consent rules that they oppose.[12] But this amounts to nothing more than an untimely petition for reconsideration of longstanding orders that are no longer ripe for review.

The authority to promulgate a rule may not be challenged before the Commission years after a rule has been adopted. It is axiomatic that the time to challenge rules at the agency level is either during the rulemaking process or upon the rule's adoption by seeking reconsideration. As the Commission recognized in rejecting a request to revisit its findings in the 2006 Junk Fax Order, "[t]o allow . . . parties to challenge the validity of [a] rule via a request for declaratory ruling years after [the] rule has been promulgated would effectively circumvent the statutory channels for review of Commission rules."[13] Following Commission practice and procedure, Petitioners' attempt to revisit the 1992 and 2008 Orders should likewise be denied.

B. The 1992 and 2008 Orders Reasonably Interpreted the Language and Purpose of the TCPA's "Prior Express Consent" Requirement.

Not only is the Petition factually unsupported and procedurally improper, it is also based upon an unduly narrow reading of the statute. Contrary to Petitioners' argument, the Commission's 1992 and 2008 Orders are a reasonable interpretation of the provision calling for

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12 *See* Petition at 16–18.

13 *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 29 FCC Rcd. 13,998, 14,005–06 (2014).

the "prior express consent of the called party."[14] Those Orders follow the plain meaning of the words Congress chose to use, and comport with the practical context in which they are applied, the legislative purpose behind the statute, and interpretations of similar language in other statutory schemes. Indeed, the vast majority of courts have applied the consent provisions of the Orders without criticism, and in many cases with endorsement of the Commission's interpretation. To argue to the contrary, Petitioners cherry-pick a handful of trial court decisions, none of which has been endorsed on appeal. The 1992 and 2008 Orders recognizing that provision of a telephone number can constitute express consent for certain types of calls have garnered widespread and consistent deference as an appropriate exercise of the agency's discretion in interpreting the TCPA, and there is no reason to revisit or disturb them.[15]

Starting with the language of the statute, the 1992 and 2008 Orders are entirely consistent with the plain text of the TCPA. In requiring "prior express consent," Congress did not require that such consent be stated in writing or use specific words. Rather, express consent can be given through a variety of means depending upon the circumstances.[16] If Congress had wanted

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[14] 47 U.S.C. § 227(b)(1)(A)(iii); *id.* § 227(b)(1)(B).

[15] *See, e.g.*, *Mais v. Gulf Coast Collection Bureau*, 768 F.3d 1110, 1123 (11th Cir. 2014) (rejecting district court's finding that the Commission's rulemaking on prior express consent could be disregarded as inconsistent with the TCPA); *Ebling v. ClearSpring Loan Servs., Inc.*, 106 F. Supp. 3d 1002, 1005 (D. Minn. 2015) ("[W]hen a person knowingly provides his cell-phone number to a creditor in connection with a debt, he 'is agreeing to allow the creditor to contact him regarding his debt, *regardless of the means*.'" (emphasis in original) (internal citations omitted)); *Roberts v. Paypal, Inc.*, No. 12-cv-0622, 2013 WL 2384242, at *5 (N.D. Cal. May 30, 2013) ("[T]he court finds that plaintiff consented to receive text messages from PayPal simply by providing his cell phone number."), *aff'd*, 621 F. App'x 478 (9th Cir. 2015); *Pinkard v. Wal-Mart Stores, Inc.*, No. 12-cv-2902, 2012 WL 5511039, at *5 (N.D. Ala. Nov. 9, 2012) ("[A]lthough the TCPA does not define 'express consent,' the FCC interprets that term to encompass a situation where an individual voluntarily divulges her telephone number. Because that interpretation is eminently reasonable, it is entitled to deference." (internal citations omitted)).

[16] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd. 1830, 1838 (2012) ("2012 Order") ("[T]he TCPA is silent on the issue of what form of express consent—oral, written, or some other kind—is required.").

to require a specific recitation of consent, or a specific written recitation of consent, it would have said so.[17] Nevertheless, Petitioners attempt to engraft additional words and requirements that simply do not exist into the statute's text. Their request is not simply for "express consent" as the statute provides, but rather "express consent" plus additional specificity and writing requirements not set forth in the TCPA.[18] If anyone is overreaching beyond the plain language of the TCPA itself, it is Petitioners.

The 1992 and 2008 Orders are also consistent with the practical realities of how people communicate, and the commonsense import of providing one's telephone number to a business or organization. As Congress recognized—whether calls are made person-to-person, through autodialing, or as a prerecorded message—businesses request phone numbers so that they can call those numbers. Those calls, in turn, provide important information to customers, including notifications "that an ordered product had arrived [or shipped], a service was scheduled or performed, or a bill had not been paid."[19] In this context, an exchange in which an organization asks a customer for his phone number and the customer responds by voluntarily providing that number constitutes express consent to receive such calls from the organization at that number, unless the customer provides instructions restricting the use of the number. Providing the number is a direct expression of consent—there is nothing "implied" about it. Like consumers, merchants and retailers ask for a phone number so that they can make calls to it; as courts have

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17 *Chisom v. Roemer*, 501 U.S. 380, 396 (1991) ("[I]f Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the . . . legislative history.").

18 *See* Petition at 2 (advocating a four-pronged test for consent where "express consent" is merely the first requirement).

19 H.R. Rep. No. 102-317, at 17 (1991).

explained, that is the fundamental purpose and value of receiving someone's phone number.[20] Because a phone number is a point of contact, the communication of one's number is a clear expression of consent to be called.

And yet, contrary to these common social practices, Petitioners suggest that the provision of a phone number could only be express consent to receive calls in a person-to-person format, but not to receive autodialed or prerecorded calls. This is true, they say, even when the substance of the call is no different and the individual has not placed any restriction on the use of his number when it was provided. In essence, Petitioners' position would require the Commission to assume that an unqualified expression of consent is actually a narrow and limited consent. That defies common sense and would impose undue restrictions on welcome calls.

Moreover, there is no need to make such sweeping assumptions, as the consent provisions of the 1992 and 2008 Orders are appropriately balanced to empower consumers to either invite or decline calls. Under the Commission's commonsense approach, the consumer can always provide instructions restricting use of his telephone number when he is asked for it, and those restrictions must be honored. By incorporating that balance, the Commission furthers the purpose of the TCPA, which is to strike an equilibrium between protecting consumer choice, on the one hand, and avoiding any undue burden on "commercial freedoms of speech and trade," including "legitimate telemarketing practices," on the other hand.[21]

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[20] *See, e.g.*, *Pinkard*, 2012 WL 5511039, at *5 & n.30 ("[P]laintiff overlooks the fact that providing her cellular telephone number to defendant was 'clear and unmistakable' consent to be contacted at that number. To hold otherwise would contradict the overwhelming weight of social practice: that is, distributing one's telephone number is an invitation to be called, especially when the number is given at another's request. . . . '[W]e [need not] be blind as judges to what we know as men.'" (quoting *Venn v. United States*, 400 F.2d 207, 211 (5th Cir. 1968))).

[21] *Telephone Consumer Protection Act of 1991*, Pub. L. No. 102-243, § 2(9), 105 Stat. 2394.

Indeed, not only is the Commission's position on "prior express consent" consistent with the statutory text of the TCPA, the legislative purpose of the TCPA, and accepted practices and conventions under the TCPA, but it is also consistent with how courts have interpreted the phrase "express consent" in other contexts. Numerous courts have found "express consent" not only in written acknowledgments, but also in oral representations and in conduct.[22]

This should come as no surprise given that Congress knows how to specify the form that consent must take, when it intends to do so. For example, the United States Code is replete with statutes—over 200, in fact—that require either "*written* consent"[23] or "consent in writing."[24] The use of these distinct formulations—"express consent" in the TCPA and "*written* consent" or

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[22] *Cowin v. Countrywide Home Loans, Inc. (In re Cowin)*, 538 B.R. 721, 731 (Bankr. S.D. Tex. 2015) (finding express consent based on oral representations); *In re Silva*, No. 15-cv-7732, 2016 WL 6471248, at *5 (C.D. Cal. Feb. 16, 2016) (bringing case in bankruptcy court qualified as "express consent" to allow non-Article III judge to issue binding final judgment in that case); *In re High Performance Real Estate, Inc.*, No. 13-cv-0663, 2013 WL 3216142, at *1 (D. Colo. June 25, 2013) (same); *cf. Palisades Collection, LLC v. Kuchinsky*, No. L-3805-12, 2014 WL 7883575, at *2 (N.J. Super. Ct. App. Div. Feb. 18, 2015) (treating a generally applicable court rule governing service of process as a judicial grant of "express permission" to contact a debtor regarding his debt).

[23] *E.g.*, 5 U.S.C. § 552a(b) (provisions of the Privacy Act requiring federal agencies to obtain "prior written consent" of "the individual to whom [a] record pertains" prior to disclosing that record); 8 U.S.C. § 1367(b)(7) (requiring an alien's "prior written consent" before the Government may communicate with nongovernmental service providers regarding the alien's case); 10 U.S.C. § 505(a) (no person under 18 may enlist in the armed forces "without the written consent" of a parent or guardian); 15 U.S.C. § 77g(a)(1) (requiring that certain individuals' "written consent[s]" be included in a securities registration statement); 18 U.S.C. § 2721(b)(13) (authorizing disclosure of "personal information" by state departments of motor vehicles "if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains"); 20 U.S.C. § 1095a(a)(1) (requiring garnishee's "written consent" as a condition of garnishing more than 15% of the garnishee's net pay); 20 U.S.C. § 1232g(b)(1) (withholding federal funds from any educational institution that releases students' educational records "without the written consent of their parents").

[24] *E.g.*, 5 U.S.C. § 574(a)(1) (insulating certain materials from disclosure in discovery unless all interested parties "consent in writing"); 7 U.S.C. § 197c(c) (authorizing arbitration to settle certain disputes if "both parties consent in writing"); 18 U.S.C. § 3161(c)(1)–(2) (specifying certain time limits and conditions for bringing a criminal defendant to trial, which must be followed unless the "defendant consents in writing to the contrary"); 26 U.S.C. § 63(e)(3)(B) (prescribing, as a condition of changing a tax election, that both "the taxpayer and his spouse consent in writing" to certain assessments).

"consent *in writing*" in scores upon scores of other statutes—is no accident and cannot be dismissed as one. Simply put, "Congress says what it means and means what it says."[25]

Further, the fact that Congress has seen fit in a variety of other statutes to require "express written consent"[26] strongly suggests that "express" and "written" have independent meanings. Petitioners' effort to equate "express" and "written" thus contravenes a central tenet of statutory construction—namely, that each term in a statute is given independent meaning and not rendered superfluous.[27] If, as Petitioners suggest, "express" means "written," then the word "written" would be surplusage in the statutes in which Congress called for "express written consent." Since Congress knew how to require written consent when it wanted to but did not do so here, it follows that "express consent" does not require a writing. The Commission's interpretation of express consent in the 1992 and 2008 Orders is an appropriate, reasonable, and sound application of that statutory language, particularly in the context of the useful informational communications covered by those Orders.

Finally, it must be said that the Petition seeks a solution in search of a problem. Any fair and accurate characterization of TCPA jurisprudence shows that the consent provisions of the 1992 and 2008 Orders are not creating confusion or uncertainty; to the contrary, they provide a clear and reasonable interpretation of the statute that has been applied without any judicial criticism or dissent the vast majority of the time.[28] In fact, courts applying those Orders have

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[25] *Simmons v. Himmelreich*, — U.S. —, 136 S. Ct. 1843, 1848 (2016).

[26] *E.g.*, 21 U.S.C. § 331(y)(2) (prohibiting disclosure of certain types of "confidential commercial information" unless the disclosing party has "express written consent" to do so); 25 U.S.C. § 5321(a)(2) (authorizing extension of deadline upon receipt of "express written consent" of affected organization).

[27] *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698 (1995) (describing the courts' "reluctance to treat statutory terms as surplusage").

[28] *See, e.g.*, *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1044–46 (9th Cir. 2017); *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1307 (11th Cir. 2015); *Sartori v. Susan C.*

specifically agreed that providing a phone number is "clear and unmistakable consent to be contacted at that number."[29] Given that there have been more than 16,000 TCPA cases filed in the last ten years alone,[30] it is telling that Petitioners can cite only a handful of decisions in support of their restrictive view of express consent in this context.

Perhaps even more telling is the fact that many of the cases Petitioners cite do not even support their position. For example, the court in *Edeh v. Midland Credit Management, Inc.* did not address the Commission's Orders, but instead advanced its own interpretation of prior express consent "without analysis."[31] The *Hill v. Homeward Residential, Inc.* majority expressed no reservations about the Commission's interpretation of prior express consent—despite the ability to join in the criticism the concurrence offered.[32] Likewise, the Eleventh Circuit voiced

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Little & Assocs., P.A., 571 F. App'x 677, 683 (10th Cir. 2014); *Wills v. Optimum Outcomes, Inc.*, No. 13-cv-0026, 2014 WL 220707, at *4 (D. Utah Jan. 21, 2014); *Ranwick v. Tex. Gila, LLC*, 37 F. Supp. 3d 1053, 1057 (D. Minn. 2014); *Andersen v. Harris & Harris, Ltd.*, No. 13-cv-0867, 2014 WL 1600575, at *9 (E.D. Wis. Apr. 21, 2014); *Steinhoff v. Star Tribune Media Co., LLC*, No. 13-cv-1750, 2014 WL 1207804, at *3 (D. Minn. Mar. 24, 2014); *Saunders v. NCO Fin. Sys., Inc.*, 910 F. Supp. 2d 464, 467 (E.D.N.Y. 2012); *Pinkard*, 2012 WL 5511039, at *5; *Moore v. Firstsource Advantage, LLC*, No. 07-cv-0770, 2011 WL 4345703 (W.D.N.Y. Sept. 15, 2011); *Frausto v. IC Sys., Inc.*, No. 10-cv-1363, 2011 WL 3704249, at *2 (N.D. Ill. Aug. 22, 2011); *Gutierrez v. Barclays Grp.*, No. 10-cv-1012, 2011 WL 579238, at *2 (S.D. Cal. Feb. 9, 2011); *Greene v. DirecTV, Inc.*, No. 10-cv-0117, 2010 WL 4628734, at *3 (N.D. Ill. Nov. 8, 2010); *Starkey v. Firstsource Advantage, LLC*, No. 07-cv-0662, 2010 WL 2541756 (W.D.N.Y. Mar. 11, 2010).

[29] *See, e.g.*, *Pinkard*, 2012 WL 5511039, at *5; *Roberts*, 2013 WL 2384242, at *4; *accord Murphy*, 797 F.3d at 1307 ("[T]he 1992 FCC Order's interpretation of prior express consent was consistent with the TCPA's legislative history. . . . [L]iability under the TCPA only inures for calls made without the called party's prior express invitation or permission." (internal quotation marks and citation omitted)); *Lamont v. Furniture N., LLC*, No. 14-cv-0036, 2014 WL 1453750, at *3 (D.N.H. Apr. 15, 2014) ("The reasoning in this line of cases is persuasive." (citing *Pinkard*, 2012 WL 5511039, at *4–6; *Saunders*, 910 F. Supp. 2d at 467; *Emanuel v. L.A. Lakers, Inc.*, No. 12-cv-9936, 2013 WL 1719035, at *3 (C.D. Cal. Apr. 18, 2013))).

[30] *See* WebRecon LLC, *2016 Year in Review: FDCPA Down, FCRA & TCPA Up*, https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/.

[31] *See* 748 F. Supp. 2d 1030, 1038 (D. Minn. 2010), *aff'd*, 413 F. App'x 925 (8th Cir. 2011). Although the Eighth Circuit affirmed the district court's ruling in *Edeh*, the plaintiff appealed only the district court's grant of summary judgment on his Fair Credit Reporting Act claim.

[32] *See* 799 F.3d 544, 551–52 (6th Cir. 2015).

no agreement with the district court in *Mais* when it reversed the lower court decision on Hobbs Act grounds.[33] In fact, the Court of Appeals "noted that the 1992 FCC Order's interpretation of prior express consent was consistent with the TCPA's legislative history."[34]

Nor, as Petitioners claim, have courts been confused or found consent where it was not warranted. That a few courts have taken different views on the extent—if at all—to which the 2008 Order limited the reach of the 1992 Order in the debt collection context is not evidence of "widespread confusion," much less a reason to jettison the Commission's guidance in its entirety.[35] Indeed, only one of the cases Petitioners cite, *Thrasher-Lyon v. CCS Commercial, LLC*, restricted the Commission's interpretation of prior express consent to the creditor-debtor context.[36] The Second Circuit in *Nigro v. Mercantile Adjustment Bureau, LLC* did not consider

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[33] *See* 768 F.3d at 1115–21.

[34] *See Murphy*, 797 F.3d at 1307 (citing *Mais*, 768 F.3d at 1124).

[35] *Compare Murphy v. DCI Biologicals Orlando, LLC*, No. 12-cv-1459, 2013 WL 6865772, at *6 (M.D. Fla. Dec. 31, 2013) (rejecting arguments that the court should not follow the Commission's interpretations of prior express consent and that the 1992 Order no longer had force), *aff'd*, 797 F.3d at 1302, *with Thrasher-Lyon v. CCS Commercial, LLC*, No. 11-cv-4473, 2012 WL 3835089, at *3–4 (N.D. Ill. Sept. 4, 2012) (concluding that Commission's ruling that providing a phone number qualifies as express consent is applicable only in the debtor-creditor context).

[36] 2012 WL 3835089, at *3–4. Tellingly, even the *Thrasher-Lyon* court recognized that the 2008 Order was the type of "rule[] for . . . automated or prerecorded calls that . . . are not considered a nuisance or invasion of privacy" that "Congress specifically anticipated that the FCC would 'design.'" *Id.* at *3. The court further emphasized that the 2008 Order did not contemplate the facts at hand. The plaintiff in *Thrasher-Lyon* had merely "verified that the number" that a crash victim's insurance company "already had obtained from the police report (and already used) was the 'best,' and only, number at which to reach her"; she did not "voluntarily provide her number . . . in the first instance" to the collection agency the insurer hired to collect an alleged subrogation debt, and there was "no evidence in the record that [she] had incurred a debt . . . at the time she gave out her number or when the robocalls were placed." *Id.* at *4. In any event, the precedential value of *Thrasher-Lyon* is minimal. The district court certified its ruling for interlocutory review, recognizing that it "present[ed] 'substantial ground for difference of opinion'" arising out of "genuine doubt as to whether the district court applied the correct legal standard in its order," and the parties settled after the Seventh Circuit granted defendant's petition for leave to appeal and defendant filed its merits brief. *Thrasher-Lyon v. CCS Commercial, LLC*, No. 11-cv-4473, 2012 WL 5389722, at *3 (N.D. Ill. Nov. 2, 2012); *see In re CCS Commercial LLC*, No. 12-8041 (7th Cir. Dec. 17, 2012), ECF No. 6 (order granting leave to appeal); *Thrasher-Lyon v. CCS Commercial LLC*, No. 12-3891 (7th Cir. June 18, 2013), ECF No. 27 (order dismissing appeal).

the issue at all,[37] while the courts in *Kolinek v. Walgreen Co.* and *Baird v. Sabre Inc.* looked to the Commission's subsequent guidance when interpreting the 1992 Order.[38]

It is similarly unremarkable that courts have not found express consent in situations where an individual provides his phone number for a stated purpose *other* than to receive calls, or where an individual provides his phone number to a creditor outside of a debt transaction. That is consistent with the Commission's guidance on express consent in the 1992 and 2008 Orders. For example, in *Kolinek*, a pharmacy customer alleged that he had provided his "phone number in response to a request from a pharmacist who said it 'was needed for potential identity verification purposes'" (rather than to receive calls); accepting that allegation as true in the context of a motion to dismiss, the district court concluded that providing the phone number for that limited purpose "d[id] not amount to consent to automated calls reminding him to refill his prescription."[39] Similarly, in *Nigro*, the plaintiff was told that providing his phone number was "necessary to disconnect [electric] service" to a deceased relative's residence.[40] He therefore did not provide his number "during the transaction that resulted in the debt owed," as required to constitute consent under the 2008 Order—indeed, the decedent, not the plaintiff, owed the debt that was the subject of the calls the plaintiff later received.[41] By contrast, the court in *Murphy v. DCI Biologicals Orlando, LLC* held that a statement on a blood plasma donor application that

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37 *See* 769 F.3d 804, 805 (2d Cir. 2014) (per curiam) (determining whether plaintiff gave consent to calls from creditor of decedent under 2008 Order without commenting on the scope of the 1992 Order).

38 *See Kolinek v. Walgreen Co.*, No. 13-cv-4806, 2014 WL 3056813, at *4 (N.D. Ill. July 7, 2014) (reading the 1992, 2008, 2012, and 2014 Orders to require that "the scope of a consumer's consent depends on its context and the purpose for which it is given"); *Baird v. Sabre Inc.*, 995 F. Supp. 2d 1100, 1102–06 (C.D. Cal. 2014) (discussing subsequent Commission guidance to interpret the 1992 Order"), *aff'd*, 636 F. App'x 715 (9th Cir. 2016).

39 2014 WL 3056813, at *4.

40 769 F.3d at 805.

41 *Id.* at 806; *see also Thrasher-Lyon*, 2012 WL 3835089, at *4.

"[t]here are a few questions we would like for you to answer *prior to* you being processed as a new donor" was not an "instruction[]" that would, under the 1992 Order, limit use of the phone number that the plaintiff provided.[42] Simply put, the cases cited by Petitioners do not undermine the inherent reasonableness of the relevant portions of the Commission's 1992 and 2008 Orders; rather, they reinforce it.

C. As the Commission Has Already Recognized, Requiring Universal Written Consent Would Be Harmful to Callers and Consumers.

Although Petitioners grudgingly acknowledge that the Commission "arguably" has discretion to set rules allowing prior express consent to be obtained orally,[43] they suggest that it should instead establish a universal written consent requirement, which they claim would be "simple."[44] But reversing the Commission's longstanding rules on consent under the TCPA would hardly be "simple." On the contrary, it would constitute a profound shift in policy that would require businesses across the country to fundamentally change their compliance programs or, more likely, curtail their informational calling programs, all to the detriment of not only businesses but also consumers.

One would expect a petition advocating such an about-face in policy to articulate how the proposed change would benefit consumers. It does not. Instead, it merely suggests that adopting a universal written consent rule would "streamline and harmonize the Commission's regulatory regime" by treating all kinds of calls in a way that is "consistent across the board."[45] But treating different things the same cannot be justified here in the name of consistency alone. As the

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[42] 2013 WL 6865772, at *6 (emphasis in original).

[43] Petition at 4. This is hardly a concession, given that the statute unambiguously does not require written consent. *See* Part II.B, *supra*.

[44] Petition at 4.

[45] *Id.*

Commission has long recognized, informational calls are ***different*** from telemarketing calls. They offer a different kind of benefit that consumers more routinely welcome, and they are far less likely to be perceived as an annoyance. The Commission reasonably found that the two categories of calls should be treated differently, rejecting the invitation to adopt one-size-fits-all rules merely for the sake of "consistency."

While Petitioners ignore entirely their burden to justify the radical change they seek, the Commission cannot similarly ignore the reliance interests of businesses that have built compliance and customer outreach programs around the long-settled meaning of "express consent" as interpreted by the Commission. As the Supreme Court reiterated just last year in *Encino Motorcars, LLC v. Navarro*, when an administrative agency walks away from an established rule or regulatory regime, it must "show that there are good reasons" to do so and must consider the "serious reliance interests" created by the established regulatory framework.[46] Specifically, an agency must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[47] Otherwise, "an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice," which "is itself unlawful and receives no *Chevron* deference."[48]

In *Encino Motorcars*, the Supreme Court found that the Department of Labor "fell short of the agency's duty to explain why it . . . overrule[d] its previous position" interpreting a statute. In reaching that result, the Court noted that "industry had relied" on the agency's longstanding

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46 — U.S. —, 136 S. Ct. 2117, 2126 (2016) (internal quotation marks and citations omitted).

47 *Id.* (internal quotation marks and citation omitted).

48 *Id.* (internal quotation marks and citations omitted).

prior interpretation and had "negotiated and structured their compensation plans" accordingly. In addition, the agency's new position "could necessitate systemic, significant changes to [their] compensation arrangements" and expose businesses "whose service advisors [were] not compensated in accordance with the [agency's] new views" to "substantial" liability.[49]

RILA members (and thousands of other businesses across the country) have similarly relied for many years on the Commission's commonsense interpretation that prior express consent can be provided orally and by offering one's telephone number as the point of contact to receive calls. Forcing businesses to adapt to a universal written consent requirement would necessitate radical systemic changes to calling and compliance programs that were designed with the existing rule in mind. In light of these substantial reliance interests, the Commission would have a high burden to explain such an abrupt change in policy. And yet Petitioners provide no legitimate justification for the disruptive change they seek.

Nor could they, as the Commission previously rejected Petitioners' proposed universal written consent rule as unwise and contrary to the goals of the TCPA. In 2012, when the Commission determined as a matter of policy—and not because it was mandated by the statute—to require written consent for automated telemarketing calls, the Commission was careful to "leave undisturbed" the framework for non-telemarketing calls.[50] In making that determination, it focused on the concern that led Congress to enact the TCPA—that telemarketing calls had "become pervasive due to the increased use of cost-effective telemarketing techniques."[51] It also noted that, since the TCPA's enactment, it "has continued to receive thousands of complaints

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49 *Id.*

50 2012 Order, 27 FCC Rcd. at 1840.

51 *Id.* at 1839.

regarding unwanted telemarketing robocalls," suggesting that "the proliferation of intrusive, annoying telemarketing calls continues to trouble consumers."[52] The record did not reflect pervasive problems or significant complaints regarding non-telemarketing, informational calls. The Commission also noted that the Federal Trade Commission had amended its rules to require prior written consent for prerecorded telemarketing calls, and that adopting a written consent requirement for telemarketing calls "would advance Congress' objective . . . to harmonize the Commission's rules with those of the FTC."[53]

Because those considerations did not justify extending a written consent requirement to non-telemarketing informational calls, the Commission rejected requests to require written consent for all autodialed or prerecorded calls.[54] The Commission concluded that a universal requirement for written consent would harm consumers because it would "unnecessarily restrict consumer access to information communicated through purely informational calls" and "unnecessarily impede consumer access to desired information."[55] The Commission was mindful that a universal written consent requirement would "unnecessarily impede" beneficial calls regarding, for example, "account balance, credit card fraud alert, [and] package delivery."[56] Retailers place such calls to consumers on a regular basis, providing "access to information that [they] find highly desirable."[57] The Commission thus recognized that the universal written consent requirement that Petitioners advocate would "serve as a disincentive to the provision of

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52 *Id.*

53 *Id.*; *see also id*. at 1840.

54 *Id.* at 1838.

55 *Id.*

56 *Id.*

57 *Id.* at 1841.

services on which consumers have come to rely."[58] Such chilling of desired communications would not advance "the consumer protection policies and goals underlying the TCPA," which "Congress did not expect . . . to be a barrier to normal, expected, and desired business communications."[59] Accordingly, the Commission elected to "leave it to the caller to determine, when making an autodialed or prerecorded *non-telemarketing* call to a wireless number, whether to rely on oral or written consent in complying with the statutory consent requirement."[60]

That freedom of choice is important in the marketplace, and RILA's own experience provides an illustrative example of why that flexibility is valuable. As a petitioner on behalf of retail companies that use "on-demand" text services, RILA explained in the omnibus TCPA proceeding in 2015 that there is a clear and recognized value to consumers in allowing them to receive "on demand" text offers.[61] In connection with the 2015 Omnibus Order, the Commission

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[58] *Id.*

[59] *In re GroupMe, Inc./Skype Communications S.A.R.I. Petition for Expedited Declaratory Ruling Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 29 FCC Rcd. 3442, 3444 (2014). Dissenting statements to the Commission's 2015 Omnibus Order further highlight concerns that "legitimate communications between businesses and consumers" will suffer when "the TCPA [strays] far from its original purpose." 2015 Omnibus Order, 30 FCC Rcd. at 8073 (Pai, dissenting) ("Rather than focus on the illegal telemarketing calls that consumers really care about, the [2015 Omnibus Order] . . . target[s] useful communications between legitimate businesses and their customers. . . . [T]he primary beneficiaries will be trial lawyers, not the American public."); *see also id.* at 8084 (O'Rielly, dissenting) (noting that the Commission should work to "protect consumers from unwanted communications while enabling legitimate businesses to reach individuals that wish to be contacted. That is the balance that Congress struck when it enacted the [TCPA] in 1991").

[60] 2012 Order, 27 FCC Rcd. at 1842 (emphasis in original). In the context of facsimile advertisements, which require prior express consent, the Commission similarly has left it to the sender to determine whether to rely on oral or written consent—with the understanding that, "[i]n the event a complaint is filed, the burden of proof rests on the sender to demonstrate that permission was given." *In re Rules and Regulations Implementing Telephone Consumer Protection Act of 1991 and Junk Fax Prevention Act of 2005*, Report and Order, 21 FCC Rcd. 3787, 3811–12 (2006) ("Prior express invitation or permission may be given by oral or written means, including electronic methods. . . . Senders who choose to obtain permission orally are expected to take reasonable steps to ensure that such permission can be verified.").

[61] *Petition for Declaratory Ruling of Retail Industry Leaders Association*, CG Docket No. 02-278, at 5–8 (Dec. 30, 2013).

considered and appropriately confirmed that the TCPA was "not intended to disrupt communications that are 'expected or desired . . . between businesses and their customers.'"[62] Those desired communications, in turn, allow a merchant to respond on an immediate, one-time basis to a specific consumer text by providing information, such as how to redeem an offer.[63] These types of beneficial interactions would be completely cut off if Petitioners had their way.

Put simply, retailers and other businesses have relied on the Commission's interpretation of "prior express consent" in designing their consumer-facing communications, in establishing and implementing related internal policies and employee training, and in selecting and monitoring vendors. Adopting a universal written consent rule would create tremendous compliance burdens, not only because it would necessitate an overhaul of current policies and practices, but also because it would require a paper trail of consent forms for every type of call, impeding the ability of businesses to provide timely informational notifications.

Consumers would likewise suffer, as the logistical difficulties of getting signed consents for all persons—especially vulnerable populations that may not have the ability or access (*e.g.*, internet access) to provide written consent—would mean that many businesses would be forced to limit their outreach to consumers, cutting off valuable informational communications. Such calls could include, for example, those regarding safety alerts, order activity and confirmations, shipping and delivery notifications, and credit card inquiries and fraud alerts. Indeed, if Petitioners had their way and the Commission adopted a universal written consent requirement, businesses would be forced not only to stop providing such notifications for consumers who do not have a signed consent form on file, but also to do so abruptly and without explanation,

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62 2015 Omnibus Order, 30 FCC Rcd. at 8016 (quoting H.R. Rep. No. 102-317, at 17 (1991)).

63 *Id.* at 8015–16.

leaving consumers without important informational services they may have relied on for years. Creating roadblocks to informational, non-telemarketing communications would harm consumers today no less than when this request was first considered and rejected.

D. The Petition Seeks Rules That Would Fuel More TCPA Litigation.

When Congress enacted the TCPA in 1991, it intended to allow individual consumers to recover small sums in small claims court without the assistance of lawyers:

> [I]t is my hope that States will make it as easy as possible for consumers to bring such actions, *preferably in small claims court . . . . Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer.* However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages.[64]

What was originally meant to be a shield for consumers has now become a sword for lawyers. Chairman Pai correctly concluded that the TCPA has "strayed far from its original purpose,"[65] and has in fact become "the poster child for lawsuit abuse."[66] That is no exaggeration, as 2016 alone saw nearly 5,000 new TCPA actions,[67] not to mention an untold number of demand letters threatening classwide litigation in the absence of quick individual settlements.[68]

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[64] 137 Cong. Rec. S16204-01, S16205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) (emphasis added).

[65] 2015 Omnibus Order, 30 FCC Rcd. at 8073 (Pai, dissenting).

[66] *Id.*

[67] WebRecon LLC, *2016 Year in Review: FDCPA Down, FCRA & TCPA Up*, https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/. In 2008, that number was 14.

[68] *See, e.g.*, Petition of SUMOTEXT Corp. for Expedited Clarification or, in the Alternative, Declaratory Ruling, CG Docket No. 02-278, at 4–6 (Sept. 3, 2015) ("SUMOTEXT Petition"), https://ecfsapi.fcc.gov/file/60001323521.pdf.

What is even more striking than the number of filings is the "ridiculous lengths" to which some will go to exploit the statute in the courts.[69] These tactics run the gamut, from buying dozens of cellphones and requesting area codes for regions where debt collection calls are common,[70] to hiring staff to log calls in order to file hundreds of suits,[71] to porting a repeating digit phone number from a landline to a cellphone and making hundreds of thousands of dollars as a result,[72] to asking law firm employees to text 'JOIN' to unknown company numbers,[73] to circumventing the opt-out mechanism of retail text message programs in order to "revoke consent" in a deliberately ineffective manner, to questionable solicitations of clients by lawyers,[74] to teaching classes on how to sue telemarketers.[75]

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[69] 2015 Omnibus Order, 30 FCC Rcd. at 8073 (Pai, dissenting).

[70] *See Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 798–99, 801 (W.D. Pa. 2016).

[71] *See Kinder v. Allied Interstate, Inc.*, No. E047086, 2010 WL 2993958, at *1 (Cal. Ct. App. Aug. 2, 2010).

[72] *See* Tr. of Hr'g on Pl.'s Standing at 12:3–5, *Konopca v. FDS Bank*, No. 15-cv-1547 (D.N.J. Feb. 16, 2016).

[73] SUMOTEXT Petition at 4–6.

[74] *See C-Mart, Inc. v. Metro. Life Ins. Co.*, No. 13-cv-80561, 2014 WL 12300313, at *1 (S.D. Fla. July 14, 2014) (noting the plaintiff "ha[d] no recollection of receiving the [communication] at issue" and "it appears that [the plaintiff] is serving as a pawn for [his counsel's] class action"); *Reliable Money Order, Inc. v. McKnight Sales Co.*, 704 F.3d 489, 490–94 (7th Cir. 2013) (admonishing two firms for potential ethical violations after they used a confidential document produced in one lawsuit to solicit new clients and file hundreds of additional suits); *Savanna Grp. v. Truan*, No. 10-cv-7995, 2013 WL 626981, at *2–6 (N.D. Ill. Feb. 20, 2013) (same); *see also* http://www.blockcallsgetcash.com/ (last visited Mar. 1, 2017) (promising users of a mobile app that they will "Collect up to $1,500 per call" and "Laugh all the Way to the Bank").

[75] *See Morris v. Unitedhealthcare Ins. Co.*, No. 15-cv-0638, 2016 WL 7115973, at *6 (E.D. Tex. Nov. 9, 2016) (internal citations omitted) (plaintiff "listed himself as a Pro Se Litigant of TCPA lawsuits on his LinkedIn profile"), *report and recommendation adopted*, No. 15-cv-0638, 2016 WL 7104091 (E.D. Tex. Dec. 6, 2016); https://www.coursetalk.com/providers/udemy/courses/make-money-from-telemarketers (last visited Mar. 1, 2017). On message boards like fatwallet.com and debtorboards.com (tag line: "Sue your creditors and win!"), plaintiffs also share tips on how to make money off of the TCPA. *E.g.*, *Using the Telephone Consumer Protection Act to Your Advantage*, http://www.debtorboards.com/index.php?topic=3998.0 (Mar. 13, 2007).

In one instructive example, a plaintiff boasted that she had purchased no fewer than 35 cellphones for the sole purpose of attracting calls that she could convert into lucrative TCPA claims.[76] She made a point of choosing area codes in economically depressed areas with the hope that this would result in more frequent debt collection calls.[77] According to her deposition testimony, she transported her shoebox full of cellphones and call logs with her at all times, even on vacations, all as part of her TCPA business:

> Q. Why do you have so many cell phone numbers?
> A. I have a business suing offenders of the TCPA . . . It's what I do.
> Q. So you're specifically buying these cell phones in order to manufacture a TCPA? In order to bring a TCPA lawsuit?
> A. Yeah.[78]

As it happens, the experiences of Petitioners are also instructive. Petitioner Cunningham is a serial plaintiff who has filed 101 lawsuits to date in state and federal court, 87 of which include claims under the TCPA.[79] He is presently a plaintiff in approximately three dozen pending TCPA lawsuits.[80] As of January 2015, he publicly claimed to have earned at least $100,000 in profits from his TCPA business—a number that has presumably grown since then.[81] Rather than being disturbed by calls, he actively seeks out calls in order to pursue TCPA claims. In fact, he maintains at least three cell phones for the purpose of receiving such calls.[82] As one journalist reported in 2010:

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76 *Stoops*, 197 F. Supp. 3d at 798–99, 801.

77 *Id*. at 799.

78 *Id.* at 788, 798–99.

79 *See* Ex. A, Lawsuits Initiated by Craig Cunningham.

80 *Id.*

81 Ex. B, excerpted posting on fatwallet.com, *TCPA Robo Caller Violation* (Jan. 14, 2015).

82 Second Am. Compl. ¶ 18, *Cunningham v. Rapid Capital Funding, LLC/RCF*, No. 16-cv-02629 (M.D. Tenn. Dec. 5, 2016), ECF No. 55.

> *He's waiting for a particular type of phone call—one from a representative of a debt collection agency or a credit card company, whom he'll try to ensnare like a Venus fly trap . . . . While most Americans with unpaid bills dread the collector's call, Cunningham sees them as lucrative opportunities.* Many collection and credit card companies, intentionally or not, violate little-known consumer rights laws, and Cunningham's favorite pastime is catching them doing so and then suing them. *In fact, it's a profitable side job.*[83]

For example, in *Cunningham v. General Dynamics Information Technology, Inc.*, the very case referenced in the Petition, Petitioner Cunningham submitted an application for health insurance on healthcare.gov—a website administered by the federal government—and provided his telephone number under the pseudonym "Greg Cunningham" in order to "creat[e] the appearance that he was called without providing his telephone number to CMS, when in fact his number was supplied in the 'Greg Cunningham' application."[84]

Similarly, in *Cunningham v. Credit Management, L.P.*, the United States District Court for the Northern District of Texas found that Petitioner Cunningham had brought his TCPA and Fair Debt Collection Practices Act claims "in bad faith and for purposes of harassment."[85] Specifically, the court found it "most worrisome" that "Plaintiff repeatedly called Defendants in an attempt to multiply his claims . . . asking questions in the hope that he could construe the answer as a false misrepresentation."[86] The court also found that he "brought suit against

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[83] Ex. C, Dallas Observer, *Better Off Deadbeat: Craig Cunningham Has a Simple Solution for Getting Bill Collectors off His Back. He Sues Them.* (Jan. 21, 2010) (emphasis added).

[84] Def.'s Memo. in Support of Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Failure to Join a Necessary Party at 5–6, *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, No. 16-cv-545 (E.D. Va. July 11, 2016), ECF No. 20.

[85] No. 09-cv-1497, 2010 WL 3791104, at *6 (N.D. Tex. Aug. 30, 2010).

[86] *Id.*

numerous individual defendants, against many of whom [Petitioner Cunningham] has only a cursory theory of recovery, and sometimes no theory of recovery."[87]

Petitioner Cunningham has stated that he is an "expert" in TCPA litigation and has used social media to advise others on how to bring suit, using the pseudonym "codename47"[88] to encourage others to sue under the TCPA and promote the "benefits" that come from doing so. For instance, he published a thread on www.fatwallet.com entitled "TCPA enforcement for fun and for profit up to 3k per call" in which he offered updates on the TCPA legal landscape and advice on how to bring suit.[89] In one thread, he commented that he "can't wait until someone sues and gets paid."[90] Petitioner Cunningham even tried to publish an autobiography to be called "Tales of a Debt Collection Terrorist: How I Beat the Credit Industry at Its Own Game and Made Big Money from the Beat Down," based on his self-identified expertise as a professional TCPA plaintiff.[91] The proposal described him as "a highly sought after expert in the field of the debt collection 'revenge' industry."[92]

For his part, Petitioner Moskowitz is also no stranger to TCPA litigation. Since 2011, he has filed at least a dozen putative class actions under the TCPA in his own name and on behalf of

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87 *Id.*

88 *See* Ex. D, deBanked, *Smile, Dial and Trial? Why the Next Call Might Be Your Worst Nightmare*, http://debanked.com/2016/10/smile-dial-and-trial-why-the-next-call-might-be-your-worst-nightmare/ (Oct. 26, 2016).

89 Ex. E, excerpted posting on fatwallet.com, *TCPA Enforcement for Fun and for Profit up to 3k Per Call* (May 25, 2014).

90 Ex. F, excerpted posting on fatwallet.com, *Codename47 vs. National Credit Solutions* (June 4, 2009).

91 *See* Ex. G, Archive of Publisher's Marketplace Post, http://web.archive.org/web/20100420075855/http://www.publishersmarketplace.com/rights/display.cgi?no=6960 (Apr. 15, 2010).

92 *Id.*

"3081 Main Street," a business that he co-owns.[93] The Petition makes clear that his motivation for filing the Petition is disappointment that he was unable to file at least one more: he laments the fact that "courts have denied TCPA claims in the debt collection context based on a person's providing a telephone number in connection with the debt transaction," and he states that he "refrained from commencing any proceedings" against Terminix as a result.[94]

Aytan Bellin, counsel for Petitioners, has represented Petitioner Moskowitz in most of these cases.[95] Of the numerous TCPA cases Petitioner Moskowitz has filed, only two—one of which was recently filed on February 21, 2017—remain pending.[96] The majority have settled.

Given the current litigation climate, Chairman Pai and Commissioner O'Rielly have recognized that the Commission should "shut[] down the abusive lawsuits by closing the legal loopholes that trial lawyers have exploited to target legitimate communications between businesses and consumers"[97] and "make sure that good actors and innovators are not needlessly subjected to [TCPA] enforcement actions or lawsuits, which could discourage them from

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93 *See Moskowitz v. 50.com Corp.*, No. 13-cv-00182 (D. Conn.); *Moskowitz v. Pullin Law Firm, P.C.*, No. 14-cv-06010 (E.D.N.Y); *Moskowitz v. Clinilabs, Inc.*, No. 15-cv-07838 (S.D.N.Y.); *Moskowitz v. Fairway Grp. Holdings Corp.*, No. 16-cv-01831 (D. Conn.); *Moskowitz v. Am. Sav. Bank, FSB*, No. 17-cv-00307 (D. Conn.); *3081 Main St., LLC v. GEA Energy, LLC*, No. 11-cv-01318 (D. Conn.); *3081 Main St., LLC v. Bus. Owners Liab. Team LLC*, No. 11-cv-01320 (D. Conn.); *3081 Main St., LLC v. Ams. Merchant Receivables LLC*, No. 11-cv-01386 (D. Conn.); *3081 Main St., LLC v. Creative Age Publ'ns Inc.*, No. 11-cv-09774 (C.D. Cal.); *3081 Main St., LLC v. Nat'l Bus. Capital, Inc.*, No. 12-cv-00531 (D. Conn.); *3081 Main Street LLC v. Creative Age Commc'ns Inc.*, No. 12-cv-04284 (C.D. Cal.); *3081 Main St., LLC v. Appchek, LLC*, No. 14-cv-80388 (S.D. Fla.).

94 Petition at 5.

95 Petitioner Moskowitz was also represented by Roger Furman in the *Creative Age* actions filed in California. *See* note 93, *supra*.

96 *Moskowitz v. Fairway Grp. Holdings Corp.*, No. 16-cv-01831 (D. Conn.), and *Moskowitz v. Am. Sav. Bank, FSB*, No. 17-cv-00307 (D. Conn.).

97 2015 Omnibus Order, 30 FCC Rcd. at 8073 (Pai, dissenting).

offering new consumer-friendly communications services."[98] It is no accident that this Petition would do just the opposite.

III. CONCLUSION

Petitioners offer no compelling reason to initiate a rulemaking process, particularly one designed to adopt heavy-handed regulations that would further empower serial plaintiffs like themselves. The Commission's analyses of "prior express consent" in the 1992 and 2008 Orders remain correct, and the disruption and dislocation that would be caused by a one-size-fits-all written consent rule is hard to overstate. Consumers understand and expect that voluntarily providing a phone number constitutes consent to be called at that phone number for a variety of non-telemarketing reasons. This settled expectation should be honored, and the Petition should be denied.

[98] Commissioner Michael O'Rielly, *TCPA: It Is Time to Provide Clarity*, FCC, https://www.fcc.gov/news-events/blog/2014/03/25/tcpa-it-time-provide-clarity (Mar. 25, 2014).

Dated: March 10, 2017

Respectfully submitted,

/s/ Laura H. Phillips

Laura H. Phillips
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W., Ste. 1100
Washington, DC 20005-1209
Phone: (202) 842-8800

Seamus C. Duffy
Meredith C. Slawe
Kathryn E. Deal
Michael P. Daly
DRINKER BIDDLE & REATH LLP
One Logan Square, Ste. 2000
Philadelphia, PA 19103-6996
Phone: (215) 988-2700

Bradley Andreozzi
Justin O. Kay
DRINKER BIDDLE & REATH LLP
191 North Wacker Drive, Ste. 3700
Chicago, IL 60606-1698
Phone: (312) 569-1000

Michael J. Stortz
DRINKER BIDDLE & REATH LLP
50 Fremont Street, 20th Floor
San Francisco, CA 94105-2235
Phone: (415) 591-7500

Counsel to the Retail Industry Leaders Association

EXHIBIT A

Lawsuits Initiated by Craig Cunningham

No.	Caption	Court	Case No.	Case Type	Date Filed	Date Closed
1	*Cunningham v. Consumer Fin. Res. LLC*	E.D. Tex.	4:17-cv-00174	TCPA	03/09/2017	**Active**
2	*Cunningham v. Nemec*	N.D. Tex.	4:17-cv-00215	TCPA	03/09/2017	**Active**
3	*Cunningham v. Peoples Bank & Tr. Co.*	W.D. Okla.	5:17-cv-00237	TCPA	03/03/2017	**Active**
4	*Cunningham v. Telemarketers from 626-799-8018*	N.D. Tex.	3:17-cv-00546	TCPA	02/24/2017	**Active**
5	*Cunningham v. Foresters Fin. Servs., Inc.*	N.D. Ind.	2:17-cv-00077	TCPA	02/17/2017	**Active**
6	*Cunningham v. Health Plan Intermediaries Holdings*	N.D. Ill.	1:17-cv-01216	TCPA	02/15/2017	02/17/2017
7	*Cunningham v. Nationwide Sec. Sols., Inc.*	N.D. Tex.	3:17-cv-00337	TCPA	02/04/2017	**Active**
8	*Cunningham v. Foresters Fin. Servs., Inc.*	M.D. Tenn.	3:17-cv-00152	TCPA	01/20/2017	02/06/2017
9	*Cunningham v. Am. Gen. Life Ins. Co.*	S.D. Tex.	4:17-cv-00125	TCPA	01/16/2017	**Active**
10	*Cunningham v. Careington Int'l Corp.*	E.D. Tex.	4:17-cv-00040	TCPA	01/16/2017	**Active**
11	*Cunningham v. Health Plan Intermediaries Holdings*	M.D. Tenn.	3:17-cv-00151	TCPA	01/20/2017	02/06/2017
12	*Cunningham v. Shopperlocal, LLC*	M.D.N.C.	1:17-cv-00024	TCPA	01/10/2017	**Active**
13	*Cunningham v. Tranzvia LLC*	E.D. Tex.	4:16-cv-00905	TCPA	11/26/2016	**Active**
14	*Cunningham v. Nationwide Sec. Sols., Inc.*	E.D. Tex.	4:16-cv-00889	TCPA	11/18/2016	01/18/2017
15	*Cunningham v. Montes*	W.D. Wis.	3:16-cv-00761	TCPA	11/17/2016	**Active**
16	*Cunningham v. Jacovetti*	M.D. Tenn.	3:16-cv-02922	TCPA, FDCPA	11/16/2016	**Active**

Lawsuits Initiated by Craig Cunningham

No.	Caption	Court	Case No.	Case Type	Date Filed	Date Closed
17	*Cunningham v. Sunshine Consulting Grp.*	M.D. Tenn.	3:16-cv-02921	TCPA	11/16/2016	**Active**
18	*Cunningham v. Student Loan Assistance Ctr. LLC*	N.D. Tex.	3:16-cv-02880	TCPA	10/13/2016	**Active**
19	*Cunningham v. TechStorm LLC*	N.D. Tex.	3:16-cv-02879	TCPA	10/13/2016	**Active**
20	*Cunningham v. Family Life Ins. Co.*	S.D. Tex.	4:16-cv-03042	TCPA	10/12/2016	02/17/2017
21	*Cunningham v. Nat'l Health Ins. Co.*	N.D. Tex.	3:16-cv-02872	TCPA	10/12/2016	11/04/2016
22	*Cunningham v. Rapid Capital Funding, LLC/RCF*	M.D. Tenn.	3:16-cv-02629	TCPA	10/05/2016	**Active**
23	*Cunningham v. Seven90, LLC*	M.D. Tenn.	3:16-cv-02500	TCPA	09/19/2016	**Active**
24	*Cunningham v. Pratt*	M.D. Tenn.	3:16-cv-02468	TCPA	09/09/2016	**Active**
25	*Cunningham v. Zoccali*	M.D. Tenn.	3:16-cv-02299	TCPA	09/01/2016	11/03/2016
26	*Cunningham v. Mitchell*	M.D. Tenn.	3:17-cv-00392	TCPA	08/30/2016	**Active**
27	*Cunningham v. First Class Vacations, Inc.*	M.D. Tenn.	3:16-cv-02285	TCPA	08/26/2016	**Active**
28	*Cunningham v. Local Lighthouse Corp.*	M.D. Tenn.	3:16-cv-02284	TCPA	08/26/2016	**Active**
29	*Cunningham v. Spectrum Tax Relief, LLC*	M.D. Tenn.	3:16-cv-02283	TCPA	08/26/2016	**Active**
30	*Cunningham v. Yellowstone Capital LLC*	S.D. Fla.	0:16-cv-62029	TCPA	08/23/2016	02/09/2017
31	*Cunningham v. Felix*	N.D. Tex.	3:16-cv-02120	Civil Rights	07/21/2016	**Active**
32	*Cunningham v. Touchstone Partners Inc*	N.D. Tex.	3:16-cv-02054	TCPA	07/14/2016	01/30/2017

Lawsuits Initiated by Craig Cunningham

No.	Caption	Court	Case No.	Case Type	Date Filed	Date Closed
33	*Cunningham v. Credit Pros Int'l Corp.*	M.D. Tenn.	3:16-cv-01678	TCPA	07/07/2016	11/15/2016
34	*Cunningham v. Focus Receivables Mgmt., LLC*	M.D. Tenn.	3:16-cv-01677	TCPA, FDCPA	07/07/2016	**Active**
35	*Cunningham v. Collecto, Inc.*	M.D. Tenn.	3:16-cv-01676	TCPA	07/07/2016	**Active**
36	*Cunningham v. Enhanced Recovery Co., LLC*	M.D. Tenn.	3:16-cv-01675	TCPA, FDCPA	07/07/2016	**Active**
37	*Cunningham v. Alpha Recovery Corp.*	M.D. Tenn.	3:16-cv-01673	TCPA	07/07/2016	10/31/2016
38	*Cunningham v. Global Receivables Sols., Inc.*	E.D. Tex.	4:16-cv-00450	TCPA, FDCPA	06/28/2016	**Active**
39	*Cunningham v. Nationwide Bus. Res., Inc.*	C.D. Cal.	2:16-cv-04542	TCPA	06/22/2016	**Active**
40	*Cunningham v. Gen. Dynamics Info. Tech., Inc.*	E.D. Va.	1:16-cv-00545	TCPA	05/16/2016	**Active**
41	*Cunningham v. Vanderbilt Univ.*	M.D. Tenn.	3:16-cv-00223	TCPA	02/16/2016	**Active**
42	*Cunningham v. Shoutpoint Inc.*	M.D. Tenn.	3:16-cv-00222	TCPA	02/16/2016	**Active**
43	*Cunningham v. Caribbean Cruise Lines*	S.D. Fla.	0:15-cv-62580	TCPA, FDUTPA	12/09/2015	01/19/2017
44	*Cunningham v. Trilegiant Corp.*	M.D. Tenn.	3:15-cv-00989	TCPA	09/14/2015	09/01/2016
45	*Cunningham v. Ortiz*	E.D.N.C.	5:15-cv-00465	TCPA	09/14/2015	10/27/2015
46	*Cunningham v. Rapid Capital Fin.*	M.D. Tenn.	3:15-cv-00957	TCPA	09/04/2015	**Active**
47	*Cunningham v. Altitude Grp., LLC* (*In re Monitronics Int'l, Inc. TCPA Litig.*, No. 1:13-md-2493 (N.D.W. Va.))	N.D.W. Va.	1:15-cv-00169	TCPA	08/25/2015	**Active**

Lawsuits Initiated by Craig Cunningham

No.	Caption	Court	Case No.	Case Type	Date Filed	Date Closed
48	*Cunningham v. Ignite Capital, LLC*	M.D. Tenn.	3:15-cv-00894	TCPA	08/17/2015	03/02/2016
49	*Cunningham v. Nat'l Payment Sys. LLC*	M.D. Tenn.	3:15-cv-00893	TCPA	08/17/2015	01/27/2016
50	*Cunningham v. Enagic USA, Inc.*	M.D. Tenn.	3:15-cv-00847	TCPA	07/31/2015	**Active**
51	*Cunningham v. Rapid Response Monitoring Servs.*	M.D. Tenn.	3:15-cv-00846	TCPA	07/31/2015	**Active**
52	*Cunningham v. Palmer Admin. Servs., Inc.*	M.D. Tenn.	3:15-cv-00566	TCPA	05/15/2015	04/27/2016
53	*Cunningham v. Educ. Fin. Sols. LLC*	M.D. Tenn.	3:15-cv-00555	TCPA	05/12/2015	07/17/2015
54	*Cunningham v. Select Student Loan Help LLC*	M.D. Tenn.	3:15-cv-00554	TCPA	05/12/2015	**Active**
55	*Cunningham v. Park Lane Dig. Media*	M.D. Tenn.	3:15-cv-00467	TCPA	04/21/2015	**Active**
56	*Cunningham v. Student Debt Relief Ctr., LLC*	M.D. Tenn.	3:15-cv-00440	TCPA	04/16/2015	08/18/2015
57	*Cunningham v. CBC Conglomerate LLC*	M.D. Tenn.	3:15-cv-00439	TCPA	04/16/2015	08/22/2016
58	*Cunningham v. Peak Legal Advocates*	M.D. Tenn.	3:15-cv-00224	TCPA	03/06/2015	03/24/2015
59	*Cunningham v. McDonald*	M.D. Tenn.	3:15-cv-00215	TCPA	03/04/2015	**Active**
60	*Cunningham v. United Shuttle Alliance Transp. Corp.*	M.D. Tenn.	3:15-cv-00179	TCPA	02/25/2015	11/04/2015
61	*Cunningham v. Endless Access, LLC*	M.D. Tenn.	3:15-cv-00178	TCPA	02/25/2015	04/03/2015
62	*Cunningham v. Portfolio Recovery Assocs., LLC* (*In re Portfolio Recovery Assocs., LLC TCPA Litig.*, No. 3:11-md-2295 (S.D. Cal.))	S.D. Cal.	3:15-cv-00926	TCPA, FDCPA	02/25/2015	**Active**

Lawsuits Initiated by Craig Cunningham

No.	Caption	Court	Case No.	Case Type	Date Filed	Date Closed
63	*Cunningham v. Constar Fin. Servs., LLC*	M.D. Tenn.	3:15-cv-00168	TCPA, FDCPA	02/23/2015	07/10/2015
64	*Cunningham v. Windham Prof'ls, Inc.*	M.D. Tenn.	3:15-cv-00167	TCPA, FDCPA	02/23/2015	03/31/2015
65	*Cunningham v. IC Sys. Inc.*	M.D. Tenn.	3:15-cv-00166	TCPA, FDCPA	02/23/2015	11/03/2015
66	*Cunningham v. Vital Recovery Servs., LLC*	M.D. Tenn.	3:15-cv-00165	TCPA, FDCPA	02/23/2015	07/09/2015
67	*Cunningham v. Dish Network LLC*	M.D. Tenn.	3:15-cv-00090	TCPA	01/28/2015	05/01/2015
68	*Cunningham v. United Collection Bureau*	M.D. Tenn.	3:15-cv-00011	FDCPA, TCPA	01/06/2015	02/27/2015
69	*Cunningham v. United Recovery Sys. LP*	M.D. Tenn.	3:15-cv-00010	FDCPA, TCPA	01/06/2015	03/20/2015
70	*Cunningham v. Trans Union*	M.D. Tenn.	3:14-cv-02410	FDCPA, FCRA	12/31/2014	09/10/2015
71	*Cunningham v. Navient*	M.D. Tenn.	3:14-cv-02409	TCPA	12/31/2014	12/21/2015
72	*Cunningham v. Ushop Mktg. Grp., LLC*	M.D. Tenn.	3:14-cv-02401	TCPA	12/30/2014	05/15/2015
73	*Cunningham v. Newport Mktg., LLC*	M.D. Tenn.	3:14-cv-02400	TCPA	12/30/2014	03/10/2015
74	*Cunningham v. Lilly Mgmt. & Mktg., LLC*	M.D. Tenn.	3:14-cv-02399	TCPA	12/29/2014	07/07/2015
75	*Cunningham v. Citibank*	M.D. Tenn.	3:14-cv-02398	TCPA	12/29/2014	04/03/2015
76	*Cunningham v. Trilegiant Corp.*	M.D. Tenn.	3:14-cv-02181	TCPA	11/07/2014	05/06/2016
77	*Cunningham v. Auto Discount Servs.*	M.D. Tenn.	3:14-cv-01764	TCPA	08/27/2014	01/07/2015
78	*Cunningham v. Ocenture, LLC*	M.D. Tenn.	3:14-cv-01763	TCPA	08/27/2014	09/25/2014

Lawsuits Initiated by Craig Cunningham

No.	Caption	Court	Case No.	Case Type	Date Filed	Date Closed
79	*Cunningham v. Kondaur Capital*	M.D. Tenn.	3:14-cv-01574	TCPA	07/31/2014	03/30/2015
80	*Cunningham v. Robertson*	M.D. Tenn.	3:14-cv-01277	TCPA, Invasion of Privacy/Harassment	06/09/2014	03/04/2015
81	*Cunningham v. First Source Advantage*	M.D. Tenn.	3:14-cv-01276	TCPA, FDCPA	06/09/2014	06/24/2014
82	*Cunningham v. Stellar Recovery Grp.*	M.D. Tenn.	3:14-cv-01184	TCPA, FDCPA	05/15/2014	09/26/2014
83	*Cunningham v. Caribbean Cruise Line*	M.D. Tenn.	3:14-cv-01040	TCPA	04/22/2014	03/19/2015
84	*Cunningham v. Addiction Intervention*	M.D. Tenn.	3:14-cv-00770	TCPA	03/18/2014	06/22/2016
85	*Cunningham v. Alliance Sec.* (*In re Monitronics Int'l, Inc. TCPA Litig.*, No. 1:13-md-2493 (N.D.W. Va.))	N.D.W. Va.	1:14-cv-00169	TCPA	03/18/2014	**Active**
86	*Cunningham v. Equifax*	M.D. Tenn.	3:13-cv-01166	FCRA	10/22/2013	11/25/2013
87	*Cunningham v. Burns*	N.D. Tex.	3:12-cv-01824	Civil Rights	06/12/2012	09/22/2014
88	*Cunningham v. Ocwen Fin.*	M.D. Tenn.	3:12-cv-00440	FCRA, FDCPA	05/02/2012	11/03/2014
89	*Cunningham v. Panola County*	E.D. Tex.	6:10-cv-00362	Civil Rights	07/22/2010	05/31/2011
90	*Cunningham v. All Inclusive Excursions*	Dallas Cty. Ct.	CC-10-02483-C	TCPA	04/14/2010	03/10/2011
91	*Cunningham v. Infinity Vacations LLC*	N.D. Tex.	3:09-cv-02338	TCPA, FCBA	12/08/2009	02/16/2010
92	*Cunningham v. North Versailles Township*	W.D. Pa.	2:09-cv-01314	Civil Rights	09/28/2009	07/15/2010

Lawsuits Initiated by Craig Cunningham

No.	Caption	Court	Case No.	Case Type	Date Filed	Date Closed
93	*Cunningham v. Credit Mgmt. LP*	N.D. Tex.	3:09-cv-01497	TCPA, FDCPA	08/12/2009	09/27/2010
94	*Cunningham v. Advanta Corp.*	N.D. Tex.	3:08-cv-01794	TCPA, FDCPA	10/08/2008	06/08/2009
95	*Cunningham v. Advantage Cable Servs., Inc.*	N.D. Tex.	3:08-cv-01536	FDCPA	09/02/2008	04/06/2009
96	*Cunningham v. Shannon*	W.D. Tex.	3:07-cv-00386	FDCPA	11/06/2007	03/27/2008
97	*Cunningham v. Alliance One, Inc.*	W.D. Tex.	3:07-cv-00244	FDCPA	07/09/2007	04/15/2008
98	*Cunningham v. Experian Corp.*	W.D. Tex.	3:07-cv-00241	FCRA	07/06/2007	03/26/2008
99	*Callier v. Billie Bauer*	W.D. Tex.	3:07-cv-00226	Tortious Interference, Libel, Interstate Stalking	06/19/2007	09/24/2007
100	*Cunningham v. NCO Fin. Sys.*	W.D. Tex.	3:06-cv-00065	ECOA	02/15/2006	05/11/2006
101	*Cunningham v. Equinox Fin. Mgmt. Sols., Inc.*	W.D. Tex.	3:05-cv-00370	FDCPA	10/05/2005	11/15/2005

EXHIBIT B

The content below is a thread from Fatwallet forums. Print document.

Thread Title: TCPA robo caller violation

Date Posted: Jan/14/2015 2:57 PM
Posted By: [redacted]
Rank: Addicted Member

So, looks like all the previous threads on this got archived.

I read the previous ones and am going to give it shot, now that I've got the time. A lovely auto warranty telemarketer just started calling again (after 0 calls for the last month or so). If the past is anything to go by, I should expect 1-2 a day for awhile.

So couple of paging CN47 questions here.

They call my cell from a number with my phone's area code (probably spoofed to increase pickup rate). When I pickup there is a slight delay and then someone comes on the line and says "this is (name) calling on a recorded line from (company name)". The company is an auto extended warranty company. Up until now I always hang up at this point.

First, since they are saying the line is recorded, I should be good to record the call without saying anything correct? I am in CA (2 party consent) Is the requirement only that both parties are aware the call is being recorded? not necessarily who is doing the recording?

Next, how do I prove they are using an auto dialer? Is it evident from the pause before an agent comes on the line?

Can I only claim the calls I record, or can I get a copy of my cell bill and list all the (probably 30+) calls over the past few months? I will start recording them now

They seem to be making it very easy for me by saying the company name right off the bat. Is this all I need? Can I just hang up once they say the call is recorded and who it's from and that counts as a call? The company name pulls up a website and address in FL.

Googling their name came up with a lawyer's office in CA handling a class action TCPA suit against the company so I gave them a call.

Date Posted: Jan/14/2015 2:57 PM
Posted By: [redacted]
Rank: New Member

Date Posted: Jan/14/2015 3:00 PM
Posted By: [redacted]
Rank: Nerdy Member

These are the worst. I frequently get the "Hello this is Sarah from Card Services! Everything on your account is fine..." where they're trying to sign me up for a credit card.

Date Posted: Jan/14/2015 3:06 PM
Posted By: [redacted]
Rank: Addicted Member

Yea, it sounds like the legwork would be somewhat less on this since they admit who is calling in every call. I should hear back from the class action lawyer in the next day or so his assistant said.

Date Posted: Jan/14/2015 3:13 PM
Posted By: [redacted]
Rank: Scrouds Butch

At least you get a phone number. I am starting to get spoofs with my own number. Do I report myself?

Date Posted: Jan/14/2015 3:24 PM
Posted By: codename47
Rank: Senior Member
4K

Yes you should record every call. You should also get the calls may be recorded disclaimer on tape. Run like hell from the class action lawyer. Get your own or pursue it independently. I have seen class action cases where the lawyer gets 10m and the class gets $50 per call. Min damages are 500 per call. You need to know the total # of calls so pull your call records if you can.

You can claim every call you can document. **Message edited by: codename47 on 2015-01-14 15:25:12 CST**

Date Posted: Jan/14/2015 3:49 PM
Posted By: [redacted]
Rank: Deez

I don't think it's worth your trouble. Most of these are scammers (Card Service, GE Security, etc) that have no intention of actually selling you something and just want your personal information. Good luck filing a suit against non-existent entities.

The only thing that will work is have the NSA/CIA track them down then nuke it.

Date Posted: Jan/14/2015 3:56 PM
Posted By: codename47
Rank: Senior Member
4K

Next, how do I prove they are using an auto dialer? Is it evident from the pause before an agent comes on the line?

The "PROOF" comes in discovery, but yes a pause before an agent picks up is a tell tale sign, as well a pre-recorded messages. You can always just ask them. I would pretend to be interested, get their website and company information and even give some fake card info if you need to seem interested to get more information. 800 notes and whitepages are pretty helpful on reverse searching the phone numbers.

Most of these are scammers (Card Service, GE Security, etc) that have no intention of actually selling you something and just want your personal information

It depends. Card services, no they probably don't have assets. GE security certainly does. They are getting hammered with multiple class actions in the multi-district litigation.

Keep in mind, while the party placing the calls is obviously liable, the party on whose behalf that ultimately benefits from the calls is liable as well.

Can I just hang up once they say the call is recorded and who it's from and that counts as a call?

Yup. Keep in mind, the law prohibits MAKING calls, and it is not necessary for you to actually receive them, so potentially there could be other violations if they attempted to make a call and your phone was off or something.

Date Posted: Jan/14/2015 5:04 PM
Posted By: [redacted]

Rank: Member

Just a ballpark, codename, how much have you made over the years doing this?

Date Posted: Jan/14/2015 5:19 PM
Posted By: [redacted]
Rank: Deez

> It depends. Card services, no they probably don't have assets. GE security certainly does. They are getting hammered with multiple class actions in the multi-district litigation.

Are you sure about that? None of the call my folks ever got were from real GE.

http://www.tn.gov/comaging/scamalert.shtml

> While there is a GE Security division of General Electric, it does not sell to individuals, does not telemarket, does not go door to door. Anyone could claim to be selling GE Security systems, but they would not be affiliated with GE. (You could buy a couple dozen cans of Pepsi and sell the cans door to door, but that would not make you a Pepsi employee, right?)

Date Posted: Jan/14/2015 6:12 PM
Posted By: codename47
Rank: Senior Member
4K

Just a ballpark, codename, how much have you made over the years doing this?

100k+

http://en.wikipedia.org/wiki/GE_Security

They are now UTC and getting sued in the MDL for hiring companies to make robo calls, so yes they directly did not telemarket, but if you hire someone to violate the law on your behalf, you are going to be sitting right next to them as a defendant.

Date Posted: Jan/14/2015 6:19 PM
Posted By: [redacted]
Rank: Senior Member
8K

CN47... Wow!!

Was all of that with you as the plaintiff or acting as counsel for someone else?

Date Posted: Jan/14/2015 6:35 PM
Posted By: codename47
Rank: Senior Member
4K

Plaintiff only. I can't/don't give legal advice for pay. Runs into unlicensed practice of law.

EXHIBIT C

Observer

Better Off Deadbeat: Craig Cunningham Has a Simple Solution for Getting Bill Collectors Off His Back. He Sues Them.

BY KIMBERLY THORPE

THURSDAY, JANUARY 21, 2010 AT 4 A.M.

Craig Cunningham says no one offered hurting small-time investors like him a government bailout when he landed deep in debt. That made him mad, so he decided to get even.

Hal Samples

Unlike his neighbors' homes, Craig Cunningham's house in Northeast Dallas looks abandoned. The grass is dried out. The concrete slab under the front door is lopsided and cracked. The green exterior has faded to a toxic-looking shade. Yellow Pages pile up near the front door, and the black mailbox is stuffed full. Maybe the home has been foreclosed on. That wouldn't be a surprise in this economy.

But no, that's not the case. Inside, the 29-year-old Cunningham hunkers his 6-foot-2-inch frame on a dumpy couch. His heavy arms extend from his sides, palms up, so two Chihuahuas, Angel and Chuay, can curl under them. Although it's 10 a.m. on a weekday, he's wearing slippers.

He leans forward to lift some paperwork out of a plastic tub on the coffee table. The phone rings, and he answers with a soft voice. It's just a friend, and soon he hangs up. He's waiting for a particular type of phone call—one from a representative of a debt collection agency or a credit card company, whom he'll try to ensnare like a Venus fly trap. It's not unlikely that Cunningham's next call will be from a bill collector, since he's between jobs—except for being in the Army Reserve—and owes $100,000 in debts.

While most Americans with unpaid bills dread the collector's call, Cunningham sees them as lucrative opportunities. Many collection and credit card companies, intentionally or not, violate little-known consumer rights laws, and Cunningham's favorite pastime is catching them doing so and then suing them. In fact, it's a profitable side job.

Call it ironic, but the only house on the block that appears to be the foreclosed end to some sad financial story is in fact the home of one of the debt collection industry's emerging and persistent threats. Cunningham calls himself a private attorney general—someone who files private lawsuits in the public interest. Debt collectors call him a credit terrorist.

Patrick Lunsford, who edits *InsideARM*, a trade magazine for the debt collection industry, knows the term. "There is a sub-group out there that does actually advise people on how to bait [collectors]," he says. "That's something that really gets under the skin of, well, obviously, collectors."

Cunningham beats the debt collectors at their own game. He turns their money-making practice into a financial liability. He is a regular guy who has become a radical enemy of the banking system.

In 2005, two foreclosures pushed Cunningham near financial ruin. Like many Americans, he fell enchanted by the siren's song of easy credit and borrowed more than $100,000 to bet on risky, high-yielding investments, such as stock in the now vilified sub-prime mortgage industry. Then, while stationed with the Army in El Paso, he attempted to become an absentee landlord and got zero-percent-down sub-prime mortgages to buy low-income four-plexes in Houston and Dallas. With the interest earned on his high-yielding stocks he was paying back his low-interest credit card debt; now, he was using the mortgages to borrow even more.

Then, the bottom fell out. Investors like Cunningham fell the fastest. He sold his Houston homes, but his Dallas properties were foreclosed on. The collection calls started. He was running scared.

Desperation took him online in a search of anything that could save him from his own $100,000 in bad choices. One afternoon while sitting on his couch in his El Paso home, he found a way to fight back. He stumbled across hundreds of other distraught consumers like himself on credit message boards, each with some different version of the same story of bad choices and greed. And, he found a new way to deal with his debt: He could hide behind the law.

His new online friends pointed him to a number of federal and state statutes protecting consumers like him against overly aggressive and abusive debt collectors and a credit system stacked against the little guy. If you knew your rights, he learned on the message boards, you were very likely to catch a collector violating them. Then you could sue.

Cunningham armed himself with this knowledge, and the next time a debt collector called, the trap was set.

It didn't take long. Cunningham had canceled a home alarm service with ADT Security after two months, and the company had billed him a $450 early termination fee, which he disputed. ADT sent his account to Equinox Financial Management Solutions, a third-party debt collector. The collection agency sent him a letter asking that he call back immediately. He dialed, armed with a voice recorder.

"Can you garnish my wages if I don't pay?" he asked.

"Yes," the voice on the other end of the line said.

"Can you put a lien on my house?"

"Yes."

Wrong answers. Turns out, Texas consumer rights laws are some of the most consumer-friendly in the country. And according to a federal consumer protection law, the Fair Debt Collection Practices Act (FDCPA), debt collectors are prohibited from threatening legal action that would violate state laws. In this case, garnishing wages or putting a lien on Cunningham's house would violate the Texas Debt Collection Act.

Cunningham knew he had a good enough case to file a lawsuit against the debt collection agency, and for his first lawsuit, he decided to enlist the help of a lawyer. Two months later, he had a check in his hand for $1,000.

"It's like discovering fire," says Cunningham, thumbing through the stack of lawsuit papers on his table.

He immediately started devouring as much information as he could about the three chief federal laws that protect consumers from collectors: the Fair Debt Collection Practices Act, the Fair Credit Reporting Act (FCRA) and the Telephone Consumer Protection Act (TCPA). In the next four years, Cunningham accused debt collectors of misrepresenting the amount he owed (an FDCPA violation that entitles a consumer to collect up to $1,000). He sued over prerecorded and auto-dialed calls to his cellular phone (a TCPA violation worth up to $1,500 per call). He also filed complaints that agencies failed to investigate his claims that his credit file contains inaccurate information, a breach of the Fair Credit Reporting Act worth up to $1,000 per violation. All told, he filed 15 other lawsuits in federal court without the help of a lawyer, earning himself settlements totaling more than $20,000.

"Most people hear about the abuses that debt collectors do, but you just didn't hear about the second part of it, where people sue the collectors," he says.

Cunningham is one of thousands of hounded debtors who are trading in their paralyzing fears and learning to stand up for themselves. Americans as a whole owe

some $2.5 trillion in consumer debt, according to the Federal Reserve, a figure that doesn't include home mortgages. Nearly four in five Americans have credit cards and half carry a balance, according to the Obama administration.

In 2008, the Federal Trade Commission, the nation's consumer protection agency, received more than 78,000 complaints against third-party debt collectors, 8,000 more than in 2007, and early numbers for 2009 indicate the growth will double. While the FTC gets the bulk of consumer complaints, today more consumers are fighting back with their own lawsuits than ever before. In 2009, nearly 10,000 cases under FDCPA, FCRA or TCPA statutes were filed around the country, mostly in federal courts. That's a 50 percent increase from 2008, and an 83 percent growth from 2007.

A cottage industry has sprung up to counter the flood of cases. Two new companies now offer the credit and collection industries databases of repeat plaintiffs filing under the FDCPA. The companies, FDCPA Case Listing Service LLC and WebRecon, offer something akin to a background check for collection agencies. For example, if an agency received a delinquent account belonging to Cunningham, it could run his name through a database and learn he's a repeat litigant; then the agency could either close his account or sue him first.

Back in his dim living room, Cunningham returns to the pile of paperwork on the table. His soft voice gets bolder when he recounts his war stories with the collection industry. His 15 lawsuits include one filed in federal court against Alliance One, a third-party agency collecting on behalf of Verizon. Alliance One added a $50 collection fee and misrepresented the debt he owed Verizon, he says, which is an unfair practice under FDCPA. Another lawsuit was over the collection of an outstanding bill from Time Warner. The collection agency, Advantage Cable Services, failed to post a surety bond required by the state of Texas in order to collect debts here. Plus, after telling them to stop calling his cellular phone with automated calls, they continued, so he sued and won around $3,500, the industry standard for many consumer rights violations. (Collection agencies frequently settle such lawsuits because that's cheaper than taking them to trial.)

His debt with Time Warner hasn't gone away, and he's in the middle of his biggest FDCPA violation lawsuit ever, demanding upward of $200,000 from the current collection agency.

Debtors, either because they feel morally obligated or because they don't know their options, get backed into a corner by their creditors and believe they *have* to repay their debts, he says. Not so with Cunningham. "I don't have to do anything but stay black and die," he says, a small, smug smile on his lips.

Cunningham wasn't always such a stickler.

As a kid growing up in Detroit, family time meant gathering around the living room table to play stock market board games. His mother was a registered nurse, and his father worked for 25 years as a computer engineer for Ford. When he was 15, Cunningham met his "first millionaire," as he tells it, still wide-eyed. This high school teacher grew wealthy off the then-booming real estate market of the mid-'90s. "He accomplished it through business and not sports," he says. "For me, that was where the light first went on."

Cunningham, a high school athlete, dreamed of making millions playing pro football, but he was accepted to U.S. Military Academy at West Point, where a degree would give him a more grounded back-up plan. The economics major also sought out an additional perk unique to West Point: stipends and absurdly low-interest loans. In his junior year, in 2002, Cunningham took out the maximum amount for a loan and dumped the $25,000 into the booming stock market.

"Everybody was making easy money," he recalls, and the young cadet wanted a shot at making even more. He spent hours on his dial-up Internet connection learning money-making strategies that capitalized on the cheap and easy credit of the times. By Googling "credit help" or "increase credit score," he landed on message boards on which posters shared how-to tips to boost his credit score and dupe major banks and credit card companies into giving him cards with credit limits around $10,000 and $20,000 at low interest rates. He'd borrow from the cards, invest the money in stocks with payouts higher than his interest rate and pay back the debt with the profits.

Cunningham learned on these boards that the credit card companies, banks and the credit bureaus worked together to determine not only your credit score but how much credit to extend you and at what interest rate.

Cunningham had no problem spending all the money anyone would loan him, but he needed to pay off some of the accrued debt to maintain his credit score. He knew

his military loan did not get reported to any of the three major credit bureaus, Equifax, Experian and TransUnion. So, by paying off his credit card debt with money from that loan, he artificially maintained his credit score and continued to be approved for high credit. Sounds fishy, but Cunningham didn't feel that he was taking advantage of the system, at least not anymore than the next guy or the brokers and bankers at the time.

"It's their system," says Cunningham. "I didn't make the rules. I'm just learning what the rules are."

Cunningham now had more than $100,000 in credit card debt, but he had a lot of money coming in as well. He was a big-time shareholder in one sub-prime lending company, Nova Star Financial, and for three years in a row he saw dividends as high as 20 percent for his investment.

Any money he was making went right back into the system. Those good times, of course, wouldn't last.

Not wanting to miss out on the easy money in real estate buying and selling, he bought two low-income four-plexes in Dallas in 2005, using a mortgage company for the loan. He put no money down, but the interest rate was high.

Then he got burned. The four-plex's seller wasn't completely honest about the occupancy of the properties. Cunningham's scheme disintegrated within six months. He was scrambling to make the mortgage payments at the high interest rate without any tenants. He knew it wouldn't be long until he couldn't make the payments and he would be foreclosed on. Somehow, he didn't despair.

"I remember one day I just got pissed," Cunningham says. "I'm running around trying to keep the ship afloat, and the banks don't care."

Cunningham had called the bank as well as the FBI to report the mortgage fraud committed by the seller, but nobody pursued his case.

"The regulators, the FBI, they don't care. So, why should I care?" he says.

The Dallas properties were foreclosed, and his obsessively maintained credit score seemed wrecked. Cunningham returned to the online credit board for help. This time, however, he wasn't looking to add an artificial shine to his credit score, he was

looking for a way out of the ashes. Cunningham discovered a whole other world of consumer-generated knowledge. This was a rogue group of disgruntled consumers who were trying to save themselves and their credit by filing lawsuits when the collection industry screwed up the mechanics of debt reporting and collection. What he found was an instrument not of repair or reconciliation, but of vengeance.

"All the conventional wisdom, all the right people say, 'Pay your bills on time and work with your creditors,'" Cunningham says, recalling his thoughts at the time. Yet he had discovered a new set of people who posted their credit reports on line and their successful lawsuits, showing how much money they won in settlements that simultaneously removed a bad debt from their credit report. "I said, 'Maybe there's another way.' Again, just revolution. I never even thought about it."

The knowledge on these boards originated from consumers testing the boundaries of the credit system through their own experiences. The nature of this information, from the beginning, was a mixture of anarchistic tendencies, vengeance and greed. Now the wisdom of the boards has been distilled into an e-book published in January. *Debtsmanship* was written by Steven Katz, a former New York debt collector turned consumer advocate, who now lives in Phoenix. In 2005, Katz founded a message board called "Debtorboards," with the slogan "Sue your creditor and win!"

Katz doesn't believe that people are morally obligated to pay back their debts. That notion was invented by debt collectors as a way to beat people into submission, he says. "Bill collectors would love for you to send them a check and then explain to your kids because you have the moral obligation to pay your debt they're not eating this week," he says. "But they don't see the moral obligation to feed your children or yourself.

"People are brainwashed to think that paying a credit card is more important than paying for the necessities of life," Katz says. "If you're in a position where you have to make a choice, my argument is food, clothing and shelter come first... Nobody ever went to hell for not paying a debt."

"Fight back" is the take-away message from a visit to Debtorboards, which is intended to help consumers who wish to file lawsuits without the help of lawyers. Debtorboards outlines steps consumers can take to deal with bothersome debt collectors. For example, if a debt collector is only bothering you, you could send

them a letter or sue them. However, if you're so far in debt that you see no way out but bankruptcy, then you can check out the board's "frustrating the skip tracer" technique. There, you'll find tips on how to run and hide from a collector.

Another Debtorboards user is 29-year-old Daniel Smith, who lives with his fiancé outside of Seattle, Washington. Early in 2009, he tried to obtain financing for a home, but was turned down by Bank of America. He soon discovered that an old girlfriend had put his name on her bank account before she fell into massive debt. He wrote angry letters to the bank, but nothing changed. He sat down at his computer and typed in "Bank of America" and "Fair Debt Collection Act" and soon landed on Debtorboards. "I spent hours upon hours upon hours on there," Smith says. "The big epiphany is I'm a little guy but I've got a voice and I'm going to use it."

Like Cunningham, Smith now armed himself with voice recorders and began keeping meticulous financial files. His file cabinet grew quickly. "I mean there's nothing I don't document now and that's probably the best thing a consumer can do."

Smith is an Army vet, an EMT, and a project manager for a construction company. He doesn't advocate stiffing the original creditor on the bill. In fact, Smith will often pay the original creditor, but still go after the violating collection agency.

"The standard line from collection agencies is always, 'Oh, gosh, no, we never violate.'...For the most part, the reality of it is you can sit down and find violation in almost every collection attempt made in America."

Cunningham insists that the court system ignores lawsuits over frivolous violations. His cases, he claims, are built on true screw-ups. Cunningham won his first lawsuit, after all, after a collection company threatened to garnish his wages and put a lien on his house, both violations of Texas law.

Although that first lawsuit was filed with the help of a consumer rights lawyer, Cunningham has been filing on his own since then. Once he saw that the entire amount of the original settlement was upward of $3,500, and he only got $1,000, while his lawyer pocketed the rest as payment, Cunningham was motivated to go pro se.

"I remember seeing the $3,500 and thinking shoot that's a lot of money, and I'm only getting a grand, so maybe I can do a little better than that if there is a next time."

Cunningham made sure there'd be a next time. A company was trying to collect on an outstanding utility bill. They threatened to send this debt to the credit bureaus and wreck his credit score. He ended up paying the utility company the money he owed, but sued the collection company because of how they threatened and harassed him for the debt. The case earned him close to $3,500.

He was fast becoming one of the most hated debtors in Dallas, and part of an especially loathed minority of debtors in the country.

Cunningham returned to Texas from a year of active duty with the Army in late 2007, and moved to Dallas. He continued filing lawsuits against debt collection agencies, and he became ever more active on the message boards, holding long conversations about the state of the country with his online pals. In the meantime, he noticed that Debtorboards founder Steven Katz had created a new thread titled "The list you want to be on." Here, Katz reported that a new company had appeared that was dedicated to aiding collection companies scrub their database against repeat FDCPA litigants, like Cunningham.

Cunningham toyed with the idea of suing them. After all, he thought, if they were working with the collection industry and the credit bureaus (FDCPA Case Listing Service partnered with TransUnion in 2009), then the companies sounded like credit reporting agencies to Cunningham, which would mean they would have to abide by certain credit reporting laws. Cunningham wrote to FDCPA Case Listing Service asking for a copy of his credit report (by law, a credit reporting agency must provide a consumer report if asked for one). Instead of a report, however, Cunningham found a lawsuit against him in his mailbox filed in May 2008 in Atlanta federal court. It alleged: "The defendant subscribes to and makes postings to a Web site in which consumers share information and promote litigation against the collection industry...The defendant has now conspired with others on the internet to incite civil litigation against plaintiff for the exclusive purpose of extorting money from the plaintiff."

FDCPA Case Listing Service asked the court to declare that they are not a consumer reporting agency and not subject to the Fair Credit Reporting Act. To Cunningham, this was a clear attempt to silence him. Cunningham filed a motion to dismiss the case. For one thing, filing the suit in Atlanta was improper venue, Cunningham wrote. They should have sued him in Texas. Furthermore, since Cunningham hadn't

actually sued the company, the company had no valid reason to sue him. The court sided with Cunningham.

WebRecon offers a similar but expanded service to FDCPA Case Listing Service. Rather than only track FDCPA cases, WebRecon makes an effort to track FCRA, TCPA, and state and local cases, as well. WebRecon is headed by Jack Gordon out of Michigan. Gordon ran his own third-party collection agency for years until a spate of FDCPA lawsuits in 2008 forced him out of business. He is familiar with Cunningham's type.

"This is definitely, if I can use a really strong word, a cesspool," Gordon says. "The overwhelming majority of these suits are not pro se. Now when you're focusing exclusively on pro se, I think you're getting into a little bit of a different area. I've spent time personally on some of the Web sites that a lot of pro se litigants frequent...I would have to say they are far more radicalized element of society, and there's certainly I think reason for concern.

"You're dealing with somebody who's looking for an opportunity. They revel in either getting opportunities or making opportunities to try out everything they're learning online. That's hardly an exaggeration," he says, laughing. "It's really an experience spending time there!"

Gordon may have a personal vendetta against Cunningham types, but so do others who represent the collection industry.

ACA International is the largest trade group representing third-party debt collection agencies. Tom Morgan is the Texas executive director for ACA International and he believes that FDCPA lawsuits will continue to rise as more and more people in this economy can't pay their debts. He views the agencies as a kind of indirect victim in the rising tide of consumer fury and desperation.

"While our members do get filed on from time to time, the FDCPA is so highly technical there are quote, technical, violations that can occur," Morgan says. "You know, somebody makes a mistake. But there's no intent, OK, to defraud people or to violate the law.

"Usually it's settled because the agency says, Uh, we didn't intend to do that. Our collector said the wrong thing and we fess up and say, 'I didn't mean to do it but I did it...

"And this is where some of our members feel aggrieved in that because there's a hyper-technical opportunity for a plaintiff's attorney to come in, it is cheaper to settle than to fight it. And sometimes they'd really like to fight it because they don't believe they are guilty, but it's so costly, so they settle it."

Thomas Stockton is on the executive committee of ACA International and also the founder and chief executive of a local collection agency, CMI. (Cunningham is in the midst of an ongoing legal dispute with CMI, which picked up his outstanding Time Warner debt.)

"In my opinion there are two reasons why there are more suits being filed today," Stockton says. "You've got the Internet sites...And, it's easy to file suit. You can do it on your own. You don't have to have an attorney."

Stockton says, however, that the better question is how many of the suits are successful.

The answer depends on how you define success. Debt collectors point to all the settlements they are forced to make because it's cheaper than fighting a frivolous suit. To Cunningham and other pro se litigants, any payment is a victory.

"Does if make sense to spend $10,000 to win this suit or pay the litigant $500 to settle?" says Stockton. "Depending on the situation, it becomes a business decision at some point."

Cunningham filed his lawsuit against Credit Management, L.P. (CMI) in August 2009, claiming violations in the amount of around $200,000—by far his gutsiest lawsuit yet. The original bill for Time Warner was for $79.84 back while he was living in El Paso. Cunningham admits he may have missed the last payment for the Time Warner bill. Time Warner, rather than validate the bill, sent his account to a collection agency. That was ACS, which Cunningham sued for violating his Texas rights, as well as federal law. ACS closed his account, but the debt wasn't forgiven. Instead, CMI picked it up.

CMI started calling Cunningham's cell phone with an auto-dialer, leaving prerecorded messages to please call them immediately regarding an outstanding bill. Cunningham told them to stop calling his cell phone on the auto-dialer, but they continued, each call a violation of TCPA. As Cunningham disputed the bill, CMI by law is also expected to cease collection efforts. So every call was another violation of

FDCPA. Plus, to this day, CMI has not provided Cunningham with anything from Time Warner, he says, either a bill or a letter, verifying that he in fact owes anything, another violation of the law. "I don't really know if I owe it," Cunningham says. "If I do, send me a bill. If they don't want to send me a bill, I don't think I need to pay 'em."

CMI has countersued Cunningham, and even asked the court for a protective order from Cunningham: "Plaintiff Craig Cunningham (herein "Plaintiff") has filed suit against a business, Credit Management, LP (herein "CMI"), and twenty-seven (27) of its employees in their individual capacities," reads the motion for a protective order filed in Northern District of Texas in December 2009. "Defendants move for a protective order to protect Defendants from the annoyance, oppression, undue burden and expense of objecting and responding to improper, repetitive and irrelevant discovery requests."

In December, Cunningham was called in for a six-hour deposition, the longest he's ever sat through, at which the lawyers printed out pages of his online comments to accuse him of acting like a lawyer. Plus, CMI insists that they didn't violate any laws and that Cunningham is acting in bad faith. Although the company already offered Cunningham money to settle the case, Cunningham refused, asking for much more than the "industry standard," as Cunningham calls it, of $3,500.

"If they don't pay a bunch of money, if they don't feel pain, they will not change," he says.

A big win in his case against CMI could go a long way toward clearing Cunningham's debts—if he ever chose to pay them, that is.

"I took outsize risks, and I got burned," he says. "When myself and some other fellow small investors were losing their assets, nobody cared."

Up until now, everything was about making easy money for Cunningham. Now, it's about justice—or at least what he sees as justice.

"When you or I make a mistake, they say, 'Hey, tough nuts, be smarter next time, you know, bad luck, didn't work out for ya," he says. "When the fat cats on Wall Street make a mistake, they say, 'Oh, national emergency! We've got to bail these guys out."

Since nobody has showed up to bail Cunningham out, he's decided some of the $100,000 debt he once amassed will never get paid back.

"I already paid them off," he says. "The government took my money without asking me and gave it to the banks. And since I owe the banks money, but they already got my money from the government, I say we're even."

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EXHIBIT D

Smile, Dial and Trial? Why the Next Call Might be Your Worst Nightmare

October 26, 2016 | By: Sean Murray

This article is from deBanked's Sept/Oct 2016 magazine issue. To receive copies in print, SUBSCRIBE FREE

Aaron Smith sued a merchant cash advance company in the United States District Court of Southern California earlier this year for allegedly making unsolicited calls to his personal cell phone registered on the Do-Not-Call list. His name has been changed for this story because he's a vexatious litigator, even landing on an official list of vexatious litigants by the State of California in the early 2000s thanks to his tendency to file harassing lawsuits. But that's not all, Smith has a criminal history that includes stalking and extortion and he's served time in prison for his role in a multi-million dollar mortgage fraud RICO conspiracy.

These days he's suing small business financing companies for alleged violating phone calls, at least five of which we could identify through San Diego court records just over the last several months. Two of the suits appeared while we were researching this story, which means that there could probably be even more by the time that you are reading this.

Smith presumably runs a business as his website has and still continues to advertise services to consumers. But if you are not an existing customer or have not been referred by an existing customer, his website warns that attempting to contact him by any means is a violation. Suffice to say that *deBanked* did not attempt to contact Smith to get his side of the story.

In one complaint, Smith claims that the phone number receiving the unsolicited calls is a "private personal cellular telephone." To his credit, a cursory glance of his business website does not appear to list any phone number for it at all. However, the Internet Archive Wayback Machine which allows users to see archived versions of web pages across time, revealed that very same phone number being prominently displayed on his business website for several years including up to as recent as September, 2015, after which it was removed. There's reason then to question if Smith might be up to no good.

While the merits of Smith's claims will be up to the courts to decide, his background doesn't inspire confidence. Countless other plaintiffs using the Telephone Consumer Protection Act (TCPA) to file lawsuits have colorful backgrounds in their own right, a lot of which can be found using Google. But a suggestion relayed by some of our readers is that plaintiffs appear to be doing what they do for profit, not because they have been harmed by the calls they allegedly receive. *deBanked* decided to conduct its own independent research on this issue.

SUING FOR PROFIT?

That's just what the headline of a WDSU TV story alluded to in its coverage in 2004 of a stay-at-home Pennsylvania dad named Stewart Abramson. Titled, Man Who Turns Table On Telemarketers Turns Profit, Too, quotes Abramson as saying, "First, I'll write them all and tell them that I'm willing to settle for the minimum statutory damages per call, which is $500, but if they don't want to settle, then I'll file a civil complaint."

In a case he won against a debt consolidation firm for calling him with a prerecorded message, Abramson reportedly said, "It would have made sense for them to pay the minimum damages due me, but they wanted to put up a fight. I don't mind. I'll take more money."

Abramson continued to say at the time that he felt empowered by Congress to stop this illegal activity and that he was just doing his part and making a little money for doing so. More than a decade later, Abramson's name is still showing up as a plaintiff in TCPA cases, including in at least one complaint discovered by *deBanked* against a small business financing company.

According to court records, the defendant contended that Abramson was "in the business of suing entities for violations of the TCPA," an accusation the judge ruled irrelevant to the particular matter at hand.

Michael Goodman, a partner in the Washington DC office of law firm Hudson Cook, who was not asked about this case specifically, said in an emailed interview that generally accusing someone of being a serial plaintiff might not really help.

"Accusing a plaintiff of being a serial or professional TCPA plaintiff is unlikely to affect the outcome much, if at all," Goodman said. "While there are outliers, the general rule is that the court will assess the merits of each case individually and will not 'punish' a plaintiff for being a serial or professional TCPA plaintiff."

An email address for Abramson could not be located and given the special circumstances of his history, we did not attempt to call him.

If ever there was a TCPA celebrity however, it'd be Diana Mey, a self-described stay-at-home mom who started wrangling with telemarketers in 1998 after what her website described as "a series of intrusive telemarketing calls by a Sears affiliate pitching vinyl siding."

She's an important figure in TCPA history, not just because she's been awarded millions through her lawsuits but also because she helped draft the FTC's rules. Reports show her participating in FTC-hosted telemarketing forums in 2000 and 2002 and her name even appears in the footnotes of the FTC's Telemarketing Sales Rule entered into the Federal Register in 2003. And so we followed Mey's story online, noting that she has actually become famous for her pursuits, even appearing in a TV segment for ABC News in 2012. Her website at www.dianamey.com teaches others how they too can pursue monetary damages from telemarketers that engage in illegal practices.

"The first step is to write a formal 'demand' letter to the president of the company, stating that the letter is a formal claim for money […] for violations of the Telephone Consumer Protection Act of 1991," her website advises.

It was quite a surprise then to discover that this Diana Mey was the same Diana Mey captioned as a plaintiff in a current case against a small business financing company. Almost two decades after her first experience, she is still filing lawsuits for alleged telemarketing violations.

Mey declined to respond to our questions even though they were not about that case, citing pending litigation.

"I'm a mom and I'm a housewife, and I'm an accidental activist," Mey said in that 2012 ABC News interview. Others have referred to her as a "private attorneys general," defined as someone who brings a lawsuit considered to be in the public interest.

That same title has been attributed to one Robert Braver who is the man behind www.do-not-call.com which launched in 1998 as "a consumer's resource for stopping unsolicited telemarketing calls." His comments appear in FCC records and he was also featured in a Dateline NBC special in 2002 about a new telemarketing scheme that was alarming consumers. Suffice to say Braver has been a consumer proponent in this area of the law for a long time, a role that has not come without risks.

According to Braver, the attorney for one telemarketer he sued, arranged to have his (then) elementary school age kids stalked and photographed, a terrifying ordeal that was only made worse after the attorney allegedly sent him a fax bragging about it. But he has continued on, noting that while he has gotten much fewer junk faxes, telemarketing calls have gotten more out of hand over time, to the point where they're disruptive to everyday life.

"My wife is a middle school teacher," Braver said. "She doesn't work in the summer and gets home before I do when she is teaching. She typically leaves her phone in her purse in a spot in the kitchen and hangs out in in the den or back patio. It's gotten so bad at times that when I need to call her, she doesn't get up and run to look at her phone when it rings, and I have ignored unknown calls on my cell and let them go to voicemail, only to find out later that they were legit calls."

And sometimes it's a total mystery how they even get added to a list. "We have two teenage boys still at home, and they have cell phones too. Somehow my youngest son's cell number got on a marketing list for student loan debt relief, and was getting 10-15 calls a day for a while," Braver explained.

Contrast that with a story that appeared in the Dallas Observer in 2010 about one Craig Cunningham, another celebrity-like TCPA figure who still has active cases pending, public records reveal.

According to the story, Cunningham stays at home on a "dumpy couch" to wait for a particular type of phone call, "one from a representative of a debt collection agency or a credit card company, whom he'll try to ensnare like a Venus fly trap," the Observer reported. Cunningham is said to have learned his trade from online message boards, where we decided to look next to see if there was anyone out there indeed talking about TCPA lawsuits for profit.

"IT'S KIND OF HARD TO CONVINCE A FEDERAL JUDGE THAT YOU ARE A VICTIM WHEN YOU ARE TRYING TO FIND A PUBLISHER FOR A BOOK CALLED CREDIT TERRORIST"

On May 25, 2014, a participant using the pseudonym codename47 published a thread titled, TCPA enforcement for fun and for profit up to 3k per call on fatwallet.com, the exact kind of salacious headline that defendant companies have probably imagined in their worst nightmares. Codename47 has a big fan base it seems, with one user even suggesting to him that he should create and sell a "sue telemarketers" package so that people could do what he does for side income.

Codename47 is Craig Cunningham, who we reached out to with some questions through the fatwallet forum. He declined to answer them, citing pending litigation and the fact that he no longer does interviews.

One user on fatwallet in 2010 said of Cunningham, "It's kind of hard to convince a Federal judge that you are a victim when you are trying to find a publisher for a book called CREDIT TERRORIST."

WAIT, WHAT?

It now being six years later, no such book can be found in Amazon or through Google. A link to where purported information on it once was leads to a page-not-found error. The Archive Wayback Machine however, produces an interesting find.

Tales Of A Debt Collection Terrorist: How I Beat the Credit Industry At Its Own Game and Made Big Money From the Beat Down is the title of a proposed book in 2010 by Craig Cunningham and Brian O'Connell. O'Connell is a writer/content producer for TheStreet.com and a well-known and widely published author. He tells *deBanked* that he wished he had written it with Cunningham but that they didn't move forward with it.

But the proposal remains, including the description of Cunningham as being a highly sought after expert in the field of debt collection "revenge" industry.

Outside of fatwallet, the only other real mention of the proposed book could be found on a website called debtorboards.com. Lenders might find the website horrifying considering the forum's tagline is "Sue Your Creditor and Win." With more than 20,000 members and nearly 300,000 posts, the forum has an entire section dedicated to TCPA. Legal strategy is a dominant topic and it's abundantly obvious that people are working together to stop companies from calling them.

Sadly, it's not all innocent consumers out there. For example, the TCPA has invited abuse to the point where at least one person admitted to buying cell phones to maximize the chances of getting illegal calls so that they could sue. That's what serial plaintiff Melody Stoops said in a June 2016 deposition as part of her case against Wells Fargo in the Western District of Pennsylvania.

> Q. Why do you have so many cell phone numbers?
> A. I have a business suing offenders of the TCPA business — or laws.
>
> Q. And when you say business, what do you mean by business?
> A. It's my business. It's what I do.
>
> Q. So you're specifically buying these cell phones in order to manufacture a TCPA? In order to bring a TCPA lawsuit?
> A. Yeah.

Purchasing at least 35 phones, she even went so far as to register them with out-of-state area codes in places she thought were more economically depressed and therefore more likely to get violating calls. Stoops sent out so many pre-litigation demand letters and filed so many lawsuits that she could not

be certain how many she sent out or how many suits she was in, according her to deposition.

Apparently Stoops found the line of legal perversion and crossed it. On June 24, 2016, the judge ruled in favor of Wells Fargo because she wasn't injured by the calls she received, nor were the injuries she claimed within the "zone of interests" the law was meant to protect. "It is unfathomable that Congress considered a consumer who files TCPA actions as a business when it enacted the TCPA," he wrote.

A TURNING POINT?

Hudson Cook law partner Michael Goodman said, "the impact of *Stoops v. Wells Fargo* is still to be determined, but I would say that it is significantly fact specific and therefore unlikely to result in large-scale changes in TCPA private actions. Stoops put a lot of effort into becoming a magnet for calls that could violate the TCPA. In many TCPA cases, consumers do not need to try that hard to receive a call that could prompt a TCPA suit."

Stoops was pursuing calls while most of the advice and discussion uncovered online is about what to do if you get a call, not about how to create the calls in the first place. Even debtorboards, for example, is a registered non-profit, keeping consistent with its image as a consumer empowerment tool.

If the tide is turning though, it's not in a direction favorable to telemarketers. Goodman said that "in July 2015, the FCC announced a new interpretation of the TCPA's 'autodialer' standard that significantly expanded the definition and introduced a lot of unnecessary uncertainty as to what is and is not a regulated autodialer. That interpretation is currently being challenged in court. There's a bit of a trend among courts requiring plaintiffs in autodialer cases to do more than simply allege that they were called with an autodialer. These courts, possibly in an effort to frustrate TCPA autodialer cases, are requiring plaintiffs to include circumstantial evidence of dialer use in their complaints: dead air, hang-up calls, generic messages, and so on. But the TCPA's penalty structure still encourages suits that should not be brought."

FCC Commissioner Ajit Pai, who was appointed by President Obama, voiced dissent to this new interpretation, echoing Goodman's comments that it encourages frivolous suits.

An excerpt of Pai's official dissent is below:

> "Some lawyers go to ridiculous lengths to generate new TCPA business. They have asked family members, friends, and significant others to download calling, voicemail, and texting apps in order to sue the companies behind each app. Others have bought cheap, prepaid wireless phones so they can sue any business that calls them by accident. One man in California even hired staff to log every wrong-number call he received, issue demand letters to purported violators, and negotiate settlements. Only after he was the lead plaintiff in over 600 lawsuits did the courts finally agree that he was a "vexatious litigant."
>
> The common thread here is that in practice the TCPA has strayed far from its original purpose. And the FCC has the power to fix that. We could be taking aggressive enforcement action against those who violate the federal Do-Not-Call rules. We could be establishing a safe harbor so that carriers could block spoofed calls from overseas without fear of liability. And we could be shutting down the abusive lawsuits by closing the legal loopholes that trial lawyers have exploited to target legitimate communications between businesses and consumers.
>
> Instead, the Order takes the opposite tack. Rather than focus on the illegal telemarketing calls that consumers really care about, the Order twists the law's words even further to target useful communications between legitimate businesses and their customers. This Order will make abuse of the TCPA much, much easier. And the primary beneficiaries will be trial lawyers, not the American public."

The FCC reviewed 19 individual petitions on the matter, some of which included relatively recent comments from the individuals we've mentioned so far. The appearance is that the FCC has collaborated with some individuals continuously over time or that individuals have collaborated continuously with the FCC. It might not matter though. Michael Goodman says that "the TCPA gives distinct enforcement rights to the FCC as well as persons who receive a call that violates the statute."

"It isn't really a matter of whether a particular violation should be handled by the FCC or privately," Goodman adds. "Private plaintiffs have independent incentive to sue thanks to the TCPA's penalty structure, and, compared to the FCC, private plaintiffs do not have to be as choosy in picking targets for actions."

And what are the violations and penalties exactly? Goodman explained as follows:

> "Depending on the specific TCPA provision at issue, private actions may be brought by individual consumers as well as businesses. The autodialer and prerecorded message provisions can be enforced by individuals and consumers, and they can sue based on a single improper call. For these provisions, the TCPA directs courts to award $500 per violation; courts do not have discretion to award a lesser figure. Courts do have discretion to award up to three times that amount (i.e., up to $1,500) per violation for willful or knowing violations. The TCPA's do-not-call provisions are enforced by individual consumers, and this type of action requires more than one unlawful call in a 12-month period. For the do-not-call provisions, courts do have discretion to award less than $500 per violation (and can triple the penalty for willful or knowing violations).
>
> The FCC has authority to obtain penalties of up to $16,000 per day of a continuing violation or per violation. FCC rules establish factors for the FCC to consider in calculating a proper penalty figure, including the nature of the violation, history of prior offenses, and ability to pay."

"The base $500 per violation in statutory damages that consumers are entitled to hasn't increased since the TCPA went into effect in 1992," said activist Robert Braver. "This should be increased, especially since the TCPA does not allow for the recovery of attorney's fees."

Goodman said that private actions are much more common than FCC enforcement actions. That much is obvious. Private actions are becoming all too common in the small business financing industry where so many cases were uncovered through public records that we lacked the resources to follow them all.

More lawsuits might not be the cure though, according to Braver. He said that "more egregious telemarketing (massive robocall campaigns) should be criminalized on the federal level," adding that "it's one thing for an unscrupulous telemarketer to allow their shell corporation to have an uncollectible money judgment, but it's another thing when individuals can wind up with a felony conviction on their records, and possible jail time."

While that suggestion might antagonize telemarketers, Braver said that his cell phone, which is listed on the Do-Not-Call-Registry, can receive as many as 4-5 telemarketing calls per day, generally robocalls.

Whether plaintiff allegations from cases in this industry are true or not, legal fees over TCPA cases have continued to be an expense that many small business financing companies are contending with. Those costs have a way of being tacked on to the price of financing for small businesses that need capital, making it a lose-lose situation.

"MORE AND MORE MERCHANTS ARE USING THEIR CELL PHONE AS THEIR BUSINESS PHONE"

One marketing company in the industry who had to remain anonymous because settlement negotiations at the time were likely to include a non-disclosure clause, posed the question, "how are you supposed to help small businesses if you can't actually call small businesses?"

"More and more merchants are using their cell phone as their business phone," he argued. "The TCPA regulations need to be changed so that a merchant can't claim his cell phone is his business phone one minute and his personal phone the next."

Indeed, the motivations, facts and alleged damages in TCPA complaints are not always clear. And even though the plaintiffs don't always win, the laws as they are, can make telemarketing difficult no matter how careful one is.

Still dialing for dollars these days? Just know that some folks may be just a little too happy that you called them. And for all the wrong reasons.

Good luck out there.

Last modified: December 18, 2016

Sean Murray is the founder of deBanked, a 10-year veteran of the merchant cash advance industry, a casual Lending Club and Prosper investor, the co-founder of Daily Funder, an alternative lending speaker, consultant, writer, and enthusiast. Connect with me on LinkedIn or follow me on twitter.

Category: Business Lending, Feature, Magazine10, merchant cash advance

EXHIBIT E

The content below is a thread from Fatwallet forums. Print document.

Thread Title: TCPA enforcement for fun and for profit up to 3k per call

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Date Posted: May/25/2014 12:38 PM
Posted By: codename47
Rank: Senior Member
4K

Just wanted to get some feedback on the latest experiences people are having with automated calls. So, the TCPA (telephone consumer protection act 47 usc 227) regulates such calls, and generally without "express written consent" or an emergency purpose.

TCPA updates:

Now, previously, before October 2013, there was an implied, express written consent where if you gave your telephone number to someone, it was considered by some courts to be "consent" or was allowed under an "established business relationship", but that all changed in the fall of 2013, so here are have a requirement for unambiguous written consent required and no established business relationship loophole as of October 2013, because the FCC says so. http://www.kleinmoynihan.com/publication/new-tcpa-rules-effectiv...

Text messages count too as prohibited methods of communication again without clear written consent. These are super easy to enforce as you have almost all the evidence you need to find out the other party's identity and bring them to court.

Also, just to be clear the company that the calls are being made for are vicariously liable for the actions of the telemarketing company. So, if a company calls and is trying to sign you up for Dish network or Caribbean cruise lines, and they are Joe Schmoe telemarketing enterprises LTD, and they fold up, declare bankruptcy, and move overseas, you aren't out of luck and can generally go after Dish network for the calls that were made on their behalf as they were the ultimate beneficiary of the illegal actions. Otherwise, any company could hire an illegal telemarketer, and claim innocence as they didn't directly make the calls themselves.

So, I am looking at switching service providers with my cell phone as I can't port my old number, and holy effin crap, I get a lot of pre-recorded calls and for no reason on the new number. I get quite a few on the old number too, but that is in the process of being rectified...

Some other interesting stuff I found is that at least in the 6th circuit COA at least, TCPA calls have a max damage amount of potentially 3k per call. Now, some lazy lawyers will cite the $500 to a max of $1500 per call, but for people who are willing to do a little research, they may find a few gem's such as Phillip Charvart, a personal hero of mine along with Edward C lawson. If you think I have a propensity to sue people you should see Phillip Charvart laying down the law. I read somewhere that he filed like 60+ lawsuits and won the vast majority of them while establishing a lot of good caselaw. For example, in one case, Charvart was awarded $73k. http://do-not-call-complaints.com/blog/tcpa-monetary-awards-char...

The 6th Circuit held in another case:
“a person may recover statutory damages of $1500 for a willful and knowing violation of the automated-call requirements, § 227(b)(3), and $1500 for a willful and knowing violation of the do-not-call-list requirements, § 227(c)(5) – *even if both violations occurred in the same telephone call*.” This is in Charvart v NMC llC:
http://www.sixthcircuitappellateblog.com/uncategorized/sixth-cir...

Therefore, if you get a pre-recorded call that fails to provide the name/entity for which the calls are being made, or the phone number or address of the entity which the calls are being made on behalf of, fails to honor a DNC request or fails to have a DNC list, you have one category of violations which can run $500 to $1500 *per call*. If you have a pre-recorded or automated call that is a second category of violations that can run $500 to 1500 *per call.*

Now, I know some have said they have trouble identifying the other party, so you can feign interest and gather some identifying information that way. Alternatively, I've found that a large number of the calls I get a least,

come from one source: peerless networks. Apparently they provide telemarketing services for many companies, and they are frequently violating the law. So I do a reverse search on whitepages.com, which takes like 5 seconds, identify the service provider, and then subpoena the information most likely from Peerless networks, which apparently gets quite a lot of requests for this information as they state the different categories of information available and how to request it. Key thing is that they can provide ALL subscribers that have called a certain telephone number, so perhaps if you missed one or two companies in the last 4 years, this company will most likely have a complete set of records for just the calls from subscribers to you. They can also provide the subscriber contact information.

http://www.peerlessnetwork.com/contact-us/law-enforcement-and-su...

In summary:

Explicit in writing opt in is required.

Text message marketing is just stupid, but there are apparently a lot of stupid people in the world

Peerless networks likely has almost all the information you need to carry a lawsuit.

you can recover somewhere between 1k and 3k per call

Parent/beneficiary companies are vicariously liable and there are a lot of stupid/lazy marketing departments in the world

Many of these companies leave robocall voicemails, which is just stupid as well.

You are a private attorney general, because congress said so

Date Posted: May/25/2014 12:38 PM
Posted By: [redacted]
Rank: New Member

Date Posted: May/25/2014 1:03 PM
Posted By: [redacted]
Rank: Senior Member

how do you get/keep evidence of a robocall? Often I get a message to the effect of, "press 1 to be connected to the telemarketer".

Is it ok to record the robocall,say from California, and not a 1 party state like Texas?

Date Posted: May/25/2014 1:30 PM
Posted By: [redacted]
Rank: Senior Member
4K

Got a call yesterday from "card member services" that showed my own phone number in the caller ID.

Date Posted: May/25/2014 1:32 PM
Posted By: [redacted]

EXHIBIT F

The content below is a thread from Fatwallet forums. Print document.

Thread Title: Codename47 vs. National Credit Solutions

Date Posted: Jun/03/2009 11:13 PM
Posted By: [redacted]
Rank: Thrifty Member

Around March I pull my credit report and I notice my score has dropped 91 points on Experian. I have gone from a 793 to a 702.

Under Collection Accounts I now have 1 new record. The company is NCS. If you do a search on google you will find multiple people who this happened to. LINK

I have never been contacted by this company. I find some templates online and send them my first letter. They balk and send me a standard form letter saying here is my notice that I owe them money.

The letter they mail me says I owed BMG $20 but with interest and fees I now owe $173.

The account has now changed from closed on my credit report to "Derogatory." I shoot them another template letter and get a second letter giving me verification of the debt saying who the account is from, who owns it and that I am in collections with NCS and to call so and so at extension 303. The company is ignoring these templates I have found online, probably because they see them everyday....

Now that I feel I have only have a few options left
Take the hit, keep sending template letters, pay them or send codename47 a PM asking for some friendly advice.

I decide on the PM.

He replies and steers me in the right direction. I type up the following letter to NCS based on his advice.

... said:

> To Whom It May Concern: This letter is being sent to you in response to a notice sent to me on 4/20/09. I will need to see the contract that I signed with BMG or you saying I am responsble for this debt. And the terms and conditions associated with this debt. I am requesting this based on you reporting the debt. I am enacting the FDCPA, Rosenthal debt collection act, and Fair Debt collection practices acts. National Credit Solutions needs to prove I owe this debt. At this time I am rejecting your validation as insufficient.

On may 28, 2009 I received a letter saying NCS has closed my file since the do not own this account and they are remitting it back to their client for their further review. In addition, NCS is ceasing to collect on this acct and will request that the credit bereaus be updated accordingly.

Thanks codename47! **Message edited by:** [redacted] **on 2009-06-03 23:16:07 CDT**

Date Posted: Jun/03/2009 11:13 PM
Posted By: [redacted]
Rank: New Member

Quick Summary is created and edited by users like you... Add FAQ's, Links and other Relevant Information by clicking the edit button in the lower right hand corner of this message.

Date Posted: Jun/03/2009 11:15 PM
Posted By: [redacted]
Rank: Senior Member
2K

I love these stories. Delicious.

Date Posted: Jun/03/2009 11:47 PM
Posted By: [redacted]
Rank: Member

I just copied that statement in case for future use. Thanks. [redacted] and c47

Date Posted: Jun/03/2009 11:47 PM
Posted By: [redacted]
Rank: Cranky Member

Green for CN47!

[redacted], it might benefit some members if you will fully paste the letter you sent them (removign personal info of course). otherwise I'm afraid CN47 will be peppered with PM's :-)))

Date Posted: Jun/04/2009 12:03 AM
Posted By: codename47
Rank: Senior Member
4K

and this is just the happy ending. I can't wait until someone sues and gets paid.

Date Posted: Jun/04/2009 12:11 AM
Posted By: [redacted]
Rank: Tired Member

Much green! I'm currently in the midst of a dispute. CA could not identify my file and had me send my SSN.:confused; I'll post back here if anything interesting happens.

Date Posted: Jun/04/2009 12:21 AM
Posted By: [redacted]
Rank: Thrifty Member

[redacted] said:

> Green for CN47!
>
> [redacted], it might benefit some members if you will fully paste the letter you sent them (removign personal info of course). otherwise I'm afraid CN47 will be peppered with PM's :-)))

Here is the actual letter (via certified mail) I sent them:

EXHIBIT G

Rights news/offering detail

. . . . . .

<< return to rights board

Tales Of A Debt Collection Terrorist: How I Beat the Credit Industry At Its Own Game and Made Big Money From the Beat Down.

Apr. 15, 2010

Author: Craig Cunningham and Brian O'Connell

Category: Non-fiction: Business/Investing/Finance

Description: My name is Brian O'Connell, author of the top-selling books The 401(k) Millionaire and Generation E. I'm also a ghostwriter who has written for best-selling authors such as Jim Cramer, Roni Deutch, and Peter Schiff.

I write to you today as a representative of Mr. Craig Cunningham, dubbed the "Debt Collection Terrorist" by the national media. I am ghostwriting a book with Mr. Cunningham called Tales Of A Debt Collection Terrorist: How I Beat the Credit Industry At Its Own Game and Made Big Money From the Beat Down.

Mr. Cunningham's story is of one fed-up consumer who learned how to hit collection agencies where they hurt most – in the pocketbook. It's a step-by-step guide on how to catch creditors when they make a mistake - usually in aggressive bill collecting mode – and then making them pay for it.

The Work: In Tales Of a Debt Collection Terrorist, Mr. Cunningham details his personal experience in being hounded by debt collectors after falling $100,000 in debt after a failed real estate deal.

His back to the wall, Mr. Cunningham decided to fight back, learning the necessary language, loopholes and leverage needed to beat debt collectors and do the seemingly impossible – make them pay you and instead of you paying them.

The book details how, over the past few years, Cunningham has collected $20,000 in fines and penalties from debt collection agencies he beat in court over improper bill collection tactics, causing some collections professionals to not call him a private attorney general, but a "credit terrorist" – and he has the court records to prove it.

There is no other book like Tales of a Debt Collection Terrorist in the marketplace. Why? Because few people have done what Mr. Cunningham has done – turn the tables on one of America's most hated industry's – the debt collection industry.
The Back Story: Mr. Cunningham began turning on collection agencies back in 2005, when he faced two foreclosures and an avalanche of debt. He had borrowed $100,000 to buy some rental property in Houston, and invest in the stock market – in the highly volatile and soon-to-be-collapsed sub-prime mortgage securities market.

When the real estate market blew out, Cunningham was left holding the bag on his rental properties, and soon both were foreclosed. Other debts piled up and soon his phone was ringing off the hook from aggressive bill collectors looking for Cunningham to fork over the cash he owed. His back to the wall, he began scouring Internet credit message boards, and found that he could leverage federal and state laws against overly aggressive bill collectors in his favor.

The key was baiting the collections agent on the other end of the line and waiting for the agent to say something incriminating that crossed the line into what the law considered abuse. He began taping calls and soon had his first lawsuit against a security alarm company looking for $450 from an early termination fee.

According to DallasObserver.com, the conversation with the company's collection agency, Equinox Financial Management Solutions, went like this:

"Can you garnish my wages if I don't pay?" he asked.

"Yes," the voice on the other end of the line said.

"Can you put a lien on my house?"

"Yes."

Wrong answers. Turns out, Texas consumer rights laws are some of the most consumer-friendly in the country. And according to a federal consumer protection law, the Fair Debt Collection Practices Act (FDCPA), debt collectors are prohibited from threatening legal action that would violate

state laws. In this case, garnishing wages or putting a lien on Cunningham's house would violate the Texas Debt Collection Act.

Cunningham took the debt collection agency to court and won a judgment and a $1,000 payment. He spent more time digging into the language on key consumer protection laws like the Fair Debt Collection Practices Act, the Fair Credit Reporting Act (FCRA) and the Telephone Consumer Protection Act (TCPA).

Soon after he filed 15 successful lawsuits involving . . .

Pre-recorded calls to his cell phone (a TCPA violation)

The failure of collection agencies to look into his claims that his file was inaccurate (a violation of the FCRA)

Abusive practices by collectors (a violation of the FDCPA)

Today, Mr. Cunningham is highly sought after as an expert in the field of debt collection "revenge" industry. His step-by-step guidelines for fighting back against often hostile debt collectors is now being used by legions of consumers who – just like Craig Cunningham – have had their fill of obnoxious creditors and decided they're not going to take it any more.

How This Book Is Structured: Tales of a Debt Collection Terrorist is the ultimate answer to the question . . . "How can I fight back against debt collectors, and make them feel as miserable as they've tried to make me?"

Inside the book, every page is packed with information on how to beat debt collectors at their own game, including:

• Knowing the state-by-state laws that debt collectors must abide by
• Knowing where to go on the Internet for the most accurate, up-to-date legal cases where creditors lose in court – and how every consumer can use the same script
• The fine art of recognizing the "A-Ha!" moment – when a debt collection agent makes a mistake that violates consumer debt collection laws.
• How much money consumers can expect to win on a case-by-case basis
• What tools consumers should use to lay a

trap for debt collectors
• How to successfully win a case against a debt collector – before the case ever goes in front of a judge
• The 10 common mistakes that debt collectors make – and how to hold them accountable

Readers of this book will also enjoy a blow-by-blow description of Craig Cunningham's most successful cases, as well as benefiting from mistakes he made along the way to becoming America's top credit terrorist.

The book is also full of useful graphics and flowcharts revealing insights on some of the best-kept secrets in foreclosure investing. Current sample documentation is utilized to demonstrate the debt collection environment and the types of available information, while sample case studies are included to provided in-depth analysis and clearly illustrate concepts. We'll back everything up with easy-to-understand USA Today-type info-boxes, sidebars, and colorful industry profiles, and package it together in one lively, user-friendly book. The text will may also be packaged with a supporting CD ROM that contains useful debt collection protection tools, standard checklists, legal forms and consolidates the expert system flowcharts into an easy to read and follow format.
After finishing Tales Of a Debt Collection Terrorist, readers will walk away from the book with the tools and talent to radically change the way they look at debt collection practices investing, to view their once-fearful encounters with credit professionals in revolutionary new ways; and to look at the notion of fighting back against debt collectors and instead of asking "why?" ask "why not"?

Why This Book Will Sell: Tales of a Debt Collection Terrorist will blow the lid off the debt collection industry. It will show, in a clear, concise and compelling way, that consumers don't need to act as punching bags for bullying debt collection agents.

On the contrary, readers of this book will learn from Craig Cunningham that they can hit back hard, and that when they do, they can give debt collectors a taste of their own noxious medicine. In the process, the actual, physical act of reading Tales of a Credit Terrorist will be a cathartic, burden-lifting

experience that not only rewards readers financially, but physically and mentally, as well.

No doubt, Americans need a book that accomplishes that right now.

According to the Federal Trade Commission, debt collection was the No. 1 consumer complaint in 2008, above auto sales and home repair/reconstruction. The FTC gets more complaints about the debt collection industry than any other industry it regulates. For example, in the first six months of 2009, consumers filed 45,050 complaints with the FTC about third-party debt collectors — collectors who buy up the debt from the original lender. Those complaints are up 19 percent from the same period in 2008.

Make no mistake; those debt collectors are growing increasingly more emboldened. According to a 2009 Scripps Howard survey, 40% of respondents in a national Scripps Howard survey answered yes to at least one of the following questions:

• Has a debt collection agency ever threatened you with violence?

• Have you or your family ever received multiple calls from a debt collection agency, so many that it seemed to you to be harassment?

• Has a debt collection agency telephoned you or your family at inappropriate times of the day, such as before 8 a.m. or after 9 p.m.?

Thus, the attraction of a book with a first-hand account of how one American said "enough is enough" and beat the debt collection industry – again and again – at their own game, using their own rules against them.

The Debt Collection Terrorist is the road map that shows them how.

The Author: Craig Cunningham is America's most celebrated debt-collection fighter. His tireless work tracking the law-breaking practices of some of the country's most notorious debt collection agencies has been recorded in numerous media platforms, including The Dallas Observer, MainStreet.com, Consumerist.com,

Bargaineering.com, Businessweek.com, Bankruptcy.org, and Newswire.com.

Thanks in advance for your interest in Tales Of A Debt Collection Terrorist: How I Beat the Credit Industry At Its Own Game and Made Big Money In the Process.

We'll be happy to follow up with a formal book proposal at your earliest convenience, which will include a book summary, a competitive analysis, a book marketing profile, two sample chapters from the book, and a table of contents.
The Co-Author: Brian O'Connell is a Doylestown, Pennsylvania-based freelance. Bylines include CNBC, Forbes, The Street.com, The Chicago Tribune, American Baby, HealthLeaders, About Health, Biopharm International, Registered Representative, The Wall Street Journal, Computer User, Newsweek, Cigar Magazine, CBS Sportsline, Men's Health, Philadelphia Magazine, USA Weekend, Smart Business, Bloomberg Wealth Advisor, CBS News Market Watch, Entrepreneur Magazine, Business 2.0, and many others.

He has authored 14 books, including two "Book of the Month Club" selections: The 401(k) Millionaire (Random House) and CNBC's Creating Wealth (John Wiley & Sons).

O'Connell is currently writing bylined articles and blog copy for Jim "Mad Money" Cramer. He also recently completed his second personal financial advice book with national tax expert Roni Deutch (for Ben Bella Books).

The Takeaway: Americans are behind on $2.5 trillion worth of debt at the start of 2010, according to the Federal Reserve. But after this book hits the streets, expect an army of Craig Cunningham's to emerge from the debt debris of the last few years and strike back against hostile bill collectors.

Collection agencies won't like this book one bit, but increasingly angry consumers who are tired of the steady phone calls and the veiled threats, will see it differently.

After reading Tales Of a Debt Collection Terrorist, they might want to make room for one more hero on Mount Rushmore.

Rights available:

	U.S. Rights
Rights already sold:	None
Other information:	Contact Author.
Contact:	Brian O'Connell [redacted]
Item number:	6960

<< return to rights board

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