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VIA ECF

Clerk of Court
Second Circuit Court of Appeals
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: *Paul Sterling v. Mercantile Adjustment Bureau, LLC*
US Court of Appeals, 2nd Circuit, Case No. 14-1247

To Clerk of Court,

Sessions, Fishman, Nathan & Israel, L.L.C., represents the defendant-appellant, Mercantile Adjustment Bureau, LLC (“Mercantile”), in the above-referenced matter. This letter brief is in response to the Order dated May 3, 2016, requiring the parties to file a brief addressing the following issues:

(1) whether the plaintiff has suffered an injury in fact sufficient to establish standing under Article III of the United States Constitution, *see, e.g., Palm Beach Golf Ctr.- Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 53 (11th Cir. 2015); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684 85 (7th Cir. 2013), and (2) what the parties intended when they stipulated that the seventeen phone calls in question were “placed” or “made” to the 1941 Number after it was recycled and reassigned to the plaintiff as the telephone subscriber. *See* A22, 23.

1. **STANDING UNDER THE TCPA** – The United States Supreme Court recently addressed the “injury-in-fact” requirement of Article III standing. *Spokeo, Inc. v. Robins*, 2016 WL 2842447 (U.S. May 16, 2016), attached as **Exhibit A**. The Court clarified that a plaintiff must establish he suffered “an invasion of a legally protected interest that is concrete and particularized.” *Id.* at *7 (internal quotations omitted). In evaluating whether a plaintiff may rely upon a statutory violation alone, Justice Alito said:

Congress’ role in identifying and elevating intangible harms does not mean

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that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, [the plaintiff] could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.

Id. at *7.

2. The Court concluded the plaintiff “cannot satisfy the demands of Article III by alleging a bare procedural violation.” *Id.* at *8. Such a violation “may result in no harm.” *Id.*

3. In the instant case, plaintiff alleges Mercantile violated the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, *et seq.*, which prohibits any person to “make any call” using an automatic telephone dialing system (“ATDS”) to a number assigned to a cellular telephone without the called party’s prior express consent. As *Spokeo* clarifies, plaintiff does ***not*** establish standing simply by alleging a caller used an ATDS to call a cellular telephone number. He must show that he suffered the harm the statute is meant to protect – that the purported violation of a statutory right was concrete *and* particularized.

4. *Palm Beach* and *Holtzman*, cited in this Court’s order, are instructive. Both cases concern the TCPA’s fax provision, which prohibits a person from using a fax machine “to send . . . an unsolicited advertisement.” 47 U.S.C. § 227(b)(1)(C). Both cases looked to the TCPA’s legislative history to determine the harm Congress sought to address –concluding the intangible “harm,” *i.e.* the concrete injury, was the occupation of a recipient’s fax machine. *Palm Beach*, 781 F.3d at 1252; *Holtzman*, 728 F.3d at 684. The plaintiffs had standing because they were able to establish the fax transmissions occupied their machines – *i.e.* that they suffered the harm the statute is meant to protect.

5. In the context of calls to a cellular telephone number, the plaintiff must establish he received the calls. The legislative history makes clear the harm the statute was meant to address is the *receipt* of unwanted telephone calls. Senator Hollings, when introducing the bill, stated that computerized calls “wake us up in the morning,” and “interrupt our dinner at night.” 137 Cong. Rec. S9840-02. The House Report identified the invasion of privacy as “[w]hether an individual or a machine is on the other end of the line, consumers find unsolicited telemarketing calls an intrusive, often frustrating,

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invasion of their privacy. The nightly recurrence of calls from solicitors and automated machines trying to sell something is now a predictable part of many lives, yet consumers can do nothing to change things.” H.R. REP. 102-317, at 18. Additionally, an ATDS “can seize a recipient’s telephone line and not release it until the prerecorded message is played[.]” Based on the foregoing, it is clear the harm Congress meant to address through the TCPA’s cell phone provision is the annoyance accompanied by the *receipt* of an unwanted call. But if the call is not received, whether the line does not connect or is busy, there is no harm – exactly the circumstance in which *Spokeo* tells us an individual lacks standing. *Spokeo*, 2016 WL 2842447 at *8 (plaintiff “cannot satisfy the demands of Article III by alleging a bare procedural violation” because such a violation “may result in no harm.”). Accordingly, a plaintiff must establish that he *received* the unwanted call.

6. The record on appeal is void of any evidence that plaintiff *received* the calls placed by Mercantile. However, Mercantile’s account records in this case, which were exchanged during discovery, indicate it left voicemail messages when it believed it connected with an answering machine or a live person. Accordingly, assuming the accuracy of Mercantile’s records, plaintiff would likely meet his burden to establish that he suffered an injury in fact sufficient to establish standing.

7. **THE MEANING OF “PLACED” OR “MADE”** – The use of the words “placed” or “made” in the Joint Statement of Uncontested Material Facts simply means that Mercantile used an ATDS to dial the 1941 Number. Indeed, the ordinary definition of “make” is “to begin or seem to begin.” Merriam’s Webster Dictionary (<http://www.merriam-webster.com/dictionary/make>, visited 5/17/16). The terms do *not* suggest or infer any particular results of the calls. To be clear, the terms “placed” or “made” do not infer that plaintiff’s phone rang or that a message was left.¹

Thank you for your time and attention to this matter.

Very truly yours,

/s/James K. Shultz

James K. Shultz

¹ A few courts have held, *outside* the context of a standing evaluation, that merely placing a call triggers the TCPA. *Yount v. Midland Funding, LLC*, 2016 WL 554851, *8 (E.D. Tenn. Feb. 10, 2016); *Fillichio v. M.R.S. Associates, Inc.*, 2010 WL 4261442, *3 (S.D. Fla. 2010); *Moore v. Dish Network L.L.C.*, 57 F. Supp. 3d 639, 656 (N.D.W. Va. 2014). In light of *Spokeo*, these cases, without more, would fail for a lack of standing.