**Before the**

**FEDERAL COMMUNICATIONS COMMISSION**

**Washington, D.C. 20554**

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| In the Matter of: | ) | |
| | ) | |
| Vincent Lucas's Petition for | ) | |
| Expedited Declaratory Ruling Regarding | ) | CG Docket No. CG 02-278 |
| Vicarious and Contributory Liability | ) | |
| Under the TCPA | ) | |
| | ) | |

**COMMENTS OF NOBLE SYSTEMS CORPORATION**

## I. INTRODUCTION AND SUMMARY

Noble Systems Corporation ("NSC") submits these comments in response to the Public Notice from the Federal Communications Commission ("Commission") seeking comments to the Petition for Declaratory Ruling filed by Vincent Lucas ("Lucas").[1] Lucas has asked the Commission to clarify whether a person is vicariously or contributorily liable if that person provides substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates 47 U.S.C. § 227(b) or (c). For various reasons, NSC requests that the Commission proceed cautiously and if the Commission deems that any Order is required, then the Commission should conduct a Notice of Inquiry and a Notice of Proposed Rulemaking.

## DISCUSSION

The facts associated with the Petition appear to paint an egregious instance of complicity

[1] *Vincent Lucas's Petition for a Declaratory Ruling Regarding the Liability for Entities that Provide Substantial Assistance to Telemarketers While Knowing that the Telemarketers Are Engaged in Practices that Violate the Telephone Consumer Protection Act*, CG Docket No. 02-278 (filed June 18, 2014) ("*Petition*").

by parties with respect to facilitating TCPA violations. Arguably, calls from "Rachel from cardholder services" have been the poster child of the type of annoying calls that the TCPA was intended to address. It may be tempting for the Commission to respond by ordering the relief sought, however careful consideration should be given to the unintended consequences of any Order produced by the Commission.

Any Order by the Commission will be applicable not only to the "*Pacific Telecom"* lawsuit[2], but also to future actions initiated by the Commission as well as private actions under the TCPA. While the Commission can selectively focus its resources in enforcing its regulations against egregious violators, such restraint is not likely to occur with private suits. It can be expected that any Order from the Commission will be applied to each and every potential violation, even if the violation is minor or questionable. Thus, the Commission should expect that private lawsuits will utilize the Commission's Order in ways not anticipated by the Commission. This behooves the Commission to proceed carefully.

There has been an explosion of TCPA suits in the past few years, and some have attempted to address alleged harms that border on the trivial, such as the harm caused by a single text message received by a plaintiff. Specifically, the Commission has recently addressed whether it is a violation of the TCPA to send a single confirmatory text message acknowledging an individual's opt-out request.[3] This ruling only occurred after a number of private lawsuits were filed. In addition, the threat of class action lawsuits under the TCPA looms over every possible violation of the TCPA, often leading to multi-million dollar settlements.

While NSC believes the Commission's GroupMe Order was correct and provided much needed certainty to the public, it would have been preferable if the existing statutory and regulatory framework would have anticipated and avoided the need for the associated lawsuits, petitions, and Commission rulings in order to address what is a relatively trivial harm (if any) of

[2] This is the district court case which lead to the Petition, *Lucas v. Pacific Telecom Communications Group et al.,* Case No. 1:12CV630 (S.D. OH).
[3] FCC 14-33, released March 27, 2014 ("GroupMe Order").

receiving one confirmatory text message.

**ANY VICARIOUS AND CONTRIBUTORY LIABILITY ORDER WOULD LIKELY REQUIRE YEARS OF LITIGATION TO CLARIFY ITS CONTOURS**

The Commission is fully aware of how the ambiguity of even a single word in a statute or regulation can consume untold resources to clarify its meaning. For example, the Commission is presently addressing comments whether the "capacity" requirement of an autodialer ("ATDS") refers to a hypothetical capability or a present capability of the equipment. This uncertainty of a single word drafted years ago in the TCPA statutes and regulations has now lead to millions of dollars in legal fees being expended by defendants, triggered various TCPA lawsuits, and the untold hours of time by Commission staff, outside counsel, and company employees.

Any ruling regarding vicarious and contributory liability under the TCPA by the Commission would likely trigger further TCPA suits in the future. The bounds of what constitutes vicarious or contributory liability under the TCPA are not well defined as there appears to be little or none case law developed on TCPA vicarious or contributory liability. It can be expected that any certainty as to what constitutes vicarious or contributory liability would develop only after years of questionable numerous private actions, followed by the expected associated petitions and declaratory rulings by the Commission to clarify the various judicial interpretations, which may be contradictory. Witness, for example, the Commission's current task of clarifying the meaning of the word "capacity," which is necessitated in part by various contradictory judicial interpretations of the statute.

A ruling regarding vicarious and contributory liability could potentially allow whole new classes of defendants to be named in TCPA suits, including: software providers, equipment providers, cloud-platform providers, information providers, and telecommunication carriers.

Each of these vendors may be alleged to have provided some form of "substantial assistance" to an alleged TCPA violator in that their equipment/service/software was utilized and required to originate the calls that are alleged to violate the TCPA. The question of whether a vendor knew, or should have known, that a violation of the TCPA occurred provides another opportunity for plaintiffs to seek settlement or force the defendant to incur expensive discovery costs.

**IF THE COMMISSION PROCEDES, A NOTICE OF INQUIRY AND A NOTICE OF PROPOSED RULEMAKING SHOULD BE CONDUCTED**

Any such ruling potentially would have a significant impact among a broad range of vendors, and involve a whole new basis of liability under the TCPA. The language of any proposed vicarious or contributory liability ruling under the TCPA requires careful consideration, and should be prefaced by a Notice of Inquiry to first collect input from the industry at large to see if the problem warrants further consideration. Further, it is recommended that the Commission further conduct a Notice of Proposed Rule Making to receive adequate comments for text of any specific rules. Although the allegations of the TCPA violations in the Petition appear egregious, it is these very types of situations where a knee-jerk reaction can lead to an Order having unintended consequences. Any ruling must adequately address a variety of situations and provide adequate guidance for clear application.

**CONCLUSION**

NSC urges the Commission to avoid a reflexive response to the Petition leading to an Order without careful consideration and allowing adequate input by the industry at large. Should the Commission believe an Order is necessary, the Commission should first conduct a formal Notice of Inquiry and a Notice of Proposed Rule Making on this subject.

Respectfully submitted,

Noble Systems Corporation.

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