

the State's claims for monetary relief including penalties, consumer redress, and attorneys' fees and costs are in excess of \$100,000 and could exceed \$1,000,000.00.

NATURE OF DEFENDANTS' OPERATIONS

3. Defendants collectively offer and sell "premium short messaging services" or "PSMS," which is a type of paid text-messaging service provided to consumers through their mobile phones. Merchants - known in this context as a "content provider" - may offer PSMS such as directory assistance, which can be ordered and purchased by consumers directly from their mobile device. The charge for PSMS is placed directly on consumers' monthly mobile phone bill. As such, consumers do not need to provide a credit card or other form of payment – rather they can opt into such paid services by sending a series of text messages or engaging in an interactive voice response system (IVR) which may require consumers to input certain keys to provide their consent to be charged.

4. In order to send and receive commercial text messages to consumers and place charges on a mobile phone bill, a content provider must register with the Common Short Code Administration (CSCA) for a five to six digit number called a "short code." The content provider typically advertises to consumers and instructs them on how to order the service. Under standard industry practice, the content provider generally requires the consumer to take two steps to confirm a purchase, a practice that is known as "double opt-in" verification. The content provider is responsible for delivering the digital content to the mobile consumer's phone, and it bills the consumer and collects charges by having the phone company place the appropriate charge on the consumer's bill.

5. As detailed below, Defendants collectively engage in a scheme whereby Defendants place unauthorized, misleading, and deceptive PSMS charges on consumers' mobile

phone bills, a practice commonly known as wireless “cramming.” Defendants have access to many toll-free phone numbers and engage in misleading and deceptive acts and practices which serve to cause confusion and mislead consumers into pressing one or more keys on their mobile phones and/or to receive a text message. Defendants then treat this action as authorization by consumers to be billed on their mobile phone bill for Defendants’ PSMS. Defendants offer and sell these services nationwide, including in Travis County, Texas. Defendants have obtained millions of dollars from consumers through their deceptive conduct.

PUBLIC INTEREST

6. Cramming has been recognized by federal regulators as a “growing problem” that is “poised to become a major fraud issue.”¹ Consumer Reports estimates that landline and wireless cramming could be costing consumers nationwide as much as \$2 billion each year.² As a result, cramming, and in particular mobile cramming, has recently been the subject of workshops hosted by the Federal Communications Commission and the Federal Trade Commission, as well as an investigation by the U.S. Senate.

7. Because Plaintiff State of Texas has reason to believe that Defendants have engaged in, and will continue to engage in, the unlawful practices set forth below, Plaintiff has reason to believe Defendants have caused and will cause adverse effects to legitimate business enterprises which lawfully conduct trade and commerce in this State and further, will cause damage to the State of Texas and to persons from whom moneys or properties are unlawfully acquired by Defendants. Therefore, the Consumer Protection Division of the Office of the

¹ Reply Comment of the Federal Trade Commission; *In the Matter of Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (“Cramming”)*; GC Docket No. 11-116, at 4 (July 20, 2012).

² Consumer Reports, *Beware of Bogus Phone Bill Fees; Consumers Could Be Losing Up to \$2 Billion a Year* (Aug. 2012), available at www.consumerreports.org/cro/magazine/2012/08/beware-of-bogus-phone-bill-fees/index.htm.

Attorney General of the State of Texas believes and is of the opinion that these proceedings are in the public interest.

JURISDICTION

8. This action is brought by Attorney General GREG ABBOTT, through his Consumer Protection Division, in the name of the State of Texas and in the public interest under the authority granted him by § 17.47 of the Texas Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE ANN. § 17.41 et seq. (hereafter the “DTPA”) upon the grounds that Defendants have engaged in false, deceptive and misleading acts and practices in the course of trade and commerce as defined in, and declared unlawful by, §§ 17.46(a) and (b) of the DTPA. In enforcement suits filed pursuant to Section 17.47 of the DTPA, the Attorney General is further authorized to seek civil penalties, redress for consumers, and injunctive relief.

DEFENDANTS

9. Defendant CELLZUM.COM, LLC (“Cellzum”) is a Delaware limited liability company that does business nationwide and in Texas as alleged specifically below in its own name, and this proceeding arises out of such business done in this state. On its website, Cellzum identifies its principal place of business as 13636 Ventura Blvd. #261 Sherman Oaks, CA 91423 and in corporate records identifies the address of its principal Harvey Berg as 617 West Victory Road, Henderson, NV 89015. Cellzum does not maintain a regular place of business in this state and has not designated or maintained a registered agent for service of process in Texas, and therefore, may be served with process by serving the Secretary of State pursuant to the Texas Civil Practices & Remedies Code § 17.044. Cellzum can be served by certified mail, return receipt requested, directed to Cellzum through the Texas Secretary of State as an agent for

service of process at the following address: Citations Section, Room 214, 1019 Brazos, Austin, Texas 78701.

10. Defendant CELL ASSIST 1 2 3, LLC (“Cell Assist 1 2 3”) is a Delaware limited liability company that does business in Texas as alleged specifically below in its own name and under its trade names SMS181.COM, CELLASSIST-123.COM, NUM4U.COM, 4ASSIST.COM, 4DAINFO.COM, ASSIST411.COM, CELL555.COM, INFOAST.COM, NUM411.COM, and NUMSVC.COM, and this proceeding arises out of such business done in this State. On most of its websites, Cell Assist 1 2 3 identifies its principal place of business as 1004 West Covina Pkwy #150, West Covina, CA 91790. Corporate records identify the address of its principal Hunter Lipton as 617 West Victory Road, Henderson, NV 89015. Cell Assist 1 2 3 does not maintain a regular place of business in this state and has not designated or maintained a registered agent for service of process in Texas, and therefore, may be served with process by serving the Secretary of State pursuant to the Texas Civil Practices & Remedies Code § 17.044. Cell Assist 1 2 3 can be served by certified mail, return receipt requested, directed to Cell Assist 1 2 3 through the Texas Secretary of State as an agent for service of process at the following address: Citations Section, Room 214, 1019 Brazos, Austin, Texas 78701.

11. Defendant HARVEY BERG is a manager of Cellzum and Cell Assist 1 2 3 and has done business in Texas as alleged below. On information and belief, Defendant Berg has at all times relevant to this petition either directly engaged in the acts or practices described below, or has directed and controlled others in committing the acts or practices described below. Defendant Berg can be served with process at Cellzum or at his home, 12836 Hortense St., Studio City, CA 91604, or at any other place where he may be found.

12. Defendant HUNTER LIPTON is a manager of Cellzum and Cell Assist 1 2 3 and has done business in Texas as alleged below. On information and belief, Defendant Lipton has at all times relevant to this petition either directly engaged in the acts or practices described below, or has directed and controlled others in committing the acts or practices described below. Defendant Lipton can be served with process at Cell Assist 1 2 3 or at his home, 255 E. 74th St., Unit 3A, New York, NY 10021, or at any other place where he may be found.

VENUE

13. Venue of this suit lies in Travis County, Texas because under the DTPA § 17.47(b), Defendants and their agents have done business in Travis County, Texas by marketing and selling its subscription text messaging services to consumers in Travis County, Texas.

TRADE AND COMMERCE

14. Defendants have, at all times described below, engaged in conduct which constitutes “trade” and “commerce” as those terms are defined by § 17.45(6) of the DTPA.

ACTS OF AGENTS

15. Whenever in this Petition it is alleged that any Defendant did any act, it is meant that Defendant performed or participated in the act or Defendant’s officers, agents, or employees performed or participated in the act on behalf of and under the authority of the Defendant.

NOTICE BEFORE SUIT

16. The Consumer Protection Division informed Defendants in general of the alleged unlawful conduct described below, at least seven days before filing suit, as may be required by § 17.47(a) of the DTPA.

SPECIFIC FACTUAL ALLEGATIONS

17. Defendants, through various relationships and agreements they have with telephone companies, have access to and control of thousands of toll-free numbers, a practice known as “warehousing.”³ Defendants use those numbers to deceptively offer and sell PSMS subscription services nationwide, including in Travis County, Texas. Defendants then cause unauthorized charges for these services to be placed on consumers’ mobile phone bills, where consumers are unlikely to notice the charges.

18. Defendants’ deceptive scheme starts by Defendants enticing consumers to call one of their toll-free numbers. Defendants use a variety of techniques to get consumers to call their numbers. For example, on information and belief Defendants intentionally obtain toll-free numbers that are very similar to those of large and legitimate businesses, like the customer service number or credit card activation number for large banks. When a consumer then tries to call the legitimate number, but misdials, they reach the Defendants instead – a practice sometimes referred to as “fat-finger” dialing.⁴ Moreover, just by virtue of the fact that Defendants control thousands of numbers, Defendants ensure that they will receive inadvertent calls from many consumers.

19. If a consumer calls one of Defendants’ toll-free numbers from a wireless telephone, the consumer will hear the first part of a recorded message similar to the following:

“The number you have dialed has new information. Please press star to receive information on the number you are calling.”

³See Federal Communications Commission (FCC), *Consumer Guide: What is a Toll-Free Number and How Does it Work?*, <http://transition.fcc.gov/cgb/consumerfacts/tollfree.pdf> (last reviewed Jan. 22, 2013).

⁴See Elizabeth Leamy, ABC NEWS, *The Pitfalls of Fat-Finger Dialing* (Aug. 13, 2007), <http://abcnews.go.com/Business/Consumer/story?id=3473030>; Herb Weisbaum, ConsumerMan on NBCNEWS.com, *Fat Fingers? Be Careful When You Make a Call*, http://www.nbcnews.com/id/41874162/ns/business-consumer_news/t/fat-fingers-be-careful-when-you-make-call/ (last visited July 8, 2013).

20. If a consumer presses the star button as directed, or any other button on the phone's keypad, the consumer hears another recorded message similar to the following:

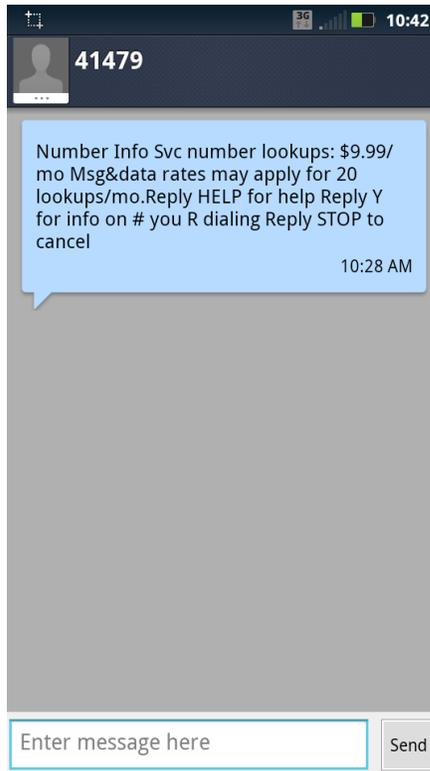
“In just a moment, you will receive a text message to your cellular phone. Reply ‘Y’ to join this service to receive access information on the number you are calling and toll free directory assistance. Remember to reply ‘Y’ to the text message you received to join this service.”

At this point, the message ends and the connection is terminated, and the consumer receives a cryptic text message as described below.

21. Concealed during these messages is any disclosure that, if the consumer “join[s] this service” to receive the promised information about the called number, he or she will be charged \$9.99 on his or her mobile phone bill every month until he or she cancels the service. While the first message does include information about a charge, the message is designed to ensure that the consumer is unlikely to hear the disclosure. If a consumer calls Defendants’ toll-free number as outlined above, but ignores the instructions and does not press the star key, he or she will hear the full message:

“The number you have dialed has new information. Please press star to receive information on the number you are calling. Please press star now from your cellular phone to receive a text message with information on the number you are calling. Message and data rates may apply. Cell Assist 123. If you decide to subscribe to this service, a charge of \$9.99 a month plus standard message fees for twenty look-ups a month will apply. Press star now.” [Message repeats]

22. After the consumer has called Defendants’ toll-free number and pressed any key, the consumer then receives a cryptic text message similar to the following:



23. Because the automated recording directed consumers to respond “Y” to the text message received in order to obtain information about the number they dialed, some consumers may reply to the text message without reading the full cryptic text message. Doing so results in charges of \$9.99 per month being added to the consumer’s mobile phone bill until they cancel the “service.” Other consumers complain that even when they do not respond to the text message or reply STOP, Defendants still cause charges to be added to their mobile phone bills without their consent.

24. Because Defendants intentionally obtain toll-free numbers that are very similar to those of legitimate businesses, consumers may also reach one of Defendants’ numbers in error

after misdialing a number received in a voicemail or text message from the legitimate business. Some of these legitimate messages direct consumers to contact a company's customer service by dialing the toll free number, then by pressing certain touchtone keys after reaching the automated system. Defendants' systems are designed such that when the consumer mistakenly misdials the intended toll-free number and presses the numbers they were instructed to press, the consumer is inadvertently enrolled in Defendants' service.

25. The deceptive nature of Defendants' operation is revealed by their efforts to conceal the actual process. For example, if a consumer dials from a landline, he or she may not receive the same recorded message described above, but could instead hear different recorded message offers, such as a recording from Caribbean Cruise Lines regarding a free cruise, or a \$100 rebate voucher available for a \$1.95 fee. Similarly, once a consumer calls one of Defendants' numbers, if he or she tries to redial that number, he or she may hear an entirely different message offering, again for example, a "free" cruise. In this way, consumers are prevented from discovering how they became subscribed to Defendants' service.

26. Further evidence of deception involves Defendants' deviation from the information regarding their services provided to the CSCA when applying for a short code, and to the carriers when applying to be on their networks. In their applications, Defendants misrepresent the reasons that customers will be calling their toll free numbers, and further misrepresent the "contents" of those recordings by providing scripts that differ from the actual recorded messages. In a likely further attempt to avoid detection, Defendants have failed to disclose to the carriers the many telephone numbers that consumers may dial in order to be enrolled in Defendants PSMS.

27. Each of the Defendants has directly engaged in some facet of the overall scheme, in some instances by acting as the registered corporate agent, paying for the short code or website registry, or providing “compliance” for the services advertised by phone and through websites. For example, Defendants’ short codes have been registered with the CSCA and with the cell phone carriers using Harvey Berg as the individual contact. For example, the short code 25434 associated with www.numsvc.com is registered to Cell Assist 1 2 3 with Harvey Berg as the contact in Henderson, NV; and the short code 82511 associated with www.cellzum.com is also registered to Harvey Berg, but at Cellzum in Sherman Oaks, CA. Defendant Lipton registered and paid for many of the websites themselves, including www.numsvc.com.

28. Defendants’ deceptive practices have caused the mobile phone bills of Texans including in Travis County to be “crammed” with unauthorized charges and have billed and collected millions of dollars from unsuspecting consumers.

FALSE, MISLEADING OR DECEPTIVE ACTS

29. Defendants, as alleged above and detailed below, have in the course of trade and commerce engaged in false, misleading and deceptive acts and practices declared unlawful in §§17.46(a) and (b) of the DTPA. Such acts include:

- A. Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services, in violation of DTPA § 17.46(b)(2);
- B. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not have, in violation of DTPA §17.46(b)(5);

- C. Advertising goods or services with intent not to sell them as advertised, in violation of DTPA §17.46(b)(9);
- D. Failing to disclose information concerning goods or services which was known at the time of the transaction with the intent to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed in violation of § 17.46(b)(24).

TRIAL BY JURY

30. Plaintiff herein requests a jury trial and will tender the jury fee to the Travis County District Clerk's office pursuant to TEX. R. CIV. P. 216 and the TEX. GOV'T CODE ANN. § 51.604.

PRAYER FOR RELIEF

31. Plaintiff further prays that Defendants be cited according to law to appear and answer herein; that after due notice and hearing a TEMPORARY INJUNCTION be issued; and upon final hearing a PERMANENT INJUNCTION be issued, restraining and enjoining Defendants, Defendants' officers, agents, servants, employees and attorneys and any other person in active concert or participation with Defendants from engaging in the following acts or practices:

- A. Representing, directly or by implication, that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have. Specifically and without limitation, Defendants shall not represent by implication that telephone numbers operated or controlled by Defendants are other business' phone numbers that have changed.

B. Causing confusion or misunderstanding as to the source, approval, or certification of any good or service sold or offered for sale by Defendants. Specifically and without limitation, Defendants shall not cause confusion by controlling or operating telephone numbers which, when consumers misdial, will mislead consumers into believing the telephone number they have dialed has changed.

C. Advertising goods or services with intent not to sell them as advertised. Specifically and without limitation, Defendants shall not advertise through automated phone messages that they offer information on the number a consumer has dialed, when in actuality consumers cannot get this information.

D. Failing to disclose information concerning any good or service sold or offered for sale by Defendants when Defendants know at the time of the transaction that such failure to disclose is intended to induce consumers to enter into transactions consumers would not enter into if such information were disclosed. Specifically and without limitation, Defendants shall disclose to each prospective purchaser of PSMS services immediately upon calling a phone number that they have reached Defendants' business, a PSMS alert service, and the cost and subscription terms of such service.

32. In addition, Plaintiff State of Texas respectfully prays that this Court will:

A. Order Defendants to restore all money or other property taken from identifiable persons by means of unlawful acts or practices, or in the alternative award judgment for damages to compensate for such losses;

- B. Adjudge against Defendants civil penalties in favor of Plaintiff State of Texas in the amount of not more than \$20,000 per violation of the DTPA;
- C. Order Defendants to pay Plaintiff's attorney fees and costs of court pursuant to the TEX. GOVT. CODE, § 402.006(c);
- D. Order Defendants to pay both pre-judgment and post judgment interest on all awards of restitution, damages or civil penalties, as provided by law; and

33. Plaintiff further prays that this court grant all other relief to which Plaintiff State of Texas may show itself entitled.

Respectfully submitted,

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