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14 **UNITED STATES DISTRICT COURT**
15 **SOUTHERN DISTRICT OF CALIFORNIA**

16 MOBILE CAPTIONS COMPANY, LLC, a
California limited liability company,
17
Plaintiff,
18 v.
19 HAMILTON RELAY, INC., a Nebraska
corporation, ULTRATEC, INC., a Wisconsin
20 corporation, and CAPTEL, INC., a Wisconsin
corporation,
21
Defendants.
22

Case No. 11-CV-2673 W BLM

**FIRST AMENDED
COMPLAINT FOR DAMAGES**

DEMAND FOR JURY TRIAL

23 Plaintiff Mobile Captions Company, LLC (“MCC”), by its undersigned counsel,
24 brings this action against Defendant Hamilton Relay, Inc. (“Hamilton”), Defendant Ultratec, Inc.
25 (“Ultratec”), and Defendant CapTel, Inc. (“CapTel”), and alleges based upon personal knowledge
26 and upon information and belief as follows:
27
28

1 **I. NATURE OF THE CASE**

2 1. Though mobile phones are a ubiquitous and integral part of everyday life, with
3 over 300 million in use in the United States, a hard-of-hearing person cannot easily use one. This
4 leads to hardship, isolation, and lost opportunities both personal and professional. In order to
5 address these limitations, Plaintiff MCC developed Mobile Captions Service, a system that
6 enables a hard-of-hearing person to communicate directly with another person on a mobile phone
7 by providing written captions of the conversation to the mobile device. The captions were
8 generated by Defendant Hamilton under a contract between Hamilton and MCC. Mobile Captions
9 Service was successfully launched in November of 2010, but in June 2011 Hamilton abruptly and
10 unilaterally terminated its contract with MCC severally and irreparably harming MCC's business.
11 Hamilton took this action at the behest of Defendants Ultratec and CapTel, Inc.

12 2. Defendant Ultratec has enjoyed a long-standing position as the dominant supplier
13 of telephone services for the hard-of hearing. Ultratec, through itself and its affiliates, including
14 CapTel, Inc., provides its technology and services to certified relay providers, including
15 Hamilton. Together, Ultratec and CapTel are the exclusive providers of services related to
16 "Captioned Telephone Service," an FCC-approved type of call received on specialized landline
17 telephone equipment supplied by Ultratec.

18 3. After MCC launched Mobile Captions Service, Ultratec's and CapTel's dominant
19 position in the business was threatened by the advancement of MCC's mobile technology. In
20 order to leverage their monopoly in the market for landline and computer-based captions into the
21 mobile market, Ultratec and CapTel interfered with MCC's contract with Hamilton by pressuring
22 Hamilton to terminate its agreement with MCC. Hamilton, Ultratec and CapTel then took MCC's
23 customers for themselves, ruining MCC's business.

24 **II. PARTIES**

25 **A. Plaintiff**

26 4. Plaintiff Mobile Captions Company, LLC is a Delaware corporation with its
27 principal place of business at 13280 Pantera Rd., San Diego, CA 92130.
28

1 **B. Defendants**

2 5. Defendant Hamilton Relay, Inc., is a Nebraska corporation with its headquarters
3 and principal place of business located at 1001 12th St., Aurora, NE 68818. Hamilton Relay, Inc.
4 is a wholly-owned subsidiary of Hamilton Telephone Co., which is a wholly-owned subsidiary of
5 Nedelco, Inc.

6 6. Defendant Ultratec, Inc. is a Wisconsin corporation with its headquarters and
7 principal place of business located at 450 Science Drive, Madison, WI 53711.

8 7. Defendant CapTel, Inc. is a Wisconsin corporation with its headquarters and
9 principal place of business located at 450 Science Drive, Madison, WI 53711. CapTel is a wholly
10 owned subsidiary of Defendant Ultratec.

11 8. Defendants Ultratec and CapTel have identical ownership and management.
12 Robert Engelke is President of both companies and both operate out of the same address in
13 Madison, Wisconsin. Ultratec and CapTel have a unity of interests and ownership such that
14 separate corporate identities do not exist and each is the alter ego of the other. The acts alleged
15 herein against Ultratec are therefore the acts of CapTel and the acts alleged against CapTel are the
16 acts of Ultratec.

17 **III. JURISDICTION AND VENUE**

18 9. This Court has personal jurisdiction over the Defendants in accordance with Cal.
19 Civ. Proc. Code § 410.10 and 28 U.S.C. § 1332 because there is complete diversity of citizenship
20 between Plaintiff and Defendants in this action, and because the amount in controversy exceeds
21 \$75,000 exclusive of interest and costs. Defendants have transacted business and their affairs in
22 California. Defendants have entered into contracts and committed the acts complained of in
23 California. Moreover, the Court has supplemental jurisdiction over the state common law causes
24 of action under 28 U.S.C. § 1367.

25 10. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a) because
26 Defendants have transacted business in this district, have committed the acts complained of in this
27 district, and a substantial part of the events and omissions giving rise to Plaintiff's claims
28 occurred in this district.

1 **IV. FACTUAL ALLEGATIONS**

2 **Background**

3 11. The Americans with Disabilities Act established a system of subsidies for
4 Telecommunications Relay Services (“TRS”). TRS encompasses a variety of telephone services
5 that allow persons with hearing or speech disabilities to place and receive telephone calls. The
6 Federal TRS fund, established in 1993, is funded by the telecommunications carriers and
7 administered by the FCC to reimburse interstate telephone calls and relay services. Each state has
8 a similar fund to provide reimbursements for intrastate calls and relay services.

9 12. For the 12-month period through April of 2011 there were an estimated 183
10 million minutes of communications services used by an estimated 150,000 people and subsidized
11 by the Federal and state TRS funds. The Federal TRS fund’s collections from July 1, 2010 to June
12 30, 2011, were about \$900 million. Adding in the smaller state funds, the total expenditure for
13 relay services was close to \$1.2 billion.

14 13. Each state contracts with a company known as a relay provider to provide the full
15 range of TRS services to customers within the state. Hamilton is one such relay provider, and
16 currently has contracts with 17 states and U.S. territories. Sprint is the largest relay provider with
17 29 states under contract; AT&T has four states under contract; Communications Services for the
18 Deaf (“CSD”) has three states that they serve in partnership with Sprint; and Purple
19 Communications has one state contract. Every state has a contractual relationship with only one
20 relay provider except for California, which has two relay providers under contract.

21 14. Relay providers subcontract with companies such as Ultratec, CapTel or MCC to
22 provide all or parts of relay services requested by the states. MCC’s Mobile Captions Service is
23 one such service.

24 15. Companies cannot provide state-reimbursed services in a state without first having
25 a contract with the relay provider(s) in that state.

26 16. In order to provide its state-based services in a particular state, MCC must
27 therefore partner with that state’s designated relay provider. For instance, because Mobile
28 Captions Service is one type of traditional TRS, in order for MCC to offer Mobile Captions

1 Service in Arizona, which has selected Hamilton as its TRS provider, MCC had to partner with
2 Hamilton to provide such services in Arizona.

3 17. Ultratec and CapTel must also contract with certified relay providers to provide
4 their services.

5 **MCC's Mobile Captions Service**

6 18. Making a call from a mobile phone using Mobile Captions Service is
7 simple for a hard-of-hearing customer. The customer dials the same way a hearing person does,
8 by dialing the remote party they are trying to reach. The MCC software application on the mobile
9 phone redirects the call, connects with the relay provider, in this case Hamilton, and provides
10 Hamilton with the remote party's phone number. Hamilton then connects the customer with the
11 remote party in a three-way call and generates captions of the conversation. The captions are sent
12 to MCC's servers, which then send those captions to the mobile phone. The MCC software
13 application on the phone receives, processes, and displays the captions on the mobile phone.

14 19. Initially, Mobile Captions Service was only offered in cooperation with Consumer
15 Cellular, Inc. ("CCI"), the exclusive wireless service provider for the AARP and a nationwide
16 provider of mobile phones and services. CCI uses the AT&T wireless network, and therefore has
17 a voice and data network that covers over 97 percent of the population of the United States.

18 20. To access Mobile Captions Service, CCI's customers could purchase a Nokia
19 phone from CCI with the Mobile Captions Service application preloaded. Mobile Captions
20 Service was operational as soon as the phone was activated. Customers paid nothing for Mobile
21 Captions Service. Instead, reimbursements were provided through the TRS funds.

22 21. On November 23, 2009, MCC and Hamilton entered into a Confidentiality
23 Agreement allowing them to discuss a possible business relationship that would give MCC access
24 to a large potential customer base.

25 22. On April 7, 2010, after significant testing and demonstration of Mobile Captions
26 Service's technical viability, MCC and Hamilton entered into a Letter of Intent to deploy MCC's
27 service.

28

1 23. After executing the Letter of Intent and before launching Mobile Captions Service,
2 Hamilton and MCC spent significant time and effort testing Mobile Captions Service and
3 conducted extensive due diligence related to how Mobile Captions Service would be reimbursed
4 by TRS funds. For example, Hamilton’s regulatory counsel issued an opinion determining that
5 calls using Mobile Captions Service are properly classified as a traditional Voice Carry Over
6 (“VCO”) calls and should be reimbursed from existing FCC and state TRS funds under existing
7 contracts between Hamilton and the states.

8 24. Following extensive testing and due diligence, on September 1, 2010, the parties
9 signed an Agreement to deploy MCC’s Mobile Captions Service for commercial application. A
10 copy of the Agreement is attached as Exhibit 1. The Agreement was to run for five years with
11 renewals for successive one year terms. *See* Exhibit 1 at Section 10(a).

12 25. Under the Agreement, MCC gave Hamilton the exclusive right to offer MCC’s
13 Mobile Captions Service in “Hamilton States,” defined in the Agreement as all states and
14 territories in which Hamilton provided relay services. Hamilton States included Arizona,
15 California, the District of Columbia, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine,
16 Maryland, Massachusetts, Montana, New Mexico, Rhode Island, Utah, and Wyoming, as well as
17 the Virgin Islands and the Island of Saipan.

18 26. MCC promised to use its technology to connect calls to Hamilton and bring
19 captions from Hamilton via the MCC server and the MCC handset software to the end user’s
20 wireless device. MCC promised to work with Hamilton to implement and offer the service to end
21 users and to cooperate in marketing the service. *See* Exhibit 1 at Section 2.

22 27. Hamilton agreed to be the relay interface and give MCC access to its relay services
23 platform, which would give MCC access to customers in Hamilton States. *See* Exhibit 1 at
24 Section 3. Hamilton would provide personnel for standard relay processing and generating
25 captions for phone calls for the hearing impaired. *See* Exhibit 1 at Section 3.

26 28. Hamilton also promised to extensively market MCC’s service. Specifically,
27 Hamilton agreed to “[m]arket [MCS] as part of its state outreach efforts and share in costs of
28

1 collateral materials and advertising for its state outreach programs as may be mutually agreed by
2 MCC and Hamilton.” See Exhibit 1 at Section 3.

3 29. MCC complied with all of its obligations under the Agreement with Hamilton.

4 **Hamilton’s Limited Release and Marketing of MCC’s Mobile Captions Service**

5 30. The initial understanding between MCC and Hamilton, as memorialized in the
6 Agreement, was that Hamilton would aggressively promote and launch Mobile Captions Service
7 in all of the Hamilton States. Hamilton, however, slowly rolled out Mobile Captions Service and
8 never offered the service in all of the Hamilton States. In June 2010, when Hamilton announced it
9 would stop marketing Mobile Captions Service altogether, the service was only available in about
10 half of the Hamilton States.

11 31. Hamilton’s efforts to market Mobile Captions Service were limited. Hamilton has
12 an outreach manager in all of its states responsible for raising awareness and educating customers
13 about the services provided. On average, there is about one outreach event per week across all of
14 the Hamilton States. MCC was mostly barred from participating in or even knowing the schedule
15 of these outreach events, and was not allowed to train Hamilton’s outreach managers in a timely
16 manner.

17 32. Hamilton limited electronic mailings regarding Mobile Captions Service and
18 specifically refused to send information on Mobile Captions Service to customers who were
19 currently using captioned telephone service on landlines, who would likely need a mobile service
20 in addition to existing landline services.

21 33. Mobile Captions Service was never featured in Hamilton’s newsletters, but
22 CapTel’s captioned telephone services were often featured, for instance in a story in Hamilton’s
23 Spring 2011 newsletter featuring Hamilton’s expanded relationship with Ultratec and CapTel.

24 34. As a result of Hamilton’s breach of its marketing obligations under the contract,
25 from November 2010 to January 2011, Mobile Captions Service gained very few new customers.

26 35. In February of 2011, Dixie Ziegler, Vice President of Hamilton, stated that
27 although MCC usage was below what was hoped, usage was about where she thought it would be
28 at that time and expressed optimism about its growth.

MCC was Positioned for Significant Growth

1
2 36. Starting in February 2011, MCC cooperated with Consumer Cellular, Inc. to
3 implement several outreach strategies, including weekly marketing meetings, outreach to hearing
4 loss groups, demo and discount programs, and emails and phone bill inserts from Consumer
5 Cellular. As a result of these efforts, the number of minutes on Mobile Captions Service more
6 than quintupled in four months from February 2011 to June 2011.

7 37. On June 8, 2011, MCC released a software application that would allow Mobile
8 Captions Service to be used on any phone that ran on the Android operating system. MCC's
9 Android application works the same way as the original application on the Nokia phones sold
10 through Consumer Cellular.

11 38. For the six months ending March 2011, roughly 50% of all smartphones sold in
12 the United States ran on the Android operating system, bringing the installed base to 37%
13 Android. MCC's Android software application was designed to take advantage of Android's
14 growing popularity by allowing any person in a served state with an Android-powered mobile
15 phone to download the MCC application for Mobile Captions Service and become a customer.

16 39. The release of this application greatly expanded MCC's potential market. MCC's
17 customer base was no longer limited to Consumer Cellular customers willing to buy the Nokia
18 phone offered through Consumer Cellular but expanded to millions of Android phone owners.
19 MCC's release of its Android application was in anticipation of the release of Consumer
20 Cellular's first Android phone in August of 2011. MCC's Android application would have added
21 to MCC's partnership with Consumer Cellular.

22 40. At all times leading to the Agreement with Hamilton, Hamilton was aware that
23 MCC was contemplating the development of an Android application to deploy Mobile Captions
24 Service on Android mobile devices.

25 41. Thousands of potential customers indicated that they wanted Mobile Captions
26 Service by signing up through the Consumer Cellular website, the MCC website or the Android
27 application to be notified when Mobile Captions Service is available in their states.
28

1 42. By June 2011, the number of conversation minutes from Mobile Captions Service
2 had increased 50% each month for the prior four months.

3 **As MCC Positions for Growth, Hamilton Terminates the Agreement**

4 43. On June 14, 2011, MCC received a letter from Hamilton announcing that
5 Hamilton was pulling out of a joint appearance with MCC at a trade show sponsored by the
6 Hearing Loss Association of America (“HLAA”). The HLAA convention is a major show of
7 products and services for the hearing-impaired. Hamilton had rented a booth and was scheduled
8 to do marketing demonstrations with MCC and Consumer Cellular to promote Mobile Captions
9 Service. The letter gave MCC two days’ notice of Hamilton’s cancellation of its participation in
10 the show, which had been scheduled for over two months.

11 44. The June 14 letter stated that Hamilton was pulling out of the show because it had
12 discovered an unspecified contractual issue that would prevent Hamilton from marketing or
13 promoting Mobile Captions Service until it was resolved, and that “Hamilton believes the fastest
14 way to resolve this issue may be to add MCS to the CapTel [Ultratec] platform.” The letter also
15 stated that Hamilton would immediately cease all marketing activities related to Mobile Captions
16 Service.

17 45. In subsequent conversations, Dixie Zeigler, Vice President of Hamilton, indicated
18 that the contractual issue was not in fact with MCC but instead was caused by Defendants
19 Ultratec and CapTel exerting pressure on Hamilton to terminate its arrangement with MCC.

20 46. MCC attempted to resolve any contractual issues with Hamilton through the
21 dispute resolution process in the Agreement. Throughout the process, Hamilton informed MCC
22 that Hamilton planned to terminate the Agreement no matter what efforts MCC made to resolve
23 the issues between the parties. When given the opportunity to explain Ultratec’s role in
24 Hamilton’s decision, Ms. Zeigler never retracted her statement that Ultratec pressured Hamilton
25 to terminate the Agreement.

26 47. On July 1, MCC received notice that Hamilton would be terminating the
27 Agreement. Hamilton then began working with Consumer Cellular to transition all Mobile
28

1 Captions Service customers to Hamilton Mobile CapTel, a captioning service for mobile devices
2 that Hamilton was offering in partnership with Ultratec and CapTel.

3 48. On September 12, 2011, Consumer Cellular sent notice to all of its customers
4 using Mobile Captions Service that the service would no longer be available starting October 1,
5 2011. The notice stated, “We’re thrilled to be working with Hamilton CapTel® to offer their
6 Hamilton Mobile CapTel solution that will allow you to read captions of what’s being said via a
7 new Android smartphone – the Motorola Bravo – now offered through Consumer Cellular.”

8 **Ultratec Partners with Hamilton to Leverage its Monopoly in the Landline and Computer**
9 **Captions Business Into a Monopoly in the Captions Business on Mobile Devices**

10 49. Hamilton has a longstanding relationship with Ultratec and CapTel, Inc. under
11 which Hamilton provides CapTel services to customers living in states in which Hamilton
12 provides relay services. Hamilton essentially subcontracts with Ultratec and CapTel to provide
13 the call processing and other related services, then Hamilton bills the states and receives the
14 reimbursements for the services Ultratec and CapTel provide. Ultratec and CapTel have similar
15 relationships with the other major relay providers, including Sprint, AT&T, and CSD.

16 50. Despite not being a relay provider, Ultratec is the dominant provider of non-video
17 telecommunications services for the hearing-impaired in the United States. Ultratec offers a wide
18 variety of services through CapTel, Inc. under the trade and product name CapTel. Ultratec has
19 proprietary technology and equipment for generating captions and manufactures and sells
20 CapTel-branded landline telephones that amplify sounds and/or receive captions through its
21 affiliate Weitbrecht Communications.

22 51. Additionally, Ultratec and CapTel were the first providers of “Captioned
23 Telephone Service” (“CTS”), a landline service that allowed customers to receive word-for-word
24 captions of a telephone conversation on a proprietary phone’s built-in screen. CTS allows the
25 customer to view the words spoken by the other party to the conversation in near real-time.
26 Because the customer may listen to the conversation and see captions at the same time, CTS
27 comes close to the goal of “functional equivalency” to a non hearing-impaired person’s phone
28

1 experience, and is marketed to the rapidly-growing segment of the population that has limited
2 hearing ability.

3 52. CTS is a state-based service and is reimbursed by the FCC and the states. Ultratec
4 and CapTel enter into exclusive relationships with relay providers, including Sprint, Hamilton,
5 AT&T, and CSD, to provide CTS. Through these relationships, Ultratec is able to offer CTS on
6 an exclusive basis to 99% of the U.S. population.

7 53. The Federal Communications Commission, several states, and prominent trade
8 associations have recognized and publicly stated that CapTel and Ultratec are the exclusive
9 providers of CTS and have a dominant presence in the landline TRS market.

10 54. The FCC modified the CTS call category to avoid giving Ultratec and CapTel a
11 monopoly on CTS calls. Despite this effort, no other companies have successfully entered the
12 market allowing Ultratec and CapTel to enjoy a monopoly in CTS landline captioning services.

13 55. States have noted that Ultratec's position in the market has an adverse impact on
14 consumers as any customer desiring to receive Caption Telephone Service must purchase a
15 proprietary Ultratec CapTel phone, which costs \$300 - \$500 more than a non-CapTel phone
16 providing standard text telephone ("TTY") services for the hearing impaired.

17 56. The State of New York has expressed concern over Ultratec's monopoly pricing of
18 its services. New York has ordered its TRS fund administrators to do whatever was necessary to
19 ensure New York citizens were not paying more than the national average for Captioned
20 Telephone Service. Noting that Ultratec was currently the only provider of CTS, New York
21 ordered its fund administrators to encourage competition by negotiating with Sprint (New York's
22 provider of relay services) to make captioned telephone services available through additional
23 providers.

24 57. In 2008, Ultratec and CapTel, in separate partnerships with Hamilton and Sprint,
25 began offering Internet Protocol Caption Telephone Service ("IPCTS") which allows captions of
26 a phone conversation to be read through the internet on computers. IPCTS is not a state-based
27 service and is only reimbursed by the FCC.

28

1 58. Ultratec and CapTel have sought to leverage their position as the exclusive
2 provider of CTS services for landline phones and their dominant position in fixed-based IPCTS
3 into the emerging market for caption services on internet and mobile devices.

4 59. On June 16, 2010, Hamilton, Ultratec and CapTel released a software application
5 for Apple's iPhone allowing iPhone users to receive captions using IPCTS. A similar Blackberry
6 application was released on Sept. 2, 2010, followed by an application for Android-powered
7 phones on June 1, 2011. The service was branded as Hamilton Mobile CapTel.

8 60. MCC's Mobile Captions Service was a competitor to Hamilton, CapTel and
9 Ultratec's mobile IPCTS.

10 61. MCC's Mobile Captions Service had a competitive advantage over Hamilton
11 Mobile CapTel. Calls using Hamilton Mobile CapTel only work when a mobile device is
12 connected to a cellular network that allows simultaneous voice and data transmissions. In
13 contrast, Mobile Captions Service's offering through Consumer Cellular could operate in areas
14 that did not support simultaneous voice and data or that did not even have a data connection.

15 62. This flexibility gave Mobile Captions Service a significant advantage in network
16 coverage. While only 75% of the population is covered by networks that allow simultaneous
17 voice and data transmissions, Mobile Captions Service could reach 97% of the population of the
18 United States.

19 63. Customers who used Mobile Captions Service reported that Mobile Captions
20 Service provided faster and more accurate captions than Hamilton CapTel. Customers reported
21 that Mobile Captions Service through Consumer Cellular also provided better and more reliable
22 coverage while using less data than Hamilton Mobile CapTel.

23 64. Hamilton Mobile CapTel also requires more data to provide services similar to
24 those provided by Mobile Captions Service on the Nokia phone. This increased data usage has
25 increased costs to customers by requiring customers to either increase the size of their data plans
26 at additional cost or incur data overage charges from their cellular carriers.

27
28

Hamilton and Ultratec Further Destroy MCC’s Future Business Prospects by Disparaging MCC to the States

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2
3 65. In a letter to the states with whom it has contracts to provide relay services,
4 Hamilton falsely suggested that Mobile Captions Service calls had been billed incorrectly to the
5 states. Specifically, Hamilton suggested that it could not tell whether or not Mobile Captions
6 Service calls were properly classified as traditional relay Voice Carry Over (VCO) calls, which
7 are reimbursed by the FCC and the states at a higher rate than CTS or IPCTS calls. Hamilton
8 made these statements despite knowing that Mobile Captions Service calls were properly
9 classified as Voice Carry Over calls.

10 66. Hamilton’s letter to the states also falsely characterized MCC’s commercial launch
11 as a “trial” which had not succeeded when Hamilton knew it had extensively tested Mobile
12 Captions Service prior to launch and knew the commercial launch was not a trial.

13 67. Ultratec also publicly suggested to others in the industry that MCC was defrauding
14 the FCC and the states by collecting improper reimbursements for Mobile Captions Service calls.
15 Specifically, Ultratec accused MCC of falsely representing that Mobile Captions Service calls are
16 properly classified as traditional VCO calls, which are reimbursed by the FCC and states at a
17 higher rate than CTS or IPCTS calls. Ultratec further disparaged MCC by stating that that MCC’s
18 promotional materials falsely stated that Mobile Captions Service calls were traditional VCO
19 calls.

20 **V. VIOLATIONS ALLEGED**

21 **COUNT I — Breach of Contract**

22 **(Against Hamilton Relay, Inc.)**

23 68. Plaintiff realleges and incorporates all prior paragraphs of this Complaint.

24 69. In September 2010, MCC and Hamilton entered into the Agreement to provide the
25 Mobile Captions Service. The Agreement was to run for five years with renewals for successive
26 one year terms.

27 70. MCC performed its obligations under the Agreement.
28

1 71. Hamilton breached the Agreement by not making Mobile Captions Service
2 available in all Hamilton States, by failing to market the Mobile Captions Service effectively, by
3 refusing to provide captioning services for Mobile Captions Service, and by terminating the
4 Agreement prior to the end of the contractual term.

5 72. Hamilton's breaches in failing to market Mobile Captions Service and in refusing
6 to offer the service in all Hamilton States severely harmed MCC by limiting the number of
7 customers MCC could sign up for its Mobile Captions Service. Hamilton's termination of the
8 Agreement and refusal to provide captioning services for Mobile Captions Service have now
9 prevented MCC from offering Mobile Captions Service.

10 73. MCC lost all of its customers and was forced to shut down Mobile Captions
11 Service as a result of Hamilton's breach of the Agreement.

12 74. As a result of Hamilton's breach of contract, MCC is entitled to recover
13 compensatory damages, including but not limited to all amounts MCC would have been entitled
14 to as consequential and direct damages under the contract, including the loss of revenue from the
15 lack of promotion of the Mobile Captions Service, MCC's loss of profits caused by the
16 termination of the Mobile Captions Service, and other damage caused by Defendants' termination
17 in an amount to be determined at trial.

18 **COUNT II — Breach of Duty of Good Faith and Fair Dealing**
19 **(Against Hamilton Relay, Inc.)**

20 75. Plaintiff realleges and incorporates all prior paragraphs of this Complaint.

21 76. In September 2010, MCC and Hamilton entered into the Agreement to provide the
22 Mobile Captions Service. The Agreement was to run for five years with renewals for successive
23 one year terms.

24 77. The covenant of good faith and fair dealing imposes on each party to the contract
25 the duty to refrain from doing anything that would render performance of the contract impossible
26 by any act of his own, and also the duty to do everything that the contract presupposes that each
27 party will do to accomplish its purpose.

28

1 78. Hamilton has breached this duty by violating, nullifying and significantly
2 impairing MCC's right to benefit from the Agreement between MCC and Hamilton.

3 79. Hamilton has frustrated the purpose of the contract by failing to promote MCC's
4 service, by failing to initiate service in all Hamilton States, and later by siphoning MCC's
5 business for the benefit of themselves and Defendants Ultratec and CapTel.

6 80. Hamilton terminated the Agreement without justification and interfered with
7 MCC's right to receive the benefit of the Agreement.

8 81. Hamilton's breach of the duty of good faith and fair dealing has harmed MCC by
9 limiting the number of customers MCC could sign up for its Mobile Captions Service and
10 preventing MCC from offering Mobile Captions Service in Hamilton States.

11 82. MCC lost all of its customers and was forced to shut down Mobile Captions
12 Service as a result of Hamilton's breach of the implied covenant of good faith and fair dealing.

13 83. MCC is entitled to recover compensatory and consequential damages, including
14 but not limited to all amounts MCC would have been entitled to as direct damages under the
15 contract, including the loss of revenue from the lack of promotion of the Mobile Captions
16 Service, MCC's loss of profits caused by the termination of the Mobile Captions Service, and
17 other damage caused by Defendants' termination in an amount to be determined at trial.

18 **COUNT III—Tortious Interference with a Business Relationship or Expectation**

19 **(Against Defendants Ultratec and CapTel, Inc.)**

20 84. Plaintiff realleges and incorporates all prior paragraphs of this Complaint.

21 85. MCC and Hamilton had a contract and agreement to provide captioning services
22 on mobile devices to hard-of-hearing customers in states in which Hamilton was the designated
23 TRS provider. MCC was to receive compensation from Hamilton for providing Mobile Captions
24 Service.

25 86. Ultratec and CapTel had knowledge of MCC's Agreement with Hamilton. Ultratec
26 and CapTel had an agreement with Hamilton to provide a competitive captioning service on an
27 Android smartphone and were aware of MCC's entrance into the mobile relay services market.
28

1 87. Ultratec and CapTel committed unjustified intentional acts to interfere with
2 MCC's Agreement with Hamilton. Ultratec has willfully maintained and leveraged its monopoly
3 power in the landline relay market and exclusive relationships with all of the major relay
4 providers, including Hamilton, to attempt to monopolize the mobile relay market and secure an
5 economic advantage over MCC.

6 88. Ultratec expanded its partnership with Hamilton to offer Hamilton Mobile CapTel,
7 a captioning service for mobile phones to compete directly with MCC's service. After Hamilton
8 terminated its agreement with MCC, Ultratec siphoned Mobile Captions Service users from
9 Mobile Captions Service to Hamilton Mobile CapTel.

10 89. Hamilton acknowledged that pressure from Ultratec and CapTel caused Hamilton
11 to terminate its Agreement with MCC.

12 90. Ultratec has also disparaged MCC and MCC's Mobile Captions Service by stating
13 that MCC was misrepresenting the Mobile Captions Service call type and collecting improper
14 reimbursements from the FCC and states. Ultratec made these disparaging statements knowing
15 that its partner Hamilton had determined that Mobile Captions Service calls were being properly
16 reimbursed.

17 91. As a result of Ultratec's interference, Hamilton made limited efforts to market the
18 Mobile Captions Service and ultimately terminated the Agreement.

19 92. As a result of Hamilton's termination, MCC has been damaged in that it has been
20 forced to shut down its Mobile Captions Service.

21 93. As a result of Ultratec and CapTel's conduct, MCC has been and continues to be
22 damaged, including without limitation the diminution in value of its business, loss of all present
23 and future profits, expenses incurred, and their investment in the business in an amount to be
24 determined at trial.

25 94. Ultratec and CapTel's actions were undertaken willfully, wantonly, maliciously
26 and in reckless disregard for MCC's rights, therefore Plaintiff seeks exemplary and punitive
27 damages in an amount sufficient to deter Defendants and others from similar future wrongful
28 conduct.

COUNT IV — Civil Conspiracy

(Against all Defendants)

95. Plaintiff realleges and incorporates all prior paragraphs of this Complaint.

96. Hamilton on the one hand and Ultratec and CapTel on the other hand, sought and agreed to jointly act against MCC with the intent to injure MCC and prevent it from successfully entering the market and competing on a level playing field. Defendants' agreed-upon objective was to intentionally and specifically damage MCC and attempt to eliminate MCC from the market of providing captioning services on mobile devices.

97. Defendants conspired to commit and committed a variety of independently tortious acts to accomplish this objective, including, among other things, the overt acts alleged herein that form the basis for MCC's claims against Defendants for tortious interference with MCC's business relationships or expectations (Count III), for breach of contract (Count I), for Unfair Business Practices (Count V), for Trade Libel (Count VI and VII), and for Defamation (Count VIII). Such overt acts were undertaken by Defendants in furtherance of Defendants' agreement to intentionally and specifically damage MCC and attempt to eliminate MCC from the market of providing captioning services on mobile devices.

98. As a result of Defendants' conduct, MCC has been and continues to be damaged, including without limitation the diminution in value of its business, loss of all present and future profits, expenses incurred, and their investment in the business in an amount to be determined at trial.

99. Defendants' actions were undertaken willfully, wantonly, maliciously and in reckless disregard for MCC's rights, therefore Plaintiff seeks exemplary and punitive damages in an amount sufficient to deter Defendants and others from similar future wrongful conduct.

**COUNT V — Violation of California Business and Professions Code Section 17200 et seq.
for Unfair Business Practices**

(Against all Defendants)

100. Plaintiff realleges and incorporates all prior paragraphs of this Complaint.

1 101. Defendants' practices as alleged in this complaint constitute unfair business
2 practices under the UCL, Bus. & Prof. Code §§ 17200 *et seq.*

3 102. Defendants have committed unfair business practices by:

4 a. Conspiring to commit and committing a variety of independently tortious
5 acts to eliminate MCC from the mobile caption market, including, among other things, the
6 overt acts alleged herein that form the basis for MCC's claims against Defendants for
7 tortious interference with MCC's business relationships or expectations (Count III) and
8 breach of contract (Count I);

9 b. Engaging in conduct where the utility of such conduct, if any, is
10 outweighed by the gravity of the consequences to Plaintiff;

11 c. Engaging in conduct that is immoral, unethical, oppressive, unscrupulous,
12 or substantially injurious to Plaintiff; and

13 d. Engaging in conduct that undermines or violates the stated policies
14 underlying the UCL, which seeks to protect consumers against unfair business practices
15 and to promote a basic level of honesty and reliability in the marketplace, and thus
16 provide a sufficient predicate for Plaintiff's claims for unfair business practices.

17 103. As a result of said conduct, Defendants have unlawfully and unfairly obtained
18 monies due to Plaintiff and are unfairly competing in the marketplace.

19 104. Plaintiff suffered injury in fact and lost money and property as a result of
20 Defendants' unfair practices, in that Defendants have acquired Plaintiff's former customers and
21 Plaintiff has lost its ability to operate its business and compete in the marketplace.

22 105. Plaintiff is entitled to damages, including but not limited to restitution of the ill-
23 gotten gains obtained by Defendants in an amount to be proven at trial.

24 106. Plaintiff is entitled to attorneys' fees and costs for promoting the interests of the
25 general public in causing Defendants to cease their unlawful and unfair business practices, in an
26 amount to be proven at trial.

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COUNT VI — Trade Libel

(Against Hamilton Relay, Inc.)

107. Plaintiff realleges and incorporates all prior paragraphs of this Complaint.

108. Defendant Hamilton made written statements to state relay agencies that Mobile Captions Service calls had been incorrectly reimbursed at a higher rate than allowed because MCC had improperly classified Mobile Captions Service calls as traditional Voice Carry Over calls.

109. Hamilton also made written statements to state relay agencies that Mobile Captions Service was still in its trial phase.

110. Hamilton couched these statements as facts, going so far as to refund the money that the states had provided as reimbursements for Mobile Captions Service calls.

111. These statements disparaged Mobile Captions Service, and were understood by state relay agencies to be about Mobile Captions Service.

112. Hamilton made these statements knowing such statements were false in that its own regulatory attorney had provided his opinion that Mobile Captions Service calls were properly classified as traditional Voice Carry Over calls subject to reimbursement by the FCC and the states.

113. Further, Hamilton knew Mobile Captions Service was not in the trial phase, as Hamilton, MCC and Consumer Cellular had marketed and promoted Mobile Captions Service as a commercially viable product for months and MCS had been implemented in several states.

114. Hamilton made its statements to the states with malice.

115. Hamilton's statements and its termination of its contract prevented MCC from receiving reimbursements from the states, from contracting with other relay providers, and forced MCC to shut down Mobile Captions Service.

116. As a result of Hamilton's conduct, MCC has been and continues to be damaged, including but not limited to general damages, special damages for pecuniary loss, including the loss of all present and future profits, financial benefit from their customer relationships, their

1 investment in the business, and expenses necessary to counteract Hamilton's false statements in
2 an amount to be proven at trial.

3 117. Hamilton's actions were undertaken willfully, wantonly, maliciously and in
4 reckless disregard for MCC's rights, therefore Plaintiff seeks exemplary and punitive damages in
5 an amount sufficient to deter Hamilton and others from similar future wrongful conduct.

6 **COUNT VII — Trade Libel**

7 **(Against Ultratec, Inc. and CapTel, Inc.)**

8 118. Plaintiff realleges and incorporates all prior paragraphs of this Complaint.

9 119. Upon information and belief, Defendants Ultratec and CapTel made statements to
10 others in the relay services industry that MCC has falsely represented the nature of Mobile
11 Captions Service calls in order to receive higher reimbursements from states.

12 120. Members of the relay services industry understood Defendants' statements to be
13 about Mobile Captions Service.

14 121. Defendants couched this statement as a fact.

15 122. These statements disparaged Mobile Captions Service.

16 123. Ultratec and CapTel were presumably aware that Hamilton's own regulatory
17 attorney had provided his opinion that Mobile Captions Service calls were properly classified as
18 traditional Voice Carry Over calls subject to reimbursement by the FCC and the states.

19 124. Defendants made their statements with malice in an attempt to prevent MCC from
20 being able to contract with another relay provider to offer Mobile Captions Service.

21 125. Defendants' statements prevented MCC from receiving reimbursements from the
22 states, from contracting with other relay providers, and forced MCC to shut down Mobile
23 Captions Service.

24 126. As a result of Defendants' conduct, MCC has been and continues to be damaged,
25 including but not limited to general damages, special damages for pecuniary loss, including the
26 loss of all present and future profits, financial benefit from their customer relationships, their
27 investment in the business, and expenses necessary to counteract Defendants' false statements in
28 an amount to be proven at trial.

1 127. Defendants' actions were undertaken willfully, wantonly, maliciously and in
2 reckless disregard for MCC's rights, therefore Plaintiff seeks exemplary and punitive damages in
3 an amount sufficient to deter Hamilton and others from similar future wrongful conduct.

4 **COUNT VIII — Defamation**

5 **(Against all Defendants)**

6 128. Plaintiff realleges and incorporates all prior paragraphs of this Complaint.

7 129. Defendants made statements regarding MCC in violation of Cal. Civil Code §§ 44-
8 46.

9 130. Defendant Hamilton made written statements to state relay agencies that Mobile
10 Captions Service calls had been incorrectly reimbursed at a higher rate than allowed because
11 MCC had improperly classified Mobile Captions Service calls as traditional relay Voice Carry
12 Over calls.

13 131. Hamilton also made written statements to state relay agencies that Mobile
14 Captions Service was still in its trial phase.

15 132. Defendants Ultratec and CapTel made statements to others in the relay services
16 industry that MCC had falsely represented the nature of Mobile Captions Service calls in order to
17 receive higher reimbursements from states.

18 133. Defendants' statements were false, in that Mobile Captions Service calls were
19 properly classified as traditional Voice Carry Over calls and had been reimbursed as such for
20 several months without issue.

21 134. Defendants statements were false, in that Mobile Captions Service was not in its
22 trial phase; it had been successfully launched and marketed in several states.

23 135. Defendants' statements were defamatory statements about Mobile Captions
24 Service and injurious to the reputation of MCC and its principals. Defendants' statements about
25 Mobile Captions Service were untrue and misleading and were made to influence potential
26 customers and state agencies.

27 136. Defendants' statements were not privileged.
28

1 137. Defendants' statements had a natural tendency to injure MCC's business and the
2 reputation of both MCC's and MCC's principals.

3 138. Defendants' statements were made with malice.

4 139. As a result of Defendants' conduct, MCC has been and continues to be damaged,
5 including but not limited to the loss of all present and future profits and their investment in the
6 business, injury to relationships with customers and states, expenses necessary to counteract
7 Defendants' false statements, and damage to the reputation of the principals of MCC in an
8 amount to be proven at trial.

9 140. Defendants' actions were undertaken willfully, wantonly, maliciously and in
10 reckless disregard for MCC's rights, therefore Plaintiff seeks exemplary and punitive damages in
11 an amount sufficient to deter Defendants and others from similar future wrongful conduct.

12 **IX. REQUEST FOR RELIEF**

13 WHEREFORE, Plaintiff respectfully requests that the Court award damages sustained by
14 Plaintiff as delineated above and restitution of ill-gotten gains obtained by Defendants in an
15 amount to be proved at trial, including but not limited to:

- 16 1. Costs of suit, which include reasonable attorneys' fees and expenses;
 - 17 2. Lost profits;
 - 18 3. Lost investment;
 - 19 4. Pre- and post-judgment interest;
 - 20 5. Punitive mages; and
 - 21 6. For such other relief as the Court deems just and proper.
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DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands a jury trial as to all issues so triable.

Dated: November 30, 2011

Respectfully submitted,

By: s/Jason S. Hartley

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*Attorneys for Plaintiff Mobile Captions
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EXHIBIT 1

AGREEMENT

This AGREEMENT (the "Agreement"), effective as of the 1st day of September, 2010 (the "Effective Date"), is entered into by and between HAMILTON RELAY, INC., a Nebraska corporation, with its principal offices located at 1001 12th Street, Aurora, NE 68818 ("Hamilton"), and MOBILE CAPTIONS COMPANY, LLC, a Delaware limited liability company, with its principal offices located at 13280 Pantera Road, San Diego, CA 92130 ("MCC").

RECITALS

WHEREAS, Hamilton is engaged in the provision of telecommunications relay service ("TRS"), and is a certified TRS provider, and among other functions, develops and maintains an advanced relay platform and telecommunications network in connection therewith; and

WHEREAS, MCC has developed a unique and patent-pending solution that provides captions in connection with the use of wireless communications devices, the specifications for which are set forth in Exhibit A attached hereto and incorporated herein by this reference (the "Technology and Service"), and has formed one or more partnerships with wireless service providers in connection with the Technology and Service; and

WHEREAS, Hamilton and MCC desire to work together to perform testing and to deploy the Technology and Service for commercial application, and through this Agreement desire to memorialize their mutual agreements with regard to the Technology and Service.

NOW, THEREFORE, in consideration of the foregoing recitals and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties agree as follows:

Section 1

EXCLUSIVE RIGHT TO OFFER THE TECHNOLOGY AND SERVICE

MCC grants to Hamilton the exclusive right to offer the Technology and Service in those states in which Hamilton, as of the Effective Date and at any time during the Initial Term (as defined below) or any renewal term, provides TRS. Such states shall be referred to in this Agreement as the "Hamilton States". As of the Effective Date, the states in which Hamilton offers TRS are: Arizona, California,¹ District of Columbia, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Montana, New Mexico, Rhode Island, Utah, and Wyoming as well as the Virgin Islands and the Island of Saipan.

¹ For the State of California or any other TRS multi vending state, Hamilton recognizes that both Hamilton and the other vendor may offer the Technology and Service.

Hamilton shall have the right to enter into such arrangements or agreements with third parties as it deems necessary to ensure the viability of its provision of the Technology and Service in the Hamilton States. Nothing contained herein shall in any way limit MCC from contracting with third parties in connection with the provision of the Technology and Service in locations other than the Hamilton States.

MCC will not submit any proposal for the supply of the Technology and Service in response to any solicitation or request for proposals for Telecommunications Relay Services by a state or federal agency within the United States for which Hamilton intends to and does submit a proposal for the supply of the Technology and Service. Hamilton acknowledges that MCC may be a supplier of the Technology and Service to others who may submit proposals in response to such solicitations. If Hamilton is awarded an exclusive TRS contract in response to such a proposal, Hamilton will have the exclusive right to offer the Technology and Service during the term of such TRS contract.

Section 2

MCC RESPONSIBILITIES

In connection with provision of the Technology and Service, MCC shall perform the following responsibilities:

- a. Secure contractual arrangements with third party wireless carriers to allow the use of the Technology and Service on wireless networks and to pay any associated costs so that end users of the Technology and Service only pay for voice plans. Hamilton will perform no end user billing. MCC will bear the cost of bringing captions from the MCC server to the end user's wireless device.
- b. Provide the MCC computer server functionality and the MCC handset software application on wireless device(s), such planned functionality being further defined in Exhibit A. MCC reserves the right, from time to time, to add or subtract features or functions, or both, from those listed in Exhibit A. The software application shall operate in 2G and 3G wireless environments.
- c. Provide the necessary redundancy and back up to ensure server and software applications operates 24 hours a day, 365 days per year, promptly informing Hamilton of any outages and problems and the likely resolution
- d. Work with Hamilton as reasonably required to implement provision of the Technology and Service.
- e. Work with Hamilton and the Hamilton States and the Interstate TRS Fund Administrators for approval of the Technology and Service as a two line voice carryover ("VCO") call.

- f. Participate in end-to-end testing of the Technology and Service prior to launch as well as stress testing the Technology and Service to ensure its proper operation, and provide feedback to Hamilton regarding this testing.
- g. Provide training to Hamilton's personnel as may be reasonably required to assist Hamilton with implementation and offering of the Technology and Service.
- h. Monitor performance of the Technology and Service and take such steps as may be reasonably necessary from time to time to adjust, modify and improve the Technology and Service to better meet the needs of deaf and hearing impaired end users of TRS in connection with such end users' wireless service and to meet any requirements which may be reasonably necessary to ensure all FCC requirements are met.
- i. Secure customer service arrangements to support Technology and Service.
- j. Build a sign up process for end users of the Technology and Service and make agreements with vendors to deliver wireless devices to end users.
- k. Provide Hamilton with approved MCC logo types and ad copy for use in advertising and outreach materials.
- l. Secure all end user data to maintain confidentiality.
- m. Coordinate marketing with wireless providers and share in costs of collateral materials and advertising for Hamilton outreach effort where Hamilton is producing such material or advertising at MCC's request.
- n. Provide cost data to Hamilton if required by the FCC, the Interstate TRS Fund Administrator or any applicable state agency.
- o. Comply with all requirements of the FCC and the Hamilton States as they relate to the Technology and Service including customer data in the provision of TRS, including but not limited to privacy and customer proprietary network information ("CPNI") requirements whether or not such privacy and CPNI requirements relate to the provision of TRS.

Section 3

HAMILTON RESPONSIBILITIES

In connection with the Technology and Service, Hamilton shall perform the following responsibilities:

- a. Provide personnel for standard relay call processing (via TRS and/or CapTel) as reasonably required to enable the functionality of the Technology and Service.

- b. Comply with all Hamilton States' TRS contracts and FCC TRS requirements in the delivery of the Technology and Service.
- c. Provide the Hamilton TRS platform and interconnectivity to the MCC server, such connectivity to be maintained 24 hours a day, 365 days per year, promptly informing MCC of any outages and problems and the likely resolution
- d. Provide Communications Assistants with sufficient training to handle TRS calls using the Technology and Service without delays or errors within reasonable professional and industry standards.
- e. Track and report MCC calls, including set-up time for voice to MCC and MCC to voice calls.
- f. Work with state agencies as reasonably required to implement provision of the Technology and Service in the Hamilton States.
- g. Participate in end-to-end testing of the Technology and Service to ensure its proper operation.
- h. Work with Hamilton States and the Interstate TRS Fund Administrator for approval of TRS calls using the Technology and Service as a two line voice carryover ("VCO") call.
- i. Bill the Hamilton States and the Interstate TRS Fund Administrator for the provision of the Technology and Service as a VCO call.
- j. Monitor performance of the Technology and Service and advise MCC of such steps that may be reasonably necessary from time to time to ensure that the Technology and Service meets all FCC requirements.
- k. Market the Technology and Service as part of its state outreach efforts and share in costs of collateral materials and advertising for its state outreach programs as may be mutually agreed by MCC and Hamilton.
- l. Submit MCC related advertising and press releases to MCC for approval prior to publication.
- m. Provide standard reporting information to MCC on all TRS Minutes of Use (defined below) utilizing the Technology and Service that are processed by Hamilton on a daily and monthly basis. See list of defined reports in Exhibit B.

Section 4

COMPENSATION; AUDIT

- a. Hamilton will compensate MCC for the provision of the Technology and Service on the following basis:

Tier	From (MOU/Month)	To (MOU/Month)	Rate/MOU Payable to MCC*
1	0	1,000,000	\$0.35
2	1,000,001	2,000,000	\$0.30
3	2,000,001	4,000,000	\$0.28
4	4,000,001	Over 4,000,000	\$0.26

1) *The parties agree that each tier is additive. The first 1,000,000 Minutes of Use in any month are billed at \$0.35, the second 1,000,000 Minutes of Use are billed at \$0.30, etc.

“Minutes of Use or MOU” shall mean conversation minutes of use as defined by the FCC and the Interstate TRS Fund Administrator and billed to the appropriate jurisdictions unless otherwise mutually agreed by the parties. Hamilton will submit Minutes of Use to each Hamilton State and to the Interstate TRS Fund Administrator for billing purposes. Payments by the TRS Fund Administrator and most Hamilton States can be expected in 60 days following such submission.

2) Hamilton will pay MCC within 30 days following the end of the calendar month in which the service occurred. At the time of Hamilton’s submission of MOU to each Hamilton State and to the Interstate TRS Fund Administrator, Hamilton will provide MCC with a report delineating all MCC Minutes of Use utilizing the Technology and Service submitted for payment, including records for each call, such details are explained in Exhibit B section B. In the event that Hamilton is not provided reimbursement for any such Minutes of Use as a result of the Technology and Service not meeting the requirements of the applicable state agency, the FCC or Interstate TRS Fund Administrator, (“Disqualified Minutes”) then Hamilton shall not be required to pay MCC for such Disqualified Minutes, and if MCC has already been paid for such Disqualified Minutes by Hamilton, Hamilton shall deduct an amount each month from the compensation due to MCC, such amount equaling the total amount paid to MCC for the Disqualified Minutes divided by the number of months over which the minutes were disqualified, until all such deductions equal the amount paid to MCC for the Disqualified Minutes. If, in any month there is insufficient funds owed to MCC from which to deduct, the deduction shall roll over to the next month. . If there are no Minutes of Use from which to deduct or the funds owed to MCC from which to deduct in the then current month are less than Twenty Percent (20%) of

the amount owed to Hamilton as a result of the disqualification of minutes, MCC shall pay the balance to Hamilton in full within Ninety(90) days.

- 3) Hamilton will pay MCC via EFT (Electronic Fund Transfer).
 - 4) Following completion of the third year of the Initial Term of this Agreement, the parties shall review the compensation rates set forth in this section and in the event that the Bureau of Labor Statistics Seasonally Adjusted Consumer Price Index for all Items for all Urban Consumers, ("CPI") as of the third year of the Initial Term of this Agreement has increased or decreased by more than 3% from the CPI as of September 2010 (the "Base Month"), then the compensation rates set forth above shall be adjusted up or down by 50% of the percentage increase or decrease from the Base Month (a "Rate Adjustment"). Thereafter, the CPI for the month that the Rate Adjustment is made shall become the updated Base Month and a future Rate Adjustment will occur as of the anniversary date of this Agreement whenever there is an increase or decrease from the updated Base Month of more than 3% percent in this new Base Period.
- b. MCC will allow at Hamilton expense, or if required by law, an authorized government agency with appropriate jurisdiction over Hamilton, at its expense, to inspect those records of MCC as may be reasonably required to audit Minutes of Use involving the Technology and Service. MCC shall retain all records that it generates in connection with the performance of this Agreement for not less than seven (7) years following the year of the activity.
 - c. At MCC's expense, MCC shall have the right to audit Hamilton's reports and service provisioning not more than once during any 12-month period to ensure all agreed to service and reporting standards are being met in accordance with this contract.
 - d. MCC agrees that, if at any time during the Initial Term and any renewal term of this Agreement, MCC has in effect an agreement which grants to any third party who receives the Technology and Service prices more favorable than the prices set forth in section 4.a above for MOU volumes and a contract duration comparable to this Agreement, MCC shall notify Hamilton in writing with respect to such more favorable pricing and any Associated Terms, and Hamilton may, at its election, request MCC to substitute such more favorable pricing along with any Associated Terms for the prices set forth in section 4.a above as an amendment to this Agreement. Associated Terms as used in this paragraph shall mean terms which are both substantive and material to the third party agreement and may include investment, payment terms, volume guarantees, payment of direct or indirect expenses.

Section 5

OWNERSHIP OF INTELLECTUAL PROPERTY

The parties agree that Hamilton's Confidential Information, the Hamilton TRS technology and Hamilton CapTel Services technology (collectively, the "Hamilton Property") whether now owned by Hamilton or hereafter developed by Hamilton, Hamilton's third party contractor CapTel, Inc., Hamilton affiliates or any third party contractor of Hamilton (each a "Hamilton Party" and collectively, the "Hamilton Parties") shall, as between Hamilton and MCC, be the exclusive property of Hamilton and MCC shall have no rights therein. Moreover, MCC agrees that, if because of its access to any Hamilton Property, MCC is involved, either jointly with any Hamilton Party or on its own, in the creation of any ideas, processes, inventions, designs, technologies, computer hardware or software, original works of authorship, specifications, devices, techniques, algorithms, methods, formulas, discoveries or inventions, patents, copyrights, copyrightable works, products and/or any enhancements or improvements, know-how, data, rights and claims that directly relate to the Hamilton Property ("Covered Hamilton IP"), then such Covered Hamilton IP shall be the exclusive property of Hamilton and MCC shall assign all rights, title and interest therein to Hamilton and execute whatever documentation Hamilton requires to secure its rights in such Covered Hamilton IP. Covered Hamilton IP shall be included in the definition of Hamilton Property automatically upon its creation.

The parties agree that MCC Confidential Information, the MCC Handset Application and the MCC Server Application described on Exhibit A attached hereto (collectively, "MCC Property") whether now owned by MCC or hereafter developed by MCC or MCC's third party contractor other than Hamilton (each a "MCC Party" and collectively, the "MCC Parties") shall, as between Hamilton and MCC, be the exclusive property of MCC and Hamilton shall have no rights therein. Moreover, Hamilton agrees that, if because of its access to any MCC Property, Hamilton is involved, either jointly with any MCC Party or on its own, in the creation of any ideas, processes, inventions, designs, technologies, computer hardware or software, original works of authorship, specifications, devices, techniques, algorithms, methods, formulas, discoveries or inventions, patents, copyrights, copyrightable works, products and/or any enhancements or improvements, know-how, data, rights and claims that directly relate to MCC Property ("Covered MCC IP"), then such Covered MCC IP is and shall remain the exclusive property of MCC and Hamilton shall assign all rights, title and interest therein to MCC and execute whatever documentation MCC requires to secure its rights in such Covered MCC IP. Covered MCC IP shall be included in the definition of MCC Property automatically upon its creation.

Neither party shall combine their respective Hamilton Property and MCC Property into any new innovations, whether or not patentable, works of authorship, know how, or trade secrets, except as mutually agreed upon in writing.

Nothing in this Agreement precludes either party, its affiliates, agents or employees from developing, independently of any knowledge of or access to the other party's Confidential Information, any work product and owning all intellectual property rights embodied therein, or from using and/or retaining General Knowledge. "General Knowledge" means generalized know-how, ideas, concepts, processes, information or techniques related to information technology that are retained solely in intangible form in the unaided memories of a party's representatives who have had access to the Confidential Information of a Disclosing Party under this Agreement. The foregoing and any use of General Knowledge shall not be deemed to impair a party's: (a) rights in and to its valid patents, copyrights or trade secrets, or (b) development, manufacture, marketing and/or maintenance of its own "Property", products and services.

Section 6

WARRANTY; LIMITATION OF LIABILITY

MCC warrants that the Technology and Service shall perform in accordance with the specifications set forth in Exhibit A attached hereto, and in accordance with the professional standards of skill and care generally exercised by similar companies and applicable to like technologies. The parties mutually warrant to one another that neither party has used any of the other party's confidential information prior to the date of this Agreement, other than exclusively for the purposes stated in this Agreement.

IN NO EVENT SHALL EITHER PARTY BE OBLIGATED OR LIABLE TO THE OTHER PARTY FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, SPECIAL OR PUNITIVE DAMAGES ARISING OUT OF OR IN CONNECTION WITH THE SERVICES PROVIDED BY THE OTHER PARTY PURSUANT TO THIS AGREEMENT, OR ANY OTHER ACTION OR INACTION OF A PARTY UNDER THIS AGREEMENT, INCLUDING BUT NOT LIMITED TO LOSS OF REVENUE OR PROFIT, EVEN IF THE PARTY HAS BEEN ADVISED OR KNEW, OR SHOULD HAVE KNOWN, OF THE POSSIBILITY OF SUCH DAMAGES OR LOSS.

Section 7

INDEMNIFICATION

MCC represents and warrants that the use, sale or other distribution of the Technology and Service shall not infringe any intellectual property rights or such other similar rights, licenses, or interests of any third party ("Intellectual Property Right"). MCC shall defend, indemnify, and hold Hamilton harmless from any and all claims, costs, damages, or causes of action (including, but not limited to, any claim based upon a theory of unauthorized use or misappropriation) arising out of or relating to any claimed infringement of any Intellectual Property Right or any other rights in connection with the

sale, use, or other distribution of the Technology and Service. If the sale, use or other distribution of the Technology and Service is held in any such suit or proceeding to constitute an infringement, Hamilton, in addition to any other right or remedy available under applicable law, shall have the right to require MCC, at MCC's option, at MCC's sole cost and expense, to (a) replace the Technology and Service with non-infringing technology of equal or superior quality; (b) modify the Technology and Service so as to make it substantially equal in quality required under the Specifications but not infringing; or (c) remove the Technology and Service and refund or credit the amounts paid by Hamilton to MCC for the Technology and Service to the extent Hamilton has to refund monies it received from offering the Technology and Service.

Section 8

INSURANCE

During the Initial Term and any renewal term of this Agreement, MCC and Hamilton each agrees to maintain, at their respective expense, the following minimum insurance coverages:

- a. Workers Compensation (Statutory) providing coverage for the employees.
- b. Employer's Liability with minimum limits of five hundred thousand dollars (\$500,000);
- c. General Liability including Products/Completed Operations and Personal Injury with minimum limits of one million dollars (\$1,000,000) per occurrence with a two million-dollar (\$2,000,000) aggregate; and
- d. All insurance obtained will be underwritten by an insurer bearing a rating of "B" or better in the current issue of Best's Key Rating Guide. Each party shall furnish the other with certificates of insurance or other appropriate documentation (including evidence of renewal of insurance) evidencing all coverage referenced above and naming the other party as an additional insured. Such certificates or other documentation will include a provision whereby thirty (30) days notice must be received by the named insured prior to coverage cancellation, non-renewal or alteration of the coverage by either the insured or the applicable insurer. Such cancellation, non-renewal or alteration will not relieve insured party of its continuing obligation to maintain insurance coverage in accordance with this Agreement.

Section 9

CONFIDENTIALITY

Each of Hamilton and MCC (for this purpose, the "Receiving Party") shall, and shall cause its personnel to, hold and deal with the following in strict confidence: (a) information relating to the business of the other party (for this purpose, the "Disclosing Party") if that information is clearly designated as confidential; (b) any unannounced

product(s) or service(s) of the Disclosing Party; (c) the terms, conditions and subject matter of this Agreement that may be agreed to by the parties; (d) all information and reports that may be generated by the Disclosing Party pursuant to this Agreement; (e) interim reports and work product that may be generated by the Disclosing Party in connection with this Agreement; (f) proprietary methodologies, techniques and tools of the Disclosing Party; and (g) any other information or materials that are designated as confidential. All of these items constitute "Confidential Information" unless excluded by the terms of the following paragraph.

Notwithstanding the terms of the preceding paragraph, Confidential Information does not include information that is: (a) approved for release or disclosure without restriction by the Disclosing Party's authorized representative in writing; (b) publicly known or becomes publicly known, so long as it is not through the acts or omissions of the Receiving Party that it is or becomes publicly known; (c) rightfully received by the Receiving Party from a third party without restriction and without violation of any agreement; (d) independently developed by the Receiving Party without reference to the Disclosing Party's Confidential Information; or (e) legally required to be disclosed by the Receiving Party under a requirement of a governmental agency or court of law having jurisdiction, but only if the Receiving Party provides the Disclosing Party with prompt notice prior to disclosure so that the Disclosing Party may seek judicial protection and the Receiving Party discloses only that information which, in the reasonable opinion of its counsel, is required to be disclosed.

The Receiving Party shall protect the Disclosing Party's Confidential Information that is in the Receiving Party's possession or control using at least the same means it uses to protect its own Confidential Information, but in any event not less than reasonable means and shall not use the Disclosing Party's Confidential Information for any purpose other than in connection with the implementation of this Agreement.

Upon termination of this Agreement, the Receiving Party shall, unless otherwise provided herein: (a) Return to the Disclosing Party all Confidential Information received from the Disclosing Party and any copies of that Confidential Information (or if the Disclosing Party so requests, shall destroy that Confidential Information and any such copies and shall certify to the Disclosing Party that it has done so); and (b) destroy any notes or other materials prepared by the Receiving Party (or prepared on its behalf) that contain Confidential Information received from the Disclosing Party. However, this requirement shall not require the return or destruction of (i) the Agreement, or drafts or copies thereof; (ii) materials that the Agreement contemplates will become the property of the Receiving Party; (iii) archival, accounting, financial or corporate files; or (iv) other materials that are required to be retained for audit, regulatory or legal reasons.

Section 10

TERM AND TERMINATION

- a. Subject to earlier termination pursuant to the terms of this Section, the initial term of this Agreement shall be five (5) years from the Effective Date (the "Initial Term"). Following expiration of the Initial Term, this Agreement shall renew for successive one (1) year renewal terms unless written notice of non-renewal is provided by one party to the other not less than ninety (90) days prior to the expiration of the Initial Term or any renewal term of this Agreement. Notwithstanding the other terms and conditions of this Agreement, it is acknowledged by the parties that this Agreement calls for certain tests, pilots and trial launches of the services making use of the Technology and Service. In the event that any such tests, pilots or trial launches are unsuccessful, as determined in the sole discretion of either Hamilton or MCC, Hamilton or MCC may terminate this Agreement upon thirty (30) days written notice without any other cause. In addition, in the event that any agency in one or more of the Hamilton States or the Interstate TRS Fund Administrator determines that TRS calls using the Technology and Service shall not be treated as a VCO call, Hamilton may, in their sole discretion, terminate this Agreement only as to the state or federal jurisdiction that has made a determination that TRS calls using the Technology and Service shall not be treated as a VCO call, except that if 3 or more states determine that TRS calls using the Technology and Service shall not be treated as a VCO call, Hamilton may terminate this Agreement in its entirety.
- b. Either party may terminate this Agreement for cause in the event of a material breach of this Agreement, violation of law or violation of regulatory rule or practice by the other party, provided that the non-breaching party furnishes the party in breach with written notice specifying such breach and that the breach is not cured within thirty (30) days following such notice. The right to terminate this Agreement shall be in addition to, and not in lieu of any and all other rights that the non-breaching party may have at law or in equity, which rights are expressly reserved by the non-breaching party. Notwithstanding such termination, the provisions of Sections 5, 6 7, 9, 11 and this Section of this Agreement shall survive termination. Breach as defined herein shall include any failure of the Technology and Service, the Hamilton TRS platform or MCC or Hamilton to comply with FCC, TRS Fund Administrator or state agency requirements.
- c. In the event that one of the parties to this Agreement is subject to an "Insolvency Event", the other party to the Agreement may immediately terminate this Agreement by giving written notice to the other party. For purposes of this Agreement, an "Insolvency Event" shall be deemed to have occurred upon any of the following events:
 - 1) A receiver is appointed for either party or its property;

- 2) Either party makes a general assignment for the benefit of its creditors;
- 3) Either party commences, or has commenced against it, proceedings under any bankruptcy, insolvency or debtor's relief law, which proceedings are not dismissed within sixty (60) days; or
- 4) Either party is liquidated or dissolved.

Section 11

MISCELLANEOUS

- a. This Agreement shall be governed by and construed in accordance with the laws of the State of Nebraska, without regard for principles of choice of law.
- b. MCC and Hamilton agree that the other shall be excused from performance under this Agreement, and neither MCC nor Hamilton shall be liable to the other or any other person or entity for any loss, damage, delay, or non-delivery, as a result, in whole or in part, from any Act of God, or any condition or circumstance not within their control, including: criminal acts of any person or entity; acts of war, terrorism or civil unrest; local or national severe weather conditions including tornado, hurricane, numbered or named tropical storm or depression, local and national disruptions in transportation networks or operations, failure of communications or information systems including network or internet outages, or any condition that presents a danger to each party's employees and/or personnel and/or facilities and equipment. In every case, the failure to perform must be beyond the control and without the contributing fault or negligence of the party claiming that its performance is excused under this provision.
- c. This Agreement, the exhibit(s) attached hereto and any amendment made a part hereof in the future, constitute the complete and exclusive statement of the agreement of the parties with respect to the subject matter hereof, and supersede all prior oral and written proposals, representations, or other communications related to the subject matter hereof.
- d. This Agreement shall not be assignable by either Hamilton or MCC to another non-related person or entity without the prior written consent of the non-assigning party, which consent may not be unreasonably withheld. Related parties include subsidiaries, and sister companies where ownership is at least 50% in common.
- e. In the event any provision of this Agreement is held by a court or other tribunal of competent jurisdiction to be unenforceable, that provision will be enforced to the maximum extent permissible under applicable law and the other provisions of this Agreement will remain in full force and effect. The parties further agree that, in

the event such provision is an essential part of this Agreement, they shall negotiate in good faith the terms and conditions of a replacement provision.

- f. No action taken pursuant to this Agreement shall be deemed to constitute a waiver of compliance with any representation, warranty, covenant or agreement contained in this Agreement and shall not operate or be construed as a waiver of any subsequent breach, whether of a similar or dissimilar nature.
- g. This Agreement may be executed in one or more counterparts, each of which will be an original against any party whose signature appears hereon and all of which taken together will constitute one and the same instrument binding upon all parties, notwithstanding that all parties are not signatories to the same counterpart.
- h. Any controversy or claim among the parties arising from or in connection with this Agreement or the relationship of the parties under this Agreement or under any addenda or exhibit hereto, whether based on contract, tort, common law, equity, statute, regulation, order or otherwise ("Dispute") shall be resolved as follows: (i) Upon written request of either Hamilton or MCC, each of the parties will appoint a designated representative whose task it will be to meet for the purpose of endeavoring to resolve such Dispute; (ii) the designated representatives shall meet as often as the parties reasonably deem necessary to discuss the Dispute in an effort to resolve the Dispute without the necessity of any formal proceeding; (iii) if not resolved by mutual efforts of the parties hereto, the parties agree to non-binding mediation or other similar non-binding alternate dispute resolution to be conducted by a neutral third party acceptable to both parties; and (iv) in the event the Dispute cannot be resolved through the foregoing efforts, then the dispute shall be settled by arbitration. In the event that arbitration of a dispute is initiated by MCC, the arbitration shall be held in the Lincoln, Nebraska, and in the event that arbitration of a dispute is initiated by Hamilton, the arbitration shall be held in San Diego, California. In either circumstance, such arbitrations shall be conducted in accordance with the commercial arbitration rules then in effect of the American Arbitration Association. The award entered by the arbitrator(s) shall be final and binding and may be entered in any court having jurisdiction.
- i. To be valid, any amendment or modification of the terms of this Agreement must be in writing, and signed by all parties.
- j. All notices and other communications hereunder shall be in writing and shall be deemed given (i) the same day if delivered personally or sent by facsimile; (ii) the next business day if sent by overnight delivery via reliable express delivery service; or (iii) after five (5) business days if sent by certified mail, return receipt requested, postage prepaid. All notices shall be delivered to the parties at the addresses set forth in the introductory paragraph of this Agreement (or at such other addresses for a party as shall be specified by like notice, provided that notice of change of address shall be effective only upon receipt thereof.)

k. In the event of any conflict between the terms and conditions of this Agreement and the provisions of any Exhibit attached hereto, the terms and conditions of this Agreement shall take precedence.

IN WITNESS WHEREOF, the undersigned parties have caused their authorized representatives to execute and deliver this Agreement as effective the date and year first above written.

MOBILE CAPTIONS COMPANY, LLC
("MCC")

HAMILTON RELAY, INC.
("HAMILTON")

By: _____

By: James Nelson

Title: _____

Title: PRESIDENT

Date: _____

Date: 9-2-10

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- k. In the event of any conflict between the terms and conditions of this Agreement and the provisions of any Exhibit attached hereto, the terms and conditions of this Agreement shall take precedence.

IN WITNESS WHEREOF, the undersigned parties have caused their authorized representatives to execute and deliver this Agreement as effective the date and year first above written.

MOBILE CAPTIONS COMPANY, LLC
("MCC")

HAMILTON RELAY, INC.
("HAMILTON")

By: 

By: _____

Title: President

Title: _____

Date: 9/7/10

Date: _____

EXHIBIT A

Confidential Description of MCC Technology and Service¹

- A. MCC Handset Application. The MCC Handset Application on the end user's wireless handset performs the following functions:
- a. Receives the appropriate TRS number to dial from the MCC server.
 - b. Stores that known TRS number for later use, in case the connection is not available.
 - c. Puts the number in the address book.
 - d. Intercepts outgoing calls and dials the TRS number.
 - e. Sends the outgoing number and other identifying information to the MCC server.
 - f. Dials the TRS number.
 - g. Receives and displays captions from the MCC server.
 - h. Provides the user with set up and status messages.
 - i. Provides for user options as follows:
 - i. Save or not save sessions;
 - ii. Adjust the time each line is delivered to the phone;
 - iii. Edit and send the sessions; and
 - iv. Length of scroll time time-out.
 - j. Allows the user to customize the experience as follows:
 - i. Text size can be changed up or down;
 - ii. Speakerphone can be engaged and disengaged;
 - iii. Headsets supported by the handset can be used;
 - iv. User can scroll back during a session, and the application provides a "time-out" where the user is brought back to new captions; and
 - v. Volume can be adjusted.
 - k. Sets up a captioned call automatically when an incoming call is received by contacting the MCC server to see whether there will be incoming captions.
 - l. Defaults to a non-captioned call if there are no captions.
 - m. Allows the user to dial 911, where it is handled without captions.
- B. MCC Server Application. The MCC Server Application performs the following functions:
- a. Receives incoming communication from the end user's wireless handset.
 - b. Checks to see if the user is registered.
 - c. If registered, passes the information to the Hamilton system.
 - d. Receives text generated by the Hamilton system.
 - e. Collects usage information for each call.
 - f. Keeps a user profile for each user including:
 - i. Name;
 - ii. Number;
 - iii. Phone type; and
 - iv. TRS number for that user.
 - g. Allows user and TRS information to be updated by the administrator.

- h. Decides which modality to use to send captions.
 - i. Connects to the SMS gateway and sends SMSs when needed.
 - j. Sends captions by a data connection to the handset when possible.
- C. Technology and Service Functions:
- a. Partner with cell providers.
 - b. Provide training materials.
 - c. Provide technical support.
 - d. Maintain MCC website.
 - e. Maintain requisite records.

¹ Features and functions subject to change provided however that such changes shall not materially degrade the resulting service to the end user.

EXHIBIT B

- A. Call Detail Data shall be reported via electronic means to MCC for each State and NECA jurisdiction daily, with daily cumulative aggregation through month's end.
- a. Call Detail Data Reports shall be available automatically no later than 8:00am Eastern time each business day for the previous day(s). If a problem occurs with the automated reporting, Hamilton will have reporting to MCC by close of business.
- B. Call Detail Data Reports shall include the following data for each MCC call serviced by Hamilton:
- a) CDR for MCC
 - b) Call Arrival Date and Time
 - c) Conversation Start Time
 - d) Inbound Call (1 for Inbound, 0 if second outbound on initial Call)
 - e) Queue Seconds (Number of Seconds a call was in Queue, 0 for calls that were not inbound)
 - f) Answered Call (1 for Answered, 0 for Abandon)
 - g) Outbound Call (1 for Outbound, 0 for GenAss)
 - h) Complete Call (1 for Complete, 0 for Incomplete (Busy/NA))
 - i) ANI
 - j) Dialed Number
 - k) Session Minutes
 - l) Conversation Minutes
 - m) DNIS
 - n) DNIS Agency (State Assigned to DNIS)
 - o) Call Jurisdiction (Intrastate, Interstate, International, 800, 900)
- C. Other Monthly Reports:
- a) Customer complaints/resolutions/commendations
 - b) Service outages/resolutions