

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Petition for Expedited Declaratory Ruling of
Mammoth Mountain Ski Area, LLC

To: The Commission

CG Docket No. CG 02-278

**PETITION FOR EXPEDITED DECLARATORY RULING
OR FORBEARANCE OF MAMMOTH MOUNTAIN SKI AREA, LLC**

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INTRODUCTION AND SUMMARY

Pursuant to Section 1.2 of the Federal Communications Commission rules, Mammoth Mountain Ski Area (“Mammoth Mountain”) hereby respectfully submits this Petition for Expedited Declaratory Ruling or Forbearance to seek a ruling that “prior express consent” under the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, includes all consents obtained prior to October 16, 2013 where the consumer has provided their telephone number to the advertiser and the advertiser has a contractual right to contact the consumer at that number. Specifically, Mammoth Mountain seeks a clarifying or forbearance ruling that consents obtained prior to the October 16, 2013 rule change through consumers’ voluntary provision of their telephone number remain valid as prior contractual obligations and invalidating these consents amounts to an improper retroactive impairment of Mammoth Mountain’s contractual rights. In the alternative, Mammoth Mountain seeks a ruling that the 2012 Order interpreting the TCPA improperly defined the term “prior express consent” as written, signed consent because this reading of the statute is manifestly contrary to the plain meaning of the TCPA and Congressional intent that written consent not be required under the TCPA.

I. BACKGROUND

A. Mammoth Mountain Ski Area

Mammoth Mountain Ski Area is a ski resort located near Mammoth Lakes, California along the eastern side of the Sierra Nevada mountain range in the Inyo National Forest. Mammoth opened in 1953 and features 3,500 acres of terrain that has been enjoyed by millions of skiers. When Mammoth’s guests purchase Mammoth Mountain products, such as season passes, lift tickets, and ski rentals, they often provide Mammoth certain personally-identifiable information so that Mammoth may contact them with updates, discounts, and related products. This personally-identifiable information can include name, address, date of birth, and relevant to

this proceeding, their telephone number. Providing Mammoth with a phone number is voluntary, and consumers are not required to provide their phone number to purchase Mammoth Mountain products.

Many Mammoth Mountain consumers purchase these products and provide their personally-identifiable information to Mammoth on the Mammoth website. By using the Mammoth website, users are subject to a Privacy Policy in which the user “agrees to be bound by all of [the] terms and conditions” of the website Privacy Policy, and the Policy explains that “[i]f you do not agree to these terms, please do not access or use this site.”¹ Mammoth’s Privacy Policy governs how Mammoth collects personally-identifiable information from guests and how Mammoth uses such information. The Policy states:

When you engage in certain activities on this site as listed below . . . , we may ask you to provide certain information about yourself by filling out and submitting an online form. It is completely optional for you to engage in these activities. If you elect to engage in these activities, however, we may ask that you provide us personal information such as your . . . telephone numbers

The Policy explains that Mammoth can use a guest’s telephone number to “offer you specially tailored deals,” to “fill orders, improve our marketing and promotional efforts, . . . improve our product and service offerings, . . . [and] to deliver information to you and to contact you regarding administrative notices.” The Policy further states that “[i]f you choose to not receive promotional material or special offers from us including but not limited to email, direct mail or telephone, we ask that you tell us by opting out”

Mammoth Mountain’s communications to its skiers include campaigns to remind season pass-holders when their passes expire and may be renewed, and provide information about

¹ Available at <http://www.mammothmountain.com/winter/home/privacy>.

discounted lift tickets and season passes. Mammoth Mountain does not purchase contact information from third parties or vendors, and has only ever contacted by phone those consumers who provided their telephone numbers to Mammoth in connection with a purchase of a Mammoth Mountain product or the use of the Mammoth website. These marketing efforts are an important way that Mammoth Mountain stays in touch with its established customers.

On October 15, 2014, a single plaintiff initiated a class action lawsuit against Mammoth Mountain alleging that Mammoth made certain automated calls to its pass holders and skiers, and that these automated calls violate the TCPA. As alleged, from October 2013 to October 2014, Mammoth Mountain initiated thousands of autodialed calls to its current and prior customers advertising season passes to the mountain, including two calls to the named plaintiff. This plaintiff was a loyal guest at Mammoth, purchasing six consecutive years of season passes from Mammoth between 2008 and 2013. The named plaintiff provided his phone number to Mammoth in 2008 when he signed up for a season pass product on the Mammoth website. Users of the Mammoth website in 2008 were subject to the same provisions of the Privacy Policy as discussed above. If Mammoth Mountain is found liable for violating the TCPA for calling the thousands of customers alleged in this plaintiff's complaint, Mammoth faces statutory penalties of potentially tens of millions of dollars.

B. The Evolving TCPA Rules

Congress passed the TCPA in 1991, prohibiting entities from using automatic dialers or pre-recorded messages to call telephone numbers for commercial purposes unless the caller has provided "prior express consent." 47 U.S.C. § 227(b). The term "prior express consent" was not defined in the text of the TCPA. Congress delegated authority to the FCC to "implement" the TCPA's provisions. 47 U.S.C. § 227(b)(2), (f).

The FCC released its first Report and Order (the “1992 Order”), instituting the rules relating to the TCPA, on October 16, 1992. In the 1992 Order, the FCC explained that:

[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary. Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached.

Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, FCC 92-443, Report and Order, 7 FCC Rcd. 8752, 8769, ¶ 31 (1992) (footnote omitted). The 1992 Order also contained a “prior business relationship” exception, which provided that the TCPA would not apply to calls to persons with whom the caller had an established business relationship:

We conclude, based upon the comments received and the legislative history, that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship.

Id. at 8770, ¶ 34 (footnote omitted). The FCC again updated its rules in 2003, establishing a national do-not-call registry with the FTC. *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, FCC 03-153, Report and Order, 18 FCC Rcd. 14014, 14017, ¶ 1 (2003). In 2005, on reconsideration of its 2003 Order, the Commission specifically affirmed that the “existing business relationship” exception still existed, stating: “the existence of financial agreements, including bank accounts, credit cards, loans, insurance policies and mortgages, constitute ongoing relationships that should permit a company to contact the consumer to, for example, notify them of changes in terms of a contract or offer new products and services that may benefit them.” *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, FCC 05-28, Second Order on Reconsideration, 20 FCC Rcd. 3788, 3798, ¶ 26 (2005).

In 2008, the FCC issued an Order (the “2008 Order”) in response to a petition seeking clarification on the TCPA’s rules regarding debt collection calls, and again had occasion to address the meaning of “prior express consent,” but in the specific context of debt collection calls. The FCC explained:

[W]e clarify that autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the “prior express consent” of the called party. . . . We conclude that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.

Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, FCC 07-232, Declaratory Ruling, 23 FCC Rcd. 559, 559, ¶ 1, 564, ¶ 9 (2008) (footnote omitted). The 2008 Order did not disturb or affect the established business relationship exception to the TCPA.

On February 15, 2012, the Commission released a Report and Order (“2012 Order”) that provided, altering years of prior regulations and orders, that “prior express consent” must be provided in writing in order to bring the FCC’s rules in line with the FTC’s telemarketing rules. *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, FCC 12-21, Report and Order, 27 FCC Rcd. 1830, 1838, ¶ 20 (2012). The 2012 Order altered “prior express consent” to require *written* consent. *Id.* Specifically, the 2012 Order adopted a set of stringent new requirements regarding the content and form of consents. The 2012 Order required that consents be “signed” such that the signature is recognized as valid under state or federal laws (*e.g.*, consistent with the E-SIGN Act). Further, the Commission concluded that written consent must:

[B]e sufficient to show that the consumer: (1) received “clear and conspicuous disclosure” of the consequences of providing the requested consent, *i.e.*, that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates. In addition, the written agreement must be obtained “without

requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service.”

Id. at 1844, ¶ 33 (footnotes omitted). These requirements — which require the consumer to sign a document stating that he or she will be contacted by an automatic dialer — are a substantial departure from the previous “prior express consent” rules that did not specify the form of consent required. The 2012 Order also eliminated the prior business relationship exemption. *Id.* at 1845, ¶ 35. Finally, the 2012 Order noted that “[o]nce [the] written consent rules become effective, however, an entity will no longer be able to rely on non-written forms of express consent to make autodialed or prerecorded voice telemarketing calls, and thus could be liable for making such calls absent prior written consent.” *Id.* at 1857, ¶ 68. The rules went into effect on October 16, 2013.

Mammoth Mountain now seeks a ruling that this change does not and cannot legally invalidate prior contractual consents provided in the form of the voluntary provision of a telephone number, where those phone numbers were provided by the consumer subject to an explicit privacy policy that allowed such calls. In the alternative, Mammoth seeks a ruling that the 2012 Order requiring written, signed consent to receive automated calls is inconsistent with Congressional intent as evidenced in the text and legislative history of the TCPA, and was therefore an improper rulemaking.

II. MAMMOTH MOUNTAIN CUSTOMERS’ PRIOR CONSENTS SHOULD REMAIN VALID BECAUSE THE TCPA SHOULD NOT BE READ TO RETROACTIVELY IMPAIR VESTED CONTRACTUAL RIGHTS.

The 2012 Order interpreting the TCPA should not be read to apply to consents received prior to October 16, 2013 because this would be an improper and unfair retroactive restriction on the contracted-for rights of Mammoth Mountain to contact its customers. Administrative rulemaking that has a retroactive effect is procedurally improper. The Administrative Procedure

Act states that a “‘rule’ means the whole or a part of an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy”

5 U.S.C. § 551 (emphasis added). If an FCC rule has retroactive application, it is not permissible under the Administrative Procedure Act:

[T]he APA requires that legislative rules be given future effect only. Because of this clear statutory command, equitable considerations are irrelevant to the determination of whether the Secretary’s rule may be applied retroactively; such retroactive application is foreclosed by the express terms of the APA.

Georgetown Univ. Hosp. v. Bowen, 821 F.2d 750, 757 (D.C. Cir. 1987), *aff’d*, 488 U.S. 204 (1988) (finding that the Secretary of Health and Human Services improperly applied legislative rule retroactively, contrary to the Medicare Act). Indeed, the FCC has acknowledged this limitation on its power in its own orders. *See, e.g., High-Cost Universal Serv. Support*, WC Docket No. 05-337 & CC Docket No. 80-286, Memorandum Opinion and Order, 25 FCC Rcd. 3430, 3434, ¶ 11 (2010) (footnote omitted) (“Generally, rules adopted by administrative agencies may be applied prospectively only.”).

The Supreme Court has made clear that, in general, “[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In *Landgraf v. USI Film Products*, the Supreme Court further explained that “[s]ince the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent.” 511 U.S. 244, 270 (1994). Quoting Justice Story, the Court explained that “every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must

be deemed retrospective” *Id.* at 269 (quoting *Soc’y for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (No. 13,156) (CCNH 1814)).

In *National Mining Association v. Department of Labor*, the Court of Appeals for the D.C. Circuit confirmed and reiterated that “a rule is retroactive if it ‘takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.’” 292 F.3d 849, 859 (D.C. Cir. 2002). Thus, rules that disturb or impair rights acquired under existing law are impermissibly retroactive and are presumptively improper. The court in *National Mining* further explained that a court’s decision about whether an administrative rule has improper retroactive application involves a “commonsense, functional judgment about ‘whether the new provision attaches new legal consequences to events completed before its enactment.’” *Id.* at 859-860 (citation omitted).

A party to a contract has a bundle of vested rights created pursuant to that contract, and retroactive legislative impairment of such rights is improper. In *Kia Motors America v. Glassman Oldsmobile Saab Hyundai*, the Sixth Circuit considered a situation in which a change in the law affected a contractual right of a party. 706 F.3d 733, 740-41 (6th Cir. 2013). In *Kia*, plaintiff Kia Motors filed a declaratory judgment action against a dealership, Glassman Oldsmobile, seeking a ruling that Kia could build a car dealership within seven miles of the defendant dealership. *Id.* The defendant dealership claimed this was in violation of the “anti-encroachment” amendment to the Michigan Motor Dealers Act — enacted after Kia and Glassman Oldsmobile had entered into a dealership agreement — that prohibited building new dealerships within seven miles of another dealership. *Id.* Kia argued that it had a prior contractual agreement with the defendant dealership, which provided that Kia could build a

dealership anywhere within a six (rather than seven) mile radius of another dealership. Kia argued that this contractual provision should control as a prior vested right. *Id.* The court agreed with Kia: “To require Kia to comply with the 2010 Amendment would clearly require us to apply the Amendment retroactively because it would take away Kia’s previously unrestricted contractual right to establish a new dealer more than 6 miles from Glassman.” *Id.* at 740-41. The court approvingly pointed to its own prior opinion indicating that a statute would operate retroactively if it impacted a pre-existing contract, even though the conduct it regulated post-dated the statute. *See Dale Baker Oldsmobile, Inc. v. Fiat Motors of N. Am., Inc.*, 794 F.2d 213, 219 (6th Cir. 1986) (finding that a party had vested contractual rights that could not be impaired by subsequent statute).

Mammoth Mountain, as Kia in *Kia v. Glassman*, has a contractual relationship with its customers that created a vested right to communicate with them about offers and information related to Mammoth Mountain’s products. The purchase process through which Mammoth Mountain customers engage with Mammoth creates a contract between them. The Mammoth Mountain Privacy Policy forms part of the contractual agreement between the skier and Mammoth Mountain. The Policy states that “[y]ou acknowledge that this Privacy Policy is part of our Site Terms of Use, and by accessing or using our site, you agree to be bound by all of its terms and conditions. If you do not agree to these terms, please do not access or use this site.” The Policy explicitly states that Mammoth may contact customers via their telephone with marketing information. By using the Mammoth website, consumers agree to be bound by the agreement. *See In re EasySaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1172 (S.D. Cal. 2010) (finding that a complaint properly alleged that the purchase of products from a web site creates a contract between the seller and consumer, and explaining that “[t]he terms of use, Privacy

Policy, and the EasySaver Rewards Policy that appear on Provide’s web page are part of that contract”).

Thus, Mammoth has a vested right to contact its customers with marketing communications who provided their phone numbers to Mammoth through the Mammoth website prior to October 16, 2013. It is improper for the 2012 Order to retroactively impair these vested rights. Considering the “commonsense” practical approach adopted by the Supreme Court in addressing retroactivity, it would be unjust to retroactively invalidate consents of consumers that have no objections to being contacted by companies like Mammoth Mountain to stay informed of products and services. Companies like Mammoth Mountain, which do not purchase third party lists of contact information and only contact those consumer who have indicated their continued interest in Mammoth’s products, should not be forced to re-solicit consents and risk confusing and alienating their customers. The FCC should issue a clarifying or forbearance ruling that consents obtained prior to the October 16, 2013 rule change through consumers’ voluntary provision of their telephone number remain valid as prior contractual obligations if the number was provided subject to a contractual right of the advertiser to contact the consumer at that number.

III. INTERPRETING “PRIOR EXPRESS CONSENT” TO INCLUDE ONLY PRIOR WRITTEN CONSENT IS CONTRARY TO CONGRESSIONAL INTENT.

Because the text of the TCPA makes clear that Congress did not intend to require that “prior express consent” be provided in writing and signed, the FCC’s requirement that consent be provided in writing and signed is contrary to the TCPA. The TCPA prohibits “any person . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone

service” 47 U.S.C. § 227(b)(1) (emphasis added). In drafting the TCPA, Congress was aware that it could have required written consent; the Committee on Energy and Commerce specifically addressed the issue of prior express consent in its discussion and recommendation regarding the TCPA. In describing the TCPA’s definition of “telephone solicitation” in Section 227(a), the Committee specifically excluded written consent from the prior consent required under the statute because it would be unreasonable and restrictive:

The Committee did not attempt to define precisely the form in which express permission or invitation must be given, but did not see a compelling need for such consent to be in written form. Requiring written consent would, in the Committee’s view, unreasonably restrict the subscriber’s rights to accept solicitations of interest and unfairly expose businesses to unwarranted risk from accepting permissions or invitations from subscribers.

H.R. REP. 102-317 at 13. This description of the prior express consent requirement makes clear that, in crafting and passing the TCPA, Congress did not intend to require written consent for communications to be provided by consumers.

The Supreme Court has explained that “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (footnote omitted). Though the FCC has interpretive authority over the TCPA (*see Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 467 (6th Cir. 2010) (“[T]he FCC has interpretive authority over the Telephone Act and its accompanying regulations”)) (citation omitted), the 2012 Order makes clear that the Commission understood in creating its rules that it must act consistently with Congressional intent, stating that “the Commission has discretion to determine, consistent with Congressional intent, the form of express consent required.” 2012 Order, 27 FCC Rcd. at 1838, ¶ 21. However, neither Congressional intent nor the common usage of the term “express consent” requires that consent be in writing and signed.

In fact, the FCC's own 1992 Order made this clear by citing House Report, 102-317, 1st Sess., 102nd Cong. (1991) at 13, describing Congress as "noting that [where a number has been provided by the consumer] 'the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications.'" 1992 Order, 7 FCC Rcd. at 8769, ¶ 31 n.57.

Even if Congressional intent were unclear, because the TCPA does not define the term "prior express consent," the common usage of those words would discern their meaning. *See CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001) ("In the absence of a statutory definition of a term, we look to the common usage of words for their meaning." (citation omitted)). "In order to determine the common usage or ordinary meaning of a term, courts often turn to dictionary definitions for guidance." *Id.* Black's Law Dictionary defines "express consent" as "[c]onsent that is clearly and unmistakably stated." BLACK'S LAW DICTIONARY 346 (9th ed. 2004). Nothing about the common usage of this term would necessarily permit, but especially require, that consent be provided in writing and signed. The Commission's interpretation, changing over time to a very narrow and restrictive view of the "prior express consent" requirement, is inconsistent with the terms of the statute and with Congressional intent.

Congressional use of "express consent" was explicitly chosen *not* to mandate written and signed consent, which would "unreasonably restrict" subscriber rights and "unfairly expose businesses to unwarranted risk." Thus, the 2012 Order's new definition of "prior express consent" was improper as contrary to Congressional intent in passing the TCPA.

IV. CONCLUSION

Mammoth Mountain now asks the Commission to rule that consents obtained by Mammoth through consumers' voluntary provision of their telephone number prior to October 16, 2013 are valid. Because Mammoth Mountain has vested rights in the contractual relationship it has established with these consumers, it is improper for the FCC's rules to retroactively impair these vested rights. In the alternative, Mammoth Mountain seeks a ruling that the 2012 Order is inconsistent with Congressional intent as evidenced in the text and legislative history of the TCPA and is therefore improper.

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