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21 **UNITED STATES DISTRICT COURT**
22 **EASTERN DISTRICT OF CALIFORNIA**

23 PAUL STORY, individually and on behalf of all
24 others similarly situated,

25 Plaintiff,

26 v.

27 MAMMOTH MOUNTAIN SKI AREA, LLC, a
28 limited-liability company,

Defendant.

Case No. 14-CV-02422-JAM-DAD

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANT MAMMOTH MOUNTAIN SKI
AREA, LLC'S MOTION TO STAY**

Assigned to the Hon. John A. Mendez

Hearing Date: March 11, 2015

Hearing Time: 9:30 a.m.

Hearing Location: Courtroom 6, 14th Floor, 501
I Street, Sacramento, California 95814

29 **I. INTRODUCTION**

30 Defendant Mammoth Mountain Ski Area, LLC's ("Mammoth") Motion to stay should be denied.
31 The petitions upon which the Motion is based concern the ongoing validity of *written* consents obtained
32 before the October 16, 2013, rule change to the Telephone Consumer Protection Act ("TCPA"). The
33 petitions are irrelevant because there is no evidence that valid written consent under the earlier rule was

1 ever obtained from Plaintiff or any putative Class Member. Mammoth’s Motion should also be denied
2 because any relief granted by the Federal Communications Commission (“FCC”) in response to the
3 petitions can only be implemented on a prospective basis. Accordingly, even if the FCC were to “grant”
4 the petitions, any such ruling would necessarily post-date the Class period—especially in light of
5 Mammoth’s representation that it no longer engages in any telemarketing activity. Consequently, the
6 petitions cannot impact this case.

7 On October 16, 2013, a new TCPA rule became effective, requiring telemarketers to obtain
8 consent from consumers in a signed writing that contains a clear and conspicuous disclosure of the
9 consequences of providing the requested consent, and that satisfies multiple other requirements spelled
10 out in the new rule, such as informing consumers that consent is not a condition of purchasing goods or
11 services. The primary petition upon which Mammoth’s Motion is based, filed by the Coalition of
12 Mobile Engagement Providers (the “CMEP petition”), seeks a declaration that the new rule does not
13 nullify written consents that were obtained before October 16, 2013, and that were compliant with the
14 law at that time. The other petition briefly referenced in Mammoth’s Motion, filed by the Direct
15 Marketing Association (the “DMA petition”), also concerns the ongoing validity of pre-rule-change
16 written consents.

17 Before the October 16, 2013, rule change—the consent period at issue in the petitions—although
18 written consent had fewer requirements, it still required the satisfaction of two independent elements:
19 (1) that a number be provided and (2) that consent to be contacted at that number also be provided.
20 Notice of Proposed Rulemaking, In the Matter of Rules and Regulations Implementing the Telephone
21 Consumer Protection Act of 1991, 25 FCC Rcd. 1501, 1507 (Jan. 22, 2010). Mammoth has failed to
22 show that the second element is satisfied here. In fact, the only evidence provided by Mammoth as to
23 this element is the presence of a privacy policy on its website that, Mammoth contends, discloses its
24 intention to use customer numbers for telemarketing. However, the deposition of Mammoth’s Vice
25 President of Database Marketing & Research, Tammy Innocenti, confirmed that Mammoth possesses no
26 evidence that Plaintiff ever reviewed the policy, that Plaintiff or putative Class Members were ever
27 prompted or directed to read the policy, or that Plaintiff or putative Class Members did anything to
28 accept its terms. Consequently, the privacy policy—which may only be accessed by affirmatively

1 depressing a button titled “privacy” on the right static menu bar of Mammoth’s website—constitutes an
2 unenforceable “browsewrap” agreement under binding Ninth Circuit precedent and may not be relied
3 upon as evidence of consent. Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175–76 (9th Cir. 2014).
4 Mammoth’s failure to provide competent evidence that Plaintiff did anything more than provide a
5 telephone number distinguishes the present case from Lambert v. Buth-Na-Bodhaige, Inc., 2014 WL
6 4187250 (E.D. Cal. Aug. 21, 2014), where the court granted a defendant’s motion to stay based on
7 sworn testimony that the defendant’s records reflected the plaintiff had provided her phone number *and*
8 *had granted permission to be contacted by the defendant at that number*. Because there is no evidence
9 that Plaintiff ever provided proper written consent under the old rule, the pending petitions—which are
10 limited to the validity of written consents obtained under the old rule—do not bear on a matter at issue
11 in this case. Defendant’s Motion therefore should be denied.

12 Mammoth’s Motion should also be denied because the pending petitions seek a rule change (as
13 opposed to a mere clarification) that may only be implemented on a going-forward basis—outside the
14 Class period—based on “the principle that new administrative rules apply only prospectively,” as
15 acknowledged by Mammoth. (See Mammoth’s Notice of Mot., Mot. to Stay, & Mem. of P. & A. in
16 Supp. Thereof (“Mammoth’s Mot.”) [ECF 17] at 6:6–7 (citing Bowen v. Georgetown Univ. Hosp., 488
17 U.S. 204, 208 (1998)).) Plaintiff notes that the parties never raised this issue in Lambert and that, as a
18 result, the Lambert court had no opportunity to consider it. See Trujillo v. Jacquez, 2014 WL 4072062
19 at *2 n.2 (N.D. Cal. Aug. 15, 2014) (stating that a “court cannot consider an argument that [a party]
20 ha[s] not made”) (citing Williams v. Cnty. of Alameda, 26 F. Supp. 3d 925, 947 (N.D. Cal. 2014)).

21 The fact that the petitions seek a change in the law is clear from the history of the TCPA’s 2013
22 amendments. In February 2012, after the close of a two-year comment period, the FCC adopted a new
23 consent rule, including in it a “sunset” provision giving telemarketers an interim period of one year to
24 modify their procedures for securing consent. That interim period closed on October 16, 2013. From
25 that date on, then, telemarketers were required to secure “prior express written consent”—as that term is
26 defined in the rule change—from any consumers they wanted to contact with prerecorded messages.
27 This includes consumers who may have provided consent *before* the rule change for any calls placed
28 *after* the rule took effect. The FCC petitions on which Mammoth bases its Motion seek to invalidate the

1 new rule by indefinitely extending the sunset provision such that written consents obtained prior to the
2 rule change—but that do not comply with the new rule—remain valid.

3 The DMA petition tacitly acknowledges that it seeks a change in the law, requesting that the
4 FCC forbear enforcement of the new rule, which rule would otherwise result in liability for those relying
5 on previously obtained written consents that are no longer compliant under the new rule. Similarly,
6 although the CMEP petition purports merely to seek a clarification of the existing law, there is no
7 denying that, in requesting the FCC to recognize the ongoing validity of consents that do not comply
8 with the new rule, the petitioner seeks to fundamentally reverse—retroactively—the October 16, 2013,
9 rule change. Respectfully, this Court can and should look beyond the petitioners’ artful drafting in
10 deciding Mammoth’s Motion. See Jamison v. First Credit Servs., Inc., 290 F.R.D. 92, 102 n.5 (N.D. Ill.
11 2013) (in denying a TCPA motion to stay premised on a pending FCC petition, explaining that, although
12 the “petitioners . . . asked the FCC to ‘clarify’” an issue, “the [c]ourt fails to see how the petition
13 requests anything less than for the FCC to overturn the clear language of” a preexisting FCC order).
14 The pending petitions seek a rule change; at most, then, the FCC may grant the requested relief on a
15 going-forward basis only. Such a ruling can have no effect on Plaintiff’s claim, which is based upon
16 past conduct—especially given Defendant’s own representation that it no longer engages in
17 telemarketing and has no intention to do so in the future. See Jamison, 290 F.R.D. at 101–02
18 (explaining that, because of the prohibition against retroactivity, “a change in the FCC’s rules would
19 likely not affect [the plaintiff]’s claim”). Defendant’s Motion fails for this separate reason as well.

20 **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

21 The history of the TCPA and the rule change makes two things very clear. First, the change
22 represents a significant and dramatic revision to the TCPA motivated by a desire to stem the rising tide
23 of telemarketing. Second, the change was intended to apply industry-wide and to have no exceptions,
24 such as the grandfathering-in of now invalid pre-rule-change written consents, as urged by the CMEP
25 and DMA petitioners.

26 **A. The FCC Codified a Major TCPA Rule Change Effective October 16, 2013, Mandating** 27 **Prior Express Written Consent that Satisfies Multiple Requirements**

28 The TCPA makes it “unlawful for any person within the United States . . . to make any call

1 (other than a call made for emergency purposes or made with the prior express consent of the called
 2 party) using any automatic telephone dialing system or a prerecorded voice . . . to any telephone number
 3 assigned to a . . . cellular telephone service.” 47 U.S.C. § 227(b)(1) (parenthetical in original). On
 4 January 22, 2010, the FCC duly released a notice of proposed rulemaking seeking comment on whether
 5 the prior-express-consent requirement should be modified to mean “prior express *written* consent.”¹ 25
 6 FCC Rcd. at 1508 (emphasis supplied). On February 15, 2012—two years after the comment period had
 7 closed—the FCC issued a report and order on the notice. See Report and Order, *In the Matter of Rules*
 8 *and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830,
 9 1831 (Feb. 15, 2012). In the February 15, 2012, report and order, the FCC explained that it needed to
 10 take steps “to [further] protect consumers from unwanted telemarketing calls.” Id. The FCC recognized
 11 that there had been a “substantial increase in the number of consumers who use wireless phone service,
 12 sometimes as their only phone service,” and that “prerecorded calls [we]re [becoming] increasingly
 13 intrusive in the wireless context, especially where the consumer pays for the incoming call.” Id. at
 14 1839–40. “Given these factors,” the FCC chose on February 15, 2012, to define the statutory term of
 15 “prior express consent” as “prior express *written* consent for [all] autodialed or prerecorded
 16 telemarketing calls to wireless numbers.” Id. at 1840 (emphasis supplied).

17 As set forth in the FCC’s report and order, “prior express written consent” requires the execution
 18 by the consumer of a signed document *affirmatively stating* that he or she “received ‘clear and
 19 conspicuous disclosure’ of the consequences of providing the requested consent,” *i.e.*, stating “that [he
 20 or she] will receive future calls that deliver prerecorded messages by or on behalf of a specific seller” at
 21 that number. Id. at 1844. The signed document must also state that he or she “agrees unambiguously to
 22 receive such calls at a telephone number [that he or she] designates.” Id. Finally, the written agreement
 23 must recite that the consent was “obtained without requiring, directly or indirectly, that the agreement be
 24 executed as a condition of purchasing any good or service.” Id. (internal quotations omitted). The
 25 FCC’s report and order contain no exceptions or carve-outs.

26 //

27 _____
 28 ¹ A copy of that notice—as well as copies of all documents from the FCC Record and the Federal Register cited in this Memorandum—is attached to the concurrently filed Declaration of David Zelenski. Plaintiff has also concurrently filed a Request for judicial notice as to those documents.

1 **B. The Rule Change Was Implemented Over One Year so that the Industry Could Adjust**

2 Although the new rule was set forth in the FCC’s February 15, 2012, report and order, it did not
3 go into effect on that date. Instead, to “allow[] a reasonable time for affected parties to implement
4 necessary changes in a way that ma[d]e[] sense for their business models”—*i.e.*, to give telemarketers
5 sufficient time to change their procedures—the FCC “establish[ed] a twelve-month period for
6 implementation” of the prior-express-written-consent rule to “commence upon publication of OMB
7 approval of [the] written consent rules in the Federal Register.” *Id.* at 1856–57. The prior-express-
8 written-consent rule change was published with OMB approval on October 16, 2012, effectively giving
9 telemarketers until October 16, 2013, to comply. See Final Rule and Announcement of Effective Date,
10 Telephone Consumer Protection Act of 1991, 77 Fed. Reg. 63240-01, 63241 (Oct. 16, 2012).

11 Based on the publication in the Federal Register, the prior-express-written-consent rule was
12 codified on October 16, 2013—the date set by the FCC for the new rule to take effect. See 47 C.F.R.
13 § 64.1200(a). Thus, the new rule was published with OMB approval a full year *before* the effective
14 date. During that one-year sunset period, telemarketers could continue to rely on any consents they had
15 obtained prior to the effective date—October 16, 2013—for all calls placed until October 16, 2013.²
16 Once October 16, 2013, arrived, however, telemarketers were required to comply with the new rule.

17 **C. Mammoth Initiated a Call Campaign to Plaintiff and Class Members After the Rule**
18 **Change Without First Obtaining the Prior Express Written Consent Required by the**
19 **New Rule**

20 Here, Plaintiff alleges that Mammoth contacted him two times in April 2014 as part of a mass
21 telemarketing campaign. (Class-Action Compl. (“Compl.”) [ECF 1] ¶¶ 9–10.) He also alleges that the
22 calls were placed using both a prerecorded voice and an automatic telephone dialing system (“ATDS”).
23 (Compl. [ECF 1] ¶¶ 9–10, 12.) On this basis, he seeks to represent a Class of individuals who have been
24 contacted by Mammoth with such messages since October 16, 2013. (Compl. [ECF 1] ¶ 15.) See 47
25 U.S.C. § 227(b)(3) (creating a private right of action). Mammoth does not dispute that Plaintiff received
26 prerecorded advertising messages on his cellular telephone or that the messages were delivered through
27 the use of an ATDS. Those allegations are therefore presumed true for purposes of the present Motion.

28 ² Telemarketers actually had more than a year to continue relying on earlier-obtained consents, given that the FCC itself announced the rule in February 2012, eight months prior to publication in the Federal Register.

1 See, e.g., Privasys, Inc. v. Visa Int'l, 2007 WL 3461761 at *1 n.1 (N.D. Cal. Nov. 14, 2007). Nor does
2 Mammoth present any evidence that it obtained written consent compliant with the new rule's
3 requirements to place the calls in question.

4 ***D. Mammoth Seeks to Stay this Action Based on Petitions Concerning the Ongoing***
5 ***Validity of Pre-Rule-Change Written Consents that Mammoth Never Obtained***

6 Nevertheless, Mammoth seeks to stay this action on the basis of the CMEP petition, the DMA
7 petition, and a petition that has yet to be filed, on the ground that these petitions place (or will place) the
8 issue of express consent in question and therefore may have a bearing on this case. The CMEP petition
9 was filed on October 17, 2013, a day after the TCPA rule change. It was brought by a coalition of
10 companies already subject to "rigorous requirements" prior to the rule change, including a requirement
11 that express written consent be obtained before sending telemarketing messages. (See Decl. of Jordan
12 M. Heinz in Supp. of Mammoth's Mot. ("Heinz Decl.") Ex. 3 [ECF 17-7] at 7.) In it, the petitioner
13 seeks a declaration that the new TCPA rule effective October 16, 2013, "do[es] not nullify those written
14 express consents already provided by consumers before that date." (Heinz Decl. Ex. 3 [ECF 17-7] at 5.)
15 Presumably, the petitioner seeks to continue relying upon written consents that comply with some, but
16 not all, of the new requirements. The petition justifies the relief sought therein on the difference
17 between written and non-written forms of express consent. (Heinz Decl. Ex. 3 [ECF 17-7] at 11.) The
18 DMA petition, filed on the same date, similarly requests that the FCC forbear enforcing the new rule as
19 to written consents that were obtained before October 16, 2013, but that fail to disclose to customers that
20 consenting to be contacted is not a condition of sale. (See Heinz Decl. Ex. 10 [ECF 17-10] at 2.)

21 Critically, prior to the 2013 rule change—the consent period relevant to the pending petitions—
22 although written consent did not carry all of the requirements it does today, it did require both the
23 provision of a telephone number *and consent to be contacted at that number*. See 25 FCC Rcd. at 1507
24 (explaining under the old rule that, if written consent is required, "the seller or telemarketer must obtain
25 a signed, written agreement between the subscriber and seller stating that the subscriber agrees to be
26 contacted by that seller and including the telephone number to which calls may be placed") (citing
27 Report and Order, In the Matter of Rules and Regulations Implementing the Telephone Consumer
28 Protection Act of 1991, 18 FCC Rcd. 14014, 14043 (July 3, 2003)).

1 The sole evidence put forth by Mammoth concerning whether Plaintiff provided written consent
2 to be contacted, and thus whether this case falls within the ambit of the pending petitions, is the
3 declaration of its Vice President of Database Marketing & Research, Tammy Innocenti. (See generally
4 Decl. of Tammy Innocenti in Supp. of Mammoth’s Mot. (“Innocenti Decl.”) [ECF 17-1].) In her
5 Declaration, Ms. Innocenti testifies that Plaintiff provided his telephone number to Mammoth when he
6 signed-up for an online “ecommerce” account in 2008. (Innocenti Decl. [ECF 17-1] ¶ 3.) Ms. Innocenti
7 further testifies that, when Plaintiff accessed Mammoth’s website, he did so “subject” to a privacy
8 policy informing users of the intention to use personal information for marketing purposes. (Innocenti
9 Decl. [ECF 17-1] ¶¶ 5–8.) Through this testimony, Mammoth suggests—without stating
10 affirmatively—that Plaintiff consented to be contacted at the number provided.

11 As discussed below, Ms. Innocenti contorts the language of the privacy policy, which nowhere
12 expressly mentions telemarketing. But more even more significant, there is no evidence before the
13 Court demonstrating that Plaintiff ever actually read the privacy policy, was ever prompted to read the
14 policy, or in any way agreed to its terms, either before or after the creation of his ecommerce account.
15 There is likewise no evidence before the Court demonstrating that Mammoth ever provided the
16 disclosures set forth in the privacy policy through some alternative mechanism. Ms. Innocenti’s
17 Declaration does not explain how the sign-up process worked, what screens Plaintiff viewed, what the
18 website looked like or stated, or why the use of Mammoth’s website is subject to its privacy policy. Nor
19 has Mammoth produced any screen-shots of the sign-up process or any other webpage Plaintiff viewed.

20 Consequently, Plaintiff duly noticed Ms. Innocenti’s deposition, which Magistrate Drozd ordered
21 take place after Mammoth had refused to produce her. (Order [ECF 26] at 1:26–2:1.) The reason for
22 the lack of evidence became very obvious at Ms. Innocenti’s deposition: There is none. Specifically,
23 Ms. Innocenti’s deposition revealed the following undisputed facts:

- 24 • Mammoth maintains *no* archives of *any* website pages from 2008. (Decl. of David
25 Zelenski in Opp’n to Mammoth’s Mot. (“Zelenski Decl.”) [filed concurrently] ¶ 2 &
Ex. 1 at 25:24–28:4.)
- 26 • Ms. Innocenti was not employed with Mammoth when Plaintiff signed up in 2008,
27 and she has never viewed the website as it existed at that time. (Zelenski Decl. [filed
concurrently] ¶ 2 & Ex. 1 at 9:6–10, 24:22–24, 31:19–22.)
- 28 • Ms. Innocenti does not know what any of the screens viewed by Plaintiff during the

1 sign-up process said. (Zelenski Decl. [filed concurrently] ¶ 2 & Ex. 1 at 32:11–14,
2 37:9–15.)

- 3 • Ms. Innocenti does not know if any of the screens viewed by Plaintiff during the sign-
4 up process discussed consent to be contacted, prompted Plaintiff to review or accept
5 the privacy policy, or even mentioned the privacy policy. (Zelenski Decl. [filed
6 concurrently] ¶ 2 & Ex. 1 at 38:15–39:11, 46:17–47:8.)
- 7 • Ms. Innocenti does not know if any of the other pages on the Mammoth website at the
8 time that Plaintiff had signed up discussed consent to be contacted, prompted him to
9 review or accept privacy policy, or even mentioned the privacy policy. (Zelenski
10 Decl. [filed concurrently] ¶ 2 & Ex. 1 at 38:15–39:11, 46:17–47:8.)

11 The most that Ms. Innocenti could say—based on her discussions with *others*—was that Plaintiff
12 provided a telephone number on a website that had a privacy policy, and that there was a button labeled
13 “privacy” on a static bar on the right side of the site which, if depressed, would open up the policy.³
14 (Zelenski Decl. [filed concurrently] ¶ 2 & Ex. 1 at 33:15–22.)

15 Regarding the pages that Plaintiff viewed when he signed up for his ecommerce account, Ms.
16 Innocenti testified as follows:

17 Q: And I take it you never saw screen shots of any of the pages that Paul Story saw when
18 he signed up for his e-commerce account?

19 A: That is correct.

20 Q: By the way, do you know how many pages Mr. Story saw when he signed up for his
21 e-commerce account?

22 A: No.

23 (Zelenski Decl. [filed concurrently] ¶ 2 & Ex. 1 at 37:9–15.) As to the specific issue of whether Plaintiff
24 provided consent to be contacted at the number he had supplied, Ms. Innocenti testified:

25 Q: Yes. I’m asking you: You don’t know whether the web page on which Mr. Story
26 provided his personal information contained any statements concerning being contacted
27 at his telephone number, do you?

28 ³ During Ms. Innocenti’s deposition, it became apparent that she was relying on hearsay instead of
her own personal knowledge as to the specific facts set forth in her Declaration regarding Plaintiff’s
supposed provision of consent. (See Zelenski Decl. [filed concurrently] ¶ 2 & Ex. 1 at 12:1–31:14,
39:23–45:24.) Mammoth chose to submit Ms. Innocenti’s Declaration as the sole evidence on which it
bases its Motion despite the fact that—according to Ms. Innocenti herself—at least one of the
individuals who provided her this information worked for Mammoth in 2008. (See Zelenski Decl. [filed
concurrently] ¶ 2 & Ex. 1 at 24:22–25:21.) Plaintiff therefore objects to the “facts” set forth in Ms.
Innocenti’s Declaration regarding the provision of consent, including those concerning the creation of
his ecommerce account in 2008 and those concerning the terms supposedly set forth in Mammoth’s
2008 privacy policy, as incompetent hearsay evidence in violation of the best-evidence rule. See Fed.
Rs. Evid. 802, 1002. Not surprisingly, the Declaration itself does not include the requisite verification
that it was executed “under penalty of perjury.” 28 U.S.C. § 1746.

1 A: I don't know.

2 Q: And you don't know whether any of the other pages that Paul Story viewed when he
3 signed up for his e-commerce account contained any statements about being contacted at
4 his telephone number, do you?

5 A: I don't know.

6 (Zelenski Decl. [filed concurrently] ¶ 2 & Ex. 1 at 39:2–11.) Similarly, Ms. Innocenti confirmed that
7 she had no knowledge whatsoever regarding user acceptance of the privacy policy and that there is
8 absolutely no factual basis for her statement that users accessed the website “subject” to the policy:

9 Q: Other than within the privacy policy itself, did the website in 2008 state anywhere
10 that user access was subject to the privacy policy?

11 A: I don't know.

12 Q: Do you know if other than the link that says privacy and—that we've discussed on
13 the right-hand side, and the privacy policy itself, other than those two things, did the
14 website say anything concerning privacy?

15 A: I don't know.

16 (Zelenski Decl. [filed concurrently] ¶ 2 & Ex. 1 at 46:17–47:1.)

17 In her Declaration, Ms. Innocenti also contorts the privacy policy itself, which nowhere contains
18 a straightforward disclosure that consumers' telephone numbers will be used for telemarketing. For
19 example, Ms. Innocenti states that the policy explained “Mammoth Mountain would use Mr. Story's
20 telephone number to ‘fill orders, improve our marketing and promotional efforts, ... [and] improve our
21 product and service offerings” and that it advised Mr. Story, “If you choose to not receive promotional
22 material or special offers from us including but not limited to email, direct mail or telephone, we ask that
23 you tell us by opting out.” (Innocenti Decl. [ECF 17-1] ¶ 8 (ellipsis in original).) These quotations are
24 from two separate sections of the privacy policy. The first quote comes from section 2 of the policy,
25 which discusses the use of personal information to better understand consumer preferences and perform
26 analysis to improve products and services. The only sentence in this section that expressly references
27 Mammoth's intent to “contact you” states: “We may use Personally Identifiable Information to deliver
28 information to you and contact you regarding administrative notices.” (Innocenti Decl. Ex. 2 [ECF 17-
3] § 2.) Telemarketing is not mentioned. The second quote comes from section 5 of the policy, which
only states that email and direct mail may be sent. (Innocenti Decl. Ex. 2 [ECF 17-3] § 5.) Nowhere

1 does this section state consumers will be contacted on their telephones, or even mention telemarketing.

2 Ms. Innocenti’s Declaration concludes by affirming that “Mammoth Mountain has no active
3 telemarketing campaign and has no such campaigns currently planned for the future.” (Innocenti Decl.
4 [ECF17-1] ¶ 9.)

5 **III. ARGUMENT**

6 Mammoth correctly explains that any primary-jurisdiction stay must be based on “the need to
7 resolve an issue that . . . that requires expertise or uniformity in administration.” (Mammoth’s Mot.
8 [ECF 17] at 8:17–20 (quoting Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc., 307 F.3d 775,
9 781 (9th Cir. 2002)).) The touchstone under this inquiry, then, is whether the petitions will somehow
10 implicate—or, to use Mammoth’s terminology, “directly affect”—Plaintiff’s alleged claim for relief.
11 (Mammoth’s Mot. [ECF 17] at 11:15. See also Mammoth’s Mot. [ECF 17] at 11:16–17 (stating that the
12 analysis should consider whether the Court will “issu[e] any decisions that may be undermined by [the]
13 FCC’s rulings on the[] petitions”).) Because the primary-jurisdiction doctrine “is ‘not designed to
14 secure expert advice from agencies every time a court is presented with an issue conceivably within the
15 [FCC]’s ambit,” a stay is warranted “only in a ‘limited set of circumstances.’” Swearingen v. Late July
16 Snacks LLC, 2014 WL 2215878 at *2 (N.D. Cal. May 29, 2014) (quoting Clark v. Time Warner Cable,
17 523 F.3d 1110, 1114 (9th Cir. 2008)) (internal quotations omitted). The doctrine therefore “is to be
18 invoked sparingly,” particularly given that “it often results in added expense and delay.” Alpharma, Inc.
19 v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2005).⁴

20 Based on the facts concerning Mammoth’s website and the prospective nature of the new consent
21

22 ⁴ Indeed, in one recent TCPA action—Glauser v. GroupMe, Inc., N.D. Cal. Case No. C 11-2584
23 PJH—a stay was lifted *sua sponte* by the court on March 27, 2014, following prolonged inaction by the
24 FCC. Glauser was stayed in January 2012 under the primary-jurisdiction doctrine pending a ruling on
25 three petitions before the FCC. (Zelenski Decl. [filed concurrently] ¶ 4 & Ex. 6 at 3:6–9.) The Glauser
26 court lifted the stay on its own motion over two years later, “after receiving no indication that any FCC
27 action was forthcoming” as to the petitions. (Zelenski Decl. [filed concurrently] ¶ 4 & Ex. 6 at 3:10–
28 11.) The import of Glauser is clear: Telemarketers should not be permitted to circumvent FCC rulings
by endlessly filing new petitions that take issue with the FCC’s now-final rules, asking for a stay
whenever a new petition in that endless stream is filed. See, e.g., Pimental v. Google, Inc., 2012 WL
1458179 at *5 (N.D. Cal. Apr. 26, 2012) (in denying a TCPA motion for stay, stating that “the [c]ourt is
reluctant to stay this proceeding pending a determination by the FCC since there is no indication that the
FCC has taken up or will take up the issues” in the near future); Jordan v. Nationstar Mortg. LLC, 2014
WL 5359000 at *10 (N.D. Cal. Oct. 20, 2014) (in denying a TCPA motion for stay, detailing the FCC’s
backlog of petitions, and explaining that “[t]here is no guarantee that the FCC will rule on these issues”).

1 rule (as well as the prospective nature of all FCC rulings in general), Mammoth’s Motion must be
 2 denied. Plaintiff never provided proper written consent for Mammoth to contact him, whether before or
 3 after the effective date of the new rule. Consequently, this case does not fall within the ambit of the
 4 pending petitions. Moreover, given the final status of the current rule, even if the FCC were to revisit
 5 the issue, the FCC could only do so prospectively. Because Mammoth itself admits that it no longer
 6 engages in any automated telemarketing, any change to the rule will necessarily post-date the Class
 7 period and, therefore, would have no effect on this case. The Motion therefore fails on its own terms.

8 ***A. The FCC Petitions Are Irrelevant Because Plaintiff Never Provided Adequate Written***
 9 ***Consent for Mammoth to Contact Him Before or After the Rule Change’s Effective***
 10 ***Date***

11 As detailed above, effective October 16, 2013, the TCPA has required that telemarketers secure
 12 “prior express written consent” from persons they seek to contact from that date forward using an ATDS
 13 or a prerecorded message. 47 C.F.R. § 64.1200(a)(2). “Prior express written consent” requires the
 14 execution of a written agreement stating that, “[b]y executing the agreement, [the consumer] authorizes
 15 the seller to deliver . . . telemarketing calls using an [ATDS] or an artificial or prerecorded voice.” *Id.*
 16 § 64.1200(f)(8)(i)(A). The written agreement must also state that the consumer “is not required to sign
 17 the agreement (directly or indirectly) . . . as a condition of purchasing any property, goods, or services.”
 18 *Id.* § 64.1200(f)(8)(i)(B) (parenthetical in original).

19 There is no evidence before the Court that Plaintiff ever executed such an agreement, much less
 20 even read one, and Mammoth does not contend otherwise. Rather, Mammoth argues that this matter
 21 should be stayed because the pending petitions raise the issue of whether consents obtained prior to the
 22 rule change are valid. These petitions, however, concern the *ongoing validity* of written consents
 23 provided prior to the rule change. Although written consent had fewer requirements before the rule
 24 change, it still required the satisfaction of two primary elements: the provision of a telephone number
 25 *and* the provision of consent to be contacted at that number. 25 FCC Rcd. at 1507. Mammoth has failed
 26 to present evidence that these requirements are satisfied here. In other words, Mammoth has failed to
 27 demonstrate that Plaintiff’s “consent” was valid in the first place under the old rule.

28 To the contrary, the only evidence of written consent offered by Mammoth is that Plaintiff’s
 telephone number was provided during a session on Mammoth’s website. Although Mammoth has

1 submitted evidence regarding the terms of its online privacy policy, and although that policy, at most,
2 obliquely refers to telemarketing contact, there is no evidence that Plaintiff ever read it. Nor, for that
3 matter, is there any evidence before the Court demonstrating that Plaintiff—or anyone else—was *ever*
4 required *at any time* to review the terms of the policy while using the website. This is not a sufficient
5 record on which to conclude that Plaintiff provided consent to be contacted for telemarketing purposes.

6 Under binding Ninth Circuit precedent directly on point, Mammoth’s privacy policy constitutes,
7 at most, an unenforceable “browsewrap” agreement that may not be used as evidence of consent to be
8 contacted. Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1175–76 (9th Cir. 2014). In Nguyen, the
9 Ninth Circuit explained that “[c]ontracts formed on the Internet come primarily in two flavors:
10 ‘clickwrap’ (or ‘click-through’) agreements, in which website users are required to click on an ‘I agree’
11 box after being presented with a list of terms and conditions of use; and ‘browsewrap’ agreements,
12 where a website’s terms and conditions of use are generally posted on the website via a hyperlink at the
13 bottom of the screen.” Id. Unlike a clickwrap agreement, “a browsewrap agreement does not require
14 the user to manifest assent to the terms and conditions expressly.” Id. at 1176. Instead, the browsewrap
15 agreement purports to bind the website user through the user’s mere use of the website itself. Id. The
16 “defining feature of a browsewrap agreement,” in other words, “is that the user can continue to use the
17 website or its services without visiting the page hosting the browsewrap agreement or even knowing that
18 such a webpage exists.” Id. (internal quotations omitted). The Ninth Circuit in Nguyen reasoned that,
19 where there is no evidence that a website user had actual knowledge of the terms of a browsewrap
20 agreement, the validity of the agreement turns on whether the website puts a reasonably prudent user on
21 constructive notice of the terms of the contract. Id. at 1177.

22 The Nguyen court went on to lay down the following categorical rule that the mere presence of a
23 link to an agreement is insufficient to provide constructive knowledge of the agreement’s terms:

24 In light of the lack of controlling authority on point, and in keeping with courts’
25 traditional reluctance to enforce browsewrap agreements against individual consumers,
26 we therefore hold that where a website makes its terms of use available via a conspicuous
27 hyperlink on every page of the website but otherwise provides no notice to users nor
28 prompts them to take any affirmative action to demonstrate assent, even close proximity
of the hyperlink to relevant buttons users must click on—without more—is insufficient to
give rise to constructive notice.

Id. at 1178–79 (internal references omitted). Mammoth’s so-called privacy policy appears as a button

1 that states “privacy” on a static bar on the right-hand side of the site and nothing more. There is no
 2 evidence that Mammoth ever prompted Plaintiff or Class Members to assent to its terms, or otherwise
 3 provided notice of its terms. In the absence of any evidence that Plaintiff himself read that policy, he
 4 cannot be held to have been aware of its terms, and it therefore cannot be enforced.

5 ***B. The FCC Petitions Have No Effect on this Action Because They Seek Relief that May***
 6 ***Be Implemented on a Prospective Basis Only, Outside the Class Period as Effectively***
 7 ***Defined by Mammoth***

8 In light of the prospective nature of the FCC’s powers, no ruling on any of the three petitions
 9 will affect Plaintiff’s TCPA claim. The CMEP Petition seeks a ruling retroactively transforming the
 10 new rule’s sunset clause (intended to permit reliance upon pre-rule-change consent forms for a limited
 11 one-year implementation period) into a grandfather clause that would permit telemarketers to rely in
 12 perpetuity on such consents even though they do not comply with the new rules. (See Heinz Decl. Ex. 3
 13 [ECF 17-7] at 10–12.) Although the FCC—when it finally has occasion to rule on the petition—may
 14 exercise its discretion to “grant” the CMEP petition by adopting a rule that exempts telemarketers from
 15 liability for calls placed to consumers who have executed now-defective forms, it may only do so
 16 prospectively. In other words, any ruling by the FCC will only affect liability for calls placed after the
 17 date of the ruling on the CMEP petition. The CMEP itself, in fact, seems to recognize this fact. (See
 18 Heinz Decl. Ex. 3 [ECF 17-7] at 12–13 (stating that the “retroactive application of . . . new rules would
 19 be inconsistent with the general principle, recognized by the FCC and the courts, that rules adopted by
 20 administrative agencies may only be applied prospectively”).)

21 The same goes for the DMA petition. Similar to the CMEP’s petition, the DMA petition seeks a
 22 ruling that scales back the disclosures required under the new prior-express-written-consent rule. (See
 23 Heinz Decl. Ex. 5 [ECF 17-9] at 4–7.) Again, the FCC may end up granting that petition—but the FCC
 24 can only grant it on a prospective basis, meaning that the liability exemption would only address calls
 25 placed on or after whatever the effective date is of whatever new rule the FCC adopts. Like the CMEP,
 26 the DMA also seems to recognize this fact. (See Heinz Decl. Ex. 5 [ECF 17-9] at 7.)

27 That leaves only Mammoth’s petition, which has yet even to be filed. According to Mammoth
 28 itself, though, the petition will “explain the impropriety of retroactive administrative rulemaking [that]
 hinder[s] . . . bargained-for rights.” (Mammoth’s Mot. [ECF 17] at 7:5–7.) The fundamental flaw with

1 Mammoth’s contemplated petition is that the FCC’s October 16, 2013, rule does not retroactively
 2 invalidate anything. As detailed above, the new prior-express-written-consent rule was adopted on
 3 February 15, 2012, and it did not go into effect until October 16, 2013. That new rule in no way created
 4 any liability for calls placed prior to October 16, 2013; it only established a clear-cut rule imposing
 5 liability on a going-forward basis for calls placed after that date. Accordingly, even if Mammoth ends
 6 up filing its contemplated petition, it cannot have any effect on Plaintiff’s alleged cause of action.

7 Put differently, the FCC can issue only one of two rulings in response to the petitions: either the
 8 FCC reaffirms what it has already held by concluding that earlier-obtained consents that do not comply
 9 with the new prior-express-written-consent requirement ceased to be valid on October 16, 2013; or the
 10 FCC permits telemarketers to rely on pre-rule-change consents. But if the FCC permits telemarketers to
 11 rely on pre-rule-change consents, it can do so only on a going-forward basis. This would have no effect
 12 on Plaintiff’s case, given Mammoth’s representation that it no longer engages in any automated
 13 telemarketing campaigns. In other words, the Class period here has an end-date—the date that
 14 Mammoth chose to cease telemarketing activities—and that end-date is necessarily before any effective
 15 date the FCC could set for any new rule change. See Jamison, 290 F.R.D. at 102 (denying a motion to
 16 stay on the ground that there was no basis to presume “that[,] if the FCC were to change its position[,]
 17 that change would apply retroactively to the pending litigation”) (citing Bowen, 488 U.S. at 208).

18 **IV. CONCLUSION**

19 The CMEP and DMA petitions only implicate those written consents that were themselves valid
 20 under the pre-October 16, 2013, rule. Because the “consent” that Plaintiff provided did not comport
 21 with that rule, the petitions do not implicate Plaintiff’s claim. Alternatively—and as Mammoth itself
 22 acknowledges—any ruling by the FCC in response to a petition can have only prospective effect.
 23 Because Mammoth no longer conducts prerecorded telemarketing campaigns, any forthcoming ruling by
 24 the FCC cannot affect this case. Mammoth’s Motion therefore must be denied.

25 Dated: February 25, 2015

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