



J AURIGUE LAW GROUP

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January 20, 2016

VIA ELECTRONIC FILING

The Honorable Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SE
Washington, DC 20554

Re: Petition for Expedited Declaratory Ruling or Forbearance of Mammoth Mountain Ski Area, LLC, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act*, CG Docket No. 02-278 (filed Feb. 23, 2015)

Comment in Opposition to Petitioner’s December 10, 2015, *Ex Parte* Request for Retroactive Waiver

Dear Ms. Dortch:

The undersigned represent Paul Story, who is the named plaintiff in a putative class-action lawsuit against Mammoth Mountain Ski Area, LLC (“Mammoth”) under the Telephone Consumer Protection Act (“TCPA”). Mr. Story’s lawsuit was identified by Mammoth in the above-referenced Petition (“Mammoth Petition”).¹ On December 10, 2015, Mammoth submitted an *Ex Parte* Supplement to that Petition,² requesting that the Commission grant Mammoth a retroactive waiver of the prior-express-written-consent requirement imposed under the Commission’s February 15, 2012, Report and Order interpreting the TCPA.³ The requested

¹ Mr. Story’s lawsuit—filed over four months before Mammoth had filed its Petition with the Commission—is pending in the United States District Court for the Eastern District of California (case no. 2:1-cv-02422-JAM-EFB) but has been stayed pending a ruling by the Commission on the Mammoth Petition. *See Story v. Mammoth*, 2015 WL 2339437 at *4 (E.D. Cal. May 13, 2015). A copy of the Complaint in the *Story* action is attached hereto as **Exhibit 1**, and a copy of the Eastern District’s stay order is attached hereto as **Exhibit 2**.

² Mr. Story did not learn of Mammoth’s *Ex Parte* Supplement until January 6, 2016, when the parties were preparing a status report in the *Story* action regarding the status of the Mammoth Petition.

³ *See* Report and Order, *In the Matter of Rules and Regulations Implementing the TCPA of 1991* (hereinafter, “2012 Report and Order”), 27 FCC Rcd. 1830, 1838 (released Feb. 15, 2012) (stating that “we require prior express written consent for all telephone calls using an automatic telephone dialing system or a prerecorded voice to deliver a telemarketing message to wireless numbers”). The prior-express-written-consent requirement took effect on October 16, 2013. *See id.* at 1857 (stating that the new requirement would take effect one year after “publication of OMB approval of [the] written consent rules in the Federal Register”); Final Rule and Announcement of Effective Date, *TCPA of 1991*, 77 Fed. Reg. 63240-01, 63241 (Oct. 16, 2012) (publishing the new rule).



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waiver would apply to anyone who provided their telephone number to Mammoth before the date that the prior-express-written-consent rule took effect. As discussed below, Mammoth is not entitled to such a waiver, and the relief requested in Mammoth’s *Ex Parte* Supplement therefore should be denied.

Mammoth attempts to shoehorn itself into the very narrow group of companies granted a retroactive waiver by the Commission.⁴ Mammoth does not belong in this group. Mammoth never demonstrated an awareness of the new rule’s existence at the time of its adoption, much less any legitimate confusion over its meaning or application. Moreover, as the court has recognized in Mr. Story’s pending lawsuit, Mammoth never obtained valid written consent under the old rule. Mammoth therefore is no different than the thousands of other companies that obtained consumer telephone numbers and used them for marketing purposes. To grant Mammoth a retroactive waiver would have a sweeping impact that would nullify the purpose and effectiveness of the new rule. Furthermore, Mammoth’s underlying Petition is frivolous. Accordingly, Mr. Story respectfully requests that the Commission deny Mammoth’s request for a retroactive waiver.

I. Mammoth Is Not Entitled to a Retroactive Waiver Because Mammoth Was Not Impacted by Any Alleged Uncertainty Created by the 2012 Report and Order.

The Coalition and the DMA filed their Petitions immediately after the effective date of the 2012 Report and Order to clarify the new prior-express-written-consent requirement.⁵ The Coalition and the DMA based their Petitions on the fact that each of these organizations had obtained written consents valid under the old rule, and that it was unclear whether these consents remained valid because of the wording of the new rule.⁶

⁴ See Declaratory Ruling and Order, *In the Matter of Rules and Regulations Implementing the TCPA of 1991* (hereinafter, “2015 Declaratory Ruling and Order”), 30 FCC Rcd. 7961, 8012–14 (released July 10, 2015) (granting the Coalition of Mobile Engagement Providers (“Coalition”) and the Direct Marketing Association (“DMA”) a “retroactive waiver from October 16, 2013, . . . through a period of 89 days following release of this Declaratory Ruling to allow Petitioners [*i.e.*, the Coalition and the DMA] to rely on the ‘old’ prior express written consents already provided by consumers before October 16, 2013”).

⁵ See generally Petition for Declaratory Ruling of the Coalition, *In the Matter of Rules and Regulations Implementing the TCPA of 1991* (“hereinafter, “Coalition Petition”), CG Docket No. 02-278 (filed Oct. 17, 2013); Petition for Forbearance by the DMA, *In the Matter of Rules and Regulations Implementing the TCPA of 1991* (hereinafter, “DMA Petition”), CG Docket No. 02-278 (filed Oct. 17, 2013).

⁶ See Coalition Petition, CG Docket No. 02-278 at 13 (arguing that the Coalition’s members “ha[d] already obtained prior express consent *in writing* under the pre-October 16 TCPA rules and [therefore] are not required to re-obtain written consent under the new rules”) (emphasis supplied); DMA Petition, CG Docket No. 02-278 at 3–4 (asking the Commission to refrain from enforcing the new rule as to the DMA’s members “in regard to existing *written agreements*”) (emphasis supplied). See also 2015 Declaratory Ruling and Order, 30 FCC Rcd. at 8013 (explaining that the “Coalition seeks clarification that the revised TCPA rule that became effective October 16, 2013, does not ‘nullify those written express consents already provided by consumers before that date’ and therefore



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Mammoth, in stark contrast to the Coalition and the DMA, has presented no evidence to support an inference that it relied on, or was confused by, the new rule in any way. As noted above, Mammoth did not seek any guidance from the Commission until mid-2015, *after* it had been sued by Mr. Story for violating the TCPA. The factual record indicates that, after the Commission's implementation of the new rule, Mammoth proceeded with business as usual, only taking note of the issues it now raises after facing liability in a lawsuit.

II. Mammoth Is Not Entitled to a Retroactive Waiver Because the U.S. District Court for the Eastern District of California Has Ruled that Mammoth Did Not Obtain Written Consents.

Again, the basis of the Coalition and DMA Petitions is that each of these organizations had obtained *written* consents valid under the old rule, and that it was unclear whether these consents remained valid because of the wording of the new rule. In Mr. Story's class-action proceedings, Mammoth moved to stay based, in part, on the Coalition and DMA Petitions, and Mr. Story opposed, in part, on the ground that Mammoth had never obtained written consents under the old rule.⁷ The court agreed, holding: "[T]he Court does not find support for the proposition that Plaintiff's provision of his phone number to Defendant constituted written consent."⁸ The court's holding was based upon an extensive factual record, including both documentary evidence and deposition testimony from Mammoth's Vice President of Database Marketing and Research.⁹

The court's conclusion was correct. Although written consent had fewer requirements prior to the rule change, it still required the satisfaction of two primary elements: the provision of a telephone number and the provision of consent to be contacted at the number.¹⁰ However, Mammoth failed to present the court with any evidence that consumers did anything more than provide their telephone numbers. Instead, the evidence presented was that the Mammoth website

[that] mobile marketers need not take additional steps to obtain the revised forms of written consent from existing customers who have already provided express written consent (under the previous rule) that does not meet the standards of the revised rule") (internal references omitted), 8015 (stating that "[t]he 'old' written express consents provided by consumers [to the Coalition and the DMA] before October 16, 2013, remain effective for a period of 89 days," so long as they were valid under the prior rule).

⁷ See *Story v. Mammoth*, 2015 WL 2339437 at *3. Again, a copy of this order is attached hereto as Exhibit 2.

⁸ *Id.* at *4.

⁹ See Memorandum of Points and Authorities in Opposition to Defendant Mammoth's Motion to Stay, *Story*, 2015 WL 2339437 at 7:4–11:4 (Case No. 2:1-cv-02422-JAM-EFB, ECF No. 38) (detailing the factual record). A copy of this Memorandum is attached hereto as **Exhibit 3**.

¹⁰ Notice of Proposed Rulemaking, *In the Matter of Rules and Regulations Implementing and Interpreting the TCPA of 1991*, CG Docket No. 02-278, 25 FCC Rcd. 1501, 1507 (released Jan. 22, 2010).



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contained a small, nondescript link on the far right-hand side to a boilerplate privacy policy. Users were not directed to the link and were not prompted to click it or to otherwise agree to the policy, and no evidence was presented that any consumers had ever read it. As such, the policy constituted, at best, an unenforceable “browsewrap” agreement that could not be used as evidence of written consent to be contacted.¹¹

III. Mammoth’s Underlying Petition is Frivolous.

As described above, Mammoth’s *Ex Parte* Supplement is based upon the underlying Petition that it filed on February 23, 2015. In that Petition, Mammoth argues that consumers’ voluntary provision of their respective telephone numbers remains valid as a prior contractual obligation and that invalidating these “consents” amounts to an improper retroactive impairment of vested contractual rights.¹² Alternatively, Mammoth argues that the 2012 Report and Order improperly defined “prior express consent” as written, signed consent because such a reading of the statute is contrary to the plain meaning of the TCPA and Congressional intent.¹³ Both of these arguments are frivolous.

Although Mammoth does not say so explicitly, its contractual-impairment argument necessarily presents a question under the U.S. Constitution’s contract and due-process clauses.¹⁴ Under the contract clause, “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts”;¹⁵ under the due-process clause, “retrospective” legislation is impermissible only if it fails “rational basis review.”¹⁶ But the contract clause applies only to

¹¹ See *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175–76, 1178–79 (9th Cir. 2014) (identifying the features of a browsewrap agreement, and stating: “In light of the lack of controlling authority on point, and in keeping with courts’ traditional reluctance to enforce browsewrap agreements against individual consumers, we therefore hold that where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor 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. While failure to read a contract before agreeing to its terms does not relieve a party of its obligations under the contract, the onus must be on website owners to put users on notice of the terms to which they wish to bind consumers. Given the breadth of the range of technological savvy of online purchasers, consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound.”) (internal references and citations omitted).

¹² Mammoth Petition, CG Docket No. 02-278 at 1.

¹³ *Id.*

¹⁴ See, e.g., *Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1097–1101 (9th Cir. 2003) (explaining that whether a statute “impair[ed] vested contractual rights” is properly analyzed under the contract and due-process clauses).

¹⁵ U.S. Const. art. I, § 10, cl. 1.

¹⁶ *Campanelli*, 322 F.3d at 1100.



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state laws, not to federal laws.¹⁷ Because the TCPA is a federal statute, contract-clause analysis is inapposite.

Consequently, the prior-express-written-consent rule need “only pass rational basis review,” *i.e.*, it need only “be based on ‘a legitimate legislative purpose furthered by rational means.’”¹⁸ Clearly, there was a legitimate purpose behind the new rule, as set forth in the Report and Order adopting the rule itself.¹⁹ This satisfies the constitutional test, and it demonstrates that Mammoth’s Petition is largely a strategic attempt to delay the resolution of Mr. Story’s class action. The Commission also is not the appropriate body for Mammoth’s constitutional challenge.²⁰ Mammoth’s contractual-impairment argument therefore cannot succeed.

Mammoth’s alternative argument that the Commission somehow exceeded the scope of its authority by requiring prior express written consent is equally frivolous. Looking squarely at the text of the TCPA itself, the Commission is empowered to “prescribe regulations to implement the requirements of this subsection,” *i.e.*, subsection (b)—the subsection prohibiting telemarketers from contacting people without having first obtained their “prior express consent.”²¹ Because the statute is so clear on its face in terms of delegating authority to the Commission, no non-frivolous argument can be made that the Commission somehow exceeded

¹⁷ See *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 732 n.9 (1984) (explaining that “[i]t could not justifiably be claimed that the Contract Clause applies, either by its own terms or by convincing historical evidence, to actions of the National Government” and that “the Framers explicitly refused to subject federal legislation impairing private contracts to the literal requirements of the Contract Clause”); *Robbins v. Pepsi-Cola Metro. Bottling Co.*, 636 F. Supp. 641, 667 (N.D. Ill. 1990) (concluding, on the basis of *Pension Benefit Guaranty Corp.*, that “federal legislation which affects a party’s contractual relations is properly analyzed under the due process clause of the fifth amendment, not the contract clause”).

¹⁸ *Campanelli*, 322 F.3d at 1100 (quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992)).

¹⁹ See 2012 Report and Order, 27 FCC Rcd. at 1831, 1840 (stating that the new rule “will protect consumers from unwanted autodialed or prerecorded telemarketing calls . . . and [will] maximize consistency with the Federal Trade Commission’s [] analogous Telemarketing Sales Rule,” and that “requiring prior written consent will enhance the FCC’s enforcement efforts and better protect both consumers and industry from erroneous claims that consent was or was not provided”).

²⁰ See *Pub. Utils. Comm’n of State of Cal. v. U.S.*, 355 U.S. 534, 540 (1958) (stating that “[t]h[e] issue is a constitutional one that the [administrative agency] can hardly be expected to entertain”); *Gete v. I.N.S.*, 121 F.3d 1285, 1291–92 (9th Cir. 1997) (explaining that “[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions”) (citing *Pub. Utils. Comm’n of the State of Cal.*, 355 U.S. at 540; *Johnson v. Robison*, 415 U.S. 361, 368 (1974)).

²¹ 47 U.S.C. § 227(b). See also, *e.g.*, *Jordan v. Nationstar Mortg. LLC*, 2014 WL 5359000 at *4 (N.D. Cal. Oct. 20, 2014) (stating that “Congress has delegated the FCC with the authority to make rules and regulations to implement the TCPA”) (quoting *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009)).



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its authority. Furthermore, even if one could be advanced, the fact remains that it is improper to ask the Commission to make that decision now.²²

IV. Conclusion.

In light of the foregoing, Mr. Story requests that the Commission deny Mammoth’s request for a retroactive waiver in its entirety. The prior-express-written-consent requirement was promulgated after affording interested parties the time to comment on the Commission’s authority to adopt it. Allowing Mammoth to seek relief from it now—after a court has already ruled that Mammoth never obtained any written consents in the first place, and in the face of zero evidence demonstrating that Mammoth had been laboring under a misinterpretation of it—would set a precedent giving any TCPA defendant the ability to endlessly delay litigation by repeatedly submitting petitions asking the Commission to revise binding rules.

²² Mammoth had the opportunity to present the arguments raised in its Petition during the comment period following the notice of proposed rulemaking in January 2010, but chose not to do so. See Notice of Proposed Rulemaking, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 25 FCC Rcd. 1501, 1509 (released Jan. 22, 2010) (stating that “we seek comment on the Commission’s authority to adopt a prior written consent requirement”) (emphasis supplied). Alternatively, after the issuance of the new rule, Mammoth could have timely raised—indeed, was *required* to have timely raised—the issue with the U.S. Court of Appeals, which has original jurisdiction over such challenges. See, e.g., *US W. Commc’ns v. MFS Intelnet, Inc.*, 193 F.3d 1112, 1120 (9th Cir. 1999) (explaining that “[t]he Hobbs Act grants exclusive jurisdiction to courts of appeals to determine the validity of all final orders of the FCC,” that “[a]n aggrieved party may invoke this jurisdiction *only* by filing a petition for review of the FCC’s final order in a court of appeals naming the United States as a party,” and that, as a result, “[t]he FCC order is not subject to collateral attack in this proceeding”) (emphasis supplied); *Leckler v. Cashcall, Inc.*, 2008 WL 5000528 at *2 (N.D. Cal. Nov. 21, 2008) (stating same in a TCPA action). See also 28 U.S.C. § 2344 (stating that aggrieved parties have “60 days after [the] entry [of a final order to] file a petition to review the order in the court of appeals”). Having failed to pursue either of these avenues, it is improper for Mammoth to attack the new prior-express-written-consent requirement now by belatedly asking the Commission to rule on its correctness. In any event, as discussed above, Mammoth’s Petition is also improper on the separate ground that it presents a constitutional question inappropriate for resolution by the Commission.



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If you have any questions, or if you require any further information, please contact the undersigned directly.

Respectfully submitted,

/s/ David Zelenski

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EXHIBIT 1

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

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

Plaintiff,

v.

MAMMOTH MOUNTAIN SKI AREA,
LLC, a Delaware limited-liability
company,

Defendant.

Case No.
CLASS-ACTION COMPLAINT

1. Violation of the Telephone
Consumer Protection Act, 47 U.S.C.
§ 227

DEMAND FOR JURY TRIAL

INTRODUCTION

1
2 1. Plaintiff PAUL STORY brings this class action on behalf of himself and all
3 others similarly situated against MAMMOTH MOUNTAIN SKI AREA, LLC
4 (“MAMMOTH”), a Delaware limited-liability company, pursuant to Rule 23 of the
5 Federal Rules of Civil Procedure.

6 2. As alleged below, Defendant has violated the Telephone Consumer
7 Protection Act (the “TCPA”), 47 U.S.C. § 227, through its unauthorized contact of
8 consumers on their cellular telephones. Specifically, Defendant has violated the TCPA
9 by contacting individuals on their cellular telephones through an artificial telephone
10 dialing system and/or by using an artificial or prerecorded voice without first obtaining
11 their express written consent, invading their right to privacy.

12 3. Pursuant to 47 U.S.C. § 227(b)(3), Plaintiff and Class Members are entitled
13 to, *inter alia*, statutory damages and injunctive relief for Defendant’s violations.

14 **JURISDICTION AND VENUE**

15 4. **Jurisdiction.** Federal and state courts have concurrent jurisdiction over suits
16 arising under the TCPA. See Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 745
17 (2012). This Court therefore has subject-matter jurisdiction of this action pursuant to 28
18 U.S.C. § 1331. This Court has personal jurisdiction over MAMMOTH because
19 MAMMOTH has purposefully availed itself of the resources and protection of California,
20 conducts business in and has systematic contacts with California, and resides in
21 California.

22 5. **Venue.** As alleged more particularly below, venue is proper in the United
23 States District Court for the Eastern District of California pursuant to 28 U.S.C. § 1391
24 because MAMMOTH resides in the County of Mono.

25 **PARTIES**

26 6. Plaintiff is, and at all times relevant to this action was, a California resident
27 of the County of Los Angeles. He is, and at all times relevant to this action was, a
28 “person” as defined under 47 U.S.C. § 153.

1 services.

2 12. Plaintiff is informed and believes, and based thereon alleges, that his
3 cellular-telephone number was entered into a database and that MAMMOTH
4 subsequently used equipment capable of storing and/or producing telephone numbers, as
5 well as capable of dialing such numbers, to make the above unsolicited, prerecorded- or
6 artificial-voice telephone calls *en masse* to consumers within that database, including
7 Plaintiff. Indeed, given the sheer volume of telephone calls made to the public—as
8 described in paragraph 14, *infra*—transmission was possible only through the use of such
9 automated equipment.

10 13. The above-alleged calls that Plaintiff received were clearly sent without an
11 emergency purpose, as they were sent for the purposes of advertisement or telemarketing
12 to encourage the purchase of goods and services at the MAMMOTH ski resort in
13 Mammoth Lakes, California.

14 14. Plaintiff is informed and believes, and based thereon alleges, that
15 MAMMOTH placed thousands of similar calls, all for advertising or telemarketing
16 purposes, to the cellular-telephone numbers of members of the general public using the
17 equipment referenced in paragraph 12, *supra*. Plaintiff is further informed and believes,
18 and based thereon alleges, that MAMMOTH never obtained signed authorizations
19 expressly permitting advertising or telemarketing calls from any of the individuals to
20 whom the calls were placed.

21 **CLASS-ACTION ALLEGATIONS**

22 15. Plaintiff seeks to represent the following Class under Rule 23 of the Federal
23 Rules of Civil Procedure: All persons throughout the United States who, since October
24 16, 2013, received one or more prerecorded- or artificial-voice telephone calls on their
25 cellular telephones from MAMMOTH, or any person or entity acting on behalf of
26 MAMMOTH, made for a marketing or advertising purpose.

27 16. Plaintiff reserves the right to amend or modify the proposed Class, or to
28 propose subclasses or limitations to particular issues, in response to facts later

1 ascertained.

2 17. **Numerosity.** The identities of Class Members may be ascertained from
3 MAMMOTH's own business and marketing records, as well as the records of
4 MAMMOTH's telephone provider(s). Joinder of all Class Members would be
5 impracticable due to the sizeable number of such Members and their likely lack of
6 resources to initiate individual claims. Plaintiff estimates that thousands of telephone
7 calls were sent to well-over the forty individuals required for numerosity purposes. Also,
8 as explained below, the amount that is owed to any given Class Member under the TCPA
9 is relatively small, making it impractical for them to bring their own individual suits.

10 18. **Commonality.** There are questions of law and fact that are common to the
11 Class that predominate over any questions affecting only individual Class Members.
12 These common questions include, without limitation:

13 a) Whether the prerecorded- or artificial-voice telephone calls constitute
14 telemarketing or advertising within the meaning of the TCPA and its regulations (quoted
15 below);

16 b) Whether the equipment used to make the prerecorded- or artificial-
17 voice telephone calls constitutes an automatic telephone dialing system within the
18 meaning of the TCPA and its regulations;

19 c) Whether prior express written consent was required under the TCPA
20 before making any of the prerecorded- or artificial-voice telephone calls; and

21 d) Whether the outright failure to secure any prior express written
22 consent constitutes willful and knowing behavior within the meaning of the TCPA and its
23 regulations.

24 19. **Typicality.** Plaintiff's claims are typical of those of the Class because he
25 received prerecorded- or artificial-voice telephone calls from MAMMOTH advertising or
26 promoting MAMMOTH's goods or services on or after October 16, 2013, on his cellular
27 telephone; he never provided prior express written consent to receive those calls; and the
28 calls were placed to him using the same equipment used to place calls to all Class

1 Members on their cellular telephones.

2 20. *Adequacy.* Plaintiff will fairly and adequately represent and protect the
3 interests of the Class. He is not aware of any conflicts with Class Members, and he plans
4 on pursuing the litigation vigorously. He also has the same interests as those of the Class,
5 and he has retained counsel who are competent and experienced in class-action litigation.
6 In addition, he has been actively involved in the litigation, he will continue to participate
7 and be available for the duration of the litigation, and he understands the duties that he
8 holds to the Class.

9 21. *Superiority.* A class action is superior to other available methods for the fair
10 and efficient adjudication of this controversy. Again, the individual joinder of all Class
11 Members is impracticable because of the relatively small recovery amounts at stake and
12 the relative lack of resources available for individual Class Members vis-à-vis the large
13 corporate Defendants. Additionally, the judicial system would be burdened with multiple
14 trials of the same issues, and the potential for inconsistent or contradictory judgments
15 would increase. The common questions detailed above, in fact, predominate in this
16 action, as Class Members' claims arise out of the same course of conduct to which
17 Plaintiff was himself subject. A class action would therefore conserve the resources of
18 the parties and the Court while protecting the rights of Class Members. MAMMOTH's
19 conduct as described above is unlawful, continuing, capable of repetition, and will
20 continue unless restrained and enjoined by the Court. Moreover, it is a matter of public
21 interest to obtain definitive answers to the legality of MAMMOTH's actions in a single
22 case.

23 ***FIRST CLAIM FOR RELIEF***

24 *Violation of the TCPA*

25 *47 U.S.C. § 227*

26 22. Plaintiff re-pleads, re-alleges, and incorporates by reference each and every
27 allegation set forth in this Complaint.

28 23. The United State Congress enacted the TCPA in order to protect and balance

1 individual privacy rights against legitimate telemarketing practices. In enacting this
2 statute, Congress found:

3 (1) The use of the telephone to market goods and services to the home
4 and other businesses is now pervasive due to the increased use of cost-
effective telemarketing techniques.

5

6 (10) Evidence compiled by the Congress indicates that residential
7 telephone subscribers consider automated or prerecorded telephone calls,
8 regardless of the content or the initiator of the message, to be a nuisance and
9 an invasion of privacy.

10 (11) Technologies that might allow consumers to avoid receiving such
11 calls are not universally available, are costly, are unlikely to be enforced, or
12 place an inordinate burden on the consumer.

13 (12) Banning such automated or prerecorded telephone calls to the
14 home, except when the receiving party consents to receiving the call or when
15 such calls are necessary in an emergency situation affecting the health and
16 safety of the consumer, is the only effective means of protecting telephone
17 consumers from this nuisance and privacy invasion.

18 Telephone Consumer Protection Act of 1991, PL 102–243, December 20, 1991, 105 Stat
19 2394.

20 24. The TCPA specifically prohibits automated calls or messages to consumers’
21 cellular-telephone numbers without the express consent or permission of the consumers:

22 It shall be unlawful for any person within the United States, or any person
23 outside the United States if the recipient is within the United States (A) to
24 make any call (other than a call made for emergency purposes or made with
25 the prior express consent of the called party) using any automatic telephone
26 dialing system or an artificial or prerecorded voice . . . (iii) to any telephone
27 number assigned to a . . . cellular telephone service

28 47 U.S.C. § 227(b)(1).

29 25. Under the relevant regulation, effective October 16, 2013, “prior express
30 consent” as used in subsection (b)(1)(A)(iii) of the TCPA means “prior express *written*
31 consent” for all telemarketing or advertising messages. 47 C.F.R. § 64.1200(a)(2)
32 (emphasis supplied). Such consent must be signed by the consumer, must state that the
33 consumer is agreeing to receive future telemarketing or advertising calls and messages,
34 and must be executed independent of any purchase of goods or services. Id.

35 § 64.1200(f)(8).

EXHIBIT 2

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

MAMMOTH MOUNTAIN SKI AREA,
LLC, a Delaware limited-
liability company,

Defendant.

No. 2:14-cv-02422-JAM-DAD

**ORDER GRANTING DEFENDANT'S
MOTION TO STAY**

Defendant Mammoth Ski Area, LLC ("Defendant") has requested the Court stay (Doc. #17) the current action pursuant to the primary jurisdiction doctrine in order to allow the Federal Communications Commission ("FCC") to resolve petitions currently pending before it.¹ In his opposition (Doc. #28), Plaintiff Paul Story ("Plaintiff") argues a stay would not be proper under the circumstances and would unduly delay the proceedings.

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for April 8, 2015.

1 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2 Defendant operates, manages and owns a ski resort in Mammoth
3 Lakes, California. Plaintiff alleges that on two separate
4 occasions in April 2014 he received prerecorded or artificial
5 voice telephone calls on his cellular phone from Defendant. The
6 calls were advertisements to purchase season passes to
7 Defendant's ski resort. Plaintiff alleges that he "had never
8 given any signed authorization to anyone expressly permitting
9 [Defendant] to use his cellular-telephone number for
10 telemarketing or advertising purposes." Comp. ¶¶ 9-10.

11 Plaintiff's Complaint contains class action allegations and
12 one cause of action for violation of the Telephone Consumer
13 Protection Act ("TCPA"), 47 U.S.C. § 227.

14

15 II. OPINION

16 A. Request for Judicial Notice

17 Plaintiff requests judicial notice (Doc. #30) of various
18 notices and reports of the FCC as well as a judicial order in
19 another district court case. In addition, Defendant requests the
20 Court take notice (Doc. #35) of its petition filed with the FCC,
21 a House Report and a public notice issued by the FCC in
22 connection with Defendant's petition.

23 Federal Rule of Evidence 201 permits courts to take judicial
24 notice of matters that "can be accurately verified and readily
25 determined from sources whose accuracy cannot be reasonably
26 questioned." Documents that "are administered by[,] or publicly
27 filed with[,] [an] administrative agency" are properly subject to
28 judicial notice under Rule 201. Tovar v. Midland Credit Mgmt.,

1 2011 WL 1431988, at *2 (S.D. Cal. 2011) (taking judicial notice
2 of reports and orders of the FCC, and of an FCC notice of
3 proposed rulemaking, under Rule 201); see also U.S. v. Woods, 335
4 F.3d 993, 1001 (9th Cir. 2003) (taking judicial notice of the
5 Federal Register). Similarly, judicial notice may also be taken
6 of official acts of the legislative, executive, or judicial
7 branch of the United States government, including court records.
8 See Bryant v. Carleson, 444 F.2d 353, 357 (9th Cir. 1971) (taking
9 judicial notice of various court actions).

10 The Court grants both of these requests for judicial notice
11 pursuant to Rule 201.

12 Defendant also filed an ex parte application to file a
13 statement of recent authority (Doc. #40) regarding a comment by
14 the United States Chamber of Commerce to the FCC. In addition,
15 Plaintiff filed a request for judicial notice (Doc. #43)
16 regarding the lifting of a stay in another Eastern District Court
17 case where the parties jointly stipulated to the stay and were
18 nearing a potential settlement. The Court does not find the
19 material underlying either request relevant to the issues
20 presented by this motion. As such, these requests are both
21 DENIED.

22 B. Legal Standard

23 "The primary jurisdiction doctrine allows courts to stay
24 proceedings or to dismiss a complaint without prejudice pending
25 the resolution of an issue within the special competence of an
26 administrative agency." Clark v. Time Warner Cable, 523 F.3d
27 1110, 1114 (9th Cir. 2008). The primary jurisdiction doctrine is
28 prudential; its invocation by a court does not indicate the court

1 lacks jurisdiction. Id. The doctrine can be invoked when "a
2 court determines that an otherwise cognizable claim implicates
3 technical and policy questions that should be addressed in the
4 first instance by the agency with regulatory authority over the
5 relevant industry rather than by the judicial branch." Id.

6 "The doctrine of primary jurisdiction is not equivalent to
7 the requirement of exhaustion of administrative remedies."
8 Syntek Semiconductor Co. v. Microchip Tech. Inc., 307 F.3d 775,
9 780-81 (9th Cir. 2002). Rather, "the doctrine of primary
10 jurisdiction is committed to the sound discretion of the court
11 when 'protection of the integrity of a regulatory scheme dictates
12 preliminary resort to the agency which administers the scheme.'" Id.
13 (quoting United States v. Gen. Dynamics Corp., 828 F.2d 1356,
14 1362 (9th Cir. 1987)).

15 Although the issue lies within a court's discretion, courts
16 have traditionally invoked the doctrine when the following
17 factors are present: (1) the need to resolve an issue that
18 (2) has been placed by Congress within the jurisdiction of an
19 administrative body having regulatory authority (3) pursuant to a
20 statute that subjects an industry or activity to a comprehensive
21 regulatory authority that (4) requires expertise or uniformity in
22 administration. General Dynamics Corp., 828 F.2d at 1362;
23 Lambert v. Buth-Na-Bodhaige, Inc., No. 2:14-CV-00514-MCE, 2014 WL
24 4187250, at *1 (E.D. Cal. 2014). "In considering the four
25 factors, the Court is mindful 'that the primary jurisdiction
26 doctrine is designed to protect agencies possessing
27 quasilegislative powers and that are actively involved in the
28 administration of regulatory statutes.'" Lambert, 2014 WL

1 4187250, at *1 (quoting Clark, 523 F.3d at 1115).

2 C. Discussion

3 Defendant contends the Court should stay this case pursuant
4 to the primary jurisdiction doctrine to allow the FCC to formally
5 respond to several petitions pending before it.

6 The TCPA prohibits any person from making "any call (other
7 than a call made for emergency purposes or made with the prior
8 express consent of the called party) using any automatic
9 telephone dialing system or an artificial or prerecorded voice
10 . . . to any telephone number assigned to a . . . cellular
11 telephone service" 47 U.S.C. § 227(b)(1). The relevant
12 portion of the statute for the Court's present purposes is "prior
13 express consent."

14 In 2012, the FCC issued a Report and Order entitled "In the
15 Matter of Rules and Regulations Implementing the Telephone
16 Consumer Protection Act of 1991." 27 F.C.C.R. 1830 (F.C.C. Feb.
17 15, 2012) (effective October 16, 2013) ("the 2013 rule change").
18 In it, the FCC initially noted that "the TCPA is silent on the
19 issue of what form of express consent - oral, written, or some
20 other kind - is required for calls that use an automatic
21 telephone dialing system or prerecorded voice to deliver a
22 telemarketing message." 27 F.C.C.R. 1830, 1838 ¶ 21. The FCC
23 concluded that it had "discretion to determine, consistent with
24 Congressional intent, the form of express consent required." Id.
25 The FCC then stated that, based on the volume of consumer
26 complaints, statutory goals, and substantial support in the
27 record, the form of "express consent" required under §227(b)(1)
28 would thereafter be "prior express written consent" that is

1 signed and is "sufficient to show that the consumer: (1) received
2 'clear and conspicuous disclosure' of the consequences of
3 providing the requested consent . . . ; and (2) having received
4 this information, agrees unambiguously to receive such calls at a
5 telephone number the consumer designates. 27 F.C.C.R. 1830, 1837
6 ¶ 18, 1838 ¶ 20, 1844 ¶ 33.

7 Defendant contends "prior express consent," as interpreted
8 prior to the 2013 rule change, was given by Plaintiff, not
9 through the privacy policy on Defendant's website, but through
10 his provision of his phone number to Defendant. Reply at pp. 7-
11 8. Prior pronouncements from the FCC support Defendant's
12 contention that Plaintiff's provision of his number to Defendant
13 satisfied the "prior express consent" requirements of §227 prior
14 to the 2013 rule change. In the Matter of Rules & Regulations
15 Implementing the Tel. Consumer Prot. Act of 1991, 7 F.C.C. Rcd.
16 8752, 8769 ¶ 31 (1992) ("persons who knowingly release their
17 phone numbers have in effect given their invitation or permission
18 to be called at the number which they have given, absent
19 instructions to the contrary"); Baird v. Sabre Inc., 995 F. Supp.
20 2d 1100, 1106 (C.D. Cal. 2014); Olney v. Job.com, Inc., No. 1:12-
21 CV-01724-LJO, 2014 WL 1747674, at *4-5 (E.D. Cal. 2014).

22 To determine whether Defendant violated the TCPA, the Court
23 will have to decide whether Defendant procured proper consent
24 before allegedly making the calls to Plaintiff. This will
25 ultimately entail an analysis of exactly what effect the 2013
26 rule change had on the preexisting agreement or relationship
27 between these parties.

28 Defendant argues that several petitions filed with the FCC

1 are relevant to this critical issue, and, therefore, the Court
2 should stay the matter under the primary jurisdiction doctrine.
3 The Coalition of Mobile Engagement Providers ("CMEP") filed a
4 petition (Doc. #17-7) with the FCC in October of 2013 seeking
5 clarification that valid written consent obtained prior to the
6 2013 rule change is effective after the rule change and that
7 renewing consent is not required. The Direct Marketing
8 Association ("DMA") filed its own petition (Doc. #17-9) the
9 following year requesting the FCC forbear from enforcing new
10 disclosure standards for previously existing written consent
11 agreements and seeking clarification that previously obtained
12 written consent is valid.

13 Plaintiff does not contest that issues regarding the
14 activity underlying his claim have been "placed by Congress
15 within the jurisdiction of an administrative body having
16 regulatory authority" (the FCC), or that interpretation of the
17 TCPA requires expertise or uniformity in administration. General
18 Dynamics Corp., 828 F.2d at 1362. In opposing this motion to
19 stay, he argues that there is no issue that will affect this case
20 to be resolved by the FCC. Plaintiff contends the CMEP and DMA
21 petitions concern the ongoing validity of written consents, which
22 Defendant never received from Plaintiff, and that even if relief
23 is granted by the FCC in response to those petitions, it can only
24 be implemented on a prospective basis, providing no support to
25 Defendant in the current action. Opp. at pp. 1-2.

26 The 2013 rule change included a sunset provision that
27 allowed previously obtained consent to continue to suffice for an
28 approximately twelve-month period, but specifically stated that

1 once the new "written consent rules become effective, however, an
2 entity will no longer be able to rely on non-written forms of
3 express consent to make autodialed or prerecorded voice
4 telemarketing calls, and thus could be liable for making such
5 calls absent prior written consent." In the Matter of Rules &
6 Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27
7 F.C.C. Rcd. 1830, 1857 ¶ 68 (2012).

8 As an initial matter, the Court does not find support for
9 the proposition that Plaintiff's provision of his phone number to
10 Defendant constituted written consent. In addressing the CMEP
11 and DMA petitions, the FCC may very well conclude that written
12 consents obtained before the rule change may continue to be
13 effective, however, this will not necessarily affect the
14 viability of Plaintiff's claim in this action. This would
15 clearly undermine Defendant's position that the Court should
16 exercise its discretion to stay the case under the primary
17 jurisdiction doctrine.

18 However, as discussed in its reply, Defendant has filed its
19 own petition (Doc. #34-2) with the FCC, which Defendant contends
20 renders Plaintiff's arguments moot. In his surreply (Doc. #42),
21 Plaintiff contends Defendant's petition raises no issue that
22 needs to first be resolved by the FCC. Surreply at pp. 1-2.
23 Plaintiff argues that although the petition is disguised as one
24 seeking clarification, it is really an improper challenge to the
25 validity of the FCC's prior rulemaking and that Defendant's
26 contentions therein are frivolous.

27 The Court finds Defendant's petition directly addresses the
28 primary issue before the Court as it seeks "a ruling that 'prior

1 express consent' under [the TCPA] includes all consents obtained
2 prior to October 16, 2013 where the consumer has provided their
3 telephone number to the advertiser and the advertiser has a
4 contractual right to contact the consumer at that number."
5 Defendant's Petition at p. 1. The FCC's ruling on this petition
6 will very likely address, to some extent, the merit of
7 Plaintiff's claim. Therefore, the FCC's anticipated ruling on
8 Defendant's petition may conflict with, and thereby undermine,
9 the decision of this Court unless a stay is issued.

10 The comment period for Defendant's petition will close soon
11 and there is no evidence that Defendant continues to make these
12 calls, so Plaintiff will likely suffer no further damages. The
13 Court thus finds it appropriate under these circumstances to
14 exercise its discretion pursuant to the primary jurisdiction
15 doctrine and stay the current matter because the issues are
16 better resolved "within the special competence of an
17 administrative agency." Clark v. Time Warner Cable, 523 F.3d at
18 1114. Defendant's motion to stay is GRANTED.

19 III. ORDER

20 For the reasons set forth above, the Court GRANTS
21 Defendant's motion to stay. The parties shall update the Court
22 by joint submission within five court days of a ruling by the FCC
23 on Defendant's petition. In addition, joint status reports shall
24 be filed with this Court every sixty days.

25 IT IS SO ORDERED.

26 Dated: May 12, 2015

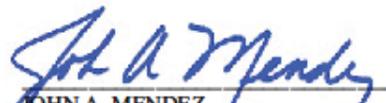
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28 JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

EXHIBIT 3

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12
13 **UNITED STATES DISTRICT COURT**
14 **EASTERN DISTRICT OF CALIFORNIA**

15 PAUL STORY, individually and on behalf of all
16 others similarly situated,
17 Plaintiff,
18 v.
19 MAMMOTH MOUNTAIN SKI AREA, LLC, a
20 limited-liability company,
21 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

22
23
24 **I. INTRODUCTION**

25 Defendant Mammoth Mountain Ski Area, LLC’s (“Mammoth”) Motion to stay should be denied.
26 The petitions upon which the Motion is based concern the ongoing validity of *written* consents obtained
27 before the October 16, 2013, rule change to the Telephone Consumer Protection Act (“TCPA”). The
28 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 &
26 Ex. 1 at 25:24–28:4.)
- 27 • Ms. Innocenti was not employed with Mammoth when Plaintiff signed up in 2008,
28 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.)
- 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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