

1 BRAD W. SEILING (Bar No. CA 143515)
2 JOANNA MCCALLUM (Bar No. CA 187093)
3 MANATT, PHELPS & PHILLIPS, LLP
4 11355 West Olympic Boulevard
5 Los Angeles, CA 90064-1614
6 Telephone: (310) 312-4000
7 Facsimile: (310) 312-4224
8 E-mail: bseiling@manatt.com; jmccallum@manatt.com

9 CLAUDIA CALLAWAY (admitted *pro hac vice*)
10 MANATT, PHELPS & PHILLIPS, LLP
11 700 12th Street, N.W.
12 Washington, DC 20016
13 Telephone: (202) 585-6504
14 Facsimile: (202) 585-6600
15 E-mail: ccallaway@manatt.com

16 JESSE S. FINLAYSON (Bar No. CA 179443)
17 MICHAEL R. WILLIAMS (Bar No. CA 196863)
18 FINLAYSON, AUGUSTINI & WILLIAMS LLP
19 110 Newport Center Drive, Suite 100
20 Newport Beach, CA 92660
21 Telephone: (949) 759-3810
22 Facsimile: (949) 759-3812
23 E-mail: jfinlayson@faw-law.com; mwilliams@faw-law.com

24 *Attorneys for Defendant*
25 *CashCall, Inc.*

26 UNITED STATES DISTRICT COURT
27 NORTHERN DISTRICT OF CALIFORNIA

28 TRICIA LECKLER, on behalf of
herself and all others similarly
situated,

Plaintiffs,

vs.

CASHCALL, INC.,

Defendant.

Case No. C 07-04002 SI

DEFENDANT'S NOTICE OF MOTION
AND MOTION TO DISMISS
PURSUANT TO F.R.C.P. 12(B)(1)
AND TO VACATE PRIOR ORDERS;
MEMORANDUM OF POINTS AND
AUTHORITIES [28 U.S.C. § 2342]

[Filed concurrently with Request for
Judicial Notice]

Date: October 31, 2008
Time: 9 a.m.
Place: Courtroom 10

Judge: Hon. Susan Illston

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 31, 2008, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 10 of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California, 94102-3483, defendant CashCall, Inc. will and hereby does move this Court for an order, pursuant to Federal Rule of Civil Procedure 12(b)(1) and 28 U.S.C. § 2342, dismissing this action and vacating its prior orders in this case. Defendant requests oral argument on this Motion.

This Motion is made on the ground that the District Court lacks subject matter jurisdiction over this action, which challenges a final order of the Federal Communications Commission, and that jurisdiction lies solely in the Court of Appeals.

This Motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities and Request for Judicial Notice, all pleadings, papers and records on file herein, any matter of which the Court may take judicial notice, and such oral argument as may be presented at the hearing on this Motion.

Dated: August 11, 2008

FINLAYSON, AUGUSTINI & WILLIAMS LLP
MANATT, PHELPS & PHILLIPS, LLP

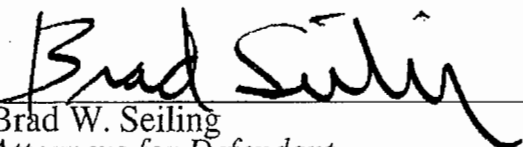
By: 
Brad W. Seiling
Attorneys for Defendant
CashCall, Inc.

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	Page
I. INTRODUCTION	1
II. FACTUAL AND PROCEDURAL BACKGROUND	2
A. Factual Background.....	2
B. Procedural Background	3
C. The FCC Ruling	3
III. LEGAL STANDARD FOR MOTION TO DISMISS PURSUANT TO RULE 12(B)(1)	6
IV. ARGUMENT	7
A. Jurisdiction Over This Action Is Vested Exclusively in the Court of Appeal	7
1. The Hobbs Act	7
2. The Hobbs Act Governs Here and Divests This Court of Jurisdiction	7
a. The FCC Ruling is a final order for purposes of the statute	8
(1) The FCC Ruling is the consummation of the FCC’s decisionmaking process	8
(2) The FCC Ruling determines rights and obligations from which legal consequences flow	9
b. Leckler’s suit requires that the Court enjoin, set aside, suspend or determine the validity of the FCC Ruling.....	9
c. It is irrelevant that Leckler’s suit was filed before the final order.....	12
B. This Court Should Vacate Its Prior Orders and Dismiss the Action	13
V. CONCLUSION.....	14

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This Court lacks jurisdiction over this action, pursuant to the Hobbs
4 Act, 28 U.S.C. § 2342, and the action therefore must be dismissed. The defense of
5 lack of subject matter jurisdiction is not waived and may be raised at any time in
6 the proceedings.¹

7 This action turns on the validity of a final order entered by the Federal
8 Communications Commission (“FCC”) after a lengthy formal rulemaking
9 procedure (the “FCC Ruling”).² This FCC Ruling is dispositive of plaintiff Tricia
10 Leckler’s (“Leckler”) claims against defendant CashCall, Inc. (“CashCall”). This
11 Court lacks jurisdiction to determine the validity of final FCC orders. For this
12 reason, the Court should dismiss this action and vacate its prior summary judgment
13 order, which invalidated the FCC Ruling.

14 Leckler’s action seeks to impose classwide liability on CashCall under
15 the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A) (“TCPA”). The
16 complaint alleges that CashCall made telephone calls to the cell phone numbers of
17 Leckler and the putative class members via automatic dialing system and/or used
18 prerecorded messages, seeking to collect on debts owed to CashCall, without the
19 called party’s prior express consent.

20 Several months after the lawsuit was filed, the FCC issued the FCC
21 Ruling, a final order that addresses the precise subject and virtually identical factual
22 predicate as Leckler’s claim. In moving for summary judgment and opposing
23 CashCall’s motion for summary judgment, Leckler specifically acknowledged that
24

25 ¹ See, e.g., *Hansen v. Department of Treasury*, 528 F.3d 597, 600 (9th Cir. 2007); see
26 also *United Investors Life Ins. Co. v. Waddell & Reed Inc.*, 360 F.3d 960, 966-67
27 (9th Cir. 2004) (“the district court had a duty to establish subject matter jurisdiction,”
28 “whether the parties raised the issue or not”).

² A copy of the FCC Ruling is submitted with the accompanying Request for Judicial
Notice.

1 the Court could not render a decision in her favor unless the Court rejected or
2 otherwise declined to apply the FCC Ruling. In fact, she specifically urged that the
3 Court “nullify the order for the purposes of the lawsuit.” (D.E. 35 at 2.) The Court
4 disagreed with the FCC Ruling, declined to apply it, and granted summary
5 judgment for Leckler.

6 The Court’s summary judgment ruling, which effectively nullifies the
7 FCC Ruling, makes clear that Leckler’s action is not subject to the jurisdiction of
8 this Court. The Hobbs Act vests exclusive jurisdiction of the action in the Courts of
9 Appeals “to enjoin, set aside, suspend (in whole or in part), or to determine the
10 validity” of final orders of the FCC. 28 U.S.C. § 2342. The FCC Ruling is a final
11 order, as it conclusively determines rights and obligations and interprets the TCPA.
12 The only way Leckler could prevail in this case is if the Court invalidates the FCC
13 Ruling, which is precisely what it did when it declined to apply the FCC Ruling and
14 granted summary judgment in Leckler’s favor. Thus, the exclusive jurisdiction
15 provision of the Hobbs Act vests jurisdiction in the Court of Appeals, not in this
16 Court. Because it lacks subject matter jurisdiction, this Court should dismiss the
17 action and vacate its prior orders made in excess of its jurisdiction.

18 **II. FACTUAL AND PROCEDURAL BACKGROUND**

19 **A. Factual Background.**

20 In December 2005, Leckler applied to CashCall for a personal loan.
21 (Jointly Submitted Statement of Undisputed Facts in Support of the Parties’ Cross-
22 Motions for Partial Summary Judgment, D.E. 32 No. 2.) As part of the loan
23 application process, Leckler provided her cell phone number to CashCall. (*Id.*
24 Nos. 3, 4.) On subsequent correspondence with CashCall regarding the loan,
25 Leckler supplied her cell phone number as her sole contact information. (*Id.* No. 18
26 & Ex. A.) Leckler concedes that she gave consent for CashCall to contact her at
27 her cell phone number. (D.E. 44 at p. 8.) When she fell behind on her loan
28 payments, CashCall placed calls to her on her cell phone to request payment. (D.E.

1 32 Nos. 8, 9.) Some of these calls were made via automatic dialing system and/or
2 used prerecorded messages. (*Id.* Nos. 10, 11.)

3 **B. Procedural Background.**

4 Leckler brought this putative nationwide class action suit against
5 CashCall, alleging intentional and negligent violations of the TCPA, which
6 provides, in relevant part:

7 It shall be unlawful for any person within the United States . . . to
8 make any call (other than a call made for emergency purposes or *made*
9 *with the prior express consent of the called party*) using any automatic
10 dialing system or an artificial or prerecorded voice . . . to any
11 telephone number assigned to a paging service, cellular telephone
service, specialized mobile radio service, or other radio common
carrier service, or any service for which the called party is charged for
the call

12 47 U.S.C. § 227(b)(1)(A) (emphasis added).³

13 The parties each filed motions for partial summary judgment, based on
14 stipulated undisputed material facts, on the pure legal issue of whether CashCall's
15 calls to Leckler's cell phone number were made with Leckler's "prior express
16 consent" for purposes of the TCPA. On May 20, 2008, this Court issued an order,
17 granting Leckler's motion and denying CashCall's motion ("MSJ Order," D.E. 45).

18 **C. The FCC Ruling.**

19 As support for its motion, CashCall presented to the Court a recent
20 declaratory ruling by the FCC, the federal agency charged with interpreting the
21 TCPA and 47 U.S.C. § 227(b)(1)(A). Among other things, the FCC concluded that
22 a borrower's disclosure to a lender of a cell phone number with regard to obtaining
23 a loan constituted the "prior express consent" sufficient to avoid a TCPA violation.
24 *See Declaratory Ruling in re Rules and Regulations Implementing the Telephone*
25 *Consumer Protection Act of 1991*, FCC 07-232 (Dec. 28, 2007; released Jan. 4,

26
27 ³ CashCall also filed a counterclaim against Leckler, seeking repayment of her
28 delinquent loan. As there is no basis for federal jurisdiction over the counterclaim if
Leckler's suit is dismissed, the counterclaim must be dismissed as well.

1 2008) (attached as Exhibit A to Request for Judicial Notice).

2 The FCC Ruling interprets a provision of the TCPA. The TCPA,
3 which was enacted in 1991, expressly grants the FCC the authority to exempt
4 certain calls and impose certain conditions on such calls:

5 [S]ection 227(b)(2)(C) gives the Commission authority to exempt from
6 the prohibition on autodialed or prerecorded message calls to wireless
7 numbers contained in section 227(b)(1)(A)(iii) only those “calls to a
8 telephone number assigned to a cellular telephone service that are not
9 charged to the called party, subject to such conditions as the
10 Commission may prescribe as necessary in the interest of the privacy
11 rights the provision is intended to protect.”

12 (FCC Ruling at 2-3 (quoting 47 U.S.C. § 227(b)(2)(C)).)

13 The FCC adopted rules to implement the TCPA in 1992. (FCC Ruling
14 at 3 (citing *Rules and Regulations Implementing the Telephone Consumer
15 Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752
16 (1992); 47 C.F.R. § 64.1200).) In 2002, the FCC “initiated a rulemaking
17 proceeding to determine whether the Commission’s rules needed to be revised to
18 more effectively carry out Congress’s directives in the TCPA.” (FCC Ruling at 4
19 (citing *Rules and Regulations Implementing the Telephone Consumer Protection
20 Act of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order,
21 17 FCC Rcd 17459, CG Docket No. 02-278 and CC Docket No. 92-90 (2002)).)
22 This rulemaking culminated in new regulations issued in 2003. (FCC Ruling at 4
23 (citing *Rules and Regulations Implementing the Telephone Consumer Protection
24 Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014
25 (2003)).)

26 The FCC Ruling was the result of a process initiated by the filing of a
27 Petition for Expedited Clarification and Declaratory Ruling regarding aspects of the
28 2003 rules. The Petition was filed on October 4, 2005, and supplemented on April
26, 2006, by ACA International. As described by ACA itself and as noted in the
FCC Ruling, ACA is “an international trade organization of credit and collection

1 companies that provide a wide variety of accounts receivable management
2 services” and “represents approximately 5,800 company members ranging from
3 credit grantors, collection agencies, attorneys, and vendor affiliates.” (FCC Ruling
4 at 1 n. 1.)

5 ACA’s Petition presented the precise issue raised by Leckler’s suit: it
6 sought “clarification that the prohibition against autodialed or prerecorded calls to
7 wireless telephone numbers in 47 C.F.R. § 64.1200(a)(1)(iii) does not apply to
8 creditors and collectors when calling wireless telephone numbers to recover
9 payments for goods and services received by consumers.” (FCC Ruling at 5 (citing
10 Petition).) The FCC sought and received comments, both in support and in
11 opposition, from creditors, collectors, consumer groups and consumers. (FCC
12 Ruling at 5-6.)

13 Following discussion and analysis, the FCC formally adopted its
14 Declaratory Ruling “pursuant to Sections 1-4, 227, and 303(r) of the
15 Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, and 303(r);
16 and Section 64.1200 of the Commission’s rules, 47 C.F.R. § 64.1200” (FCC
17 Ruling at 9.) The substance of the Declaratory Ruling was that calls to cell
18 numbers provided in connection with a loan application are permissible under the
19 TCPA:

20 IT IS FURTHER ORDERED that the Request for Clarification filed
21 by ACA International in CG Docket 02-278 on October 4, 2005 and
22 supplemented by ACA on April 26, 2006, IS GRANTED insofar as
23 ACA seeks clarification that autodialed and prerecorded message calls
to wireless numbers that are provided by the called party to a creditor
in connection with an existing debt are permissible as calls made with
the “prior express consent” of the called party

24 (FCC Ruling at 10.)

25 The FCC Ruling was released on January 4, 2008 and became “final”
26 on the date of public notice. *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 397 (9th Cir.
27 1996).

1 **III. LEGAL STANDARD FOR MOTION TO DISMISS PURSUANT TO**
2 **RULE 12(B)(1)**

3 Federal Rule of Civil Procedure 12(b)(1) allows a party to move the
4 Court to dismiss an action on the ground that the Court lacks subject matter
5 jurisdiction. Fed. R. Civ. P. 12(b)(1). The action must be dismissed “[i]f the Court
6 determines at any time that it lacks subject-matter jurisdiction.” Fed. R. Civ. P.
7 12(h). Therefore, “the defense of lack of subject matter jurisdiction cannot be
8 waived,” *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983), and may
9 “be raised at any time during the proceedings.” *United States v. Bennett*, 147 F.3d
10 912, 914 (9th Cir. 1998) (internal quotations omitted). This Court has jurisdiction
11 to determine its own jurisdiction. *Wilson*, 87 F.3d at 396 (citing *United States v.*
12 *United Mine Workers*, 330 U.S. 258, 292 n. 57 (1947)). The plaintiff bears the
13 burden of establishing that the Court does have jurisdiction. *Kokkonen v. Guardian*
14 *Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Moreover, a District Court has an
15 independent obligation to ensure that subject matter jurisdiction is established. *See*
16 *United Investors*, 360 F.3d at 966-67.

17 In considering a facial challenge to the allegations of the complaint,
18 the Court must accept the complaint’s factual allegations as true. *See NL Indust. v.*
19 *Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Other challenges, such as this one, are
20 factual, and require resort to extrinsic evidence in order to demonstrate that the
21 Court lacks jurisdiction. The Court determines the facts regarding its jurisdiction
22 for itself rather than accepting the allegations of the complaint. *See Trentacosta v.*
23 *Frontier Pacific Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 1987);
24 *Thornhill Publishing Co. v. General Telephone & Electronics Corp.*, 594 F.2d 730,
25 733 (9th Cir. 1979). In this case, the material facts are undisputed, per the parties’
26 prior stipulation.
27
28

1 **IV. ARGUMENT**

2 **A. Jurisdiction Over This Action Is Vested Exclusively in the Court**
3 **of Appeal**

4 **1. The Hobbs Act.**

5 In the Hobbs Act, Congress vested in federal courts of appeal
6 “*exclusive jurisdiction* to enjoin, set aside, suspend (in whole or in part), or to
7 determine the validity of . . . all final orders of the Federal Communication [sic]
8 Commission made reviewable by section 402(a) of title 47.” 28 U.S.C. § 2342
9 (emphasis added). Section 402(a) of title 47 makes reviewable “[a]ny proceeding
10 to enjoin, set aside, annul, or suspend any order of the Commission” under the
11 Communications Act of 1934, as amended by the Telecommunications Act of
12 1996.⁴

13 As the Ninth Circuit has observed: “Together, these two statutes ‘vest
14 the courts of appeal with *exclusive jurisdiction* to review the validity of FCC
15 rulings.’” *US West Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1054 (9th
16 Cir. 2000) (emphasis added) (quoting *Wilson*, 87 F.3d at 396-97). Further,
17 “[a]ggrieved parties may invoke this exclusive jurisdiction ‘only by filing a petition
18 for review of the FCC’s final order in a court of appeals naming the United States
19 as a party.’” *US West*, 224 F.3d at 1054 (quoting *US West Communications, Inc. v.*
20 *MFS Intelenet, Inc.*, 193 F.3d 1112, 1120 (9th Cir. 1999)); *see also* 28 U.S.C. §
21 2344. As discussed below, the Hobbs Act mandates dismissal of this action for
22 lack of jurisdiction.⁵

23 **2. The Hobbs Act Governs Here and Divests This Court of**
24 **Jurisdiction.**

25 For an action to be subject to the exclusive jurisdiction of the Court of
26 Appeals under the Hobbs Act, it (1) must involve a “final order” of the FCC and (2)

26 ⁴ The statute contains certain enumerated exceptions, none of which is relevant in the
27 circumstances here. *See* 47 U.S.C. § 402(b).

28 ⁵ As noted, the defense of lack of subject matter jurisdiction may be raised at any
time. *See, e.g., Hansen*, 528 F.3d at 600.

1 must seek to “enjoin, set aside, suspend, . . . or . . . determine the validity of” that
2 order. 28 U.S.C. § 2342; *see generally Wilson*, 87 F.3d 393. Leckler’s action
3 meets both criteria.

4 **a. The FCC Ruling is a final order for purposes of the**
5 **statute.**

6 For the purposes of the exclusive jurisdiction provisions of the Hobbs
7 Act, “agency orders are ‘final orders’ . . . ‘if they impose an obligation, deny a
8 right, or fix some legal relationship as a consummation of the administrative
9 process.’” *US West*, 224 F.3d at 1054 (quoting *Sierra Club v. United States*
10 *Nuclear Regulatory Commission*, 862 F.2d 222, 225 (9th Cir. 1988)). The Ninth
11 Circuit has determined that a “final agency action” for purposes of invoking the
12 Administrative Procedures Act is “analytically equivalent” to a “final order” under
13 the Hobbs Act, and thus follows the analysis of a “final agency action” articulated
14 by the Supreme Court.

15 Under the Supreme Court’s analysis, a final agency action must result
16 from the conclusion of the agency decision-making process and be an action that
17 determines rights and obligations:

18 As a general matter, two conditions must be satisfied for agency action
19 to be “final”: First, the action must mark the consummation of the
20 agency’s decisionmaking process—it must not be of a merely tentative
or interlocutory nature. And second, the action must be one by which
rights or obligations have been determined, or from which legal
consequences will flow.

21 *US West*, 224 F.3d at 1054 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78
22 (1997)). The FCC Ruling meets both conditions.

23
24 **(1) The FCC Ruling is the consummation of the**
FCC’s decisionmaking process.

25 The FCC Ruling is a definitive and final statement of the FCC’s
26 position on the issue presented in ACA’s Petition. The Ruling was issued after
27 solicitation and review of public comment. The Ruling is neither tentative nor
28 interlocutory; rather, it unequivocally “order[s]” the analysis and conclusions set

1 forth therein. *See* FCC Ruling at 9-10, ¶¶ 16, 17. It “terminat[es] a controversy or
 2 remov[es] uncertainty.” 47 C.F.R. § 1.2 (addressing scope of FCC declaratory
 3 rulings); *Wilson*, 87 F.3d at 397; *see also id.* at 395-99 (FCC Declaratory Ruling is
 4 a “final order” under the Hobbs Act; reviewing cases from “[a]ll other circuits to
 5 have decided the issue, except the Eleventh,” invoking exclusive appellate
 6 jurisdiction to review declaratory rulings issued by the FCC).

7 **(2) The FCC Ruling determines rights and**
 8 **obligations from which legal consequences flow.**

9 The FCC Ruling also meets the second prong of the definition of “final
 10 agency order” – determining rights and obligations. It “clarif[ies]” that calls made
 11 to wireless numbers by autodialed or prerecorded messages are “permissible” when
 12 the consumer provided the number in connection with an existing debt. (FCC
 13 Ruling at 6 ¶ 9.) It conclude[s]” that “the creditor should be responsible for
 14 demonstrating that the consumer provided prior express consent.” (FCC Ruling at
 15 7 ¶ 10.) It sets forth the legal consequences of the rights of the consumer and
 16 creditor under the Ruling: that a creditor does not violate the TCPA under the
 17 circumstances addressed in the Petition. (FCC Ruling at 6-7 ¶¶ 9, 11.) *See US*
 18 *West*, 224 F.3d at 1055.

19 Under the Hobbs Act, as well as Ninth Circuit precedent, the FCC
 20 Ruling is a “final agency order.”

21 **b. Leckler’s suit requires that the Court enjoin, set aside,**
 22 **suspend or determine the validity of the FCC Ruling.**

23 As reflected in the Court’s Order granting summary judgment in favor
 24 of Leckler, the relief sought in Leckler’s complaint could not have been awarded
 25 without the Court enjoining, setting aside, suspending and/or determining the
 26 validity of the FCC Ruling. *See Victor Oolitic Stone Co. v. CSX Transportation,*
 27 *Inc.*, 852 F. Supp. 721, 723 (S.D. Ind. 1994) (“A challenge to an [agency] order
 28 need not be direct for [the exclusive jurisdiction of the court of appeals] to be
 invoked; all that is required is that the effect of the prayed for relief contradict a[n]

1 [agency] order.”).

2 In *Wilson*, the Ninth Circuit held that Hobbs Act exclusive jurisdiction
3 is invoked whenever an action requires a determination of the validity of an agency
4 order:

5 [T]he [complaint’s] claims raise the *same issues decided by the FCC*
6 *in the Declaratory Ruling If the district court disagreed with the*
7 *Declaratory Ruling, the effect of the proceeding would have been to*
8 *enjoin, set aside, or suspend the Declaratory Ruling—all actions*
9 *which are within the exclusive domain of the court of appeals under*
10 *§ 2342. Even if the district court agreed with the Declaratory Ruling,*
11 *that result would have required a determination of the validity of the*
12 *Declaratory Ruling, which would also violate § 2342.*

13 *Wilson*, 87 F.3d at 400 (emphasis added).

14 In this case, as in *Wilson*, the FCC Ruling and Leckler’s lawsuit
15 address the “same issues.” The FCC Ruling concluded that “autodialed and
16 prerecorded message calls to wireless numbers provided by the called party in
17 connection with an existing debt are made with the ‘prior express consent’ of the
18 called party.” (FCC Ruling ¶ 9.) Leckler asked this Court to determine that her
19 consent did not constitute “prior express consent” to receive such calls. (*See*
20 *Plaintiff’s Memorandum of Points and Authorities in Support of Motion for*
21 *Summary Judgment, D.E. 35, at 1:10-13 (“The issue here is what constitutes ‘prior*
22 *express consent’ as required by the TCPA. At issue here is whether the Federal*
23 *Communications Commission (‘FCC’) can legally redefine that phrase as it*
24 *attempts to do in its Declaratory Ruling.”).) This is precisely the “same issue.” In*
25 *fact, even as to ACA itself—the petitioner in the proceeding culminating in the*
26 *FCC Ruling—the precedential effect of the FCC Ruling may now be cast in doubt,*
27 *as a plaintiff arguably could ignore the FCC Ruling in favor of ACA and bring suit*
28 *against ACA for violation of the TCPA under the authority of the ruling in this*
case.

As this Court noted, its decision on the issue presented by the parties’
summary judgment motions “hinges on the propriety of a ruling by the Federal

1 Communications Commission ('FCC')" (MSJ Order at 3:26-27.) Leckler
 2 also acknowledged that adherence to the FCC's position would end her lawsuit. In
 3 fact, she specifically asked that the Court "nullify the FCC ruling for purposes of
 4 this lawsuit." (D.E. 35 at 2.) *See Victor Oolitic*, 852 F. Supp. at 723 ("the result
 5 Plaintiff seeks assumes that the ICC decision is a nullity. The fact remains that the
 6 ICC order stands . . .").

7 This Court analyzed the FCC Ruling under the standard set forth in
 8 *Chevron, U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984),
 9 and determined not to accord deference to the ruling, finding that the FCC's
 10 interpretation was inconsistent with the TCPA's plain language. (MSJ Order at
 11 6:7-9.)

12 In fact, the Court explicitly rejected the reasoning of the FCC Ruling:

13 On January 4, 2008, in response to a petition filed by ACA
 14 International, the FCC issued a declaratory ruling, adopted December
 15 28, 2007, which held that "the provision of a cell phone number to a
 16 creditor, e.g., as part of a credit application, reasonably evidences prior
 17 express consent by the cell phone subscriber to be contacted at that
 18 number regarding the debt," and thus that "autodialed and prerecorded
 19 message calls to wireless numbers provided by the called party in
 20 connection with an existing debt are made with the 'prior express
 21 consent' of the called party." 2007 FCC Ruling at ¶ 9. **The Court
 22 finds this construction of "prior express consent" both "manifestly
 23 contrary to the statute" and unreasonable** [citation] because it
 24 impermissibly amends the TCPA to provide an exception for "prior
 25 express *or implied* consent" and flies in the face of Congress' intent.

26 (MSJ Order at 6:1-9) (bold added; italics in original). Therefore:

27 [T]he FCC's interpretation of the TCPA reads out Congress'
 28 requirement that autodialed and prerecorded calls may be made to cell
 phone numbers only where the called party's consent is express, and
 instead permits the application of this exemption where the consent
 can be implied. **This interpretation is manifestly contrary to the
 plain language of the statute, is unreasonable, and therefore is not
 deserving of deference.**

(MSJ Order at 11:17-21 (bold added).)

Leckler's action could not be adjudicated by this Court without
 effectively enjoining, setting aside, suspending, or determining the validity of the

1 FCC Ruling—regardless whether this Court ruled as it did, in favor of Leckler, or
 2 whether the Court had adopted CashCall’s (and the FCC’s) position. *See Wilson*,
 3 87 F.3d at 400; *see also Alison & Associates, Inc. v. Dartek Corp.*, No. CV 104-
 4 181, 2005 WL 2453089 (S.D. Ga. Sept. 30, 2005) (transferring case to Eleventh
 5 Circuit where district court lacked jurisdiction under the Hobbs Act over dispute
 6 about the application of the FCC’s “established business relationship” exception to
 7 certain unsolicited faxes otherwise prohibited by the TCPA).⁶

8 **c. It is irrelevant that Leckler’s suit was filed before the**
 9 **final order.**

10 Leckler’s suit was filed before the FCC Ruling was issued, and thus
 11 her complaint is not framed as a direct challenge to that order. For the purposes of
 12 Hobbs Act jurisdiction, however, that makes no difference. The end result of the
 13 relief she seeks requires the Court to overturn the FCC Ruling, and that is all that is
 14 necessary under the Hobbs Act.

15 In *Wilson*, political candidates brought a lawsuit in September 1991,
 16 seeking to recover alleged advertising overcharges from television stations. The
 17 complaint alleged that the charges were in excess of charge limitations set forth in
 18 the Communications Act of 1934, as amended, 47 U.S.C. § 315(b). *Wilson*, 87
 19 F.3d at 395. In December 1991, three months after the suit was filed, the FCC
 20 issued a Declaratory Ruling, determining that the agency had exclusive jurisdiction
 21 over claims alleging violations of Section 315(b). *Id.* Following the FCC’s denial
 22 of petitions for reconsideration, the district court dismissed the action, finding itself
 23 divested of jurisdiction under the Hobbs Act. *Id.* at 395-96.

24 The candidates argued, *inter alia*, that their action, filed prior to the

25 ⁶ In *Alison*, the U.S. government, which opposed the transfer, argued that neither
 26 party to the lawsuit was “aggrieved” for purposes of the Hobbs Act, as neither had
 27 participated in the FCC proceedings on the topic. *Id.* at *3. The court disagreed,
 28 applying an exception to the “aggrieved party” requirement for challenges to an
 agency action as in excess of the agency power. *Id.* at *3. The court concluded that
 the matter should be transferred to the court of appeals. *Id.* at *4.

1 issuance of the Declaratory Ruling, was not a collateral attack on the ruling and did
 2 not invoke Hobbs Act exclusive jurisdiction. The Ninth Circuit rejected that
 3 argument, holding: “[a] complaint need not be a collateral attack on a declaratory
 4 ruling for 28 U.S.C. § 2342 to vest exclusive jurisdiction in the court of appeals.
 5 *All that is required is that the complaint filed in the district court raise the same*
 6 *issues and seek the same relief in substance as the declaratory ruling.”* *Wilson*, 87
 7 F.3d at 399 (emphasis added). The court concluded that “[t]hus, it is irrelevant that
 8 the Candidates’ first suit was filed prior to the FCC’s issuance of the Declaratory
 9 Ruling. Once the Declaratory Ruling became final, it divested the district court of
 10 jurisdiction to consider the issues decided in the Ruling.” *Id.* at 400; *see also Air*
 11 *Transport Ass’n v. Public Util. Comm’n*, 833 F.2d 200, 206 (9th Cir. 1987) (district
 12 court lost jurisdiction to consider action once the FCC issued its ruling), *cert.*
 13 *denied*, 487 U.S. 1236 (1988).

14 **B. This Court Should Vacate Its Prior Orders and Dismiss the**
 15 **Action.**

16 As this Court lacks subject matter jurisdiction over this action, its prior
 17 orders are void and should be vacated. “It is well settled that a judgment is void ‘*if*
 18 *the court that considered it lacked jurisdiction of the subject matter*” *Watts v.*
 19 *Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985) (affirming district court’s vacating of
 20 its own order) (quoting 11 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE at
 21 198, 200 (emphasis in *Watts*)). The action also must be dismissed. *See Wilson*, 87
 22 F.3d at 395-96 (dismissing the action where district court found it lacked
 23 jurisdiction under the Hobbs Act).

1 **V. CONCLUSION**

2 For the foregoing reasons, CashCall requests that the Court dismiss the
3 action and vacate all prior orders entered in this case.

4
5 Dated: August 11, 2008

Respectfully submitted,

6 FINLAYSON, AUGUSTINI & WILLIAMS LLP

7 MANATT, PHELPS & PHILLIPS, LLP

8
9 By: 
10 Brad W. Seiling
Attorneys for Defendant CashCall, Inc.

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28