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25 CashCall, Inc.

26 UNITED STATES DISTRICT COURT
27 NORTHERN DISTRICT OF CALIFORNIA
28

29 TRICIA LECKLER, on behalf of
30 herself and all others similarly
31 situated,

32 Plaintiffs,

33 vs.

34 CASHCALL, INC.,

35 Defendant.

Case No. C 07-04002 SI

DEFENDANT'S REPLY IN SUPPORT
OF MOTION TO DISMISS FOR LACK
OF SUBJECT MATTER
JURISDICTION; DECLARATION OF
ETHAN POST

Date: October 31, 2008

Time: 9 a.m.

Place: Courtroom 10

Judge: Hon. Susan Illston

1 **I. INTRODUCTION**

2 Leckler concedes that the Hobbs Act divests this Court of jurisdiction
3 over this action, because her lawsuit challenges a final ruling of the Federal
4 Communications Commission (“FCC Ruling”). Leckler also concedes that this
5 Court should vacate its prior orders granting summary judgment in her favor.
6 Under well-settled principles of federal jurisdiction, then, this case must be
7 dismissed.

8 Even with all that, Leckler still does not think that the Court should
9 dismiss her case. Instead, she posits a novel and utterly unsupported procedure—
10 suggesting that this Court should allow her lawsuit to morph into a different lawsuit
11 brought by a new plaintiff. Leckler then would disappear and abandon her
12 individual claim against CashCall, as well as the claims she purported to pursue on
13 behalf of a putative class of CashCall borrowers. According to Leckler, this
14 passing of the baton to a new plaintiff will “cure” the admitted jurisdictional
15 defects. This argument is specious, for several reasons.

16 First, the law is clear: if the Court has no jurisdiction—as both parties
17 agree it does not here—then the Court has no authority to take any action other than
18 dismiss the case. It cannot rule on Leckler’s motion to amend, or on any other
19 motion. The Court lacks jurisdiction because the operative complaint necessarily
20 requires the Court to determine the validity of the FCC Ruling. The summary
21 judgment orders did not create the jurisdictional problem, as Leckler argues. So
22 vacating those orders does not, as Leckler says, “solve” the jurisdictional problem.
23 (Opp. at 1:11-12.)

24 Second, the law just as clearly precludes this Court from allowing
25 Leckler to amend her complaint for the purpose of *creating* jurisdiction. Leckler’s
26 proposed amended complaint is not simply a continuation of her existing suit. It is,
27 rather (at least according to Leckler), something entirely different, with a different
28 plaintiff, a different class definition, a “completely different factual situation” (Opp.

1 at 5:22), and different applicable law. Leckler cites no authority that would allow
2 her to create jurisdiction by swapping her existing case for another plaintiff's new
3 one.

4 Finally, Leckler argues that the proposed new plaintiff, Miguel
5 Madrigal ("Madrigal"), did not provide his cell phone number to CashCall as part
6 of the application process (which, Leckler asserts, distinguishes his situation from
7 hers and makes the FCC Ruling inapplicable). In fact, Madrigal's original
8 application for a loan from CashCall quite clearly sets forth his "mobile phone"
9 number. Therefore, Madrigal's proposed case presents the identical jurisdictional
10 issue as Leckler's case, because it also would require the Court to determine the
11 validity of the FCC Ruling.

12 Of course, Madrigal can try to spin a new factual story that does not
13 present the same fatal jurisdictional obstacle as Leckler's current case. But he will
14 have to file that case and start from the beginning. Then, CashCall will be able to
15 raise appropriate challenges to the new case. This motion is not the appropriate
16 forum to determine the merits of a new plaintiff's supposedly new claims.

17 As the parties agree, the Hobbs Act divests this Court of jurisdiction.
18 The case must therefore be dismissed.

19 II. ARGUMENT

20 A. As This Court Lacks Jurisdiction, It May Only Vacate Its Prior 21 Orders and Dismiss the Case.

22 Leckler repeatedly concedes that this Court lacks subject matter
23 jurisdiction, due to the Hobbs Act, 28 U.S.C. § 2342.¹ Leckler's action requires the
24 Court "to enjoin, set aside, suspend (in whole or in part), or to determine the

25 ¹ That Leckler's complaint alleges jurisdiction under the Class Action Fairness Act
26 ("CAFA") or presents a question of federal law is not relevant to the motion before
27 the Court. Where the Hobbs Act is implicated by the claims alleged in a complaint,
28 it overrides any otherwise legitimate jurisdictional basis on which the complaint was
filed in federal court in the first place. Thus, the federal jurisdictional basis alleged
has nothing to do with whether the Hobbs Act deprives the Court of jurisdiction –
and, as Leckler concedes, it does.

1 validity [of]" a final order of the FCC. 28 U.S.C. § 2342. Under the Hobbs Act,
2 exclusive jurisdiction lies in the Courts of Appeals.

3 Leckler's entire opposition is based on the supposition that this Court
4 may "cure" the lack of jurisdiction by vacating its prior orders and allowing Leckler
5 to abandon her case (and the putative class she purports to represent), substituting a
6 new plaintiff with a new case. But this Court lacks jurisdiction to do *anything* other
7 than dismiss the case, including ruling on Leckler's motion to amend: "[A] district
8 court is powerless to grant leave to amend when it lacks jurisdiction over the
9 original complaint." *Morongo Band of Mission Indians v. California State Bd. of*
10 *Equalization*, 858 F.2d 1376, 1380 n. 2 (9th Cir. 1988), *cert. denied sub nom.*
11 *Miller v. Morongo Band of Mission Indians*, 488 U.S. 1006 (1989); *see also id.* at
12 1380-81 ("we must examine the Band's original complaint to determine whether
13 the claim alleged therein was one over which the district court had jurisdiction. If
14 jurisdiction was lacking, then the court's various orders, including that granting
15 leave to amend the complaint, were nullities."). Leckler does not cite a single case
16 that would authorize the Court to grant her leave to amend the complaint or take
17 any action other than dismissing the case. Once the Court determines that it has no
18 subject matter jurisdiction, the case is over.

19 Leckler is mistaken in suggesting that this Court's summary judgment
20 orders are what deprived this Court of jurisdiction, and that jurisdiction can
21 effectively be restored by simply vacating the orders. *See, e.g.,* Opp. at 1:11-12
22 ("The jurisdictional problem arising from the Court's review of the FCC Ruling is
23 solved by vacating the orders . . ."); *see also* 6:3-15 (positing a series of rhetorical
24 questions based on the assumption that vacating the orders will restore jurisdiction).
25 Because her case would require the Court to determine the validity of the FCC
26 Ruling, there is no jurisdiction. This means the Court had no jurisdiction to grant
27 (or deny) summary judgment. Thus, the summary judgment orders are "nullities."
28 *Morongo Band of Mission Indians*, 858 F.2d at 1380-81. The orders are simply a

1 symptom of the jurisdictional problem; vacating the orders does not cure the root
2 problem.

3 Leckler's promise to abandon her challenge to the FCC Ruling does
4 not change the fact that her complaint—the operative complaint and the only one
5 before the Court—does just that. Thus, in arguing that vacating the summary
6 judgment orders will give the Court jurisdiction over “the rest of the case . . . ,” she
7 ignores the fact that there is no “rest of the case.” Leckler's *entire* case requires the
8 Court to determine the validity of the FCC Ruling. Leckler acts as though her own
9 complaint is irrelevant and has already ceased to exist. *See* Opp. at 8:5-6 (“Plaintiff
10 agrees the FCC Ruling was quite important with the first plaintiff Leckler under the
11 original complaint.”).² Leckler is not the “first” plaintiff, as she argues in her
12 opposition; she is the only plaintiff. And her complaint may be the “original” one,
13 but it is also the only one pending now. As the Court lacks jurisdiction over the
14 action, it must dismiss the action.

15 **B. There Is No Authority for Allowing Amendment to Create**
16 **Jurisdiction Where None Exists.**

17 Leckler seeks to amend the complaint to replace herself with an
18 *entirely different plaintiff* to attempt to plead an *entirely different lawsuit* that she
19 claims will not implicate the FCC Ruling or Hobbs Act jurisdiction. This is
20 impermissible, and she cites no authority sanctioning such a novel procedure.

21 In fact, the law is clear that a court may allow an amendment to clarify
22 or correct a misstatement where the court *does* have subject matter jurisdiction, but
23 inartful pleading failed to establish jurisdiction on the face of the complaint. *See* 28
24 U.S.C. § 1653 (“Defective allegations of jurisdiction may be amended, upon terms,

25 ² Leckler tries to minimize the significance of the FCC Ruling as a trivial “side
26 issue” pertaining only to whether any particular class member actually did give
27 consent to be called. (Opp. at 6:28-7:2.) But as Leckler herself argued in her motion
28 for summary judgment, when she asked the Court to “nullify” the FCC Ruling, the
FCC Ruling is central to her claims.

1 in trial or appellate courts.”); *Snell v. Cleveland, Inc.*, 316 F.3d 822, 828 (9th Cir.
2 2002) (“The primary purpose of § 1653 is to permit correction of incorrect
3 statements about extant jurisdiction”; ordering amendment of the pleadings where it
4 was undisputed that jurisdiction actually existed). But that is not the circumstance
5 here; Leckler wants to amend the complaint not to correct defective jurisdictional
6 allegations, but to create jurisdiction that does not exist. *See Newman-Green, Inc.*
7 *v. Alfonzo-Larrain*, 490 U.S. 826, 831-32 (1989) (noting that Section 1653 allows
8 amendment to cure jurisdictional *allegations* where jurisdiction exists but was not
9 properly alleged; “It does not apply to the instant situation, where diversity
10 jurisdiction does not, in fact, exist.”); *see also Iron Cloud v. Sullivan*, 984 F.2d 241,
11 243-44 (8th Cir. 1993) (holding that Section 1653 does not permit amendment to
12 add plaintiffs with standing to overcome lack of jurisdiction); *Aetna Cas. & Surety*
13 *Co. v. Hillman*, 796 F.2d 770, 775 (5th Cir. 1986) (Section 1653 “is not to be used
14 to create jurisdiction retroactively where it did not previously exist”).

15 But Leckler does not seek to correct any misstated facts in her
16 complaint. Instead, she seeks to establish jurisdiction for the first time, by
17 replacing herself with a different plaintiff with an allegedly different factual
18 scenario, and to amend the class definition so that the new plaintiff represents a
19 putative class not governed by the FCC Ruling. Whether this Court has jurisdiction
20 over that proposed different suit should be determined if and when such a suit is
21 filed; it is not a matter for this Court to determine now in this case.

22 **C. The *Wilson* Case Is Not Distinguishable.**

23 *Wilson v. A.H. Belo Corp.*, 87 F.3d 393 (9th Cir. 1996), is directly on
24 point. The Ninth Circuit squarely held that a lawsuit filed before an FCC
25 declaratory ruling was issued, but which had the effect of directly challenging that
26 ruling, must be dismissed because the Courts of Appeals had exclusive jurisdiction
27 under the Hobbs Act. The procedural posture addressed in *Wilson* is identical to
28 this case—an agency ruling that was entered after a lawsuit was filed divested the

1 district court of jurisdiction.

2 Leckler tries to distinguish *Wilson* by arguing that the FCC ruling
3 challenged in that case “*completely disposed of*” the plaintiffs’ lawsuit. (Opp. at
4 7:6-7 (emphasis in original).) That, however, is not a distinction, because the
5 Hobbs Act completely disposes of Leckler’s case as well (which Leckler concedes
6 in effectively offering to drop out as named plaintiff). Leckler attempts to avoid
7 the application of the Hobbs Act by arguing that a different plaintiff could bring a
8 different case. But that does not help Leckler or save her case.

9 Moreover, the Ninth Circuit’s holding in *Wilson* that the district court
10 lacked jurisdiction and was required to dismiss the suit was not based on the fact
11 that the FCC ruling expressly stated that the FCC had exclusive jurisdiction.
12 Rather, the basis for the Ninth Circuit’s holding was that the plaintiffs (like
13 Leckler) sought to challenge a final order of the FCC—the exact basis for the lack
14 of jurisdiction here. *See Wilson*, 87 F.3d at 397 (“the district court’s ruling that it
15 lacked jurisdiction over the instant actions was proper if (1) the Declaratory Ruling
16 was a final order of the FCC made reviewable by 47 U.S.C. § 402(a), and (2) these
17 proceedings would have required the district court to enjoin, set aside, suspend, or
18 determine the validity of the Declaratory Ruling”); *id.* at 400 (“If the district court
19 disagreed with the Declaratory Ruling, the effect of the proceeding would have
20 been to enjoin, set aside, or suspend the Declaratory Ruling—all actions which are
21 within the exclusive domain of the court of appeals under § 2342. Even if the
22 district court agreed with the Declaratory Ruling, that result would have required a
23 determination of the validity of the Declaratory Ruling, which also would violate §
24 2342.”).

25 Moreover, other cases confirm that an agency ruling need not
26 specifically address the question of jurisdiction in order to fall within the scope of
27 the Hobbs Act. *See, e.g., Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057
28 (9th Cir. 2008) (discussing the district court’s improper deference to an FCC order

1 regarding preemption of state law, which had previously been invalidated by the
2 Eleventh Circuit; “The Hobbs Act provides a framework for determining the
3 validity of final FCC orders, a framework that grants exclusive jurisdiction to the
4 circuit courts. While the district court may not have agreed with the Eleventh
5 Circuit’s analysis . . . , according to the framework for reviewing an FCC decision,
6 the district court was bound by the [Eleventh Circuit’s] determination that the [FCC
7 order was invalid.”) (citation omitted); *Nuclear Information & Resource Serv. v.*
8 *U.S. Department of Transportation Research & Special Programs Admin.*, 457
9 F.3d 956, 957 (9th Cir. 2006) (affirming district court’s dismissal for lack of
10 jurisdiction under the Hobbs Act); *Victor Oolitic Stone Co. v. CSX Transportation,*
11 *Inc.*, 852 F. Supp. 721, 723 (S.D. Ind. 1994) (dismissing claims for lack of
12 jurisdiction under the Hobbs Act).

13 **D. Madrigal Is Not Different From Leckler, as He Also Provided His**
14 **Cell Phone Number to CashCall When He Applied for a Loan.**

15 Leckler’s argument that Madrigal can step in as a new plaintiff and
16 class representative—which is the sole focus of her opposition—is merely an
17 academic discussion. This Court lacks authority to do what Leckler asks. But it is
18 worth noting that, contrary to Leckler’s and Madrigal’s arguments, Madrigal did in
19 fact provide his cell phone number to CashCall when he applied for his loan, just as
20 Leckler did. Thus, the FCC Ruling and its discussion of consent are equally
21 applicable to Madrigal. Madrigal’s initial application to CashCall for a loan in
22 2005 explicitly provides a “mobile phone” number—in addition to a “home phone”
23 number and a “work phone” number. (Declaration of Ethan Post ¶ 3 & Ex. A.)

24 At a minimum, this evidence calls into serious question whether
25 replacing Leckler with Madrigal would render the FCC Ruling irrelevant to
26 adjudication of the proposed new claims. But this is not the proper forum or
27 procedure to adjudicate the merits of Madrigal’s claims against CashCall. Those
28 issues can be litigated if and when Madrigal chooses to file his own lawsuit against

1 CashCall.

2 **III. CONCLUSION.**

3 Leckler does not oppose the grounds for dismissal; she just opposes
4 dismissal. She asks this Court to allow her to manufacture jurisdiction by
5 withdrawing and passing this case to another person with another claim. She cites
6 no authority for this result, and there is none. For the foregoing reasons and those
7 stated in the motion, CashCall respectfully requests that the Court vacate its prior
8 orders and dismiss the case with prejudice.

9 Dated: October 17, 2008

Respectfully submitted,

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FINLAYSON, AUGUSTINI & WILLIAMS LLP

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MANATT, PHELPS & PHILLIPS, LLP

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By: 

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Joanna S. McCallum

Attorneys for Defendant CashCall, Inc.

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DECLARATION OF ETHAN POST

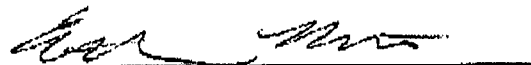
I, Ethan Post, declare and state as follows:

1. I am currently Principal Architect for CashCall, Inc. ("CashCall") and have been employed by CashCall since October 2003. In my role as Principal Architect, I am responsible for the design of company software, and I participated in the design of the program by which CashCall's representatives enter and save information provided by applicants for loans. I have personal, first-hand knowledge of the matters stated herein, and, if called upon to do so, I could and would competently testify thereto.

2. CashCall has a software program that allows CashCall representatives to input a loan applicant's information directly into the system when a person applies for a loan over the telephone. The CashCall computer system always saves a copy of the original application data before any additions or corrections, for recordkeeping purposes.

3. Attached hereto as Exhibit A is a true and correct copy of the original application data saved in CashCall's computer system regarding the loan application submitted by Miguel Madrigal. This document shows the data provided by Miguel Madrigal to a CashCall representative by telephone, when he applied for a loan on September 25, 2005, as entered by the CashCall representative into the CashCall computer system at that time.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on October 16, 2008, at Anaheim, California.


Ethan Post

4132811.2



Logged on as ngoodman

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Original Application

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city:

HIGHLAND

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creditAgreement:

You understand that by clicking on the I AGREE button Immediately following this notice, you are providing 'written instructions' to CashCall, Inc., under the Fair Credit Reporting Act authorizing CashCall, Inc., to obtain information from your personal credit profile or other information from Experian.

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dateOfBirth:

1952-02-02

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driverLicenseNumber:

driverLicenseState:

CA

emailAddress:

willget@cashcall.com

emailAddress2:

emailAddress3:

employerCity:

SAN BERNADINO

employerName:

omni trans

employerPhone:

909-379-7100

employerState:

CA

employerStreetAddress1:

1700 W 5TH ST

employerStreetAddress2:

employerZip:

92404

esignAgreement:

To apply for and obtain a loan from CashCall, Inc., you must agree to receive all information and disclosures electronically prior to submitting your loan application. Once you provide consent, you will not be able to withdraw it. This consent applies only to the current loan transaction. The following information will be provided by electronic communication: • CashCall Promissory Note and Truth In Lending Disclosure Statement and any applicable attachments; • Electronic Funds Transfer Act Authorization and Disclosure; • Notices of changes to any of the agreements listed above; • Loan settlement statement; • Adverse Action Notifications; and • All inquiries, notices and delinquency information to you about your account or your payments on the account. To apply for and receive a loan from CashCall and to receive all of the documents and information referenced above by electronic communication, you must have a personal computer (PC) or Macintosh computer with the following specifications: A secure Web Browser with 128 bit encryption and Java Script enabled and Internet access through an Internet Service Provider (ISP). We support most current commercially accepted browser versions supplied by Microsoft Internet Explorer. If you wish to change the e-mail address at which you will receive communications from CashCall, please-mail us at info@cashcall.com or send written notification to: CashCall, Inc. 17360 Brookhurst Street Fountain Valley, CA 92708 attn: Electronic Notification Dept. You may obtain a paper copy of any disclosure provided to you electronically by sending a request in writing to the address listed above.

firstName:

miguel

homePhone:

909-864-1473

homePhone2:

inMortgageIndustry:

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isLead:

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jobTitle:

driver

lastNameSuffix:

lastName:

madrigal

loanAmount:

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militaryOverseas: false
mobilePhone: 909-645-1283
monthlyExpenses: 1
monthlyIncome: 3700
monthlyRent: 750
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otherPhone2:
phoneInApp: true
refDetail:
refName1: w
refName2: w
refName3:
refName4:
refName5:
refPhone1: 111-111-1111
refPhone2: 111-111-1111
refPhone3:
refPhone4:
refPhone5:
relativeName1: w
relativePhone1: 111-111-1111
runningCreditAndUnderwriting: false
selfEmployed: false
ssNo:
state: CA
statedIncome: true
streetAddress1: 7717 CHURCH AVE
streetAddress2: 213
username: mmadrigal52
verbalPledge: will pay back
workPhone: 909-379-7100
zip: 92346
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