

1 Douglas J. Champion, Esq. (SBN: 75381)
2 **LAW OFFICES OF DOUGLAS J. CAMPION**
3 411 Camino Del Rio South, Suite 301
4 San Diego, CA 92108
5 Telephone: (619) 299-2091
6 Facsimile: (619) 858-0034

7 Robert L. Hyde, Esq. (SBN: 227183)
8 bob@westcoastlitigation.com
9 Joshua B. Swigart, Esq. (SBN: 225557)
10 josh@westcoastlitigation.com
11 **Hyde & Swigart**
12 411 Camino Del Rio South, Suite 301
13 San Diego, CA 92108-3551
14 Telephone: (619) 233-7770
15 Facsimile: (619) 297-1022

16 Attorneys for Plaintiff
17 Tricia Leckler

18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**

20 **TRICIA LECKLER, ON BEHALF**
21 **OF HERSELF AND ALL OTHERS**
22 **SIMILARLY SITUATED,**

23 **Plaintiffs,**

24 **v.**

25 **CASHCALL, INC.,**

26 **Defendant.**

27 CASE NO.: C 07-04002 SI

28 CLASS ACTION

PLAINTIFF'S MEMORANDUM
OF POINTS AND AUTHORITIES
IN OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS

Date: October 31, 2008

Time: 9:00 a.m.

Crtrm: 10, 19th Floor

Judge: Hon. Susan Illston

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 It appears that part of Defendant's motion has merit and Plaintiff agrees that the Orders granting
3 Plaintiff's and denying Defendant's summary judgment motions must be set aside because of lack of
4 subject matter jurisdiction under the Hobbs Act. Plaintiff reluctantly agrees to Defendant's request to
5 vacate those Orders of May 20, 2008¹ and makes a separate request to do so. Those motions both sought
6 to have this Court determine the validity of the recent FCC Ruling² which set forth the FCC's new
7 definition of "prior express consent" under the TCPA. The Court held the FCC Ruling was contrary to
8 Congress' intent in passing the TCPA and held the FCC Ruling did not apply in this case.

9 However, Plaintiff does not agree with any other remedies sought by Defendant. This case need
10 not be dismissed because this Court does not lose subject matter jurisdiction if there is no challenge to the
11 FCC Ruling. The jurisdictional problem arising from the Court's review of the FCC Ruling is solved by
12 vacating the orders, as Defendant seeks. Once the Orders are vacated, this Court plainly has subject matter
13 jurisdiction of the rest of the case, unless and until Plaintiff challenges the FCC Ruling in the Circuit
14 Court, which she does not intend to do. Furthermore, because of the First Amended Complaint Plaintiff
15 ("FAC") seeks leave to file, there will be no need to challenge the FCC Ruling for purposes of this case.³

16 One reason that this case can go forward is that Plaintiff will amend her original complaint and
17 substitute a new class representative, Miguel Madrigal. Unlike the original Plaintiff, Tricia Leckler, Mr.
18 Madrigal never gave his cell phone number that was called to Defendant in an application or otherwise.
19 Therefore, the FCC Ruling's validity on that issue of "prior express consent" is irrelevant to this new
20 Plaintiff and the new Subclass One he represents. The FCC Ruling was certainly relevant to the existing
21

22
23 ¹ That Order filed May 20, 2008 is entitled Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment ("Orders").

24 ² That Declaratory Ruling is entitled In the Matter of Rules and Regulations implementing the Telephone
25 Consumer Protection act of 1991; Request of ACA International for Clarification and Declaratory Ruling,
26 Declaratory Ruling Adopted December 28, 2007 and Released January 4, 2008 ("Ruling" or "FCC Ruling" herein).
That Ruling is attached to Defendant's Request for Judicial Notice.

27 ³ Vacating the Order, filing the FAC, and not pursuing the challenge to the FCC Ruling in the Circuit Court also
28 makes Defendant's other motion for Certification of Order for Interlocutory Appeal and for Stay of Proceedings
under 28 U.S.C. 1292(B) moot because the Orders sought to be appealed are vacated. That motion is set for hearing
on 2/6/09.

1 Plaintiff Tricia Leckler because she did give her cell phone number to Defendant in an application.
 2 Therefore, the FCC Ruling was dispositive of Ms. Leckler’s TCPA claim and thus her suitability as the
 3 only class representative. But with Mr. Madrigal named as the class representative in the FAC, the FCC
 4 Ruling does not dispose of the case as it is irrelevant to his status as a class representative because there is
 5 no “consent” issue with him. Plaintiff will have to and does accept the validity of the FCC Ruling going
 6 forward with the case.

7 Furthermore, Plaintiff does not intend to – nor can she -- challenge the FCC Ruling in the Circuit
 8 Court. As Defendant well knows but does not reveal in its moving papers, Plaintiff is precluded from
 9 petitioning the Circuit Court for relief here for many reasons, including standing, but also because of the
 10 jurisdictional requirement that such petitions be filed within 60 days after public notice. 28 U.S.C. § 2344.
 11 That time passed months before the MSJ motions were heard.⁴

12 Bottom line, there is absolutely no reason to dismiss this case if the summary judgment Order is
 13 vacated because the Court only loses subject matter jurisdiction if someone challenges an FCC Order or
 14 Ruling. With the Orders vacated, there is none, and there will be no such challenge in the future.
 15 Therefore, this case can go forward with the FAC, with a new plaintiff and an amended complaint.

16 **II. ARGUMENT**

17 **A. Legal Standard for a Rule 12(b)(1) Motion to Dismiss.**

18 Clearly there is presently subject matter jurisdiction here, primarily based upon the diversity
 19 alleged under the Class Action Fairness Act (“CAFA”), 28 U.S.C. §§ 1332(d)(2) and 1332(d)(5)(B), and
 20 also because of the federal law-based TCPA. Because Defendant argues the Hobbs Act controls and
 21 divests the Court of subject matter jurisdiction, the federal question and diversity issues have not been
 22 challenged directly. However, Plaintiff answers those questions herein because in a Rule 12(b)(1) subject
 23 matter jurisdiction motion brought by Defendant, it is Plaintiff’s burden to prove such jurisdiction. *Lujan*

24
 25
 26 ⁴ There are strict requirements as to standing, “aggrieved” parties and most importantly, any petition
 27 must be filed within 60 days of public notice. 28 U.S.C. § 2344; *Sable Communications of California, Inc. v.*
 28 *F.C.C.*, 827 F.2d 640 (9th Cir. 1987). Here the motions for summary judgment were heard after the 60 days had
 already run. So it is not a question of taking the decision from this Court and simply refiled the petition in the
 Circuit Court, as one might think after reading Defendant’s brief. That time has passed. Plaintiff accepts the
 FCC Ruling because this case must go forward, with or without the FCC Ruling.

1 *v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

2 As set forth in the Complaint and the FAC of which Plaintiff requests the Court to take judicial
3 notice, Plaintiff has alleged diversity under CAFA, which permits these class actions to be filed in federal
4 court.⁵ *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 450-451 (7th Cir. 2005). Both the
5 Complaint's and the FAC's allegations plainly meet the requirements of CAFA that require that there are
6 at least 100 class members in all proposed plaintiff classes; the combined claims of all class members
7 exceed \$5 million exclusive of interest and costs; and there is "minimal diversity", i.e., any class member
8 (need not be named) is a citizen of a different state than any defendant. 28 U.S.C. §§ 1332(d)(2) and
9 1332(d)(5)(B). This case also alleges a violation of the TCPA,⁶ a federal statute, 47 U.S.C. §
10 227(b)(1)(A).⁷ The new Plaintiff and Class Representative has submitted a declaration in support of this
11 motion as well to meet any Rule 12(b)(1) "factual" challenge to the Complaint or proposed FAC. That
12 declaration summarizes how he was called on his cell phone but never gave his cell phone number to
13 CashCall. Instead, CashCall "captured" the telephone number of a car dealer from which Mr. Madrigal
14 called CashCall and repeatedly called and faxed the dealer seeking Mr. Madrigal until the dealer provided
15 Mr. Madrigal's contact information, including his cell phone number. *See* Declaration of Miguel Madrigal
16 in Opposition to Rule 12(b)(1) Motion to Dismiss and in Support of Motion to Amend Complaint
17 ("Madrigal Decl."), filed herewith.⁸ Therefore, aside from the Hobbs Act arguments, Plaintiff has

18
19 ⁵ Original Complaint, para. 2; FAC, para. 2.

20 ⁶ 47 U.S.C. § 227(b)(1)(A) states: ("*It shall be unlawful for any person within the United States or any person*
21 *outside the United States if the recipient is within the United States—(A) to make any call (other than a call made*
22 *for emergency purposes or made with the prior express consent of the called party) using any automatic telephone*
23 *dialing system or an artificial or prerecorded voice—(i) to any emergency telephone line (including any "911" line*
24 *and any emergency line of a hospital, medical physician or service office, health care facility, poison control center,*
25 *or fire protection or law enforcement agency); (ii) to the telephone line of any guest room or patient room of a*
26 *hospital, health care facility, elderly home, or similar establishment; or (iii) to any telephone number assigned to a*
27 *paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service,*
28 *or any service for which the called party is charged for the call[.]"). Emphasis added.*

⁷ Original Complaint, paras. 6 –14; 27 – 34; FAC, paras 6 –14; 27 – 34.

⁸ The parties have previously filed a Jointly Submitted Statement of Undisputed Facts in Support of the Parties' Cross-Motions for Partial Summary Judgment, Docket Entry no. 32. That statement sets forth the facts relating to Ms. Leckler and the original Complaint and meets any factual challenge to the Complaint, confirming for purposes of this Rule 12(b)(1) motion that there is sufficient subject matter jurisdiction.

1 established subject matter jurisdiction both through the federal question raised and the CAFA diversity
2 allegations.

3 **B. Plaintiff Accepts the Demand by Defendant to Vacate the Court's Prior Orders on the**
4 **Summary Judgment Based Upon a Lack of Jurisdiction.**

5 Defendant moves this Court to "vacate its prior orders" on the motions for summary judgment as
6 they were void for lack of subject matter jurisdiction. Def's Memo at 13. Plaintiff agrees and also
7 requests the Orders be vacated. Unbeknownst to both sides at the motion for summary judgment, the
8 Circuit Courts apparently had exclusive subject matter jurisdiction to "enjoin, set aside, suspend (in whole
9 or in part), or to determine the validity of - (1) all final orders of the Federal Communications
10 Commission made reviewable by section 402(a) of title 47". 28 U.S.C. § 2342. Thus, there are two
11 specific statutes relating to only the FCC and a handful of other agencies that require a different procedure
12 to challenge their validity than by a challenge in the district court: 28 U.S.C. § 2342 and 47 U.S.C. §
13 402(a). They require anyone challenging any FCC Order or Ruling to file such challenges only in the
14 Circuit Court of Appeal. Consequently, the district court did not have subject matter jurisdiction over such
15 a challenge. *Sable Communications of California, Inc. v. F.C.C.*, 827 F.2d 640 (9th Cir. 1987).
16 Furthermore, even if *Plaintiff* did not file any motion for summary judgment, *Defendant's* request in its
17 motion to *confirm* the validity of the FCC Ruling was itself beyond the Court's jurisdiction and would
18 require vacating of any Order. "Even if the District Court agreed with the Declaratory Ruling, that result
19 would have required a determination of the validity of the Declaratory Ruling, which also would violate
20 Section 2342." *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 400 (9th Cir. 1996). Therefore, reluctantly,
21 Plaintiff agrees that the Court's prior Order should be vacated.

22 Thus, challenges to the FCC Rulings and Orders are treated differently than those of most other
23 agencies, and permit only the Circuit Courts' jurisdiction. Despite that difference, it has long been the law
24 that there is an exception to the rule that district courts ordinarily lack jurisdiction to review actions of
25 administrative agencies if the agency had clearly acted "in excess of its delegated powers and contrary to a
26 specific prohibition in the Act." *Leedon v. Kyne* (1958) 358 US 184, 188, 79 S.Ct. 180. Also, there are
27 also surprisingly many FCC challenges reported in the case law that were brought before the district
28 courts. There appears to be a history of confusion over the Hobbs Act's application, based upon a number

1 of issues, such as the definitions in the statute, including whether an order is “final” under 28 U.S.C. §
 2 2342(a), whether a party is the required “aggrieved” party to petition the Circuit Court under 28 U.S.C. §
 3 2344, and whether a constitutional challenge to an FCC order is included in the matters over which the
 4 district court has jurisdiction (*Sable Communications of California, Inc. v. F.C.C.*, *supra*, 827 F.2d at
 5 643). And there is case authority that holds if a statute is unambiguous (*Chevron* analysis, Step One), the
 6 district court can make that finding – without taking the challenge to the Circuit Courts.⁹ The reasoning is
 7 that the FCC cannot force such a Circuit Court challenge by claiming to clarify an ambiguity in a statute
 8 where there is none. “[T]he Agency cannot create ambiguity where none otherwise exists by defining
 9 statutory terms contrary to their plain meaning.” *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 110 (2nd Cir.
 10 2007).

11 Nonetheless, Plaintiff accepts the directives of 28 U.S.C. § 2342 and 47 U.S.C. § 402(a), and
 12 recognizes the Court’s Orders should be vacated.

13 **C. There is No Authority to Require this Court to Divest Itself of Jurisdiction or to**
 14 **Prevent This Case From Going Forward, Once the Orders Are Vacated.**

15 Where Plaintiff differs with Defendant here is that Plaintiff does not agree that this action should
 16 be dismissed, or stayed, or that Plaintiff is required -- if she does not want to -- to file a challenge to the
 17 FCC Ruling in the Circuit Court. Instead, Plaintiff seeks to let that issue go, let the FCC Ruling stand
 18 as it relates to this case, and simply amend the Complaint. Simply put, since the FCC Ruling cannot
 19 now be challenged by Plaintiff, she has to proceed with litigating this case, notwithstanding the
 20 existence of that Ruling. Thus, it does not matter if the Hobbs Act prevents the FCC Ruling to be
 21 challenged in this Court, because Plaintiff need not do so to prevail, as detailed below. Importantly, the
 22 case that proceeds with the proposed FAC has a completely different factual situation than the one that
 23 existed when Defendant filed its motion. Because of that FAC, any of Defendant’s arguments that were
 24

25 ⁹ A few of those cases are *Bell Atlantic Mobile, Inc. v. Dept. of Public Utility Control*, 754 A.2d 128 (Conn. 2000)
 26 (utilizing the plain statutory language and legislative history under the *Chevron* analysis, the court found the statute
 27 unambiguous, and determined Congressional intent was clear without resorting to the FCC’s interpretation to
 28 resolve the question); *Sprint Spectrum, L.P., v. State Corp. Comm’n of the State of Kansas*, 149 F.3d 1058 (10th Cir.
 1998) (in an appeal of an action brought in the district court, the court invoked applied the *Chevron* two-part test,
 first analyzing the plain language of the statute and then resorted to the FCC interpretation only after finding the
 statute ambiguous).

1 relevant as to the FCC Ruling's application to the original Leckler complaint are not applicable with the
2 FAC.

3 Defendant is hard pressed to explain a logical inconsistency in its motion. That question is if the
4 Orders are vacated – which Defendant seeks -- and therefore the Hobbs Act does not apply, why does
5 the action need to be dismissed? What is the legal basis for dismissing the case if there is no further
6 Order or pending FCC challenge? If the Orders are vacated, jurisdiction over this action is not “vested
7 exclusively in the Court of Appeal”, as Defendant argues. (Def's Memo at 7). If the Order was void
8 for lack of subject matter jurisdiction because the issue was decided by the Court, vacating those orders
9 cures the problem. If there is no pending challenge to the FCC Ruling, and is the Order is vacated, how
10 can this Court possibly be divested of jurisdiction? It can't. And this Court will continue to have
11 subject matter jurisdiction, absent such a challenge to the FCC Ruling at any other time in this case. As
12 Defendant concedes, it is the act of challenging an FCC Ruling that divests this Court of subject matter
13 jurisdiction. 28 U.S.C. § 2342. If the Orders on the validity of the FCC Ruling are vacated, and there
14 is no other FCC challenge, the requirements of 28 U.S.C. § 2342 and 47 U.S.C. § 402(a) are simply
15 not met.

16 Defendant has only one half-hearted argument on this point: that because the relief Plaintiff
17 seeks is impossible to achieve without overturning the FCC Ruling, the case must be dismissed. Def's
18 Memo at 13. To that end, Defendant further argues “the end result of the relief [Plaintiff] seeks requires
19 the Court to overturn the FCC Ruling, and that is all that is necessary under the Hobbs Act.” Def's
20 Memo at 12. Defendant further claims “The only way Leckler could prevail in this case is if the Court
21 invalidates the FCC Ruling, . . .”. Def's Memo at 2. Defendant cites to *Wilson v. A.H. Belo Corp.*, 87
22 F.3d 393 (9th Cir. 1996) in support of its argument. Def's Memo at 12-13.

23 However, those conclusions are simply not true and the *Wilson* case is inapposite. If those
24 contentions were true at the time of the MSJ, they are not true now, especially with the FAC's filing.
25 As detailed below in Section E, Plaintiff need not overturn or set aside the FCC Ruling in order to
26 prevail. As alleged in the FAC, Plaintiff Madrigal never provided his cell phone number to Defendant
27 that Defendant called and therefore the FCC Ruling is irrelevant in trying to attack his suitability to
28 assert a TCPA claim as a class representative. Now the FCC Ruling only relates to a side issue –

1 whether Defendant can assert an affirmative defense of “prior express consent” contained in an
2 application or other writings as newly defined in that FCC Ruling. And Defendant cannot rely on that
3 FCC Ruling to attack Mr. Madrigal, and Mr. Madrigal as the new Plaintiff need not fear that FCC
4 Ruling because there is now no “consent” issue.

5 Defendant cites to *Wilson v. A.H. Belo Corp.*, *supra*, as its authority for dismissing this case.
6 However, this case is factually substantially different from *Wilson*. There the FCC Order *completely*
7 *disposed of* the pending case; here it does not. In *Wilson*, the plaintiffs sought to recover in district
8 court from a number of defendant television stations overcharges for political advertising under 47
9 U.S.C. § 315(b), the Communications Act of 1934. *Id.* at 395. The complaints filed in district court
10 also sought relief for state causes of action such as breach of contract and negligent misrepresentation
11 based upon such overcharge claims, among others. *While the case was pending* in the district court, the
12 FCC issued a Ruling holding 1) that the FCC has exclusive jurisdiction to decide such overcharge
13 claims; 2) that federal law preempts any state law causes of action related to overcharge claims; and 3)
14 and that no private cause of action exists. *Id.* It was as if the FCC in *Wilson* said “We hereby decide
15 we are the only tribunal that can rule on any of plaintiff’s claims, and we also decide plaintiffs cannot
16 sue on any of their claims so they lose on each of them.”

17 In *Wilson*, it is plain that the FCC Ruling was wholly dispositive of *all* issues then pending in
18 the district court case. As a result, in *Wilson* there was no subject matter jurisdiction in district court
19 since *every* issue raised by plaintiffs in their complaints would necessarily have to be a direct challenge
20 to the FCC’s Ruling. Thus, *Wilson* is distinguishable because there, unlike here, their case in district
21 court was about the *very same issues* which the FCC disposed of in its Ruling.

22 Here, to the contrary, the FCC Ruling does not take away any of the substantive bases of the
23 TCPA claims alleged in the Complaint or FAC. Instead, the FCC Ruling relates to only an affirmative
24 defense that Defendant may or may not assert, or may or may not be able to prove. It also affects at
25 most only a portion of the FAC’s proposed Class and Subclass – those persons that provided their cell
26 phone numbers to Defendant. For example, the FCC Ruling here does *not* assert exclusive jurisdiction
27 over the subject matter of the case – TCPA violations – as it did in *Wilson*. Here the FCC Ruling does
28 not take away the causes of action and make them subject to only the FCC’s determination of the facts,

1 as in *Wilson*. The FCC Ruling here also does not take away Plaintiff's private right of action here, as it
2 did in *Wilson*. As a result, here there is absolutely no reason to dismiss the case as occurred in *Wilson*
3 because there the FCC Ruling resolved every issue in the case. Here the FCC Ruling goes to goes to
4 only part of the case, the affirmative defense of consent.

5 Furthermore, Plaintiff agrees the FCC Ruling was quite important with the first plaintiff Leckler
6 under the original complaint. There Leckler was the only class representative and, unlike the FAC class
7 representative Madrigal, she did in fact provide her cell phone number to Defendant in her application.
8 Therefore, if the FCC Ruling applied, and Defendant could prove Leckler provided her cell phone
9 number in an application, which was deemed by the FCC to be "prior express consent", it could be
10 dispositive of the entire case by disposing of Leckler's TCPA claim. If so, Leckler could not be a class
11 representative and the case would likely be dismissed.

12 However, now with the FAC, the FCC Ruling has no bearing on Mr. Madrigal, as he is outside
13 the FCC Ruling's scope of "prior express consent". He never provided his cell phone number of the cell
14 phone called to Defendant (see Madrigal Decl.) and thus the FCC Ruling is irrelevant to him and to all of
15 the similarly situated members of Subclass One.

16 **D. Plaintiff Seeks to Amend The Complaint at This Time in Order to Continue to Litigate**
17 **This Case.**

18 As an integral part of her response to this motion to dismiss, Plaintiff has filed a motion to amend
19 this complaint in order to file the First Amended Complaint to be hopefully heard at the time of the
20 hearing on the motion to dismiss.¹⁰ It is important that the Complaint be amended for several reasons.
21 First, the FAC substitutes a different Plaintiff Mr. Madrigal as the class representative with a wholly
22 different status than the original Plaintiff. Mr. Madrigal never provided his cell phone number to
23 Defendant; Defendant obtained it through other means. Thus, that FAC with a new class representative
24 obviates any defense motion for summary judgment based upon the FCC Ruling because the new
25 Plaintiff did not give "prior express consent" to such calls by providing his cell phone number on any
26

27 _____
28 ¹⁰ The earliest available date for the motion to amend is November 21, 2008 but Plaintiff is submitting a
motion for an order shortening time with this opposition so that all these matters might be resolved at the same
time. The motion to amend with the FAC attached is filed herewith.

1 application for a loan or by any other means.

2 Second, a broad Class is alleged in the FAC, the same as in the original Complaint, of all those
3 persons called by Defendant on their cell phones with an autodialer or by a prerecorded voice message.
4 However, there is also a new Subclass One alleged, consisting of all those persons called on their cell
5 phones but had not provided their cell phone numbers to Defendant. Therefore, the FCC Ruling will
6 have no bearing at all on those Subclass One members. And if Defendant wants to raise the FCC Ruling
7 as an affirmative defense as to some of the Class members, that Ruling puts the burden of proving that
8 the Class members provided their cell phone numbers on the Defendant. See Section E below. If
9 Defendant can provide the proof of its affirmative defense under the FCC Ruling, so be it. The
10 remainder of persons called without consent will prevail.

11 Even if it were possible for Plaintiff to now challenge the FCC Ruling in the Circuit Courts,
12 which it is not, Plaintiff also looks at the reality here of what can be gained by it, which would take at
13 least several additional years. There may already be more “non-consent” Class and Subclass One
14 members that Defendant could ever pay, even with the FCC Ruling in place. Prior to filing this motion,
15 Defendant produced to Plaintiff in discovery records of over 1 million cell phone calls it made in only
16 two years, so far only half of the class period’s four years. At a statutory minimum of \$500 in damages
17 per call made negligently for those 1 million calls, that is \$500,000,000. If the calls were made
18 intentionally, that is \$1,500,000,000 in statutory damages. Furthermore, this Defendant is best
19 characterized as a “sub-prime” lender loaning money to those persons with no other place to turn, and
20 most often charging 70% to 90% per annum in interest. To mount further legal challenges and delay this
21 matter for years might deny any relief to the Class, if Defendant does not survive the current financial
22 crisis as a viable business.

23 **E. The FCC Ruling Has Pluses and Minuses but Plaintiff Can Prevail With the Ruling in**
24 **Place.**

25 The FCC Ruling actually contains both good and bad for both sides. The FCC Ruling did give
26 the Defendant debt collectors some relief, with the “clarification” of “prior express consent”. However,
27 the FCC confirmed debt collectors and creditors *also have the burden of proof* in establishing any
28 instance where the FCC’s new definition of “prior express consent” is asserted as a defense by the caller.

1 The FCC Ruling only provides a potential safe harbor *if* the debt collector or other caller can prove the
 2 called party *has previously provided their cell phone number to the debt collector's assignor*. "In this
 3 ruling, we clarify that autodialed and *prerecorded message calls to wireless numbers that are provided*
 4 *by the called party to a creditor in connection with an existing debt are permissible* as calls made with
 5 the 'prior express consent' of the called party." FCC Ruling, Para. 1, page 1, Def's Req for Jud Notice,
 6 emphasis added.

7 Moreover, the FCC Ruling confirmed it is the Defendant's burden to prove that the called
 8 party provided that cell number to the creditor:

9 We emphasize that prior express consent is deemed to be granted *only if the wireless number*
 10 *was provided by the consumer to the creditor*, and that such number was *provided during*
 11 *the transaction that resulted in the debt owed*. To ensure that creditors and debt collectors
 12 call only those consumers who have consented to receive autodialed and prerecorded
 13 message calls, we conclude that *the creditor should be responsible for demonstrating that*
 14 *the consumer provided prior express consent*. The creditors are in the best position to have
 15 records kept in the usual course of business showing such consent, such as purchase
 16 agreements, sales slips, and credit applications. *Should a question arise as to whether*
 17 *express consent was provided, the burden will be on the creditor to show it obtained the*
 18 *necessary prior express consent*.

19 FCC Ruling, Para. 10, page 6, Def's Req for Jud Notice, emphasis added.

20 Thus, the FCC Ruling actually imposes a substantial burden on any Defendant that attempts to
 21 assert its "prior express consent" defense. And Defendant has asserted that consent defense as its eighth
 22 affirmative defense in its Answer. If Defendant asserts the same affirmative defense in its Answer to
 23 the FAC, Plaintiff therefore need not attack the FCC Ruling in order to prevail because that affirmative
 24 defense of consent requires the creditor and debt collector to prove that the class members provided
 25 their cell phone numbers to the original creditors.

26 III. CONCLUSION

27 For the reasons set forth herein, Plaintiff respectfully requests that the Orders be vacated, the
 28 case not be dismissed, and that Plaintiff be allowed to file a First Amended Complaint as requested in
 the motion filed herewith.

Respectfully submitted,

Dated: October 9, 2008

LAW OFFICES OF DOUGLAS J. CAMPION

By: /s/ Douglas J. Campion
 Douglas J. Campion
 Attorneys for Plaintiff

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Dated: October 9, 2008

HYDE & SWIGART

By: /s/ Joshua B. Swigart
Joshua B. Swigart
Attorneys for Plaintiff

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Robert C. Hyde (SBN: 227183)
bob@westcoastlitigation.com
Joshua B. Swigart (SBN: 225557)
josh@westcoastlitigation.com
Hyde & Swigart
411 Camino Del Rio South, Ste. 101
San Diego, CA 92108
Telephone: (619) 233-7770
Facsimile: (619) 330-4657

Douglas J. Campion, Esq. (SBN: 75381)
doug@djcampion.com
Law Offices of Douglas J. Campion
411 Camino Del Rio South, Suite 301
San Diego, CA 92108
Telephone: (619) 299-2091
Facsimile: (619) 858-0034

Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

**TRICIA LECKLER, ON BEHALF
OF HERSELF AND ALL OTHERS
SIMILARLY SITUATED,**

PLAINTIFF,

v.

CASHCALL, INC.,

DEFENDANT.

CASE NO.: 3:07-CV-04002-SI
[CLASS ACTION]
**DECLARATION OF MIGUEL MADRIGAL
IN OPPOSITION TO RULE 12 (b)(1)
MOTION TO DISMISS AND IN SUPPORT
OF MOTION TO AMEND COMPLAINT**

HON. SUSAN ILLSTON

Motion to Dismiss
Hearing Date: Oct. 31, 2008
Time: 9:00 a.m.
Courtroom 10

1. I, Miguel Madrigal, declare:
2. I am an adult over the age of eighteen years. I am submitting this declaration in

1 opposition to Defendant's motion to dismiss the complaint herein for lack of subject
2 matter jurisdiction. I am also submitting this declaration in support of Plaintiff's
3 motion to amend the Complaint filed herein in order to add me to the Complaint as a
4 Class Representative. If called as a witness, I could and would testify to the matters
5 herein from personal knowledge.

- 6 3. I only recently spoke with Plaintiff's counsel, within the past two to three weeks. I
7 learned of this lawsuit and advised counsel that I would like to participate in this
8 case. I was called many times by CashCall on my cell phone within the past four
9 years. I never gave them my cell phone number. I only gave them my home number
10 on any paperwork I filled out when I borrowed money from them.
- 11 4. However, I went with my daughter to a car dealer to help her purchase a used car.
12 CashCall had left a message on my home phone so I returned their call on the car
13 dealer's phone while I was waiting for the paperwork to be completed. We talked
14 about my loan and the payment that was due and we ended the conversation.
- 15 5. Several days later the car dealer contacted me and said they had received many calls
16 and faxes from CashCall for me or related to me. The dealer said that in order to get
17 CashCall to stop the calls and faxes, they gave CashCall my contact information,
18 including my cell phone number. By the faxes sent, it appeared that CashCall
19 believed I was working at the car dealer.
- 20 6. Ever since then, CashCall has called me many times on my cell phone and left
21 prerecorded messages. I never gave them my cell phone number nor did I ever
22 consent to having them call me on my cell phone.

23 I declare under penalty of perjury pursuant to the laws of the United States that
24 the above is true and correct. Executed on October 8TH. 2008.

25
26 

27 Miguel Madrigal

1 *Re: Tricia Leckler v. CashCall Inc.,*
2 *United States District Court, for the Northern District of California*
3 Case No. C 07-04002 MEJ

3 **CERTIFICATE OF SERVICE**

4 I, the undersigned, declare as follows:

5 I am over the age of eighteen years and not a party to the case. I am employed in the County of San Diego,
6 California where the mailing occurs: My business address is 411 Camino Del Rio South, Suite 301, San
7 Diego, CA 92108. I am readily familiar with our business' practice of collecting, processing and mailing of
8 correspondence and pleadings for mail with the United Postal Service.

9 On the date below I electronically filed with the Court through its CM/ECF program and served through the
10 same program the following document(s):

- 11 1. Plaintiff's Opposition to Defendant's Motion to Dismiss
- 12 2. Declaration of Miguel Madrigal in opposition to Defendant's Motion to Dismiss

13 On the interested parties in said case addressed as follows:

14 Michael Williams	Brad W. Seiling
15 FINLAYSON, AUGUSTINI & WILLIAMS LLP	MANATT PHELPS & PHILLIPS LLP
16 110 Newport Center Drive, Suite10	11355 W. Olympic Blvd
17 Newport, CA 92660	Los Angeles, CA 90064
18 mwilliams@faw-law.com	bseiling@manatt.com

- 19 BY MAIL, by placing a copy thereof in a separate envelope for each addressee named above,
20 addressed to each addressee respectively, and then sealed each envelope and, with the
21 postage thereon fully prepaid, deposited each in the United States mail at San Diego,
22 California in accordance with our business' practice.
- 23 BY PERSONAL SERVICE, by placing a copy thereof in a separate envelope for each addressee
24 named above, addressed to each such addressee respectively, and caused such envelope to be
25 delivered by hand to the offices of addressee.
- 26 BY FACSIMILE, this document was transmitted by facsimile transmission from
27 (619) 330-4657 and transmission was reported as complete and without error. A copy of the
28 transmission report is attached to this affidavit.
- 29 ELECTRONICALLY, Pursuant to the CM/ECF System, registration as a CM/ECF user constitutes
30 consent to electronic service through the Court's transmission facilities. The Court's CM/ECF
31 system sends an email notification of the filing to the parties and counsel of record listed
32 above who are registered with the Court's EMC/ECF system.

33 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and
34 correct. Executed on October 10, 2008, at San Diego, California.

35 /s/ Joshua B. Swigart
36 Joshua B. Swigart