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13 **UNITED STATES DISTRICT COURT**

14 **NORTHERN DISTRICT OF CALIFORNIA — SAN FRANCISCO DIVISION**

15 MARK HEINRICHS; INDIVIDUALLY AND
 ON BEHALF OF ALL OTHERS
 16 SIMILARLY SITUATED,

17 Plaintiff,

18 vs.

19 WELLS FARGO BANK, N.A.,

20 Defendant.

Case No. 3:13-cv-05434-WHA
 Hon. William H. Alsup
 Courtroom 8

CLASS ACTION

**SUPPLEMENTAL BRIEF SUPPORTING
 MOTION TO STAY**

Date: April 10, 2014
 Time: 8:00 a.m.
 Crtrm.: 8, 19th Floor

FAC Filed: January 15, 2014
 Action Filed: November 22, 2013
 Trial Date: None Set

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I. INTRODUCTION

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2 The FCC has pledged to address its inventory of TCPA petitions “as soon as possible” so
3 as to provide “clear rules of the road” for those attempting to comply with the statute. There is no
4 reason to doubt, therefore, that the FCC will rule on the ACA and UHS petitions and will do so
5 relatively soon.

6 A review of FCC action taken in similar contexts confirms that the FCC is certainly
7 capable of moving quickly when it puts its mind to it. The issuance of Notices of Proposed Rule
8 Making (“NPRM”) sometimes follows hot on the heels of the initial public notice period and
9 recent FCC activity suggests a ruling may be expected on the ACA and UHS petitions as early as
10 October, 2014. Admittedly, however, the FCC is not bound by any particular time limit and its
11 performance is not always swift. Hence, the issuance of an NPRM may not occur for several
12 months after the close of public comment. Many times the FCC skips the NPRM step altogether
13 and simply adopts a declaratory rule or order without further comment.

14 While it may be hard to predict precisely *when* the FCC will rule on the ACA and UHS
15 petitions—and whether it will do so via NPRM or other process—they key here is that it *will* do
16 so. Whether that happens in six weeks, six months, or six years the Court and the parties will be
17 bound by that ruling. As the newly decided case of *Matlock v. United Healthcare Services, Inc.*,
18 No.2:13-cv-02206-MCE-EFB, 2014 WL 1155541 (E.D. Cal. March 20, 2014), recognizes,
19 therefore, prudence dictates that the matter must be stayed or dismissed pending the determination
20 of the ACA and UHS petitions.

II. HISTORY OF FCC ACTIVITY IN SIMILAR CIRCUMSTANCES

21 A review of recent FCC activity and activity taken in similar circumstances suggests that
22 the FCC will rule on the ACA and UHS petitions sometime between October, 2014 and August
23 2015.
24

A. Rulings on TCPA Petitions

25 The FCC has issued several important rulings regarding the TCPA.

26 The first and most comprehensive ruling was the 1992 Report and Order by which the FCC
27 initially implemented its lengthy regulations governing the TCPA. See *Rules and Regulations*
28

1 *Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and
 2 Order, 7 FCC Rcd 8752 (1992). That rulemaking action was triggered by the passage of the TCPA
 3 on December 20, 1991. By April 10, 1992 (less than four months later) the FCC had issued its
 4 NPRM seeking comment on its proposed comprehensive regulations. See 7 FCC Rcd 8754. It
 5 received over 240 comments on its new proposed regulations. Ibid. After giving due consideration
 6 to the comments the FCC adopted amended versions of the regulations governing the TCPA on
 7 October 16, 1992. 7 FCC Rcd 8783. Start to finish the process took under a year.

8 Timeframes for other FCC rulings in the TCPA context are set forth in the table below.¹

9 **TABLE OF FCC ACTION IN THE TCPA CONTEXT**

| 10 Ruling Name | Triggering Date | NPRM Date | Ruling Date |
|--|--|-------------------------|--------------------|
| 11 1992 Report and Order 12 7 FCC Rcd 8752 (1992) | Dec. 20, 1991 passage of TCPA. | April 10, 1992 | Oct. 16, 1992 |
| 13 1995 TCPA Reconsideration 14 Order 15 (Consolidated Ruling on 16 Numerous Petitions) 17 10 FCC Rcd 1239 (1995). | Feb. 6, 1995 reversal of injunction preventing enforcement of the TCPA on constitutional grounds. See <i>Moser v. FCC</i> , 46 F.3d 970 (9th Cir.1995) and 10 FCC Rcd at 12393, FN 17. | None | Aug. 7, 1995 |
| 18 1997 TCPA Reconsideration 19 Order | Sept. 14, 1995 (Petition) | None (Public comment | April 10, 1997 |

21 _____
 22 ¹ Wells Fargo hereby requests judicial notice of these activities as necessary—and activity
 23 on the FCC’s official blog—based either upon the citations supplied herein or the exhibits
 24 supplied herewith, as the publically available history of actions taken by the FCC provided on the
 25 FCC’s official website. Federal Rule of Evidence 201 provides that a court may take judicial
 26 notice of a fact “not subject to reasonable dispute in that it is either (1) generally known within the
 27 territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort
 28 to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Good cause
 exists for this Court to take judicial notice of these documents because they are a matter of public
 record. See *Save Strawberry Canyon v. Department of Energy*, 613 F. Supp. 2d. 1177, 1190 n.5
 (N.D. Cal. 2009) (taking judicial notice of public documents published from government
 websites); *Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F.2d 380, 385 (9th Cir.
 1954) (stating that courts “may take judicial notice of records and reports of administrative
 bodies.”).

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|----|--|-----------------------------|--|----------------|
| 1 | (MCI) 12 FCC Rcd 4609 (1997). | | on petition closed on Nov, 3, 1995) | |
| 2 | | | | |
| 3 | 2003 Report and Order 18 FCC Rcd. 14014 (2003). | None specified. | Sept. 18, 2002 | July 3, 2003 |
| 4 | 2008 Declaratory Ruling (ACA) 23 FCC Rcd 559 (2008). | Oct. 4, 2005 (Petition) | None (Public comment on petition closed on May 22, 2006) | Dec. 28, 2007 |
| 5 | | | | |
| 6 | | | | |
| 7 | 2012 Report and Order 27 FCC Rcd 1830 (2012). | None specified. | Jan. 22, 2010 | Feb. 15, 2012 |
| 8 | 2012 Declaratory Ruling (Soundbite) 27 FCC Rcd. 15391 (2012) | Feb. 16, 2012 (Petition) | None (Public comment on petition closed on May 15, 2012) | Nov. 26, 2012 |
| 9 | | | | |
| 10 | | | | |
| 11 | 2013 Declaratory Ruling (Consolidated Ruling on Several Petitions, including those submitted by parties in <i>Charvart v. EchoStar Satellite, LLC</i> , 630 F.3d 459 (6th Cir. 2010).) 28 FCC Rcd. 6574(2013) | Feb. 22, 2011 (Petition) | None (Public comment on petition closed on approx. May 19, 2011) | May 9, 2013 |
| 12 | | | | |
| 13 | | | | |
| 14 | | | | |
| 15 | 2014 Order (Cargo Airlines) ² | Aug. 17, 2012 (Petition) | None (Public comment on petition closed on Nov. 30, 2012) | March 27, 2014 |
| 16 | | | | |
| 17 | 2014 Declaratory Ruling (Group Me) ³ | March 1, 2012 (Petition) | None (Public comment on petition closed on Sept. 10, 2012) | March 27, 2014 |
| 18 | | | | |
| 19 | | | | |

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21 Accordingly, the timeframe for FCC action in the TCPA context ranges between about six
22 months (E.g. 1992 Report and Order/2012 Declaratory Ruling) and twenty-seven months (2008
23 Declaratory Ruling) for the entire process to play out. On average the FCC issues its rulings on
24 TCPA petitions just under seventeen months following the close of public comments on the

25 ² Attached hereto as Exhibit "A." (Ruling available at "<http://www.fcc.gov/document/cargo-airline-petition-declaratory-ruling>".)

26
27 ³ Attached hereto as Exhibit "B." (Ruling available at "<http://www.fcc.gov/document/granted-part-groupme-inc-petition-declaratory-ruling>".)

1 petition. Applying this timeframe to the ACA and UHS petitions, the Court may expect the FCC
2 to rule sometime prior to August, 2015.

3 **B. Illustrations of Rulings Involving the Issuance of a Notice of Formal Rulemaking**

4 As the FCC has never initiated a formal rulemaking in response to a TCPA petition, it is
5 impossible to discern a likely date for an NPRM to issue on the ACA petition⁴ by looking solely at
6 FCC activity in the TCPA context. Accordingly, in the table below Wells Fargo provides a
7 sampling of circumstances in which the FCC has issued a NPRM in response to a petition.

| 8 TABLE OF PETITION-INITIATED FCC PROCEEDINGS INVOLVING A NPRM | | | |
|---|----------------------|--------------------------------|----------------------------|
| 9 Petition Name | Petition Date | Close of Public Comment | NPRM Date |
| 10 11 12 13 14 Telecommunications for the Deaf, Inc. Petition for Rulemaking (seeking to initiate a proceeding on the FCC's closed captioning rules.) CG Docket No. 05-231 | July 23, 2004 | October 18, 2004 | July 21, 2005 ⁵ |
| 15 16 17 18 Hawk Relay Request for Expedited Clarification (seeking clarification on cost recovery of internet protocol speech to speech relay service). CG Docket Nos. 03-123 and 08-15 | Dec. 21, 2007 | May 22, 2008 | June 24, 2008 ⁶ |
| 19 20 21 22 23 Sprint Nextel Request for Declaratory Ruling (seeking to authorize Greater than 25 kHz Bandwidth Operations in the 817-824/862-869 MHz Band) WT Docket Nos. 12-64 and 11-110 | June 3, 2011 | August 16, 2011 | March 9, 2012 ⁷ |

24 ⁴ The UHS petition seeks an expedited declaratory ruling, not formal rulemaking.

25 ⁵ NPRM available at 20 FCC Rcd 13211 (2005).

26 ⁶ NPRM available at 23 FCC Rcd 10663 (2008).

27 ⁷ NPRM available at 27 FCC Rcd 2742 (2012).

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| 2 | Pyramid Communications, Inc. Petition (seeking amendment of Section 3 90.20(D)(34) and 90.265 of the 4 Commission's Rules to Facilitate the Use of Vehicular Repeated 5 Units.) 6 PS Docket No. 13-229 | Aug. 16, 2011 | Nov. 18, 2011 |
| 7 | Globalstar, Inc. Request for Declaratory Ruling (seeking to use 2473-2495 MHZ 8 bank in low-power mobile 9 broadband network) 10 IB Docket No. 13-213 | Nov. 13, 2012 | January 29, 2013 |
| 11 | LeSEA Broadcasting of South Bend, Inc. Petition for 12 Rulemaking to amend the DTV Table of Allotments 13 MB Docket No. 14-1 | October 25, 2013 | None |
| 14 | | | Sept. 16, 2013 ⁸ |
| | | | Nov. 1, 2013 ⁹ |
| | | | Jan. 9, 2014 ¹⁰ |

15 Accordingly, the timing of FCC action taken in response to a petition that triggers an
16 NPRM is somewhat sporadic. An NPRM may follow as quickly as three months after a petition is
17 file (Le SEA) and within 45 days of the end of the comment period (Hawk Relay). On the other
18 hand the FCC took twenty three months to issue the NPRM in response to the petition of Pyramid
19 Communications, Inc. A rough average of these petitions yields an anticipated wait time of just
20 less than eleven months from the close of the comment period to the issuance of a NPRM.
21 Applying this timeframe to the ACA petition, the Court may expect the FCC to issue an NPRM
22 sometime prior to February, 2015.¹¹

23
24 ⁸ NPRM available at 28 FCC Rcd. 13544, 2013 WL 5229736 (2013).

25 ⁹ NPRM available at 28 FCC Rcd. 15351, 2013 WL 6185162 (2013).

26 ¹⁰ NPRM available at 29 FCC Rcd 162 (2014).

27 ¹¹ Again this assumes that the FCC issues a NPRM. As noted above, however, the FCC has never
28 initiated such a process with respect to a TCPA petition. Accordingly it appears that the most
(footnote continued)

1 **C. Illustrations of Other More Recent Rulings**

2 To provide a broader breadth of analysis, in the table below Wells Fargo also provides a
3 sampling of most recent FCC activity responding to industry petitions in other contexts.

4 **TABLE OF OTHER RECENT FCC ACTION**

| 5 Ruling Name | Triggering Date | NPRM Date | Ruling Date |
|---|---|---|-----------------------------|
| 6 Order on Coalition of E-Reader 7 Manufacturers' Petition on 8 Requiring Access to Advanced 9 Communications Services (ACS) 10 and Equipment by People with 11 Disabilities 12 CG Docket No. 10-213 | May 16, 2013 (Petition) | None (Deadline for reply comments: Sept. 13, 2013) | Feb. 28, 2014 ¹² |
| 11 Order on petitions regarding 12 Proceeding Concerning the TDM- 13 to-IP Transition 14 Connect America Fund 15 GN Docket Nos. 13-5, 12-353 16 WC Docket Nos. 10-90, 13-97 17 CG Docket Nos. 10-51, 03-123 | November 7, 2012- November 19, 2012 (Petitions by two different groups filed at different times) | None (Deadline to comment is "75 days after publication in the Federal Register") 28 FCC Rcd 6346 | Jan. 30, 2014 ¹³ |
| 15 Order on Verizon Petition for 16 Declaratory Ruling 17 (seeking foreign ownership ruling 18 pursuant to Section 310(b)(4) of 19 the Communications Act). 20 IB Docket No. 13-230 | Sept. 16, 2013 (Petition) | None (Public comment on petition closed on Nov. 1, 2013) | Dec. 4, 2013 ¹⁴ |
| 19 Order on Toll Free Service 20 Access Codes Petition 21 CC Docket No. 95-155 22 WC Docket No. 12-260 | Sept. 13, 2012 (Petition) | None (Deadline for reply Comment: Oct. 9, 2012) | Nov. 1, 2013 ¹⁵ |

23 likely result is that the FCC simply rules on the petitions without further opportunity for comment.

24 ¹² Order available at 2014 WL 764420.

25 ¹³ Order available at 2014 WL 407096.

26 ¹⁴ Public Notice of Order granting of the petition is available at 28 FCC Rcd 16432 (2013).

27 ¹⁵ Order available at 27 FCC Rcd. 11105, 2012 WL 4098947.

| | | | |
|--|---|---|--------------------------------------|
| <p>1 Order on Reconsideration 2 Framework for Next Generation 3 911 Deployment 4 (CTIA) 5 PS Docket Nos. 11-153, 10-255 6 FCC 13-127</p> | <p>7 June 28, 2013 8 (Petition)</p> | <p>9 None 10 (Deadline for 11 replies to petition 12 Aug. 26, 2013)</p> | <p>13 Sep. 27, 2013¹⁶</p> |
|--|---|---|--------------------------------------|

14 These recent FCC actions suggest that the agency is capable of moving quite quickly on
15 industry petitions. For instance, in the last year the FCC has twice ruled on a petition within three
16 months of receipt (CTIA and Verizon). In each of those instances it also ruled within one month of
17 the close of public comment on the petition. Taking the average timeframes of the recent activity
18 noted above as a guide, an FCC ruling may be expected within nine months of the filing of a
19 petition and within seven months of the date that public comments close. Applying such a
20 timeframe to the UHS and ACA petitions, the Court may expect the FCC to rule sometime before
21 the end of October, 2014.

22 **D. In All Likelihood the FCC Will Promptly Rule on the ACA and UHS Petitions**

23 As noted at the hearing on the oral argument in this matter, FCC Commissioner O’Rielly
24 has recently informed the public that the FCC recognizes TCPA jurisprudence has “become
25 complex and unclear.” See O’Rielly, Michael, *TCPA: It is Time to Provide Clarity*, publicly
26 available at “<http://www.fcc.gov/blog/tcpa-it-time-provide-clarity>”.¹⁷ The FCC is now committed
27 to addressing the backlog of TCPA petitions “as soon as possible” because, as he put it, “[c]lear
28 rules of the road would benefit everyone.” Ibid. Wells Fargo whole-heartedly agrees.

Moreover Commissioner O’Rielly specifically references the issue before the FCC in the
ACA and UHS petition—“the FCC has the opportunity to answer important questions and
provide much needed guidance on a variety of TCPA issues, including... whether there is liability
for calls made to reassigned phone numbers...” Ibid. (Underling Added). He concludes:

¹⁶ Order available at 28 FCC Rcd. 14422, 2013 WL 5459688.

¹⁷ Attached hereto as Exhibit “C.”

1 “[t]ackling this backlog in a comprehensive manner will help restore certainty and reduce the need
2 to file additional petitions.” Ibid.

3 While informal and non-binding, Commissioner O’Rielly’s blog entry nonetheless
4 provides profound insight into the thought process of the decision-making body that Congress
5 entrusted to implement the TCPA. The Commissioner’s thoughts echo Wells Fargo’s arguments in
6 its moving papers: the law is unclear, TCPA compliance is impossible, and it is time for the FCC
7 to step in and sort matters out.

8 Commissioner O’Rielly’s thoughts are strong evidence that the FCC will move forward on
9 the UHS and ACA petitions on the earliest end of the spectrum, (i.e. much closer to October, 2014
10 than August, 2015.) Accordingly, the Court should defer to the FCC and allow it the time
11 necessary to rule on the central issue at stake in this case— whether there is liability for calls made
12 to reassigned phone numbers.

13 **III. NEW AUTHORITY ALSO CONVINCINGLY DEMONSTRATES WHY THE** 14 **MOTION SHOULD BE GRANTED**

15 On March 20, 2014 the Honorable Morrison C. England, Jr., entered an order staying an
16 identical putative TCPA class action on primary jurisdiction grounds based upon the pending UHS
17 petition. *Matlock v. United Healthcare Services, Inc.*, No.2:13-cv-02206-MCE-EFB, 2014 WL
18 1155541 (E.D. Cal. March 20, 2014).

19 Just as here, in *Matlock* “[t]he crux of Plaintiff’s complaint is that Defendant violated the
20 TCPA when it initiated calls to his cell phone without his consent.” *Id.* at *1. Also similar to this
21 case, there “Defendant purportedly nonetheless had the consent of the prior subscriber to
22 Plaintiff’s phone number” and “[u]nknownst to Defendant, that subscriber had subsequently
23 switched carriers and his phone number was reassigned to Plaintiff.” *Id.* at *1. Judge England
24 therefore recognized that “[t]he dispute in this case thus turns, in large part, on whether the ‘prior
25 express consent of the called party’ refers to the party the caller intended to reach or the actual
26 recipient of the call.” *Id.* at *2.

27 The *Matlock* decision first rejected Plaintiff’s argument that the law is uniform on the issue
28 of the meaning of the phrase “called party”:

1 A number of courts have issued conflicting decisions (none of which
 2 are binding on this Court) as to the meaning of the phrase "called
 3 party." Compare, e.g., *Cellco P'ship v. Wilcrest Health Care Mgmt.,*
 4 *Inc.*, 2012 WL 1638056 at *7 (D.N.J. May, 8, 2012) ("called party"
 5 is the intended recipient of the call), with *Soppett v. Enhanced*
Recovery Co., LLC, 679 F.3d 637 (7th Cir. 2012) ("called party" is
 6 the current cell phone subscriber).
 7 Id.

8 The court then granted the motion to stay finding: i) the FCC has regulatory authority over
 9 the TCPA; ii) autodialers are subjected to comprehensive regulations under the TCPA; iii)
 10 expertise and uniformity of regulations is necessary to administer the TCPA. *Id.* at *2, (tracking
 11 the factors set forth in *Davel Communications, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086-1087
 12 (9th Cir. 2006).) Crucially, the Court also specifically found i) "judicial economy weighs against
 13 issuing a decision that may be undermined by an anticipated ruling of the regulatory body"; ii)
 14 "the violation alleged in this case is not ongoing so Plaintiff will suffer no further damages during
 15 a stay"; and iii) the "case is in the early stages of litigation, such that Plaintiff will not be
 16 prejudiced by any delay." *Id.*

17 *Matlock* is identical to this case. The decision is well reasoned, applies the correct standard
 18 of law and is properly analyzed. All of the *Davel Communications, Inc.* factors are present here
 19 just as they were in that case. Further, just as in *Matlock*, Plaintiff has made no showing of any
 20 potential prejudice to himself or class members resulting from a stay. On the other hand the
 21 potential for waste is tremendous if this litigation sprints ahead.¹⁸

22 As the findings made in *Matlock* are equally warranted here, the Court should grant Wells
 23 Fargo's motion to stay for the exact reasons given—and upon the exact same findings made—in
 24 that decision.

25 ¹⁸ As explained above, the most likely timeframe for a ruling on the ACA and UHS petitions
 26 appears to be around February, 2015. Yet by then the parties will—at a minimum—have
 27 completed the entire first phase of discovery and fully briefed and argued Plaintiff's certification
 28 motion. See Dkt No. 43. Indeed as Plaintiff's certification motion is to be heard on a regular 35
 day motion schedule, the parties will likely be well into the second phase of discovery (class
 merits) and perhaps preparing for trial by the time the NPRM/ruling is issued. There is a very real
 possibility that all of that work would be for naught. Given the resources that parties routinely
 pour into class actions—especially a nationwide class action with damages of the magnitude
 sought here—and the built-in expense of class notice, it is ill-advised to forge ahead with this case
 while the FCC ponders a ruling that may entirely dispose of the central issue in this litigation.

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IV. CONCLUSION

For the foregoing reasons the Court should stay or dismiss this action pending the FCC's determination of the UHS and ACA Petitions.

Respectfully submitted,

DATED: April 14, 2014

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