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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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

13 Plaintiff,

14 v.

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

17 Defendant.

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

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

18

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

26

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

1 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

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

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

14  
15 II. OPINION

16 A. Request for Judicial Notice

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

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

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

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

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

22 B. Legal Standard

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

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

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

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

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

2 C. Discussion

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

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

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

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

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

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

28 Defendant argues that several petitions filed with the FCC

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

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

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

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

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

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

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



1 express consent' under [the TCPA] includes all consents obtained  
2 prior to October 16, 2013 where the consumer has provided their  
3 telephone number to the advertiser and the advertiser has a  
4 contractual right to contact the consumer at that number."

5 Defendant's Petition at p. 1. The FCC's ruling on this petition  
6 will very likely address, to some extent, the merit of  
7 Plaintiff's claim. Therefore, the FCC's anticipated ruling on  
8 Defendant's petition may conflict with, and thereby undermine,  
9 the decision of this Court unless a stay is issued.

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

19 III. ORDER

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

25 IT IS SO ORDERED.

26 Dated: May 12, 2015

27   
28 JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE