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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LINDA JACKSON,

Plaintiff,

v.

SAFEWAY, INC.,

Defendant.

Case No. [15-cv-04419-JSC](#)**ORDER GRANTING DEFENDANT
SAFEWAY INC.'S MOTION FOR
SUMMARY JUDGMENT**

Re: Dkt. No. 58

Plaintiff Linda Jackson brings this putative class action against Defendant Safeway, Inc. arising from the receipt on her wireless phone of prerecorded telephone messages promoting Safeway's flu shots. (Dkt. No. 56.¹) Plaintiff contends that these calls violate the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1)(A)(iii). (Id. ¶¶ 3, 51-58.) Now before the Court is Safeway's motion for summary judgment on Plaintiff's TCPA claims.² Safeway seeks summary judgment on three alternative grounds: (1) Plaintiff gave Safeway prior express consent to call her cell phone about the flu shots; (2) the flu shot calls are exempt from the TCPA as emergency calls; and (3) the flu shot calls fall within the FCC's 2015 exemption from the TCPA for certain exigent health care calls not charged to the called party. (Dkt. No. 58.) After carefully considering the arguments and briefing submitted, and having had the benefit of oral argument on August 25, 2016, the Court GRANTS Safeway's motion for summary judgment on

¹ Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

² Plaintiff's amended complaint contains two TCPA claims for relief: (1) violations of the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii); and (2) knowing and/or willful violations of the same TCPA section, seeking treble damages. (Dkt. No. 56 ¶¶ 51-58.)

1 grounds (1) and (3).^{3,4}

2 BACKGROUND

3 I. Factual Summary

4 Safeway operates stores throughout the United States, the majority of which offer both
5 grocery and pharmacy services to customers and patients. (Dkt. No. 58-5 ¶ 2.) Through its
6 pharmacies, Safeway provides prescription and non-prescription medications. (Id.) Flu shots are
7 among the medications that Safeway provides to its patients. (Id. ¶ 3.)

8 Plaintiff is a resident of Oakland, California. (Dkt. No. 58-7 at 7-8 (Ex. A at 10:22-
9 11:25).) Plaintiff generally shopped at Safeway's store on Fruitvale Avenue in Oakland,
10 California, but also occasionally went to the Safeway store in San Ramon, California, near her
11 place of work. (Id. at 15-16 (Ex. A at 19:15-20:8).) Plaintiff first received a seasonal flu shot
12 from Safeway at its pharmacy in San Ramon on January 20, 2014. (Dkt. No. 58-5 ¶¶ 22-23 & at
13 63-66 (Exs. K, L).) In connection with this flu-shot visit, Plaintiff completed a Consent and
14 Release form, where she provided her wireless telephone number to Safeway above the line
15 indicating "Home Phone." (Id. ¶ 22 & at 63-64 (Ex. K).) When completing this form, Plaintiff
16 did not discuss with anyone why she needed to provide the requested information; instead she was
17 simply asked to complete the form before receiving the flu shot. (Dkt. No. 58-7 at 24-27 (Ex. A at
18 31:18-34:6).) Safeway maintained an electronic transaction record of Plaintiff's administered flu
19 shot; the record contains the Rx # or prescription number, the name of the administered drug, and
20 an electronic copy of Plaintiff's signature. (Dkt. No. 58-5 ¶ 23 & at 65-66 (Ex. L).)

21 In late September 2014, Safeway entered into an agreement with a third-party provider of
22 communications solutions, MarkeTouch Media, Inc. ("MarkeTouch"), for purposes of contacting
23 Safeway's existing pharmacy patients through the use of prerecorded telephone calls to remind

25 ³ Both parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C.
26 § 636(c). (Dkt. Nos. 5, 9.)

27 ⁴ Because the Court grants summary judgment on these two independent grounds, it does not
28 address Safeway's argument (2) relating to the exception for calls made "for emergency purposes"
under 47 U.S.C. § 226(b)(1)(A). (See Dkt. No. 58 at 23-25.) Further, the Court denies as moot
Plaintiff's objections to certain portions of the Declaration of Brian Hille as the objected-to
evidence relates to Safeway's "emergency purposes" argument. (See Dkt. No. 62 at 28-29.)

1 them to get a flu shot for the new flu season (2014-2015). (Id. ¶ 15; Dkt. No. 58-6 ¶¶ 2-3.) On
2 November 6, 2014, November 7, 2014, and January 9, 2015, Safeway, through MarkeTouch,
3 placed automated flu shot reminder calls to a specific set of its pharmacy patients. (Dkt. No. 58-6
4 ¶ 3.) The contacted patients were limited to those patients who satisfied three criteria: (1) the
5 patient was an existing Safeway patient who previously provided her telephone number to
6 Safeway; (2) Safeway believed that the patient had received a flu shot at one of its pharmacies
7 during the immediately preceding year's flu season; and (3) Safeway's records indicated that the
8 patient had not yet received a flu shot during the current flu season. (Dkt. No. 58-5 ¶ 17.)

9 MarkeTouch's records indicate that Plaintiff did not answer Safeway's November 6, 2014
10 flu shot reminder call. The call instead went to Plaintiff's wireless phone's voicemail box, where
11 the following prerecorded message was left for Plaintiff:

12 Hello, this is a flu shot reminder call from your Safeway Pharmacy.
13 Because you previously received a flu shot from Safeway you
14 already know the best way to prevent the flu is by being vaccinated
15 each year. If you haven't already received your flu shot – now is the
16 time! The CDC is recommending that everyone over the age of 6
months receive their flu shot this flu season. Flu Shots are now
available from your Safeway community Pharmacists, no
appointment necessary, while stocks last. To opt-out of future
reminders, please call 866-284-6198. Thank you, goodbye.

17 (Id. ¶ 19 & at 60-62 (Ex. J.).)

18 The next day, on November 7, 2014, Plaintiff visited Safeway's pharmacy store in San
19 Ramon, California and received a flu shot. As with her prior visit, Plaintiff completed a Consent
20 and Release form before receiving her flu shot and again listed her wireless telephone number
21 above the line indicating "Home Phone." (Dkt. No. 58-5 ¶ 24 & at 67-68 (Ex. M.).) Safeway
22 maintained an electronic transaction record of this flu shot as well, identifying the prescription
23 number and the administered drug. (Id. ¶ 25 & at 69-70 (Ex. N.).)

24 On January 9, 2015, Safeway placed a second prerecorded flu shot reminder call to
25 Plaintiff's wireless telephone number. Plaintiff again did not answer the call and another
26 prerecorded flu shot message, identical to the one from November 2014, was left in Plaintiff's
27 phone's voicemail box. (Id. ¶¶ 18, 20 & at 55-62 (Exs. I, J.).)

1 **II. Procedural History**

2 Plaintiff and one other individual, Khuzema Savai, initiated this action on September 25,
3 2015, alleging violations of the TCPA based on various automated telephone calls from Safeway
4 relating to flu shot reminders and prescription reminders. (Dkt. No. 1.) Only Plaintiff's TCPA
5 claims relating to the flu shot reminders remain.⁵ (Dkt. No. 56.) The parties submitted a further
6 joint case management conference in which they identified the limited issues on which Safeway
7 would move for early summary judgment—specifically, whether Plaintiff provided Safeway with
8 prior express consent to call her with automated flu shot reminders and whether, for two separate
9 reasons, Safeway did not require Plaintiff's consent at all. (Dkt. No. 49 at 2.) The Court
10 thereafter set a briefing and hearing schedule on Safeway's motion for summary judgment. (Dkt.
11 No. 51.) Safeway's motion is now before the Court. (Dkt. No. 58.)

12 **LEGAL STANDARD**

13 Summary judgment is appropriate “if the movant shows that there is no genuine dispute as
14 to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
15 56(a). The Court must draw “all reasonable inferences [and] resolve all factual conflicts in favor
16 of the non-moving party.” *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1138 (9th Cir. 2004).
17 A fact is material if it “might affect the outcome of the suit under the governing law,” and an issue
18 is genuine if “a reasonable jury could return a verdict for the non-moving party.” *Anderson v.*
19 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). There can be “no genuine issue as to any material
20 fact” when the moving party shows “a complete failure of proof concerning an essential element
21 of the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

22 Where, as here, the moving party will have the burden of proof on an issue at trial, it must
23 affirmatively demonstrate that no reasonable trier of fact could find other than for the moving
24 party. See *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). If the moving
25 party meets its initial burden, the opposing party must then set forth specific facts showing that
26 there is some genuine issue for trial in order to defeat the motion. See Fed. R. Civ. P. 56(c);

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28 ⁵ The parties stipulated to the dismissal of Khuzema Savai's claims against Safeway without
prejudice. (See Dkt. Nos. 47, 55-1, 56.)

1 Anderson, 477 U.S. at 250. All reasonable inferences must be drawn in the light most favorable to
2 the nonmoving party. See Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 922 (9th Cir. 2004).

3 DISCUSSION

4 I. TCPA

5 Congress enacted the TCPA amid outrage from consumers “over the proliferation of
6 intrusive, nuisance [telemarketing] calls to their homes.” Mims v. Arrow Fin. Servs., LLC, 132 S.
7 Ct. 740, 745 (2012) (citation and internal quotation marks omitted). “Congress determined that
8 federal legislation was needed because telemarketers, by operating interstate, were escaping state-
9 law prohibitions on intrusive nuisance calls. The Act bans certain practices invasive of privacy
10 and directs the Federal Communications Commission (FCC or Commission) to prescribe
11 implementing regulations.” Id. at 744. “The FCC’s interpretations of TCPA are controlling
12 unless invalidated by a court of appeals.” Olney v. Job.com, Inc., No. 1:12-CV-01724-LJO, 2014
13 WL 1747674, at *4 (E.D. Cal. May 1, 2014) (citations omitted); see also Hobbs Act, 28 U.S.C.
14 § 2342 et seq.; Huricks v. Shopkick, Inc., No. C-14-2464 MMC, 2015 WL 5013299, at *2 (N.D.
15 Cal. Aug. 24, 2015), appeal dismissed (Jan. 26, 2016) (“[C]ourts defer to the FCC’s interpretation
16 of a term in the TCPA, so long as the term is ‘not defined by the TCPA’ and the FCC’s
17 interpretation is ‘reasonable.’”) (citation omitted).

18 Pursuant to its granted authority, the FCC previously issued regulations prohibiting “calls
19 made by automated telephone dialing systems and artificial or prerecorded voice messages” unless
20 there was an emergency or the called party provided her prior express consent. See In the Matter
21 of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 7 F.C.C. Rcd. 8752,
22 8755 ¶ 5 (Oct. 16, 1992); see also 47 U.S.C. § 227(b)(1)(A) (prohibiting any call using an
23 automatic telephone dialing system or an artificial or prerecorded voice “other than a call made for
24 emergency purposes or made with the prior express consent of the called party”).

25 In 2012, the FCC issued an order tightening the restrictions for automated telemarketing
26 calls under the TCPA, requiring “prior express written consent” for most automated telemarketing
27 calls to wireless numbers and residential lines. See In the Matter of Rules & Regulations
28 Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C. Rcd. 1830, 1838 ¶ 20 (Feb. 5, 2012)

(hereinafter, “2012 Order”). The FCC codified the 2012 Order at 47 C.F.R. § 64.1200(a), see Telephone Consumer Protection Act of 1991, 77 Fed. Reg. 34233, 34246 (June 11, 2012); that section provides, in relevant part:

(a) No person or entity may:

* * *

(2) Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, other than . . . a call *that delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.*

47 C.F.R. § 64.1200(a)(2) (emphasis added) (the “Telemarketing Health Care Exception”).

In 2015, the FCC created a safe harbor from the consent requirement for certain “exigent” calls to wireless telephone numbers that have a “healthcare treatment purpose” and “are not charged to the called party.” See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, 8030-31 ¶¶ 143, 146 (July 10, 2015) (hereinafter, “2015 Order”).⁶ The FCC limited the exemption to the following types of calls: “appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions.” Id. (emphasis added). In addition to being one of these types of calls, a call must also satisfy each of the following requirements to be exempt:

1) voice calls and text messages must be sent, if at all, only to the wireless telephone number provided by the patient;

⁶ While the FCC issued its 2015 Order after the two flu shot calls in question, the Court applies the law in effect at the time it renders its decision. See, e.g., W. Radio Servs. Co. v. Qwest Corp., 678 F.3d 970, 989 (9th Cir. 2012) (“While the [Public Utilities Commission] and the district court obviously did not have this clear guidance available to them at the time they rendered their respective decisions below, the FCC’s newly promulgated interpretation of the statute must yet be given effect.”); US W. Commc’ns, Inc. v. Jennings, 304 F.3d 950, 963 (9th Cir. 2002) (reversing “the district court to the extent it held that certain FCC regulations, now in effect but not in effect at the time of the [Arizona Corporation Commission’s] decisions, [did] not apply on judicial review of the interconnection agreements.”). Further, based on the arguments raised in briefing and at oral argument, both parties agree that the 2015 Order is applicable in this case.

- 1 2) voice calls and text messages must state the name and contact
2 information of the healthcare provider (for voice calls, these
3 disclosures would need to be made at the beginning of the call);
4
5 3) voice calls and text messages are strictly limited to the purposes
6 permitted in para. 146 above; must not include any telemarketing,
7 solicitation, or advertising; may not include accounting, billing,
8 debt-collection, or other financial content; and must comply with
9 HIPAA privacy rules;
10
11 4) voice calls and text messages must be concise, generally one
12 minute or less in length for voice calls and 160 characters or less in
13 length for text messages;
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15 5) a healthcare provider may initiate only one message (whether by
16 voice call or text message) per day, up to a maximum of three voice
17 calls or text messages combined per week from a specific healthcare
18 provider;
19
20 6) a healthcare provider must offer recipients within each message
21 an easy means to opt out of future such messages, voice calls that
22 could be answered by a live person must include an automated,
23 interactive voice- and/or key press-activated opt-out mechanism that
24 enables the call recipient to make an opt-out request prior to
25 terminating the call, voice calls that could be answered by an
26 answering machine or voice mail service must include a toll-free
27 number that the consumer can call to opt out of future healthcare
28 calls, text messages must inform recipients of the ability to opt out
 by replying ““STOP,” which will be the exclusive means by which
 consumers may opt out of such messages; and,

 7) a healthcare provider must honor the opt-out requests
 immediately.

18 Id. at 8032 ¶ 147 (the “Exigent Healthcare Treatment Exemption”).

19 **II. Summary Judgment**

20 Plaintiff alleges that Safeway’s flu shot calls were placed in violation of the TCPA’s
21 restrictions on the use of automated telephone equipment. (See Dkt. No. 56 ¶¶ 3, 51-54 (citing 47
22 U.S.C. § 227(b)(1)(A)(iii)).) Safeway contends the TCPA claims fail because Plaintiff provided
23 express consent to receive automated phone calls that deliver a “health care” message pursuant to
24 the Telemarketing Health Care Exception set forth in 47 C.F.R. § 64.1200(a)(2) and because
25 Safeway did not require Plaintiff’s consent to make such calls under the Exigent Healthcare
26 Treatment Exemption set forth in the 2015 Order. Because the flu shot calls did not contain
27 telemarketing or advertising under the FCC’s guidance, the Court addresses first the Exigent
28 Healthcare Treatment Exemption. To the extent there is a genuine dispute of material fact as to

1 whether the flu shot reminder calls are telemarketing calls, the Court also addresses in the
2 alternative Safeway's argument that the calls satisfy the Telemarketing Health Care Exception.

3 **A. The Exigent Healthcare Treatment Exemption**

4 Safeway argues that it did not require Plaintiff's prior consent to place the automated flu
5 shot reminder calls because the calls fall under the FCC's 2015 safe harbor for "exigent" calls that
6 have a "healthcare treatment purpose" and "are not charged to the called party." See 2015 Order,
7 30 F.C.C. Rcd. at 8030-31 ¶¶ 143, 146. The Court concludes that every reasonable trier of fact
8 would have to find that the flu shot calls qualify for the Exigent Healthcare Treatment Exemption.

9 Safeway has provided undisputed evidence that the flu shot calls were not charged to the
10 called party, as Plaintiff had an unlimited talk, text, and data plan (see Dkt. No. 58-7 at 11-13) and
11 thus she did not incur a charge for the calls nor did the calls count against any plan limit on
12 minutes. See 2015 Order, 30 F.C.C. Rcd. at 8032 ¶ 148 (noting that calls are exempted "only if
13 they are not charged to the recipient, including not being counted against any plan limits that apply
14 to the recipient (e.g., number of voice minutes, number of text messages)"). And Safeway's flu
15 shot calls satisfy each of the remaining requirements from the FCC's 2015 Order: (1) the flu shot
16 reminder calls Plaintiff received were sent only to the wireless telephone number that she provided
17 to Safeway in connection with receiving flu shots (Dkt. No. 58-5 ¶¶ 17-20); (2) the calls
18 sufficiently identified Safeway's name and contact information (id. ¶ 19 & at 60-62 (Ex. J)); (3)
19 the calls are limited to the purposes identified in paragraph 146 of the 2015 Order (relevant here,
20 "prescription notifications" as well as "wellness checkups") and, as discussed below, do not
21 include telemarketing, solicitation, or advertising; (4) the calls were concise and lasted less than a
22 minute (id.); (5) on the two days Safeway called Plaintiff, it made only one call per day (id. ¶ 18);
23 and (6) the calls provided Plaintiff the opportunity to opt out by calling a toll-free number, 866-
24 284-6198 (id. ¶ 19 & at 60-62 (Ex. J)).⁷

25 Plaintiff contends that the Exigent Healthcare Treatment Exemption does not apply
26 because (1) the flu shot calls are not for a "healthcare treatment purpose" and (2) the calls "must
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28 ⁷ Element (7), requiring a healthcare provider to honor opt-out requests immediately, is
inapplicable here because Plaintiff did not call to opt out.

1 not include any telemarketing, solicitation, or advertising.” (Dkt. No. 62 at 23-24.) With respect
2 to Plaintiff’s first argument, every reasonable trier of fact would have to conclude that Safeway’s
3 flu shot calls were made for a “healthcare treatment purpose.” Indeed, the importance of flu shots
4 to a patient’s health, and to the general public, is established by the fact that the Center for Disease
5 Control has recommended the flu vaccine to everyone six months of age and older for every
6 season since February 2010. (Dkt. No. 58-5 at 18 (Ex. B).) Further, the flu shot calls are the same
7 as the “wellness checkup” and “prescription notification” calls specifically enumerated by the
8 FCC as subject to the exemption. See 2015 Order, 30 F.C.C. Rcd. at 8031 ¶ 146. Reminding a
9 patient to receive an annual flu shot is not materially different, for healthcare treatment purposes,
10 than reminding a patient to receive an annual wellness checkup. Nor is it materially different from
11 a reminder that a prescription needs to be refilled.

12 Regarding Plaintiff’s second argument, the FCC previously ruled, in the context of
13 residential landlines, that certain calls subject to HIPAA, including “immunization reminders,”
14 communicate health care-related information and are not calls with “unsolicited advertisements”:

15 In the FTC’s TSR [Telemarketing Sales Rule] proceeding, concern
16 was raised, in relevant part, whether immunization reminders, health
17 screening reminders, medical supply renewal requests, and generic
18 drug migration recommendations would constitute inducements to
19 purchase goods or services. In our proceeding, one commenter
20 argues that a call “pushing” flu vaccines would be illegal under the
21 TCPA. Without reaching the merits of this argument, we do believe
22 that an exemption for prerecorded health care-related calls to
23 residential lines is warranted when such calls are subject to HIPAA.
24 With respect to the privacy concerns that the TCPA was intended to
25 protect, we believe that prerecorded health care-related calls to
26 residential lines, when subject to HIPAA, do not tread heavily upon
27 the consumer privacy interests because these calls are placed by the
consumer’s health care provider to the consumer and concern the
consumers’ health. Moreover, the exemption we adopt today does
not leave the consumer without protection. The protections provided
by HIPAA safeguard privacy concerns. Under the second prong of
the TCPA exemption provision, which requires that such calls not
include an unsolicited advertisement, we find the calls at issue here
are intended to communicate health care-related information rather
than to offer property, goods, or services and conclude that such
calls are not unsolicited advertisements. Therefore, such calls would
satisfy the TCPA standard for an exemption as provided in the Act
and our implementing rules.

28 2012 Order, 27 F.C.C. Rcd. at 1855-56 ¶ 63 (emphasis added). Safeway argues—and the Court

1 agrees—that “the outcome [of the FCC’s 2012 Order] should not change when the analysis turns
2 from landlines to cell phones.” (Dkt. No. 64 at 18.) Under the FCC’s guidance, there is no
3 genuine dispute that the flu shot reminder calls, i.e., immunization reminders, are not
4 telemarketing, solicitation, or advertising calls.⁸

5 Accordingly, every reasonable trier of fact would find that the flu shot reminder calls fall
6 under the Exigent Healthcare Treatment Exemption and Safeway thus did not require Plaintiff’s
7 prior express consent under the TCPA.⁹

8 **B. The Telemarketing Health Care Exception**

9 According to Safeway, each of the flu shot reminder calls constitutes “a call that delivers a
10 ‘health care’ message made by, or on behalf of, a ‘covered entity’ or its ‘business associate,’” 47
11 C.F.R. § 64.1200(a)(2), and thus, if the calls did constitute telemarketing, Safeway required only
12 Plaintiff’s prior express consent in order to place those calls.¹⁰ Further, Safeway asserts, Plaintiff
13 in fact provided such express consent, therefore eliminating any TCPA liability. See Reardon v.

14

15 ⁸ Though not raised in her briefing, Plaintiff at oral argument also maintained that the flu shot calls
16 are not covered by HIPAA and thus not entitled to consideration for any health care exceptions.
17 Specifically, Plaintiff argued the flu shot calls are not subject to HIPAA because, under the FCC’s
18 2015 Order, “a HIPAA message . . . has to be of such a personal nature that it would violate the
19 privacy of the patient if, for example, another person received the message.” (Dkt. No. 72 at 9.)
20 Plaintiff, however, misquotes the FCC’s 2015 Order, which provides: “We also clarify that
21 HIPAA privacy rules shall control the content of the informational message where applicable,
22 such as where the message attempts to relate information of a sensitive or personal nature; as one
23 commenter cautions: ‘the information provided in these exempted voice calls and texts must not
24 be of such a personal nature that it would violate the privacy’ of the patient if, for example,
25 another person received the message.” 2015 Order, 30 F.C.C. Rcd. at 8031 ¶ 146. In other words,
26 and contrary to Plaintiff’s assertion, the FCC indicated that a HIPAA-compliant message must not
27 be of such a personal nature that a person’s privacy would be violated if another person received
28 the message. Plaintiff’s argument is therefore without merit.

9 The analysis for the 2015 exemption is the same for both flu shot reminder calls on November 7,
2014 and January 9, 2015, as the timing of the calls in relation to when Plaintiff received her flu
shot is not relevant under the requirements for the exemption set forth in the 2015 Order.

10 Under the plain language of 47 C.F.R. § 64.1200(a)(2), it appears that “a call that delivers a
11 ‘health care’ message made by, or on behalf of, a ‘covered entity’ or its ‘business associate’” is
12 not subject to any consent requirement, written or otherwise. In their briefing, however, both
13 parties assume that there is a “prior express consent” requirement for such “health care” calls.
14 (See Dkt. No. 58 at 14 (“Plaintiff gave Safeway her prior express consent to call her cell phone
15 number.”); Dkt. No. 62 at 19 (“[A]t a minimum, because it is undisputed that the calls were placed
16 to Plaintiff’s cellular telephone number using an ATDS and/or an automated or prerecorded voice,
17 Safeway must at least have obtained Plaintiff’s prior express consent under 47 C.F.R.
18 § 64.1200(a)(1)(iii).”). For purposes of this motion, the Court assumes that the use of prerecorded
19 calls delivering a “health care” message requires prior express consent.

1 Uber Techs., Inc., 115 F. Supp. 3d 1090, 1097 (N.D. Cal. 2015) (“Prior express consent is a
2 complete defense to Plaintiffs’ TCPA claims.”) (citation omitted). The burden is on Safeway to
3 establish “express consent.” See Grant v. Capital Mgmt. Servs., L.P., 449 F. App’x 598, 600 n.1
4 (9th Cir. 2011) (“[E]xpress consent’ is not an element of a TCPA plaintiff’s *prima facie* case, but
5 rather is an affirmative defense for which the defendant bears the burden of proof.”); see also In
6 the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C.
7 Rcd. 559, 565 (Jan. 4, 2008) (“[W]e conclude that the creditor should be responsible for
8 demonstrating that the consumer provided prior express consent.”).

9 Plaintiff disputes that “prior express consent”—as opposed to “prior express written
10 consent”—is the proper inquiry here because, according to her, the flu shot reminder calls are not
11 “health care” messages and thus not exempt from the written consent requirement. She also
12 argues that, even if she provided prior express consent, Safeway’s flu shot calls were beyond the
13 scope of her provided consent. Under the present record, every reasonable trier of fact would
14 conclude that the flu shot calls deliver a “health care” message and were within the scope of
15 Plaintiff’s prior express consent. See 47 C.F.R. § 64.1200(a)(2).

16 **1. “Health Care” Message**

17 The first question is whether Safeway’s flu shot reminder calls constitute “health care”
18 messages delivered by a “covered entity” or its “business associate” within the meaning of the
19 Telemarketing Healthcare Exception. See 47 C.F.R. § 64.1200(a)(2). As set forth in Section
20 64.1200(a)(2), the meaning of those three terms is governed by their definitions in the HIPAA
21 Privacy Rule. See id. (“. . . as those terms are defined in the HIPAA Privacy Rule, 45 CFR
22 160.103”). Initially, Safeway asserts—and Plaintiff does not challenge—that, as a pharmacy, it is
23 a health care provider and thus a “covered entity”¹¹ under HIPAA and that MarkeTouch, the party

24
25 ¹¹ HIPAA defines “covered entity” as:

26 Covered entity means:
27 (1) A health plan.
28 (2) A health care clearinghouse.
29 (3) A health care provider who transmits any health information in
30 electronic form in connection with a transaction covered by this
31 subchapter.

1 placing the automated flu shot calls, is a “business associate” of Safeway. (See Dkt. No. 58 at 17
2 (citing Dkt. No. 58-5 ¶¶ 2, 18, and Dkt. No. 58-6 ¶ 2 & at 4-26 (Ex. B)).) The Court therefore
3 accepts these assertions as true.

4 Next, Safeway contends that the flu shot reminder calls deliver a “health care” message.
5 Under HIPAA, “health care” is defined as follows:

6 Health care means care, services, or supplies related to the health of
7 an individual. Health care includes, but is not limited to, the
following:

- 8 (1) Preventive, diagnostic, therapeutic, rehabilitative, maintenance,
9 or palliative care, and counseling, service, assessment, or procedure
10 with respect to the physical or mental condition, or functional status,
of an individual or that affects the structure or function of the body;
and
- 11 (2) Sale or dispensing of a drug, device, equipment, or other item in
accordance with a prescription.

12
13 45 C.F.R. § 160.103. Safeway argues that the flu shot reminder calls concern “care, services, or
14 supplies related to the health of an individual” and that the administration of flu shots constitutes
15 “dispensing of a drug . . . in accordance with a prescription.”

16 **a. “Related to the Health of an Individual”**

17 Safeway asserts that flu shots concern “care, services, or supplies related to the health of an
18 individual” because, “through its pharmacy professionals at its San Ramon store, it administered a
19 flu shot to the individual, e.g., Plaintiff Linda Jackson, in January and November 2014, a classic
20 example of administering health care.” (Dkt. No. 64 at 6 (emphasis in original).) The Court
21 agrees and concludes that every reasonable trier of fact would find that Safeway provides actual
22 health care services “related to the health of an individual” when it administers flu shots to each of
23 its individual patients. Indeed, Plaintiff would be hard-pressed to argue that a doctor
24 administering a flu shot to a patient—just as Safeway’s pharmacists do—does not provide “health
25 care” related to the patient’s health.

26 Plaintiff nevertheless maintains that the flu shot calls are not “related to the health of an

27
28 45 C.F.R. § 160.103.

1 individual,” and thus not “health care” messages, by likening Safeway’s provision of flu shots to
2 generic drug, biologics, and device manufacturers that the Department of Health and Human
3 Services (“HHS”) previously held are not “health care providers” because they do not provide
4 “health care” services to individuals. See Standards for Privacy of Individually Identifiable
5 Health Information, 65 Fed. Reg. 82462, 82568 (Dec. 28, 2000) (“We do not intend that a
6 manufacturer of supplies that are generic and not customized or otherwise specifically designed
7 for particular individuals, e.g., ace bandages for a hospital, is a health care provider. Such a
8 manufacturer is not providing ‘health care’ as defined in the rule and is therefore not a covered
9 entity.”). Plaintiff’s attempted comparison is unpersuasive. No reasonable trier of fact could
10 conclude that the actual administration of flu shots to individual patients is the same as
11 manufacturing supplies. Moreover, as noted above, Plaintiff does not dispute Safeway’s assertion
12 and supporting evidence that Safeway is a “covered entity” under HIPAA as a “health care
13 provider.” See 45 C.F.R. § 160.103. This distinguishes Safeway from the mere manufacturers of
14 supplies, which the HHS expressly determined are not “health care providers.”

15 Plaintiff further claims that the flu shot calls cannot be for “health care” purposes under the
16 Telemarketing Healthcare Exception because they impermissibly contain advertising or
17 telemarketing content. (Dkt. No. 62 at 15-16.) The Court disagrees. Under the plain language of
18 the regulation, the FCC created an exception to the express written consent requirement for any
19 advertising or telemarketing call so long as the call also delivers a “health care” message. See 47
20 C.F.R. § 64.1200(a)(2). As Safeway correctly notes, “it would have been odd for the FCC to
21 create an exception to the general rule only for calls that contain no advertising or telemarketing,
22 given that the general rule itself only applies to a call that ‘includes or introduces an advertisement
23 or constitutes telemarketing.’” (Dkt. No. 64 at 7 n.3 (emphasis in original).)

24 Thus, every reasonable trier of fact would conclude that Safeway's flu shot calls are
25 "health care" messages because they relate to the "care, services, or supplies related to the health
26 of an individual." 45 C.F.R. § 160.103.

b. “Dispens[ed] . . . in Accordance with a Prescription”

Although the flu shot calls deliver a “health care” message because they concern “care,

1 services, or supplies related to the health of an individual,” the Court also addresses Safeway’s
2 second argument that the flu shots it provides are drugs dispensed “in accordance with a
3 prescription.” In support, Safeway has provided unrefuted evidence from Brian Hille (“Hille”),
4 the Corporate VP of Patient, Specialty and Wellness Services at Albertsons LLC (which merged
5 with Safeway in 2015) (Dkt. No. 58-5 ¶ 1), that flu shots are prescription drugs that pharmacists in
6 California have been granted the authority to prescribe without the need for a physician:

7 Flu shots are vaccines and among the medications provided by
8 Safeway pharmacies to its patients. Flu shots are also prescription
9 medications, which pharmacists are permitted to administer on
10 demand based on state regulations that confer either prescription
11 authority or prescriptive authority by a protocol. In other words, a
12 Safeway pharmacy does not usually need a written or verbal
13 prescription from a physician to provide a flu shot to Safeway’s
14 patients.

15 (Id. ¶ 3.) Hille’s declaration is consistent with the relevant California regulations, which permit
16 pharmacists to not only “[a]dminister immunizations [such as flu shots] pursuant to a protocol
17 with a prescriber,” Cal. Bus. & Prof. Code § 4052(a)(11), but also to “independently initiate and
18 administer vaccines listed on the routine immunization schedules recommended by the federal
19 Advisory Committee on Immunization Practices (ACIP), in compliance with individual ACIP
20 vaccine recommendations, and published by the federal Centers for Disease Control and
21 Prevention (CDC) for persons three years of age and older,” Cal. Bus. & Prof. Code § 4052.8.
22 Additionally, Safeway’s evidence shows that for each flu shot that was administered to Plaintiff,
23 Safeway maintained an electronic transaction record that contained a prescription number and the
24 specific drug that was administered to Plaintiff. (See Dkt. No. 58-5 at 65-66 (Ex. L), 69-70 (Ex.
25 N).) Safeway also recorded these prescriptions as part of Plaintiff’s overall prescription history.
26 (Id. ¶ 21 & at 79-87 (Ex. Q).)

27 Plaintiff responds that Safeway “contradictorily states that ‘[f]lu shots are prescription
28 medication’ but then, in the very next sentence, states that ‘[a] Safeway pharmacist does not
usually need a written or verbal prescription from a physician to provide a flu shot to a Safeway
patient.’” (Dkt. No. 62 at 16 (brackets in original).) Safeway’s statements, however, are not
irreconcilable—simply because a prescription “from a physician” is not required does not mean, as

1 Plaintiff urges, that no prescription is required. Moreover, when questioned at oral argument how
2 renewing a flu shot each year, after the prior season's shot is no longer effective, is different from
3 renewing an expired prescription, Plaintiff argued that "what the FCC has focused on is how
4 important that prescription may be to the person's health." (Dkt. No. 72 at 10.) But, given the
5 CDC's flu shot recommendation to everyone six months of age and older for every season since
6 February 2010 (Dkt. No. 58-5 at 18 (Ex. B)), there can be no dispute that flu shots are in fact
7 important to a person's health and to the health of the general public. Therefore, based on the
8 record before the Court, there is no genuine dispute of material fact that flu shots are drugs
9 dispensed "in accordance with a prescription."

10 In sum, every reasonable trier of fact would conclude that Safeway's flu shot reminder
11 calls are "health care" messages under the relevant FCC and HIPAA guidelines both because they
12 concern "care, services, or supplies related to the health of an individual" and because providing
13 flu shots constitutes "dispensing of a drug . . . in accordance with a prescription." See 47 C.F.R.
14 § 64.1200(a)(2). Thus, for purposes of this motion, Safeway was only required under the
15 regulation to have Plaintiff's prior express consent—and not prior express written consent—before
16 engaging in automated flu shot calls.

17 **2. Scope of Prior Express Consent**

18 The Court now turns to whether Plaintiff provided her express consent to receive phone
19 calls to Safeway and whether Safeway's flu shot calls were within the scope of that consent. On
20 the issue of consent, the FCC has clarified "that provision of a phone number to a healthcare
21 provider constitutes prior express consent for healthcare calls subject to HIPAA by a HIPAA-
22 covered entity and business associates acting on its behalf, as defined by HIPAA, if the covered
23 entities and business associates are making calls within the scope of the consent given, and absent
24 instructions to the contrary." 2015 Order, 30 F.C.C. Rcd. at 8029 ¶ 141. Further, the FCC stated
25 that "[b]y 'within the scope of consent given, and absent instructions to the contrary,' we mean
26 that the call must be closely related to the purpose for which the telephone number was originally
27 provided. For example, if a patient provided his phone number upon admission to a hospital for
28 scheduled surgery, then calls pertaining to that surgery or follow-up procedures for that surgery

1 would be closely related to the purpose for which the telephone number was originally provided.”
2 Id. at 8029 n.474.

3 Safeway’s evidence establishes that Plaintiff provided her wireless phone number in
4 connection with receiving flu shots at Safeway’s San Ramon pharmacy. (Dkt. No. 58-5 ¶¶ 22,
5 24.) Thus, Safeway argues, Plaintiff provided her express consent to receive automated telephone
6 calls from Safeway. See, e.g., Reardon, 115 F. Supp. 3d at 1098-99 (“[A]ny plaintiff who
7 provided her phone number as part of the Uber application process consented to receive Uber’s
8 texts about becoming an Uber driver.”). Safeway further asserts that the flu shot calls were within
9 the scope of Plaintiff’s provided consent because they arose out of identical circumstances—that
10 is, “a cell phone number given by Plaintiff to Safeway in connection with Plaintiff’s getting a flu
11 shot in January 2014 was used the very next flu season to remind Plaintiff that it was time for her
12 to get another flu shot.” (Dkt. No. 58 at 22.)

13 Plaintiff concedes that she provided her wireless phone number to Safeway but disagrees
14 that the automated flu shot reminder calls were within the scope of consent. (See Dkt. No. 62 at
15 19-23.) According to Plaintiff, under the FCC’s guidance and relevant case law, “[p]roviding a
16 cell phone number at the time of receiving a flu shot for the 2013-2014 flu season at a Safeway
17 pharmacy would logically permit a patient, at a maximum, to be robocalled regarding that specific
18 visit, including follow-up calls to remind a patient of possible side effects of the flu shot or calls
19 regarding recall information in the event that the pharmacy discovers a problem with the vaccine
20 provided to the patient.” (Id. at 22-23 (emphasis in original).) The scope of provided consent,
21 however, cannot be so narrowly construed.

22 As a first matter, Plaintiff’s attempt to limit “closely related” calls to only those calls
23 pertaining to a specific surgery (or visit) or follow-up procedures for that surgery (or visit) is
24 misplaced—the FCC’s provided hypothetical merely serves as an “example” of “closely related”
25 calls and not, as Plaintiff suggests, an exhaustive or comprehensive list. See 2015 Order, 30
26 F.C.C. Rcd. at 8029 n.474 (“For example, . . .”). To the contrary, courts addressing the scope of
27 consent have taken a broader approach than the one advocated by Plaintiff, finding the “closely
28 related” requirement satisfied so long as the call bears some relation to the reason for which the

1 number was originally provided. See, e.g., *Hudson v. Sharp Healthcare*, No. 13-CV-1807-MMA
2 NLS, 2014 WL 2892290, at *6 (S.D. Cal. June 25, 2014) (“The TCPA does not require that calls
3 be made ‘for the exact purpose for which the number was provided,’ but rather that the call ‘bear
4 some relation to the product or service for which the number was provided.’”) (citation omitted);
5 *Olney*, 2014 WL 1747674, at *7 (“Defendant is correct that TCPA does not require that a call be
6 made ‘for the exact purpose for which the number was provided,’ but it undoubtedly requires that
7 the call bear some relation to the product or service for which the number was provided.”)
8 (emphasis in original).

9 The FCC’s recent guidance also indicates that the scope of consent to be considered is
10 broader than what Plaintiff urges here. Addressing consent to receive automated calls from
11 schools, the FCC stated that, “consistent with the Commission’s rationale relating to the provision
12 of telephone numbers to healthcare providers and debt collectors, that when a parent/guardian or
13 student provides only their wireless number as a contact to a school, the scope of consent includes
14 communications from the school closely related to the educational mission of the school or to
15 official school activities absent instructions to the contrary from the party who provides the phone
16 number.” In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of
17 1991, CG02-278, 2016 WL 4158735, at *8 ¶ 23 (Aug. 4, 2016). The FCC went on to note that
18 calls pertaining to “non-school events”—such as those that “lacked any educational purpose or
19 connection to official school activities”—“do[] not necessarily qualify as closely related.” Id. ¶ 25
20 (emphasis in original); see also id. at *9 ¶ 29 (clarifying that “consumers who provide their
21 wireless telephone number to a utility company when they initially sign up to receive utility
22 service, subsequently supply the wireless telephone number, or later update their contact
23 information, have given prior express consent to be contacted by their utility company at that
24 number with messages that are closely related to the utility service”). Under this reasoning,
25 Plaintiff’s overly narrow view of “closely related” cannot stand.

26 The Court concludes that every reasonable trier of fact would have to find that Safeway’s
27 flu shot reminder calls to Plaintiff for future flu seasons bear sufficient relation to the original
28 reason for which Plaintiff provided her number—namely, for her to receive flu shots from

1 Safeway in January 2014 and again in November 2014.¹² Therefore, in light of the above
2 authorities, Safeway's flu shot calls were within the scope of Plaintiff's prior express consent and
3 Safeway is entitled to summary judgment on the TCPA claims.

4 **CONCLUSION**

5 For the reasons stated above, Safeway is entitled to summary judgment on Plaintiff's
6 TCPA claims on two alternative grounds—the calls are exempt from the consent requirement
7 under the Exigent Healthcare Treatment Exemption, or, to the extent there is a genuine dispute of
8 material fact as to whether the calls constitute telemarketing, Plaintiff provided her express
9 consent to receive such calls under the Telemarketing Health Care Exception. The Court therefore
10 GRANTS Safeway's motion for summary judgment. Judgment will be entered in Safeway's favor
11 on Plaintiff's complaint.

12 The Clerk shall close the action.

13 **IT IS SO ORDERED.**

14 Dated: October 11, 2016

15 
16 JACQUELINE SCOTT CORLEY
17 United States Magistrate Judge

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24 ¹² At the hearing, Plaintiff argued that the second flu shot call from January 9, 2015 could not be
within the scope of her provided consent because she had already received the first call on
November 6, 2014 and received a flu shot at Safeway's pharmacy the very next day. (See Dkt.
No. 72 at 37.) The Court, however, treats both of Safeway's flu shot calls to Plaintiff the same
because Plaintiff did not revoke her consent at any point in time. See Reardon, 115 F. Supp. 3d at
1102 ("The 2015 FCC Order also makes clear that consumers may revoke consent through any
reasonable means, either orally or in writing.") (citation omitted). Thus, while the January 2015
flu shot call may have been made in error, the reasonable trier of fact would nevertheless have to
find that it was closely related to the original purpose for which Plaintiff provided her number, i.e.,
to get a flu shot, and thus within the scope of Plaintiff's express consent.