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Via ECFS

March 20, 2024

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: CG Docket Nos. 21-402 (Targeting and Eliminating Unlawful Text Messages), 02-278 (Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991), and 17-59 (Advanced Methods to Target and Eliminate Unlawful Robocalls)

Dear Ms. Dortch:

Insurance Marketing Coalition, Ltd. ("IMC") hereby submits redacted copies of its Petition for a Partial Stay Pending Judicial Review and the corresponding declarations, as well as a Request for Confidential Treatment, in the above referenced dockets in ECFS. IMC is also simultaneously filing confidential, unredacted copies of its Petition, the declarations, and the Request for Confidential Treatment with the Commission via hand delivery.

Any questions concerning this submission should be addressed to the undersigned.

Respectfully submitted,

/s/ Kevin F. King
Kevin F. King
Yaron Dori
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Counsel for Insurance Marketing Coalition

Enclosures

cc: Alejandro Roark, Chief, Consumer and Governmental Affairs Bureau

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Via Hand Delivery

March 20, 2024

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: Request for Confidential Treatment

CG Docket Nos. 21-402 (Targeting and Eliminating Unlawful Text Messages), 02-278 (Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991), and 17-59 (Advanced Methods to Target and Eliminate Unlawful Robocalls)

Dear Ms. Dortch:

Pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j); Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); and Sections 0.457(d)(2) and 0.459(b) of the Commission's Rules, 47 C.F.R. §§ 0.457(d)(2), 0.459(b), Insurance Marketing Coalition ("IMC") respectfully requests that the identified portions ("Confidential Information") of the enclosed request for a partial stay pending judicial review and the corresponding declarations (the "Submissions") be withheld from public inspection and afforded confidential treatment. Accordingly, the enclosed submission is labeled "Confidential – Not for Public Inspection." IMC is simultaneously electronically filing a redacted version of its request for a partial stay pending judicial review, marked "Redacted – For Public Inspection," in accordance with Section 0.459(a)(2) of the Commission's Rules, 47 C.F.R. § 0.459(a)(2).

Under Exemption 4 of the Freedom of Information Act, an agency may withhold from public disclosure any information that qualifies as "trade secrets and commercial or financial information obtained from a person [outside government] and privileged or confidential." 5 U.S.C. § 552(b)(4). The Submissions include highly sensitive commercial information about IMC's members' businesses that falls under Exemption 4 because it is "of a kind that would not customarily . . . be released to the public." *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992). IMC therefore submits this Request for Confidential Treatment in accordance with Sections 0.457(d)(2) and 0.459(b) of the Commission's rules, and IMC supports its request with the following showing:

The information for which confidential treatment is sought

IMC seeks confidential treatment for the bracketed Confidential Information in the Submissions because it is highly sensitive and proprietary commercial and financial information that is entitled to protection from public disclosure and availability under 5 U.S.C. § 552(b)(4) and 47 C.F.R. § 0.457(d).

Commission proceeding in which the information was submitted

The Confidential Information is being submitted with IMC's Submissions in CG Docket No. 21-402, *Targeting and Eliminating Unlawful Text Messages*, CG Docket No. 02-278, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, and CG Docket No. 17-59, *Advanced Methods to Target and Eliminate Unlawful Robocalls*.

IMC requests that the Commission stay its Second Report and Order, FCC 23-107 (rel. Dec. 18, 2023) ("Order"), pending judicial review of the *Order* in *Insurance Marketing Coalition Ltd. v. FCC*, No. 24-10277 (11th Cir.).

Degree to which the information is commercial or financial, or contains a trade secret or is privileged

The Confidential Information consists entirely of sensitive, non-public commercial and financial information. It includes details about two particular IMC members—Ideal Concepts, Inc. and Blue Ink Digital—such as, among other things, their client counts; annual expenses and revenue; contractual relationships; projected losses of past capital and labor investments, including but not limited to those made in reliance on and in compliance with the Commission's 2012 TCPA Order; projected costs of compliance with the *Order*; the *Order*'s consequences for the viability of their businesses; their existing clients' responses to the *Order*, including shifts in demand for services; and the new capital investments these members must make in response to the *Order*; as well as other information regarding financial and business harm.

This Confidential Information is not routinely and has not been made available for public inspection by IMC or its member corporations and thus is protected from public availability and inspection under 5 U.S.C. § 552(b)(4), 47 C.F.R. § 0.457(d), and Supreme Court precedent. *See, e.g.*, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) ("commercial" is given its ordinary meaning and, "[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4 [of the Freedom of Information Act, 5 U.S.C. § 552(b)(4)]").

Degree to which the information concerns a service that is subject to competition and how disclosure of the information could result in substantial competitive harm

Disclosure of the Confidential Information would pose significant harm to Ideal Concepts and Blue Ink Digital. These IMC members participate in highly competitive markets for providing performance marketing and other services. If these members' sensitive business information, such as their client counts, revenue, expenses, and business methods were disclosed, their

competitors would obtain a substantial advantage. Indeed, while IMC's members have provided their Confidential Information to the undersigned counsel for submission to the Commission, the members and the undersigned have taken several tangible steps to ensure that the Confidential Information is not shared with IMC or any other IMC members.

Measures taken by the submitting party to prevent unauthorized disclosure

Ideal Concepts and Blue Ink Digital have treated and continue to treat the Confidential Information disclosed in IMC's Submissions as highly confidential and have protected the information from public disclosure. Before submitting their declarations in support of IMC's request for a stay, Ideal Concepts and Blue Ink Digital have not shared the Confidential Information with any outside entities. Ideal Concepts and Blue Ink Digital have only agreed to share this information with IMC's outside counsel and the Commission because the *Order* poses a significant threat to Ideal Concepts's and Blue Ink Digital's businesses and because they face irreparable harm if the *Order* is not stayed pending judicial review. In the ordinary course of business, the Confidential Information is only made available to employees, attorneys, or other agents of Ideal Concepts and Blue Ink Digital who need access to such information for the performance of their duties.

Availability of the information to the public and the extent of any previous disclosure of the information to third parties

Ideal Concepts and Blue Ink Digital have not made the Confidential Information available to the public or any third parties. As described above, Ideal Concepts and Blue Ink Digital have only agreed to make the Confidential Information available to IMC's outside counsel and the Commission because the *Order* threatens core aspects of Ideal Concepts's and Blue Ink Digital's businesses. Ideal Concepts and Blue Ink Digital have not made and will not make the Confidential Information available to IMC or any of IMC's other members.

Justification of the period during which the submitting party asserts that material should not be available for public disclosure

At this time, IMC cannot determine any date on which the Confidential Information included in the Submissions should not be considered confidential or become stale for purposes of the current matter. Ideal Concepts and Blue Ink Digital would not, in the normal course of business, provide this information or data to the public or to any third parties, including to IMC or IMC's other members. IMC thus respectfully requests that the Commission indefinitely withhold the Confidential Information in the Submission from public inspection.

* * *

If the Commission denies IMC's request for confidential treatment, IMC respectfully requests pursuant to Section 0.459(e) of the Commission's Rules that the Commission return the materials to IMC. This request for confidential treatment should not be construed as a waiver of any other protection from disclosure or confidential treatment accorded by law. Please contact the undersigned at (202) 662-6000 should you have any questions concerning this submission.

Respectfully submitted,

/s/ Kevin F. King

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Counsel for Insurance Marketing Coalition

Enclosures

cc: Alejandro Roark, Chief, Consumer and Governmental Affairs Bureau

REDACTED - FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Targeting and Eliminating Unlawful Text Messages	)	CG Docket No. 21-402
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
Advanced Methods to Target and Eliminate Unlawful Robocalls	)	CG Docket No. 17-59

PETITION OF INSURANCE MARKETING COALITION, LTD. FOR PARTIAL STAY PENDING JUDICIAL REVIEW

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March 20, 2024

TABLE OF CONTENTS

PETITION FOR STAY PENDING APPEAL

Pursuant to 47 C.F.R. § 1.43, Insurance Marketing Coalition, Ltd. (IMC) petitions for a partial stay of the Commission's December 13, 2023 order implementing provisions of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227.[1] In particular, IMC respectfully requests that the Commission stay the effect of Part III.D of the *Order*, as well as the *Order*'s corresponding revisions to 47 C.F.R. § 64.1200, pending disposition of IMC's petition for judicial review of the *Order*.[2] A partial stay is warranted because, as explained below, the *Order* exceeds the Commission's authority and will irreparably harm IMC's members.

INTRODUCTION

The TCPA provides that a caller generally must obtain "prior express consent" to place an automated call to a consumer. For decades, courts and the Commission have interpreted that requirement in a way that allows performance marketing companies to quickly and efficiently connect comparison shoppers with the businesses that are best positioned to meet their needs. That framework has been particularly beneficial for small businesses, such as local insurance offices and handyman services, because it has provided an inexpensive way for them to reach

[1] *See* Second Report and Order, *In re Targeting and Eliminating Unlawful Text Messages, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Advanced Methods to Target and Eliminate Unlawful Robocalls*, FCC CG Dkt. Nos. 21-402, 02-178, 17-59 (released Dec. 18, 2023) (*Order*), https://docs.fcc.gov/public/attachments/FCC-23-107A1.pdf.

[2] *See Insurance Marketing Coalition, Ltd. v. FCC*, No. 24-10277 (11th Cir.).

new customers and compete with larger, more sophisticated rivals. Comparison shoppers have benefitted as well, due to the broader range of choices and better matches the consent rules have made possible.

The *Order* discards that longstanding framework and replaces it with a rigid new scheme that will reduce consumer choice, drive small businesses out of the market, and devastate performance marketing companies that partner with and operate comparison shopping services. The *Order*'s unprecedented scheme is unlawful. Its additional consent requirements exceed the Commission's authority by (1) impermissibly defining the same statutory term to mean different things depending on the caller at issue and (2) contravening the ordinary meaning of "prior express consent." Compounding these errors, the *Order* also violates the First Amendment by applying content-based discrimination against commercial marketing calls. The Supreme Court invalidated another part of the TCPA on those grounds in *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), and the same reasoning applies here.

On January 26, 2024, IMC petitioned for judicial review of the *Order* in the U.S. Court of Appeals for the Eleventh Circuit. Because IMC's members would be irreparably harmed if the *Order*'s redefinition of "prior express consent" is permitted to take effect, and because the remaining factors support a stay, the Commission should grant a partial stay of the *Order* pending judicial review.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

In 1991, Congress enacted the TCPA to protect Americans from unwanted calls made using automated telephone equipment. Under the TCPA, a caller generally must obtain "prior express consent," a term the statute does not define, before making an automated call to a consumer. 47 U.S.C. § 227(b)(1).[3]

In 2012, the Commission issued regulations defining "prior express consent" to mean "prior express *written* consent" and requiring commercial marketers to obtain such consent before making automated calls. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830 (Feb. 15, 2012) (emphasis added). Under these regulations, other types of automated calls may continue to rely on non-written consent, such as verbal consent or consent derived from a business relationship. *See* 47 C.F.R. § 64.1200(a)(2) (requiring "prior express written consent" only for automated calls that "includ[e] or introduc[e] an advertisement or constitut[e] telemarketing").

B. IMC and the Performance Marketing Industry

Performance marketing (sometimes referred to as "lead generation") often takes place on comparison shopping websites, which provide a one-stop means of comparing options for health insurance, auto loans, home repairs, and other

[3] IMC uses the term "automated" herein to mean a call made using an automatic telephone dialing system or an artificial or prerecorded voice. 47 U.S.C. § 227(b)(1).

services—thus sparing consumers the inconvenience of having to consult multiple vendors for information and offers. Comparison shopping sites typically give visitors the option of requesting additional information—such as a quote for particular services—from the listed businesses, and website operators often employ algorithms, questionnaires, or other means to connect consumers with the businesses that best match their needs. If a consumer consents to receive a follow-up call or text message, the website will then transmit that "lead" to one or more of those businesses. Because marketers and website operators typically cannot know in advance which businesses will be the best fit for a particular consumer, many potential businesses are listed when seeking a consumer's prior express consent for TCPA purposes, even when only a handful of business (or only a single business) will ultimately contact the consumer.

IMC represents entities in the insurance marketing industry, including performance marketing companies that offer insurance comparison services, lead brokers who have networks of performance marketing companies and use them to furnish leads generated on those websites to insurance providers, and small insurers who depend on such leads to reach new customers and compete for their business. IMC filed detailed comments in the proceedings leading up to issuance of the *Order*, pointing out among other things that the proposed redefinition of "prior express

consent" would violate the TCPA, the First Amendment, and the Administrative Procedure Act.[4]

C. The 2023 *Order*

On December 13, 2023, the Commission adopted the *Order*, with Commissioner Simington dissenting in part. As relevant here, the *Order* interprets the TCPA's requirement to obtain "prior express consent" as including two additional conditions—on top of the written-consent requirement imposed by the 2012 rule—when a commercial marketer makes an automated call:

- *First*, the *Order* requires that prior express consent for marketing calls be provided on a "one-to-one" basis. *Order* ¶ 31. As a result, a consumer cannot consent to receive automated calls from a list of "marketing partners," even if that list is clearly and conspicuously displayed to the consumer in advance of consent. *Id.* ¶ 32. Instead, a consumer must separately consent to each *individual* potential marketer that may or may not later choose to call the consumer (for example by checking a box for each marketer). *Id.*

- *Second*, the *Order* requires that "consent obtained on comparison shopping websites must be logically and topically related to th[e] website" from which it is obtained. *Id.* ¶ 36. For example, according to language in the *Order*'s preamble (but not the Code of Federal Regulations), a visitor to "a car loan comparison shopping website" may not "consent to" automated calls or text messages "about loan consolidation." *Id.* That is true even if website visitors in fact have loans they wish to consolidate and expressly state their desire to receive calls about options for doing so. *Id.*

[4] *See, e.g.*, Letter from Insurance Marketing Coalition to Federal Communications Commission, CG Docket Nos. 02-278, 21-402 (Dec. 6, 2023), https://www.fcc.gov/ecfs/document/1206656001108/1.

Neither of these limitations applies when a consumer consents to receive any type of call other than a marketing call.[5]

The *Order* acknowledges that "many comparison shopping websites . . . benefit consumers by enabling them to quickly compare goods and services and discover new sellers." *Order* ¶ 30; *see also id.* ¶ 30 n.69 (describing lead generation as "a well-established industry that offers benefits to both consumers and advertisers"). These websites are also a particularly useful tool for small businesses that "face larger competitors for consumer attention" because the websites provide an efficient way of connecting with "potential customers." Statement of Commissioner Anna Gomez at *1.

Nevertheless, the *Order* concludes that additional consent requirements are necessary because lead generation is responsible for "a large percentage of unwanted [automated] calls and texts," and because such calls "often rely on flimsy claims of consent." *Order* ¶ 30. The only evidence the *Order* provides to support those assertions is a comment letter from USTelecom. *See id.* ¶ 30 n.68. That letter contains no statistics whatsoever about the prevalence of unwanted automated calls

[5] The Commission's rules generally divide calls into two classes: marketing calls and "informational" calls, which are subject to fewer restrictions and include calls and text messages from political campaigns, advocacy organizations, charities, and other non-commercial entities (or that serve non-commercial purposes). *See* 47 C.F.R. § 64.1200(a)(3); *see also In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order and Further Notice of Proposed Rulemaking, FCC 24-24, CG Docket No. 02-278, ¶¶ 29–30 (Feb. 15, 2024).

resulting from lead generation. Instead, it merely asserts that "the robocalls consumers are most likely to receive are lead generation robocalls they do not want" and cites three news articles, none of which even mentions lead generation. USTelecom Comments at 2 (May 8, 2023), https://www.fcc.gov/ecfs/document/10508915228617/1. The USTelecom letter is equally threadbare with respect to its assertion regarding the validity of consent for lead-generated marketing calls: The letter cites only a single enforcement action on that issue, involving a fraudulent overseas enterprise that, in stark contrast to the comparison shopping websites IMC members operate and partner with, made no effort to obtain prior express consent from the consumers who received calls. *See id.* at 2 (citing *In re Sumco Panama SA*, File No. EB-TCD-21-00031913, No. FCC 22-99, ¶¶ 45–46 (F.C.C. Dec. 21, 2022)). Indeed, the Commission has informed Congress that "[f]oreign-originated calls are a significant portion, if not the majority, or illegal robocalls." FCC, Report to Congress on Robocalls and Transmission of Misleading or Inaccurate Called Identification Information, at 7 (Dec. 23, 2022), https://docs.fcc.gov/public/attachments/ DOC-390423A1.pdf.

In his dissenting statement, Commissioner Simington explained that the *Order*'s one-to-one consent rule is based on "a factually thin record," and its reasoning is "so impoverished . . . that it gives every appearance of an arbitrary and capricious action." Statement of Commissioner Simington at *1.

A summary of the *Order* was published in the *Federal Register* on January 26, 2024, and the *Order*'s one-to-one and logically-and-topically-related consent requirements are scheduled to take effect on January 26, 2025.

ARGUMENT

The Commission should grant a partial stay of the *Order* because (1) IMC is likely to succeed on the merits of its challenges to the *Order*; (2) IMC members will suffer irreparable harm if the *Order* is not stayed; (3) the Commission will not be injured if a stay is granted; and (4) a stay is in the public interest. *See Hand v. Scott*, 888 F.3d 1206, 1207 (11th Cir. 2018); *In re Sponsorship Identification Requirements for Foreign Government-Provided Programming*, 36 FCC Rcd. 16,737, 16,738–39 (2021).

I. IMC IS LIKELY TO PREVAIL ON THE MERITS.

A. The *Order*'s "Prior Express Consent" Requirements for Marketing Calls Exceed the Commission's Statutory Authority.

The *Order* redefines the term "prior express consent" for marketing calls (and *only* for marketing calls) in a way that exceeds the Commission's statutory authority. *First*, the *Order* assigns different meanings to the same statutory term without any textual basis for doing so. *Second*, the *Order* defines "prior express consent" for marketing calls to include additional conditions—that the consent be (1) obtained on a one-to-one basis and (2) logically-and-topically related to the website where consent was obtained—that are not encompassed within that term's ordinary

meaning. Each of these reasons is independently sufficient to warrant vacatur of the *Order* in relevant part.

1. The Order *Impermissibly Redefines "Prior Express Consent" to Mean Two Different Things.*

Generally, "an agency may not simultaneously interpret the same statute in two different ways." *Ford Motor Co. v. United States*, 715 F.3d 906, 915-16 (Fed. Cir. 2013); *see also, e.g.*, *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019) (courts must "avoid interpretations that would attribute different meanings to the same phrase"); *United States v. Bryant*, 996 F.3d 1243, 1258 (11th Cir. 2021) ("[W]e presume that the same words will be interpreted the same way in the same statute."). This presumption against multiple interpretations hardens into an outright prohibition where the agency seeks to define the same term in two different ways within a single provision. *See, e.g.*, *United States v. Jackson*, 55 F.4th 846, 858-59 (11th Cir. 2022) (courts "must construe the definition of" the same term in the same provision to mean the same thing); *Ryan v. United States*, 725 F.3d 623, 627 (7th Cir. 2013) ("It is rare enough to interpret the same language differently in distinct statutory sections, but is an entirely different matter for a court to give a term a different meaning in the same statutory provision.").

That is precisely what the *Order* does. According to the *Order*, before a marketer may make an automated call to a customer, it must obtain (1) written and (2) one-to-one consent that is (3) logically-and-topically related to the website where

such consent was obtained. *Order* ¶¶ 30-36. None of these conditions applies to consent for any other type of automated call—even though the TCPA requires "prior express consent" to be obtained for those calls as well.

Nothing in the TCPA grants the Commission authority to define "prior express consent" in wholly different ways depending on the type of call at issue. True, the TCPA permits the Commission to "prescribe regulations," including promulgating certain "exemptions" to the requirement that prior express consent be obtained. 47 U.S.C. § 227(b)(2). But that authority cannot save the *Order*. The *Order* nowhere invokes the Commission's authority to craft exemptions, as the Commission has consistently done when exercising that authority in the past.[6] Nor does it purport to redefine the statutory term "prior express consent" as a general matter and then promulgate an exemption negating the requirement to obtain such consent for everyone but marketers. Instead, the *Order* simply provides that "prior

[6] *See, e.g.*, *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8023 (2015) ("We exempt from the TCPA's consumer consent requirements, with conditions, certain pro-consumer messages about time-sensitive financial and healthcare issues."); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, 1837 (2012) ("[W]e adopt an exemption . . . [for] health care-related calls to residential lines."); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8755 (1992) ("We exempt . . . calls: not made for commercial purposes; made for commercial purposes which do not transmit an unsolicited advertisement; made to a party with whom the caller has an established business relationship; and non-commercial calls by tax-exempt nonprofit organizations.").

express consent" means one thing for marketers—and another very different thing for everyone else, such as the political campaigns, advocacy groups, and nonprofits that are not "telemarketers" and thus are not subject to the *Order*'s new interpretation of the TCPA. That approach is unlawful under the precedent cited above.[7]

2. The Order *Redefines "Prior Express Consent" in a Way that Conflicts with that Term's Ordinary Meaning.*

The TCPA does not define "prior express consent." *Medley v. Dish Network, LLC*, 958 F.3d 1063, 1069–70 (11th Cir. 2020) ("[T]he TCPA is silent regarding the means of providing or revoking consent" (quotation marks omitted)). That term should thus be given its ordinary meaning, as informed by the surrounding statutory context and the common-law understanding of what consent normally entails. *See Lucoff v. Navient Sols., LLC*, 981 F.3d 1299, 1304 (11th Cir. 2020) ("We use common law principles to interpret whether a party gave . . . their 'prior express consent' to receive calls under the TCPA."); *Osorio v. State Farm Bank*, 746 F.3d 1242, 1255 (11th Cir. 2014) ("[O]ne can infer that Congress intended for the TCPA to incorporate the common-law meaning of consent[.]"); *United States v. Lopez*, 590

[7] Even if the Commission *had* invoked its authority to craft exemptions, that authority only permits exemptions that are, for example, "necessary in the interest of the privacy rights this section is intended to protect." 47 U.S.C. § 227(b)(2)(C). For reasons discussed below, the *Order* does not include findings that would support such an exemption for all non-marketing calls here.

F.3d 1238, 1248 (11th Cir. 2009) ("When a statutory term is undefined, courts give it its ordinary meaning or common usage." (quotation marks omitted)).

"Under the common law understanding of consent, the basic premise of consent is that it is given voluntarily." *Osorio*, 746 F.3d at 1253 (quotation marks omitted). That understanding accords with the ordinary meaning of "express consent" as simply "[c]onsent that is clearly and unmistakably stated." *Express Consent*, Black's Law Dictionary (11th ed. 2019); *see also Gorss Motels, Inc. v. Safemark Sys., LP*, 931 F.3d 1094, 1100 (11th Cir. 2019) (looking to Black's Law Dictionary to construe the related TCPA term "prior express . . . permission" to mean "permission that is clearly and unmistakably granted by actions or words, oral or written.").[8]

This ordinary understanding of "express consent" does not encompass the additional conditions the *Order* imposes on automated marketing calls—*i.e.*, that consent be one-to-one and logically-and-topically related to the website where it was obtained. In other words, express consent can be "clearly and unmistakably stated" to multiple individuals at once and on a website with no logical or topical relationship to the call being consented to. *See Lawrence v. Bayview Loan Servicing,*

[8] The TCPA defines an "unsolicited advertisement" to a fax machine as one "transmitted" without the recipient's "prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5).

LLC, 666 F. App'x 875, 879 (11th Cir. 2016) ("No specific method is required under the TCPA for a caller to obtain prior consent to place automated calls[.]").[9]

The Ninth Circuit's decision in *Fober v. Management & Technology Consultants, LLC*, 886 F.3d 789 (2018), illustrates the point. *Fober* involved a TCPA claim against a company that made an automated call to conduct a survey on healthcare issues. The Ninth Circuit affirmed the award of summary judgment against the plaintiff because she had *agreed* that her health care provider could disclose her phone number to intermediaries for purposes of "quality improvement." *Id.* at 793. As the court noted, the TCPA "does not require any one method for obtaining 'prior express consent.'" *Id.* Looking to the longstanding rule that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary," the court concluded that the plaintiff had given her prior express consent for the automated survey call. *Id.* at 792 (quoting *In re Rules &*

[9] For the same reason, the Commission's decision in the 2012 rule to require that "prior express consent" for marketing calls be made in writing is likewise inconsistent with the ordinary meaning of that term. As with express permission—which courts have noted can be "oral or written,'" *Gorss Motels*, 931 F.3d at 1100—express consent ordinarily need not be provided in writing, *see, e.g.*, *Bismark v. Fisher*, 213 F. App'x 892, 896 (11th Cir. 2007) (holding that "express consent" to disposition of a civil action by a magistrate judge "should be commemorated via a filed, fully executed written consent form or the parties' *oral expressions of consent* during a hearing on the record") (emphases added)); *United States v. Vines*, 9 F.4th 500, 509 (7th Cir. 2021) ("[C]onsent can be express or implied from circumstances, and can be verbal or non-verbal.").

Regulations Implementing the Tel. Consumer Prot. Act of 1991, 7 FCC Rcd. 8752, 8769 (1992)).

If prior express consent can be given to multiple *unnamed* intermediaries at once, as in *Fober*, it follows that it can also be given to multiple *named* intermediaries at once, contrary to the *Order*'s one-to-one consent requirement. Indeed, the Eleventh Circuit has already held as much with respect to the related term "prior express . . . permission." *See Gorss Motels*, 931 F.3d at 1100–01 (plaintiffs provided "prior express . . . permission" to receiving solicitations via fax, because they had "expressly agreed to receive information about purchasing items from Wyndham affiliates, so they cannot complain that an affiliate sent them that kind of information").

The *Order*'s logically-and-topically related requirement strays even further from the ordinary meaning of "prior express consent." On its face, that requirement serves only to *prevent* consumers from consenting to calls that they would like to receive. Under the *Order*, for example, a consumer on a car loan comparison website can *never* consent to receive marketing calls about loan consolidation—even if that consumer has multiple loans and clearly and unmistakably states a desire to learn more about how to consolidate them. *See Order* ¶ 36 n.93. No ordinary understanding of "prior express consent" would bar a consumer from being able to consent to receive such a call.

The *Order* does not justify its redefinition of the term "prior express consent" for marketing calls as an ordinary interpretation of those words. Instead, it seeks to defend this redefinition purely on policy grounds. *See Order* ¶¶ 30–36. But precedent makes clear that the Commission "cannot impose a limitation [into the TCPA] that Congress did not include." *Gorss Motels*, 931 F.3d at 1102; *see also Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014) (agencies may not "rewrite clear statutory terms to suit its own sense of how the statute should operate"); *Redus Fla. Com., LLC v. Coll. Station Retail Ctr., LLC*, 777 F.3d 1187, 1196 (11th Cir. 2014) (same).

B. The *Order's* Discrimination Against Marketing Calls Violates the First Amendment.

The *Order* is unconstitutional because it applies more rigorous consent requirements to marketing calls than to other types of calls. This content-based discrimination violates the First Amendment.

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* "It is rare" that a content-

based regulation on speech "will ever be permissible." *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 818 (2000).

The *Order* flunks these standards. In *Barr*, the Supreme Court held that the TCPA's government-debt exception (which excepted calls to recover debts owed to the federal government from the prior express consent requirement) was a content-based regulation of speech. 140 S. Ct. at 2347. Because that exception favored government-debt collection calls over "other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy, *commercial advertising*, and the like," it had to satisfy strict scrutiny (which the Government conceded it could not). *Id*. (emphasis added).

It follows from *Barr* that the *Order*'s discriminatory treatment of marketing calls is likewise subject to strict scrutiny, a standard the Commission cannot meet. Even assuming that the Commission has a compelling interest in restricting unwanted automated calls generally, discriminating against marketing calls is not a narrowly tailored way of advancing that interest.

First, the *Order* is both over and underinclusive. *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 805 (2011) (laws subject to strict scrutiny "must be pursued by means that are neither seriously underinclusive nor seriously overinclusive."). The *Order* is overinclusive because many calls affected by its redefinition of "prior express consent" are in fact *wanted* by the consumer that

authorizes them. *See Schweitzer*, 866 F.3d at 1276 ("The TCPA . . . is designed to protect consumers from receiving *unwanted* and intrusive telephone calls.") (emphasis added); *Fober*, 886 F.3d at 792 ("[T]he statute aims to curb a particular type of uninvited call. As a result, the statute omits from its ambit those calls that a person agrees to receive."). The *Order* prohibits marketing calls to which customers have given their prior express consent under any ordinary meaning of that term. *See supra* at 11–14. The Commission does not have any interest (much less a compelling one) in preventing consumers from receiving calls that they have expressly consented to receiving.

The *Order* is also underinclusive because it only targets marketing calls, even though the legislative findings in support of the TCPA show that Americans "consider [unwanted] automated or prerecorded telephone calls, *regardless of the content or the initiator of the message*, to be a nuisance and an invasion of privacy." 137 Cong. Rec. H11307-01, 1991 WL 250340 (emphasis added). Indeed, the *Order* offers no explanation for why its heightened consent requirements apply only to marketing calls and not to "informational" calls and texts from political committees, advocacy groups, or similar entities. *See Reed*, 576 U.S. at 172 (striking down a law differentiating between different types of street signs because "the Code's distinctions fail as hopelessly underinclusive," as "the Town has offered no reason

to believe that directional signs pose a greater threat to safety than do ideological or political signs").

Second, the *Order* contains no record evidence that unwanted marketing calls resulting from comparison shopping websites are especially common, or that the new consent rules in the *Order* would meaningfully reduce the number of such calls. *See FEC v. Cruz*, 596 U.S. 289, 307 (2022) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden.") (cleaned up). In fact, the only support in the *Order* for the idea that "[l]ead-generated communications are a large percentage of unwanted calls and texts," *Order* ¶ 30, is a single citation to a comment letter that itself includes no evidence whatsoever about the prevalence of such calls, *see supra* at 6–7. The *Order* likewise fails to explain how its proposed consent requirements would meaningfully reduce the number of unwanted automated calls. *See* Statement of Commissioner Simington at *1 ("[T]he factual record on the question" of how mandating "1-to-1 consent" will ward off unwanted automated calls "is so thin, and the [*Order*] so impoverished in its reasoning supporting a rule upending the consumer financial products industry, that it gives every appearance of an arbitrary and capricious action by the Commission."). And even if the *Order* were to conceivably reduce the number of unwanted calls received by consumers by some unknown amount, that would still not be enough to justify a content-based discrimination against marketing calls. *See Brown*, 564 U.S. at 803

n.9 ("[T]he government does not have a compelling interest in each marginal percentage point by which its goals are advanced.").

Third, there were numerous less-restrictive measures (some of which are content neutral) that the Commission could have instead adopted to address any legitimate concerns it might have had about unwanted automated calls. For instance, IMC proposed requiring prior express consent agreements to clearly and conspicuously disclose: (1) the number of callers who may rely on a single provision of consent; (2) the maximum time period after consent is given during which calls may be made; and (3) the types or categories of goods or services that may be offered on such calls. *See* Letter from Insurance Marketing Coalition to Federal Communications Commission, CG Docket Nos. 02-278, 21-402, at 2 n.4 (Dec. 6, 2023), https://www.fcc.gov/ecfs/document/1206656001108/1. The Commission's failure to adopt these less-restrictive alternatives—or explain why they would not serve its interests—dooms any argument that the *Order* is narrowly tailored. *See Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004) ("Absent a showing that the proposed less restrictive alternative would not be as-effective, . . . the more restrictive option . . . could not survive strict scrutiny."); *Playboy*, 529 U.S. at 813 ("If a less restrictive alternative would serve the Government's purpose, the legislature must use [it]."); *FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1299 (11th Cir. 2017)

(striking down municipal law that "disregarded numerous and obvious less-burdensome alternatives").

Even if the *Order* were assessed under the commercial speech doctrine, it would still be unconstitutional. When that doctrine applies, the government must show that its asserted interest is "substantial" and that its regulation on commercial speech "directly advances" and "is not more extensive than is necessary to serve that interest." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). Even if the *Order* served a substantial government interest (which, as discussed above, it does not), the Commission has failed to show that its additional consent requirements are not more extensive than necessary to serve that interest. To make that showing, the Commission must present evidence to show that "less restrictive means would fail"; in doing so, it "cannot rest on 'speculation or conjecture.'" *United States v. Philip Morris USA Inc.*, 855 F.3d 321, 327 (D.C. Cir. 2017). As explained above, the Commission has not shown that the many less restrictive means available would fail to serve any legitimate interests it might have.

II. THE *ORDER* WILL CAUSE IMC MEMBERS IRREPARABLE HARM.

Absent a stay, IMC and its members will suffer irreparable harm from the *Order*, including damage to their business operations, significant compliance costs, and chilling of their speech.

While the relevant parts of the *Order* do not take effect until January 2025, the *Order* is *already* imposing significant costs on IMC members. As explained in sworn declarations attached to this petition, to comply with the *Order*, IMC's members must engage in costly, time-consuming, and labor-intensive processes that include revamping their technology, remaking websites to integrate with new systems, renegotiating contracts with other business, educating and training their employees on compliance with the *Order*, and reassessing their company strategy and viability. Ex. A, Declaration of Alexander Liebergall ¶¶ 23–24; Ex. B, Declaration of Gregory Dobak ¶¶ 22–23. Those efforts are so substantial that IMC members must begin working on them now to have any hope of coming into compliance by January. Liebergall Decl. ¶ 23; Dobak Decl. ¶ 22.

IMC members are already feeling the *Order*'s tangible effects in other ways as well—for example, {{[redacted]}}. Dobak Decl. ¶ 24. And before the *Order* takes effect, that member will also spend {{[redacted]}} developing a new technology system that will allow service providers to continue generating leads under the *Order*. *Id.* ¶¶ 11, 22. Similarly, another member estimates it will spend {{[redacted]}} on its compliance efforts before the *Order*'s effective date because the member must, among other things, adjust its

{{ }}. Liebergall Decl. ¶ 24. Absent a stay pending appeal, these companies will be forced to reduce {{ }}, shut down {{ }}, spend {{ }} on their efforts to comply with the *Order*, and lose {{ }} of their revenue. Liebergall Decl. ¶ 24; Dobak Decl. ¶ 23.

The *Order*'s new consent requirements also threaten the core business operations of IMC's members. For example, the *Order* will prohibit IMC members from using the shared leads they have gathered in reliance on the Commission's prior interpretation of the TCPA. *See* Liebergall Decl. ¶ 10; Dobak Decl. ¶¶ 7–9. These shared leads—which some IMC members have invested nearly {{ }} to generate—will instantly become worthless, even though leads are typically useful for a period of time after a consumer's initial consent. Liebergall Decl. ¶¶ 10–12, 18. Shared leads currently account for {{ }} as many sales as exclusive leads and self-generated leads combined.[10] *Id.* ¶ 13. But under the *Order*, IMC members will be forced to use only exclusive leads—which are {{ }} more expensive than shared leads—and self-generated leads—which are

[10] Shared leads are leads that can be sold to multiple lead buyers. Exclusive leads are leads that can only be sold to one lead buyer. Self-generated leads are leads that service providers generate themselves, *i.e.* without assistance from a third party website or marketing partner. *See* Liebergall Decl. ¶¶ 13–17; Dobak Decl. ¶ 8.

{{[redacted]}} more expensive than shared leads. *Id*. ¶¶ 13, 17. The upshot is that, as a direct result of the *Order*, the leads developed (or obtained) by IMC members will cost more money and generate less revenue than under the prior framework, resulting in a significant overall loss of business.

The *Order* also prevents IMC's members from using their technology to help consumers find the service providers that can best meet their needs. Visitors to comparison shopping sites will be forced to individually select potential service providers from a list of businesses—many of which they may be unfamiliar with. Liebergall Decl. ¶ 4; Dobak Decl. ¶¶ 18–19. This will be especially true for small, non-branded businesses, who already struggle to compete with larger branded companies, particularly online. *See* Dobak Decl. ¶¶ 6, 17–19. While performance marketers can currently solve this information problem by matching a consumer with the optimal service providers, the *Order* limits this technology because performance marketers will be forced to try to make that match while the consumer waits on a loading screen. Dobak Decl. ¶¶ 11–14; Liebergall Decl. ¶ 15. If it is even possible to make matches in real time, it will cost {{[redacted]}} and will take {{[redacted]}} to develop the requisite technology, and it will require consumers to wait on a loading screen for {{[redacted]}}. Although that delay may seem inconsequential, studies and the declarants' industry experience show that the additional delay caused by the *Order* will have "significant

adverse effects" on performance marketers' businesses, for example by substantially reducing the number of consumers who complete the consent process. Dobak Decl. ¶¶ 11–12; *see also* Liebergall Decl. ¶ 20 (noting performance marketers have quoted post-*Order* costs per lead that are {{ }} higher than current costs per lead). And even if a consumer consents to receive calls and texts, the *Order* forbids IMC members from helping the consumer find additional services he or she may be interested in because those services may not be "logically and topically related" to the consumer's request, as the Commission envisions that term. Liebergall Decl. ¶ 16.

These injuries constitute irreparable harm. Even if the Eleventh Circuit grants IMC's petition for review, IMC's members will be unable "to recover monetary damages because of sovereign immunity," which "renders the harm suffered irreparable." *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013); *see also Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (finding irreparable harm because petitioner "would not be able to bring a lawsuit to recover their undue economic losses if the FCC's rules are eventually overturned"). Understanding the bind that regulated entities face, courts have explained that "unrecoverable costs of compliance constitute irreparable harm," *Georgia v. President of the U.S.*, 46 F.4th 1283, 1302 (11th Cir. 2022), as do "the

loss of customers and goodwill," *BellSouth Telecomms., Inc. v. MCI Metro Access Trans. Servs., LLC*, 425 F.3d 964, 970 (11th Cir. 2005).

IMC's members satisfy these standards. The *Order* imposes significant financial hardship, none of which IMC's members will be able to recover if the Eleventh Circuit vacates the challenged parts of the *Order*. Members have been forced to begin developing technology that would allow them to generate leads that comply with the *Order*, even though this technology will be unnecessary if IMC's petition for review is granted. Dobak Decl. ¶¶ 11–14; 16–21; Liebergall Decl. ¶¶ 19–23. IMC's members have also begun preparing for scenarios in which they would {{[redacted]}}, shut down locations, and invest resources in renegotiating many of their existing contracts. Liebergall Decl. ¶¶ 23–24. And at least one member {{[redacted]}} as more customers learn about the *Order*'s effects. Dobak Decl. ¶ 24.

The *Order* also inflicts irreparable harm by chilling IMC members' speech. The *Order* violates the First Amendment by discriminating against marketing calls. *See supra* at 15–20. Courts have recognized that "it is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1271–72 (11th Cir. 2006) (cleaned up). As a result, if IMC is likely to succeed on the merits of its First Amendment claim, it follows that IMC and its members

would be irreparably harmed if the *Order* were permitted to take effect while the litigation proceeds. *See KH Outdoor*, 458 F.3d at 1271–72; *cf. LaCroix v. Town of Fort Myers Beach, Fla.*, 38 F.4th 941, 954–55 (11th Cir. 2022) ("Ordinances that violate the First Amendment are per se irreparable injuries." (cleaned up)).

To be sure, the challenged parts of the *Order* do not take effect until January 2025. But if the *Order* is not stayed, IMC and its members would be forced to continue their efforts to comply with a government mandate that discriminates against their speech and expression. Requiring IMC to continue those efforts cannot be squared with the "stringent protection of First Amendment rights," which stems from "the intangible nature of the benefits flowing from the exercise of those rights," or with the rule that a plaintiff need not "prove actual, current chill" to "prove irreparable injury." *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983). Without a stay, the *Order* could take effect while the courts consider the merits of IMC's petition for review, forcing IMC to lose its First Amendment freedoms in the meantime. *See Honeyfund.com, Inc. v. Governor, State of Fla.*, __ F.4th __, 2024 WL 909379, at *8 (11th Cir. Mar. 4, 2024) ("[A] [First Amendment] violation, even for a minimal period of time, constitutes irreparable injury.").

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST REQUIRE A STAY.

The balance of equities and the public interest "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435–36 (2009). Those factors

also counsel in favor of a stay. The public does not have a significant interest in the Commission's reinterpretation of the TCPA taking effect before a court determines whether the Commission exceeded its legal authority. IMC's members invest significant resources to ensure that they comply with the Commission's prior (and longstanding) interpretation of the TCPA, and they already do not make automated calls or texts without a consumer's express consent. *See* Liebergall Decl. ¶¶ 10, 18, 20 (explaining compliance with Commission's 2012 Order). Although the Commission has an interest in limiting unwanted calls, *see Barr*, 140 S. Ct. at 2348, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends," *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2490 (2021). Further, because the *Order* violates the First Amendment, a stay is appropriate "because neither the government nor the public has any legitimate interest in enforcing an unconstitutional ord[er]." *LaCroix*, 38 F.4th at 955.

IV. CONCLUSION

For the foregoing reasons, the Commission should stay the effect of Part III.D of the *Order* and the corresponding revisions to 47 C.F.R. § 64.1200 pending disposition of IMC's petition for judicial review of the *Order*. This stay should remain in effect until a final, nonappealable court order has issued with respect to the petition for review and any subsequent petition for rehearing or writ of certiorari.

Respectfully Submitted,

/s/ Kevin King

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March 20, 2024

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Targeting and Eliminating Unlawful Text Messages	)	CG Docket No. 21-402
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
Advanced Methods to Target and Eliminate Unlawful Robocalls	)	CG Docket No. 17-59

DECLARATION OF ALEXANDER LIEBERGALL

I, ALEXANDER ABRAHAM LIEBERGALL, hereby declare under penalty of perjury as follows:

1. I am currently the Compliance Officer at Ideal Concepts, Inc. I have held that position for six (6) years and have six (6) years of experience in the insurance and marketing industry. Before that, I worked at McBee as a Compliance Analyst and Pentec Health, Inc. as a Compliance Analyst. I am a graduate of Elizabethtown College with a Bachelor of Science (B.S.) in Business Administration and Management with a concentration in Marketing; the Drexel University Dornsife School of Public Health with a Master of Public Health (M.P.H.); and the Drexel University Thomas R. Kline School of Law with a Juris Doctor (J.D.).

2. I am competent to testify to the matters set forth herein, which are based on my personal knowledge, information I have acquired in my current position at Ideal Concepts Inc., which has a wholly-owned subsidiary, InsureMe, Inc., (collectively Ideal Concepts Inc. and InsureMe Inc. will be referred to as "Company") and information provided to me by others in the ordinary course of business.

3. I understand that this declaration is being filed in support of the Insurance Marketing Coalition's motion for a stay pending judicial review of the Federal Communications Commission's December 18, 2023, *Second Report and Order* ("*Order*") in the above-captioned proceeding.

4. I understand that, under the *Order*, everyday consumers who comparison shop for goods and services, including insurance coverage, will no longer be permitted to provide a single consent to receive automated phone calls and text messages from multiple providers. Instead, consumers will be required to separately consent to receive calls and texts from each individual seller, even though consumers will not be well-positioned to understand which sellers best meet their needs, and that the *Order* would put the consumer at a disadvantage due to the inability to comparison shop, which may result in consumers settling for plans that may not best meet their needs (e.g., higher premiums, fewer benefits). I also understand that the *Order* requires consent obtained on comparison shopping websites to be "logically and topically related" to that website.

5. Both Ideal Concepts, Inc. and InsureMe, Inc. are corporations based in Pennsylvania. Ideal Concepts, Inc., is an insurance marketing and technology company founded in 2007 to help connect insurance agents to clients across the country by providing independent insurance agents administration, marketing, training, technology, and other support services. InsureMe, Inc. is an insurance agency that is licensed in all fifty (50) states and contracts with over one hundred health insurance carriers nationwide. In addition to individual health insurance, InsureMe, Inc.'s licensed agents offer consumers Medicare Advantage plans, supplemental accident and health plans, life insurance plans, and property insurance, including, but not limited

to, home and auto insurance. Both Ideal Concepts, Inc. and InsureMe, Inc. are members of the Insurance Marketing Coalition.

6. Company is a customer of performance-marketing services. Performance-marketing services help make everyday consumers aware of the broad array of product choices and sellers available to them. Performance marketers allow consumers to explore their purchasing options easily and quickly from several sellers at once. This service is especially valuable in the context of personalized products, such as insurance, where consumers often seek consultations with licensed professionals to help them comparison shop and understand options, terms, benefits, pricing, etc., prior to purchase.

7. Company purchases leads from performance marketers. Company uses those leads to intelligently match Company's licensed insurance agents with consumers interested in insurance and insurance-related products and services.

8. Company has annual sales of [redacted] and, since 2020, [redacted] of Company's sales stem directly from these leads and from other activity regulated by the *Order*.

9. The leads Company receives from performance marketers are essential to its business. Company has used these types of leads to provide products and services to a [redacted] customers since 2020, which is [redacted] its customers. These leads allow Company to reach more customers, a large percentage of whom are in need of insurance. Using these leads, Company has been able to grow its market share and total enrollments year-over-year. Much of this increase is attributable to the new customers Company has obtained as a result of the leads it received from performance marketers.

10. Marketing is one of Company's biggest expenses. As part of Company's good-faith effort to abide by the Telephone Consumer Protection Act ("TCPA"), since 2015, Company has spent [redacted] on marketing in compliance with the FCC's interpretation of the TCPA in the FCC's 2012 Order. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830 (Feb. 15, 2012); *see also* 77 Fed. Reg. 34,233 (June 11, 2012). This expense accounts for [redacted] of Company's total budget.

11. Under the *Order*, Company may no longer be able to use its database of leads because those leads were obtained in conformity with the 2012 Order, which permitted consumers to consent to receive information from multiple providers at once. Company purchased those leads in good-faith reliance on the FCC's existing interpretation of the TCPA's consent requirement. Typically, Company would expect to leverage this consent to extract the value of these leads over a multi-year period because, based on Company's experience, consumers continue to be in the market for insurance services well after they initially provide their consent to receive calls and texts for a variety of reasons such as a new insurable interest (e.g., new/additional property or covered life) and the need to reconsider options before policy renewal/expiration, annually during Open Enrollment, and/or after a qualifying life event. If the FCC's new definition applies to Company's existing leads, those leads become worthless once the *Order* goes into effect.

12. Losing access to these leads, would significantly impact the Company's business, costing Company [redacted] since 2020 alone, and would effectively require Company to start [redacted] the day the regulation goes into effect, discarding all prospective consumer information previously generated prior to that day. Moreover, losing these

leads would mean Company would have to contend with massive corporations (e.g., Allstate, Geico, AIG, and UnitedHealthcare) that have brand recognition and large marketing budgets in the space, unequally favoring these big-name players. Competition of this type does not currently exist in the market, because without a one-to-one consent requirement businesses of all sizes that are included in the consent language have a chance to contact the same consumers.

13. Without the option of shared leads, the price of each lead will materially increase, as there will be a significantly smaller supply, while the same demand, if not higher, will persist. This will restrain the ability of Company to [redacted] because, since 2020, [redacted] To compensate for the reduction in volume of leads available from performance marketers that Company currently relies on [redacted] since 2020, Company will likely have to [redacted] Based on an analysis of Company's investments since 2020, [redacted] However, what is much more concerning is that Company found [redacted] and [redacted] The costs for [redacted] will restrain Company's ability to [redacted] and needed to [redacted]

14. The *Order* would make many of these negative effects a reality. Under the *Order*, Company could no longer easily work with performance-marketing companies to ensure that Company was pitched to consumers who are well-suited to receive its services and who have consented to receiving information from businesses like Company. Instead, when providing consent, consumers would be required to individually select Company specifically, even though the consumer may not be as familiar with Company and its offerings. Within the insurance industry, this means that consumers will instead be forced to stare at a list of insurance providers, many of which they may be unfamiliar with, and discern the differences between them.

15. Under the *Order*, performance marketers cannot use their know-how and expertise to obtain consumers' consent to reduce those transaction costs by intelligently matching consumers with businesses, including Company, that would provide the options a reasonably prudent person would need to comparison shop and make a knowledgeable enrollment decision. Currently, performance marketers use consumers' explicit consent to multiple marketers to help streamline this process and allow consumers to discover Company, which can offer consumers an abundance of product options. But the *Order* significantly limits performance marketers' ability to match consumers with the right businesses. If Company would no longer be able to use shared leads, [redacted] since 2020, Company would be substantially limited in its capability to [redacted] which it is reliant on to [redacted] At the same time, Company would lose the ability to provide many consumers with the ability to get a clearer picture and understanding of their options, which naturally allows consumers to make a knowledgeable enrollment decision by selecting a plan that better meets their needs.

16. The *Order* will also prevent Company from connecting consumers with insurance and insurance-related products and services that they are likely to need in the future. Even when there is a clear connection between the website a consumer uses and the services Company provides, consumers will not be permitted to consent to receiving information about Company unless the website is "logically and topically related" to Company's services. For example, if Company receives a consumer's consent regarding homeowners insurance, even though that consumer will highly likely have a need for auto insurance and may even receive multi-line discounts for purchasing homeowners and auto insurance through the same carrier (in our experience, consumers are often interested in knowing about such discounts), Company may not be able to offer that consumer auto insurance despite a clear need and benefit to the consumer (e.g., in 2022, 91.7% of U.S. households had at least one vehicle[1]) because, based on the example the Commission provided in the *Order*, auto insurance would not be "logically and topically related" to the consumer's original inquiry for homeowners insurance. This would reduce Company's [redacted] because, since 2020, [redacted] Company's clients purchase [redacted] Moreover, the "logically and topically related" restriction would create significant additional compliance overhead because Company would need to ensure that, for every consumer Company speaks to, every agent is explicitly aware of the exact product the consumer consented to, which can differ and be highly specific for every lead. For example, the majority of consumer inquiries typically relate to a few primary products, such as auto insurance or health insurance. As such, agents are generally accustomed to presenting or discussing those commonly requested products. Even though Company's proprietary

[1] *See* Forbes, Car Ownership Statistics 2024, https://www.forbes.com/advisor/car-insurance/car-ownership-statistics/#american-community-survey (Feb. 12, 2024).

technology already provides its agents with the specific product the consumer inquired about, if a consumer's inquiry concerns an uncommon product, such as motorcycle insurance or accident insurance, from time to time agents may reference the general product types (e.g., auto insurance and health insurance) when reaching out to consumers. As such, maintaining one hundred percent (100%) compliance may be very difficult and resource intensive due to the human element in the natural course of interactions between agents and consumers. Even if Company were able to achieve ninety-nine percent (99%) compliance through technological mechanisms and rigorous training and auditing of agents, the remaining one percent (1%) of non-compliance would expose Company and its performance marketing partners to significant liability due to the threat of class action suits under the TCPA. Currently, the *Order* does not explicitly define this term, and only offers a vague description of what could classify as "logically and topically related." This leaves Company in a gray area, waiting on the judicial system to define the term through case law.

17. If the *Order* goes into effect, Company will be restricted in its ability to obtain [redacted] it does today, [redacted] since 2020, due to the fact that most lead sources will be dominated by the companies with brand recognition and deep pockets. Company uses these leads to connect with consumers who have a demonstrated need for the insurance and insurance-related products and services it provides. Since [redacted] since 2020, it will be difficult and cost prohibitive, placing a financial burden on Company, for Company to [redacted]. Likewise, it will be extraordinarily onerous for Company to find or develop an alternative method or tool that will not only provide the same value that the Company derives from

[redacted] since 2020, but that will also produce the same [redacted] needed to [redacted].

18. If the Commission interprets the *Order* to apply retrospectively to pre-existing leads, Company will no longer be able to market to [redacted] it has already cultivated. Company has spent [redacted] to acquire [redacted] and [redacted]. All these leads were obtained in good-faith compliance with the TPCA, as last defined by the FCC in its 2012 Order. Under the *Order*, the lists of prospects Company has cultivated over this time have an [redacted], thereby [redacted], because of a change in definition by the FCC if applied retrospectively.

19. Under the *Order*, instead of using its current practices and existing leads, Company may be forced to make significant changes. At a minimum, Company will have to start from scratch, modifying and creating new agreements for vendors to ensure that their lead generation complies with Company's strict compliance standards. Company prides itself on its culture and organizational commitment to Compliance. Company has a long-standing policy that one hundred percent (100%) of marketing materials (e.g., advertisements, landing pages, mailers, scripts) are reviewed and approved for compliance. Company currently rejects [redacted] from performance marketers that do not meet Company's criteria for TCPA compliance, insurance marketing compliance, Medicare compliance, and/or other applicable laws and regulations.

20. On average, Company spends [redacted] annually on [redacted]. The *Order* will require Company to invest more resources, time, and

expenses, in excess of [redacted] it already invests annually, into [redacted]. Furthermore, irrespective of Company making the aforementioned changes, Company will still have to wait for the performance marketers themselves to modify the collection vehicles they use to generate compliant leads, which Company will then purchase. As mentioned earlier, it is expected that the [redacted] will be much higher, and so Company will have to pay this increased cost to [redacted]. After initial reach out [redacted]. Company may not even be able to call prospective consumers whose leads were generated the day before the *Order* goes into effect unless those leads were generated in compliance with the new requirements of the *Order*, defeating the purpose of adjustment period provided by the *Order*.

21. The changes mandated by the *Order* will reduce revenues, increase costs of leads, decrease total amount of leads, impose additional compliance costs, impede ability to effectively compete with the largest competitors, impact ability to grow market share and sustain Company's current growth rate.

22. The *Order* also imposes a chilling effect on Company's speech. Part of Company's business includes generating leads for its own use, but Company will be subject to regulations on its lead generation that business in other industries will not have to face because of the content of Company's speech. The *Order* restricts Company's ability to make marketing calls,

but it does not restrict other types of calls, nor does it restrict marketing calls from entities in other industries, such as political and nonprofit fundraising calls. In other words, Company understands that entities in other industries will still be permitted to obtain a consumer's single consent to receive calls from multiple parties and then to place calls to those consumers. However, Company will no longer be permitted to obtain consent or to place calls in these circumstances, because, due to their content, Company's messages are regulated by the *Order*.

23. Compliance with the *Order* will be a costly, time-consuming, and labor-intensive process. It will include technological changes, renegotiations of all contracts with all performance marketers, updating compliance standards and framework, policy and procedure updates, ongoing education of employees on compliance with the *Order*, retraining employees, and reassessment of company strategy. For example, Company will have to renegotiate all of its contracts with its performance marketers to establish new compliance requirements/expectations, pricing models, and more. Therefore, although some parts of the *Order* do not carry legal force for twelve (12) months, Company will have to begin its compliance efforts immediately, otherwise Company could risk losing any investments made between now and the effective date for compliance. However, as mentioned above, Company efforts are limited by the timelines of performance marketers ensuring that their lead generation forms are in compliance with the *Order*. In essence, many parts of Company's business are reliant on performance marketers to adjust to the *Order*.

24. If the *Order* is not stayed during the pendency of the litigation, Company will suffer the following kinds of irreparable harm: (1) [redacted]; (2) shut down [redacted] operations/locations; (3) lose [redacted] revenue; (4) increase costs related to

[redacted] (5) increase reliance on [redacted] which [redacted] since 2020 but are [redacted] since 2020, and [redacted].

25. Even if IMC's petition for review is ultimately granted, Company will never be able to recover those financial and opportunity costs, for example because damages are not available in litigation against the Commission.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed at Hatboro, Pennsylvania on March 13, 2024.

A. Liebergall

Alexander Abraham Liebergall

EXHIBIT B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Targeting and Eliminating Unlawful Text Messages	)	CG Docket No. 21-402
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
Advanced Methods to Target and Eliminate Unlawful Robocalls	)	CG Docket No. 17-59

DECLARATION OF GREGORY DOBAK

I, Gregory Dobak, hereby declare under penalty of perjury as follows:

1. I am the CEO and Founder of Blue Ink Digital. I have held those positions going on six years and have nine years of experience in the marketing industry. Before I founded Blue Ink Digital, I worked with a variety of other early-stage and established companies including TripAdvisor, Boston Materials and InfoBoard International. I am a graduate of Columbia University in the City of New York with a masters degree in Journalism, Northeastern University with a juris doctorate, and University of Idaho with a bachelor's degree in Political Science, International Relations, and Psychology.

2. I am competent to testify to the matters set forth herein, which are based on my personal knowledge, information I have acquired in my current position at Blue Ink Digital, and information provided to me by others in the ordinary course of business.

3. I understand that this declaration is being filed in support of the Insurance Marketing Coalition's motion for a stay pending judicial review of the Federal Communications

Commission's December 18, 2023 *Second Report and Order* ("*Order*") in the above-captioned proceeding.

4. I understand that, under the *Order*, everyday consumers who comparison shop for goods and services, including insurance coverage, will no longer be permitted to consent to receiving information via an automated phone call from multiple service providers. Instead, consumers will be required to separately consent to receive information from each individual service provider or "seller," even though it may be extremely difficult, if not impossible, as a technical matter to display which individual seller will be best suited to fulfill that particular consumer's request before the request is made.

5. Blue Ink Digital is a performance-marketing company founded in Boston, Massachusetts, that offers consumers the ability to be connected in real-time to insurance providers as well as home service providers who can provide a customized quote for the service the consumer is seeking. Blue Ink Digital employs seven fulltime workers in the United States and provides performance marketing services to hundreds of clients enabling thousands of consumers to quickly, easily and at no cost to them find local businesses offering the services they are seeking. Blue Ink Digital is a member of the Insurance Marketing Coalition.

6. Performance marketers and marketing organizations sometimes known as lead generators help service providers (sellers) advertise to a broad set of consumers in a cost-effective way when they might otherwise be too small, regional, unsophisticated, or lack the resources to run effective digital marketing efforts. These performance marketing organizations also help consumers by allowing them to explore, compare, and get quotes from local service providers (sellers) quickly and easily. Further, by the nature of the products we work in (insurance and home services) there exist hundreds of thousands of small local service providers that the

consumer likely has not encountered before due to the service providers' size and local focus (*e.g.,* local insurance agents, regional window installers, neighborhood handymen etc.).

7. Today, Blue Ink Digital facilitates leads for service providers in the following way: Blue Ink hosts (*i.e.*, owns and operates) consumer-facing websites such as HomeOtter.com that allow consumers nationwide the ability to receive quotes from local home service providers relating to the home service the consumers are seeking. Blue Ink Digital does this by allowing a consumer to make a request to obtain a quote for a particular service (*e.g.,* window repair). Once the consumer has submitted the request—which includes the consumer's geographic location—and provided his consent to receive calls from our service-provider clients, we use a software platform to check which service providers in the country might be able to provide a quote based on the location of the consumer along with any additional information provided by the consumer. Our software matches this to the best situated service provider and passes the consumer's request to that service provider (and only that service provider) within seconds. The service provider is then able to see the consumer's request in real time, reach out and provide the desired quote with no further action required by the consumer. That outreach from the service provider to the consumer commonly occurs using an automated mechanism to dial and transmit the call. The service we provide is free for the consumer; the service provider (seller) pays us a referral fee.

8. Blue Ink Digital also operates a similar matching service for instances in which consumers submit their service requests on a third-party website. Once a consumer submits his request for a quote and provides his consent to receive calls, the third-party website transmits basic information about the request (e.g., the location and type of service) to Blue Ink Digital. We then use our software to match the consumer with the optimal service provider and Blue Ink Digital

submits a bid for the lead on the service provider's behalf. If our client submits the winning bid, we then receive access to the consumer's personal identifying information. We then perform a separate validation process to confirm the information in the bid (e.g., that the listed name and address are true, that the lead does not already exist in our system, that the consumer is not on the FCC's Do Not Call Registry, etc.). The chosen service provider also performs its own separate validation process. Once the lead is validated, the chosen service provider pays for the lead. If, however, the chosen service provider declines to pay for lead, Blue Ink Digital can attempt to sell the lead to a different service provider capable of fulfilling the consumer's request. Because all Blue Ink Digital's leads are exclusive leads, today, we sell each lead to only one service provider.

9. Our business operates in such a way that any single request is only passed to a single service provider. However, until the consumer submits the request we cannot know which service provider will be best suited to handle the consumer's request. By requiring the consumer to consent to a specific service provider (seller), the *Order* requires us to implement substantial modifications to our system that effectively require us to return to the consumer *after* we have matched the consumer's request to a service provider to seek to consumer's consent for that specific, identified service provider to call that consumer. The *Order* also will require the service providers that Blue Ink Digital serves to make modifications to their systems. The costs and other implications of these modifications to Blue Ink Digital and these service providers are described below.

10. Currently, Blue Ink Digital can match a consumer to a service provider after the consumer provides his consent to receive automated calls from several service providers. However, if the *Order* takes effect, Blue Ink Digital will be forced to change its technology to try to create a system through which a consumer can provide his consent to receive calls from only

the optimal service provider before the validation process. But that consent necessarily can only occur after Blue Ink Digital uses its software to identify the optimal service provider. The only way to implement the *Order*'s mandate is for Blue Ink Digital's software to attempt to match the consumer to a service provider while the consumer is entering his information and/or to make the consumer wait at a loading screen after he submits his information so that the matching system can find the best service provider. After this wait, the consumer could then consent to receive calls from only the optimal match.

11. Developing this technology will be challenging and extremely costly. Based on the information known today, Blue Ink Digital believes it will initially cost [redacted] and take [redacted] of development to attempt to create a first iteration of a system that would satisfy the *Order*'s new interpretation of the TCPA, plus further ongoing costs discussed below. In addition to creating a new system, every lead generation website would need to make substantial changes to their website and how they operate to be able to work with Blue Ink's new system. These changes would require substantial expenditure, reworking, and testing on thousands of websites operated by hundreds of independent companies. Most customer websites will also now need to work with multiple systems as there is no industry standard and multiple companies have already come forward and are creating different potential systems in an attempt to comply with the *Order.* Even if it is technologically possible to develop the type of system that complies with the *Order*, our current research shows that any new system will not work nearly as well as the current system.

12. Even if a new system is implemented, it will not be as effective as the current system in producing effective and useful leads. We estimate that, if a consumer is forced to wait for the matching system to show the best service provider, the consumer will be waiting

[redacted] for a match. Although that delay may seem inconsequential, it is not. Indeed, based on my knowledge and experience understanding how consumers use the Internet, this length of delay would have significant adverse effects on Blue Ink Digital's business. We estimate that [redacted] consumers would not wait for the match to appear and therefore would not provide consent. *See* Kristen Baker, *11 Website Page Load Time Statistics [+How to Increase Conversion Rate]*, HubSpot (Nov. 10, 2023) (explaining based on an analysis of more than four billion website visits that the average desktop webpage load time is 2.5 seconds, that websites that load in 1 second have a conversion rate three times higher than websites that load in five seconds and five times higher than websites that load in 10 seconds, and that "as each second passes, the potential to lose out on prospective customers increases"), https://blog.hubspot.com/marketing/page-load-time-conversion-rates.[1] The end result is that a new system, if technologically feasible, would generate far fewer leads than the current framework, in turn significantly reducing Blue Ink Digital's revenues and increasing Blue Ink Digital's cost of doing business.

13. Additionally, even for the portion of consumers that do wait for the final screen and provide their consent, there will be additional challenges preventing that consent from generating a usable lead. After receiving consent, Blue Ink Digital would then still need to perform our validation process to confirm that the lead is usable before Blue Ink Digital shares the lead with the service provider, and the provider will need to conduct its own validation (such as checking if the lead will be a duplicate or if the consumer has already requested a quote in the past). If there is any problem with the lead that prevents its validation, Blue Ink Digital cannot

[1] "Conversion rate" means the percentage of visitors to a website that complete a desired goal, such as consenting to be contacted about a good or service.

later sell the lead to a different service provider because the consumer did not provide his consent for other service providers. This means in many cases the consumer may never receive a call from a service provider that could meet his needs, even though the consumer has affirmatively sought a quote and expressed that he wishes to hear from service providers. It also means that such leads will cease having any value to Blue Ink Digital. Currently [redacted] our leads, which are all exclusive leads, end up being sold to a service provider other than the one first matched with the consumer. The *Order* will prevent this practice and cause significant harm to Blue Ink Digital by eliminating that portion of our business, which amounts to [redacted] Blue Ink Digital's revenue.

14. Blue Ink Digital [redacted]. In other words, [redacted]

15. [redacted] Blue Ink Digital's annual sales are potentially regulated by the *Order*. Essentially all of Blue Ink Digital's clients (most of which use some form of automated technology to dial the consumer when the request comes in) would be subject to the *Order*. This includes our local insurance agent clients, solar installation operations and regional home service clients.

16. If the *Order* takes effect, Blue Ink Digital's business structure will be forced to change. Blue Ink Digital will no longer be permitted to use its software to run a search of the more eligible service providers after the consumer makes their request.

17. Blue Ink will still be able to display large nationwide businesses to the consumer because nationwide service providers have the financial and geographic flexibility to accept a wide range of potential leads. For example, a nationwide insurer could agree to pay a

fixed rate for leads without a sophisticated matching process that accounts for the consumer's location or the particular type of service sought. Websites that generate quotes from consumers will therefore be more likely to work with nationwide service providers, because the nationwide providers will be able to offer more revenue certainty.

18. While large service providers may be able to mitigate the *Order*'s damage, the *Order* poses a significant challenge in displaying the optimal local or regional service provider to the consumer prior to the consumer submitting a request as required by the *Order*. A large portion of our business goes to smaller service providers and hundreds of thousands of small and local businesses rely on lead generation services to connect to their customers. Specifically, small individual insurance agents, local home service providers, and regional organizations will be the most affected as they often have little to no online presence or technical capacity. Blue Ink Digital will have to work with these businesses to position them to generate leads that will satisfy the *Order*'s consent requirement, but that technology will be costly for us to develop and will be costly for small service providers to rely on—all to generate leads that will not be as effective as current leads. These increased costs with lead generation under the *Order* are likely to cause small service providers to leave the market altogether. Put differently, the *Order* will imminently result in a significant erosion of Blue Ink's customer base and sales.

19. If the *Order* takes effect, Blue Ink Digital will not be able to provide its clients, many of which are small businesses, with the types of marketing leads they have come to expect. Blue Ink Digital's clients rely on these leads to connect with customers who have a demonstrated need for particular types of insurance coverage or other services we offer. Losing these leads will harm our clients' ability to compete with larger companies. Losing our ability to provide these leads will damage the relationships that Blue Ink Digital has built with its clients

and threatens both Blue Ink Digital's business as well as the business model of our clients and the hundreds of thousands of other small businesses that also rely on these services.

20. Under the *Order*, instead of using its current, proven practices, Blue Ink Digital will be forced to make significant changes if it seeks to continue to operate. For example, Blue Ink Digital will need to limit business only to clients that are able to service consumer requests nationwide or must implement costly and unproven technology to attempt to determine which service provider (seller) the consumer should be matched with before consumers make and submit their requests. Because smaller service providers only seek to purchase leads that fit their business, Blue Ink Digital will have to build software that matches these service providers to consumers while the consumer waits on a loading screen so that the consumer can provide individual consent to receive calls from the service provider. As explained above, this technology will be incredibly expensive to develop, and it is unclear whether it will even be feasible.

21. These changes will surely reduce revenues, increase the cost of marketing to our clients, decrease the total number of consumer requests we can process, impose compliance costs, slow business operations, eliminate jobs, damage client relationships, and generally make things more difficult for the company and the industries that we serve. While it is difficult to precisely estimate the overall impact since the change is so large and creates so much uncertainty, it is likely the total cost of marketing for leads will [redacted] for clients. This will also accompany a decrease in how effective the leads are as Blue Ink Digital will be severely limited in placing leads with the optimal service provider. This dramatic change in the cost of marketing will put many smaller businesses out of business or they will no longer be able to afford to use Blue Ink Digital's services. Any loss of clients will require Blue Ink Digital to scale down operations and lay off employees.

22. Compliance with the *Order* will be a costly, time-consuming, and labor-intensive process that is both extremely large in scope, high in technical difficulty and unproven. It will require multiple industries to make significant changes and exposes hundreds of thousands of businesses to additional and significant costs. More specifically thousands of companies that currently buy leads will ultimately need to create, implement, or license technology that will allow them to comply with this *Order*. This process will likely impose yearly costs on those businesses in the range of $5,000.00 to $20,000.00 per business per year to license the required technology and substantially more to create their own. Additionally, tens of thousands of websites will need to be remade and integrate with new and untested systems. This will likely impose costs of several thousand dollars to tens of thousands of dollars per website to make these changes. Additionally Blue Ink Digital and similar companies will need to spend [redacted] creating and implementing just the first version of a new system and likely equal amounts in coordinating with other companies to agree on common standards, implementation and testing. This change is akin to requiring a hospital receptionist to tell a prospective patient walking in off the street which exact doctor they will speak with before the patient even specifies what they are looking for. To put it simply, complying with the *Order* is no small change, it requires a complete retooling of operations and ultimately of the systems that consumers have come to rely on in order to obtain free quotes for any given service they are looking for.

23. If the *Order* is not stayed during the pendency of the litigation, Blue Ink Digital will suffer irreparable harm, including: 1) the expenditure [redacted] to create and implement brand new technological systems to attempt to comply with the *Order*. These systems must have the ability to identify the optimal service provider (seller) and display that information to the consumer before the consumer makes his or

her service request, or it must factor in long delays for the consumer while the matching process is carried out and the resulting drop off in terms of the number of consumers who remain on the website while that process is completed; 2) continued loss of clients, including based on the legal uncertainty of being able to continue to legally buy leads and the increased costs of leads; and 3) significant costs [redacted] to train or onboard clients on a new system and to integrate client's existing platforms with the new systems that must be built to attempt to comply with this *Order*.

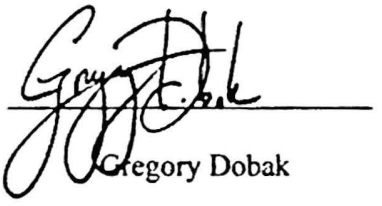
24. Indeed, Blue Ink Digital [redacted]. The *Order* also increases the risk that businesses will face allegations of TCPA non-compliance, even when businesses make best efforts to comply in good faith with the *Order* and the TCPA. [redacted].

25. The *Order* will also restrict Blue Ink Digital's speech. Blue Ink Digital currently communicates with consumers by noting the benefits associated with consenting to calls, and once the consumers provide their consent, Blue Ink Digital contacts them directly to provide service offerings and communicates with other service providers to determine which company is best positioned to serve the consumer. However, if the *Order* takes effect, Blue Ink Digital's ability to engage in this expression will be significantly limited, as it will no longer be able to rely on a consumer's single consent to communicate with multiple service providers and select the most appropriate service provider on the consumer's behalf. Blue Ink Digital's speech will be restricted in this manner, even though performance marketers in other industries will be able to continue

providing services the same way Blue Ink Digital does now. However, due to the content of Blue Ink Digital's speech, the *Order* imposes restrictions.

26. Even if IMC's petition for review is ultimately granted, Blue Ink Digital will never be able to recover the above stated costs because damages are not available in litigation against the Commission.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed at New York City, March 13, 2024.



Gregory Dobak