No. 11-56600

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSE MEYER, an individual, on his own behalf and on behalf of all others similarly situated, Plaintiff-Appellee.

vs.

PORTFOLIO RECOVERY ASSOCIATES, LLC, a Delaware limited liability company, Defendant-Appellant,

and

DOES 1-100, inclusive, Defendant

Appeal from the United States District Court
for the Southern District of California
No. 11-cv-01008-AJB-RBB
The Honorable Anthony J. Battaglia

APPELLANT'S BRIEF

Edward D. Lodgen (Bar No. 155168)
Julia V. Lee (Bar No. 252417)
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2049 Century Park East, Suite 3400
Los Angeles, CA 90067-3208
Telephone: 310-552-0130
Facsimile: 310-229-5800

Christopher W. Madel
Jennifer M. Robbins
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
800 LaSalle Avenue. Suite 2800
Minneapolis, MN 55402
Telephone: 612-349-8500
Facsimile: 612-339-4181

Attorneys for Appellant Portfolio Recovery Associates, LLC

Rule 26.1 Corporate Disclosure Statement

Pursuant to Rule 26.1 and to enable Judges of the Court to evaluate possible disqualification or recusal, the undersigned counsel for Portfolio Recovery Associates, LLC certifies that this party is a non-governmental corporate party and that it is a wholly owned subsidiary of Portfolio Recovery Associates, Inc. No publicly-held corporation owns 10% or more of Portfolio Recovery Associates, Inc. stock.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: s/*Jennifer M. Robbins*

Christopher W. Madel
Jennifer M. Robbins
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
800 LaSalle Avenue. Suite 2800
Minneapolis, MN 55402
Telephone: 612-349-8500
Facsimile: 612-339-4181

Edward D. Lodgen (Bar No. 155168)
Julia V. Lee (Bar No. 252417)
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2049 Century Park East, Suite 3400
Los Angeles, CA 90067-3208
Telephone: 310-552-0130
Facsimile: 310-229-5800

Table of Contents

Page

Table of Authorities

Page

Cases

Statutes

Other Authorities

Statement Regarding Oral Argument

Portfolio Recovery Associates, LLC ("PRA") respectfully requests oral argument because this appeal raises questions of: whether the district court had jurisdiction to issue its September 14, 2011 written order; whether class certification, even for a limited purpose, was an abuse of the district court's discretion; whether the district court's preliminary injunction, which enjoins PRA from actions not prohibited by the TCPA, was an abuse of discretion; whether plaintiff Meyer, a convicted felon with methamphetamine-possession and forgery convictions, is an adequate class representative; and whether the district court's order conflicts with this Court's interpretation of the Telephone Consumer Protection Act's ("TCPA") definition of an "automatic telephone dialing system" under *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009). PRA believes oral argument will help the Court determine the application of the legal standards to the factual circumstances raised in this appeal.

Jurisdictional Statement

The district court properly has jurisdiction over the underlying lawsuit under 28 U.S.C § 1332(d)(2), but because it previously transferred the case to another judge and because a notice of appeal was filed, it did not have jurisdiction to issue its September 14, 2011 preliminary-injunction and limited-class-certification order. PRA appeals from the district court's order entered September 14, 2011, enjoining

PRA from using its Avaya Proactive Contact Dialer to place calls to cellular telephone numbers with a California area code that PRA obtained through "skip-tracing,"[1] and the district court's provisional certification of a conditional class for the limited purpose of obtaining preliminary-injunctive relief. (Excerpts of Record ("ER") 6-23.) This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1). PRA timely filed its Notice of Appeal on September 16, 2011. Fed. R. App. 4(a)(1)(A). (ER 58-65.)

Statement of Issues Presented for Review

1. Whether the district court lacked jurisdiction to issue the September 14, 2011 written order because it previously transferred the case to another judge and because a notice of appeal had already been filed. Issue raised: *infra* at pages 9-10.

2. Whether the district court erred in reversing itself and certifying a provisional class for the purposes of preliminary-injunctive relief under Federal Rules of Civil Procedure 23(a) and 23(b)(2). Issue ruled upon: ER 7-14. Issue raised: ER 240-246; ER 129-137; ER 91-96.

---

[1] "Skip-tracing" is a colloquial term used to describe the process of locating a person's whereabouts for any number of purposes. (ER 48 at 24:8-10.) The sources of skip-traced information are wide-ranging and include Google, phone books, public filings with local government, inquiries to individuals answering the phone at numbers provided to PRA from the original creditor, and third-party vendors such as LexisNexis, TransUnion, and Experian. (*See id.* at 24:11-18.)

3. Whether the district court erred in reversing itself and thereby applying the wrong legal standard in analyzing whether Meyer is likely to demonstrate that PRA uses an "automatic telephone dialing system" as defined by the Telephone Consumer Protection Act. Issue ruled upon: ER 15. Issue raised: ER 231-233; ER 137-140; ER 86-89.

4. Whether the district court erred in reversing itself and granting Meyer's Motion for a Preliminary Injunction in favor of a convicted felon. Issue ruled upon: ER 14-19. Issue raised: ER 226-240; ER 122-144; ER 84-91.

Statement of the Case

Meyer filed his putative class action alleging that PRA violated the Telephone Consumer Protection Act ("TCPA") by contacting California residents on their cellular telephones through the use of an automatic telephone dialing system as defined by the TCPA at 47 U.S.C. § 227(a)(1).

On May 16, 2011, Meyer filed his motion for preliminary injunction and limited class certification. (ER 215-217.) Portfolio Recovery Associates, LLC ("PRA") filed its opposition brief on May 31 (ER 113-146), and Meyer filed his reply brief on June 7. (ER 77-99.) Oral argument was heard on June 23, 2011, at the conclusion of which the district court ruled from the bench and denied Meyer's motion for preliminary injunction and limited class certification, finding:

> . . . the plaintiffs failed to make their burden of irreparable injury by clear and convincing evidence, finding that the balance of the equities do not tip in favor of the plaintiff. If I were to use the sliding scale of the Ninth Circuit, and there being no basis for the injunction, the limit imposing a class certification for the limited purposes of the injunction renders the issue moot. But were it not, I would find the plaintiffs failed to make the required Rule 23 burden to establish all of the elements for class certification, even on the limited basis.

(ER 56 at 32:10-19.) The district court then promised to "issue a further order to commemorate the ruling." (ER 57 at 33:3-4.) That same day, the following Order was entered on the docket:

> Minute Order. for proceedings held before Judge Anthony J. Battaglia: Motion Hearing held on 6/23/2011. Court rules as follows: 11 MOTION for Preliminary Injunction filed by Jesse Meyer - Denied, 14 MOTION to Stay *Action on Primary Jurisdiction Grounds* filed by Portfolio Recovery Associates, LLC - Denied. Court to prepare order. (Court Reporter Jeanette Hill).(Plaintiff Attorney Ethan Mark Preston, David C. Parisi).(Defendant Attorney Jennifer M. Robbins, Christopher Madel). (ymm) (Entered: 06/23/2011)

(ER 24.) Meyer noticed his appeal of this Order on July 22, 2011. (ER 70-76.)

On September 13, 2011, Judge Battaglia signed an order transferring Meyer's case to the Honorable Judge Houston "for all further proceedings." (ER 3-5.) After transferring the case to Judge Houston, Judge Battaglia then signed a September 14, 2011 written order that reversed his previous June 23 Order and granted Meyer's motion for preliminary injunction and limited class certification. (ER 6-23.)

On September 16, 2011, Meyer requested dismissal of his appeal. (ER 66-69). PRA noticed its appeal on September 16, 2011. (ER 58-65.) This Court then granted Meyer's motion to dismiss his appeal on September 23. (ER 1-2.)

Statement of Facts

I. PRA has ceased all calls to Meyer's cellular telephone.

On January 4, 2011, PRA ceased all calls to Meyer's cellular telephone, rendering an order for injunctive relief without practical effect. (ER 121 at 1:11-16; ER 207 at ¶ 12.) Indeed, PRA has not placed any calls to Meyer's cellular telephone number since January 4, 2011, and has indicated that it will not do so in the future. (*Id.*)

II. PRA's dialers are not "automatic telephone dialing systems" under the TCPA.

As thoroughly described in the Declaration of Joshua S. Cherkasly, PRA does not have an automatic telephone dialing system ("ATDS") that has the capacity to store or produce telephone numbers using a random or sequential number generator. (ER 201-203 at ¶¶ 8-16.) In the district court, Meyer presented no evidence that PRA has ever possessed an ATDS. (*Cf.* ER 218-247; ER 77-99.)

III. Meyer is not an adequate class representative.

Meyer is a convicted felon. He has a criminal record dating back to 1998 when he was convicted of possession of methamphetamine. (ER 156 at Form Interrog. 2.8.) In 2001, he received multiple felony convictions including

possession of methamphetamine and cocaine for sale, receiving stolen property (*e.g.*, ATM and credit cards), and falsifying a driver's license for the purpose of committing a forgery. (*Id.*) Meyer has also used a host of aliases including "Jesse Helm Sherlock, Jay Helm, and an assortment of other names which he does not recall." (ER 153 at Form Interrog. 2.1.) Additionally, Meyer has had six addresses in the past two years, typically moving every three to four months. (ER 154 at Form Interrog. 2.5.)

Standards of Review

A district court's class-certification and preliminary-injunction orders are reviewed for abuse of discretion. *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010) (class certification); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) (preliminary injunction).

With regard to class certification, a district court abuses its discretion where its decision is premised on legal error (*Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001)) or where it "relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them." *Parra v. Bashas', Inc.*, 536 F.3d 975, 977-78 (9th Cir. 2008) (internal citations omitted). Likewise, "[a]n order is reversible for legal error if the court did not apply the correct preliminary injunction standard, or if the court misapprehended the law with

respect to the underlying issues in litigation." *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994) (citation and internal quotation marks omitted).

Summary of the Argument

The district court lacked jurisdiction to enter the September 14, 2011, preliminary-injunction and limited-class-certification order for two reasons: (1) it was divested of jurisdiction upon Meyer's July 22, 2011 Notice of Appeal of the district court's denial of Meyer's same motion for preliminary injunction and limited class certification; and (2) Judge Battaglia transferred the action to another district-court judge before he signed the September 14 Order. On either, or both, of these jurisdictional bases, this Court should vacate the district court's September 14, 2011 Order.

Other independent reasons require this Court to vacate the district court's September 14, 2011 Order. *First*, the district court abused its discretion in granting Meyer's request for provisional class certification pursuant to Rule 23(b)(2), which allows for certification of an injunctive class only for the purposes of final injunctive relief—not preliminary injunctive relief. *Second*, the individualized questions on the issue of consent preclude certification of a class, and the district court's attempt to avoid the consent issue by equating consent with skip-tracing, is contrary to the factual circumstances and results in an overbroad injunction that prevents PRA from actions that are not alleged to be violations of the TCPA.

Third, the district court did not sufficiently address the question of whether Meyer can adequately represent the proposed class given his criminal background. *And* finally, the district court abused its discretion in granting Meyer's proposed preliminary injunction. The district court did not discuss whether Meyer was likely to demonstrate that PRA uses an ATDS as required to establish a violation of the TCPA. Nor did the district court consider the only evidence in the record on the question of whether PRA's dialers qualify as ATDS. Indeed, the district court did not distinguish—or even cite—the only precedential authority on the issue of an ATDS: this Court's decision in *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009). Given the district court's failure to answer the question of whether Meyer demonstrated that PRA's dialers will likely be held to constitute ATDS, the district court abused its discretion in concluding that Meyer successfully showed irreparable harm, or even (under the lesser standard improperly used by the district court) that PRA violated the TCPA and that future violations were likely to occur. For these reasons, the district court's order must be reversed.

Argument

I. The September 14, 2011 written order entering a preliminary injunction and provisional class certification is void on jurisdictional grounds for two independent reasons.

A. Meyer's July 22, 2011 Notice of Appeal divested the district court of jurisdiction over the motion for preliminary injunction and limited class certification.

For the purposes of judicial economy and to "avoid the confusion that would ensue from having the same issues before two courts simultaneously," "[o]nce a notice of appeal is filed, the district court is divested of jurisdiction over the matters being appealed." *Natural Res. Def. Council, Inc. v. Sw. Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). The district court's jurisdiction while an appeal is pending is limited to actions "to preserve the status quo." *Id.* (citing *Newton v. Consol. Gas Co.*, 258 U.S. 165, 177 (1922); *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976)).

Because Meyer filed a Notice of Appeal on July 22, the district court had no jurisdiction to reverse itself and order the opposite of the status quo on September 14. This Court should therefore vacate the district court's September 14 Order.

B. Judge Battaglia did not have the authority or jurisdiction to issue the September 14, 2011 written order because he previously transferred this action to another judge.

On September 13, 2011, Judge Battaglia "ORDERED that [Meyer's] case is transferred to the calendar of Judge John A. Houston and Magistrate Judge Skomal for all further proceedings." (ER 3.) Having ordered the transfer on September 13,

Judge Battaglia was without jurisdiction to enter a new ruling on Meyer's motion for preliminary injunction and limited class certification at any later time. Accordingly, the September 14 written order is void and must be vacated. *See, e.g.*, *Truett v. Johns-Manville Sales Corp.*, 725 F.2d 1301, 1302 (11th Cir. 1984) (concluding that order granting motion where court lacked jurisdiction "was void *ab initio*"); *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1145 n.1 (9th Cir. 1983) (district court order rendered after notice of appeal void for lack of jurisdiction). This Court should accordingly vacate the September 14 order and need go no further in its consideration of the instant appeal.

II. The district court's application of Rule 23(b)(2) to Meyer's motion for a preliminary injunction is erroneous under any standard of review.

Rule 23(b)(2) only applies to "final," and not "preliminary," injunctive relief. *See Broadnax v. U.S. Parole Comm'n,* No. 96-6161, 1997 U.S. App. LEXIS 15192, at *6-7 (10th Cir. June 24, 1997) (denying use of Rule 23(b)(2) because the case was about "*preliminary* injunctive relief only, not *final* injunctive relief") (emphasis in original). Indeed, Rule 23(b)(2), on its face, applies only to final injunctive relief: "A class action may be maintained if Rule 23(a) is satisfied and if: . . . (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that *final injunctive relief* or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2) (emphasis added).

In its Order, the district court improperly certified the proposed class for preliminary-injunctive relief under Rule 23(b)(2). This simple misapplication of the law is subject to *de novo* review by this Court. *See Yokoyama*, 594 F.3d at 1091 ("If the district court's determination was premised on a legal error, we will find a per se abuse of discretion."). The district court's use of Rule 23(b)(2) to certify a class for preliminary-injunctive relief constitutes a per se abuse of discretion.

III. The district court abused its discretion in granting Meyer's request for provisional class certification.

Class litigation is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (U.S. 2011). In determining if a case is ripe for adjudication by a class, the court conducts the "rigorous analysis" under Rule 23. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982). To obtain class certification Meyer was required to demonstrate that his proposed class satisfied the requirements of Rule 23(a), including demonstration that there are questions of law and fact common to the class; that Meyer's claims or defenses are typical of the claims or defenses of absent class members; and that Meyer can fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). And, for the purposes of Meyer's proposed injunctive class, Meyer was required to meet the standards set out in Rule 23(b)(2). *See Zinser v. Accufix Research Inst.,*

Inc., 253 F.3d 1180, 1186 (9th Cir. 2001), *amended by* 273 F.3d 1266 (9th Cir. 2001).

Meyer's proposed injunctive class definition included "all persons using a cellular telephone number which (1) PRA did not obtain either from a creditor or from the Injunctive Class member; and (2) has a California area-code; or (3) where PRA's records identify the Injunctive Class member as residing in California." (ER 226.) Meyer failed to satisfy the requirements under Rules 23(a) and 23(b)(2), and the district court's certification of the provisional class was an abuse of discretion.

A. In its second Order, the district court erroneously concluded that Meyer met the commonality and typicality requirements of Rule 23(a) despite the individualized questions on the issue of consent.

The district court correctly found that consent was fatal to Meyer's proposed class on June 23, but abused its discretion when it reversed itself and found that "[b]ecause the Defendant obtained these cell phone number [sic] via skip-tracing and did not obtain them from either the cell phone owner or third party debt owner or assignee, there is no question of consent and no need for individualized inquiry." (ER 11 at 6:5-7.) The district court addressed Meyer's burden of demonstrating typicality in similarly conclusory fashion, stating that, "[b]ecause the Plaintiff has demonstrated that the Defendant engaged in a standardized course of conduct vis-a-vis the class members, and the Plaintiff's alleged injury arises out

of that conduct, the Court finds that the typicality requirement has been met." (*Id.* at 6:18-21.) Nowhere does the district court cite to evidence of PRA's purported "standardized course of conduct" and nowhere is there analysis of how the individualized inquiry into PRA's different defenses—specific to each consumer's underlying agreement and subsequent communications—is to be avoided. (*Cf.* ER 9-11.) For these reasons, and as detailed below, the district court abused its discretion. *See Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1161 (9th Cir. 2001) (stating that class-certification decision must be supported by sufficient findings to be "afforded the traditional deference given to such a determination").

To prove commonality, Meyer must identify questions of fact or law common to the class such that the issues are susceptible to classwide proof. *See Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 914 (9th Cir. 1964). "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 131 S. Ct. at 2551 (omission and emphasis in original). The Ninth Circuit has held that the existence of a unique defense may be fatal to class certification. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Rule 23(a)'s typicality and commonality requirements "tend to merge," *Dukes*, 131 S. Ct. 2541, 2551 n.5, but

named plaintiffs must demonstrate that their "claims or defenses . . . are typical of claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The purpose of Rule 23(a)'s typicality requirement is "to assure that the interest of the named representative aligns with the interests of the class." *Hanon*, 976 F.2d at 508.

Here, unique questions of consent preclude class certification. Meyer's attempt to equate skip-tracing with a lack of consent is a red herring. Numerous debtors provided their consent to be contacted on their cell phones regardless of where or how those cell-phone numbers were obtained. (ER 206 at ¶ 5.) Because such contracts and consent inquiries lead to myriad individualized issues, Meyer's (and thus the District Court's preliminarily-certified class) results in an overbroad class that includes individuals who *did* provide their consent to be contacted at numbers later obtained from other sources and for whom no violation of the TCPA has been alleged. Indeed, as the district court held on June 23, there is a "problem with the typicality arm [of Rule 23(a)] in terms of the fact that we have got these issues out there of consent or not through some contractual means when people signed up in the process. I don't think there has been an adequate showing of evidence that warrants class treatment even on a limited basis." (ER 54 at 30:14-19.) This is why the district court correctly analyzed the issue in its June 23 Order but misapplied the same in its September 14 Order.

1. Legislative history and case law demonstrate that consent is an individualized question and the central issue of liability under the TCPA.

The TCPA prohibits the use of an ATDS to call a cellular telephone *only if* such calls are made without the party's express consent. 47 U.S.C. § 227(b)(1)(A). The term "prior express consent" is undefined in the TCPA's text, *cf.* 47 U.S.C. § 227, *et seq.*, but the TCPA's legislative history provides that consent may be "given orally, in writing, electronically, or by any other means." 137 Cong. Rec. S16204 (daily ed. Nov. 7, 1991). For instance, consent may be obtained "by including a clause in a contract or purchase agreement indicating that signing the agreement constitutes the purchaser's express consent to receive a computerized call concerning that service or product." *Id.*

Whether each putative class member consented to being called on his cellular telephone is a "central issue of liability" that requires the court to undertake a detailed analysis of each class member's individual circumstances—a fact intensive inquiry that does not lend itself to resolution on a classwide basis. *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1169 (S.D. Ind. 1997); *see also Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 327 (5th Cir. 2008) ("[T]he predominant issue [in a TCPA claim] is undoubtedly one of individual consent."). Because "consent" can take many forms, courts have held that proof of consent is "an essential individual issue," making class certification inappropriate. *Hicks v.*

Client Services, Inc., No. 07-61822-CIV, 2008 U.S. Dist. LEXIS 101129, at *19-21 (S.D. Fla. Dec. 11, 2008); *see also, e.g., Gene & Gene LLC*, 541 F.3d at 327; *Levitt v. Fax.com*, No. WMN-05-949, 2007 U.S. Dist. LEXIS 83143, at *11-13 (D. Md. May 25, 2007); *Kenro*, 962 F. Supp. at 1169-70.

In *Hicks*, the plaintiff sought to certify a class of citizens who received telephone calls on their cellular telephones from a debt collector. 2008 U.S. Dist. LEXIS 101129, at *3. Hicks urged certification, arguing that "[t]he common issue of receiving the call at a wireless number predominates other individual issues," and to the extent consent is an issue, "Defendant has the burden of producing evidence that there had been consent." *Id.* at *18-19. The court rejected this argument, stating:

> Plaintiff claims that she will be able to show at trial the lack of express consent by herself and the class members. *She does not, however, describe how she intends to do so without the trial degenerating into mini-trials on consent of every class member.*

Id. at *20 (emphasis added). The court determined that "*consent is an issue that would have to be determined on an individual basis* at trial," *id.* (emphasis added), and refused to certify the class because of lack of commonality between members.[2]

---

[2] Other courts have held that individual issues on "affirmative defenses" may preclude class certification. *See, e.g., Gene & Gene LLC*, 541 F.3d at 327 ("Whether established . . . as an affirmative defense or . . . as an element of the cause of action, the issue of consent will entirely determine how the proposed class-action trial will be conducted on the merits.") Thus, it is no defense that because PRA bears the burden to prove consent, a class should be certified.

Moreover, cases applying "consent" to waivers of *constitutional* rights (which should be a higher standard than the TCPA) find consent in far less compelling circumstances. *See, e.g., United States v. Walls*, 225 F.3d 858, 862-63 (7th Cir. 2000) (opening door and stepping back to allow the entry sufficient to convey consent); *United States v. Carter*, 378 F.3d 584, 593-94 (6th Cir. 2004) (Moore, J., dissenting) ("A nod, a terse 'okay' in response to a request to enter, or a hand gesture, may constitute unequivocal consent depending on the particular circumstances."); *United States v. Patten*, 183 F.3d 1190, 1194 (10th Cir. 1999) ("[S]ilence and acquiescence may support a finding of voluntary consent."); *United States v. Gordon*, 173 F.3d 761, 766 (10th Cir. 1999) (removing key from pocket and handing it to officer held to be consent).

Here, just as in *Hicks*, individual questions of consent preclude a finding of commonality because of the necessary determination of whether an individual provided "prior express consent" to call her cellular telephone by scouring each potential class member's credit application and all other written and oral communication between her and the original creditor, or PRA, to ascertain whether she provided her cellular telephone number to the original creditor through a "voluntary transaction." Accordingly, a determination of consent will require "mini-trials" as to each class member. Not only will the court be required to review each credit agreement and its amendments (evidence for which availability varies

from account to account and from consumer to consumer), but it will also be required to ascertain if consumers consented on an individual basis (*e.g.*, by returning PRA's communications using their cell phone)—to determine if that putative class member authorized contact at *any* phone number. *See Gene & Gene LLC*, 541 F.3d at 328-29 (where consent was gleaned from a variety of sources, no classwide proof was available). Thus, determination of this "essential individual issue" on liability defeats commonality.[3]

2. The injunctive class definition requires individualized questions *and* results in an overbroad class that restrains PRA from actions not prohibited by the TCPA.

In its September 14 Order, the district court attempted to avoid the individual questions required in a consent analysis by equating skip-tracing to a lack of consent: "Because the Defendant obtained these cell phone number[s] via skip-tracing and did not obtain them from either the cell phone owner or third party debt owner or assignee, there is no question of consent and no need for an individualized inquiry." (ER 11 at 6:5-7.) The district court's conclusion, and its

[3] Although not addressed by the district court, the same individualized questions on the issue of consent will defeat Meyer's proposed Rule 23(b)(3) class, for which Meyer would be required to demonstrate that the questions of law or fact common to class members *predominate* over any questions affecting only individual members. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 615 (1997). As demonstrated by the TCPA's legislative history, Meyer will likewise be unable to demonstrate that a class action is superior to other methods of adjudication as required by Rule 23(b)(3).

reliance on *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 645 (W.D. Wash. 2007) in reaching its conclusion, is flawed.

The TCPA does not prohibit investigation of debtors' phone numbers. This is particularly true where the underlying contract permits contacting a debtor using a cell phone whether or not a particular cell-phone number is designated. Yet, the provisional class certified by the district court includes individuals for whom (1) PRA discovered a cell-phone number through skip-tracing; but who (2) provided their express consent to be contacted on their cell phone. The district court's September 14 Order prevents PRA from calling those consumers.

PRA's skip-tracing process, and the individual questions resulting from it, are unworthy of any class certification. The situation here is distinguishable from *Kavu* where a single source of information was used to acquire fax information; PRA uses dozens of sources of information. Indeed, PRA's investigative process is more analogous to *Hicks* where the court determined that the issue of whether plaintiffs consented to be called on their cellular telephones would be a factual determination that must "be determined on an individual basis at trial." 2008 U.S. Dist. LEXIS 101129, at *19-21; *see also Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404 (E.D. Pa. 1995) ("Plaintiff's proposed 'common' questions are inherently individualized, requiring inquiry into the particular circumstances of each transmission."); *Kenro*, 962 F. Supp. at 1169-70 (holding that plaintiff's

"class definition would require the court to conduct individual inquiries with regard to each potential class member in order to determine whether each potential class member had invited or given permission for transmission of the challenged fax advertisements").

B. The district court abused its discretion in determining that Meyer is an adequate class representative under Rule 23(a)(4).

The district court abused its discretion in finding Meyer to be an adequate representative because its holding is based only on whether Meyer's criminal record conflicts with the class' interests. (ER 11-13 at 6:22-8:8.) But this is not the only question that the district court must answer. The district court left Meyer's personal credibility and integrity—factors relevant to his ability to act as class representative—unanalyzed.

Although a prior felony conviction does not necessarily preclude serving as a class representative, a class representative is inadequate when his lack of personal integrity is "confirmed [through] examples of dishonesty, such as a criminal conviction for fraud." *Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1015 (N.D. Cal. 2010) ; *see also Ash v. Brunswick Corp.*, 405 F. Supp. 234, 248 (D. Del. 1975); *Hall v. Nat'l Recovery Sys. Inc.*, No. 96-132-CIV-T-17(c), 1996 U.S. Dist. LEXIS 11992, at *12-14 (M.D. Fla. Aug. 9, 1996). Courts have found that where the proposed class representative "lacks the honesty, conscientiousness, and other affirmative personal qualities required of a class representative," the

proposed class representative is inadequate. *Hall*, 1996 U.S. Dist. LEXIS 11992, at *14 (quoting *Weisman v. Darneille*, 78 F.R.D. 669, 671 (S.D.N.Y. 1978)) (internal quotations omitted); *see also In re Cooper Cos. Inc. Secs. Litig.*, 254 F.R.D. 628, 637 (C.D. Cal. 2009); *In re Proxima Corp. Sec. Litig.*, No. 93-1139, 1994 U.S. Dist. LEXIS 21443, at *49 (S.D. Cal. May 3, 1994) ("It is proper for this Court to consider [the proposed class representative's] integrity in assessing his adequacy as a class representative in this action."); *CE Design Ltd. v. King Arch. Metals, Inc.*, 637 F.3d 721, 728 (7th Cir. 2011). Moreover, the "history of financial responsibility of the proposed class representative" is relevant to the adequacy determination. *Del Campo v. Am. Corrective Counseling Servs., Inc.*, No. 01-21151, 2008 U.S. Dist. LEXIS 106837, at *15 (N.D. Cal. May 12, 2008).

Meyer's criminal record includes multiple convictions for deceptive conduct and includes convictions for possession of methamphetamine and cocaine with intent to sell, stealing drivers licenses and credit cards, and driving under the influence as recently as 2009. (ER 121-122 at 1:22-2:8; ER 156 at Form Interrog. 2.8.) Each of these crimes bears on his credibility and character. Also, Meyer's history of misrepresenting his identity so many times that he cannot remember all of his aliases (ER 153 at Form Interrog. 2.1) demonstrates that he lacks the high standard of integrity, forthrightness, and sincerity to serve as a class representative and illustrates the district court's abuse of discretion. The district court's omission

of "consideration of a factor entitled to substantial weight"—Meyer's personal integrity, credibility, and character—constitutes an abuse of discretion.

IV. Meyer did not meet his burden of proving that he is entitled to the extraordinary remedy of a preliminary injunction.

The district court erred in granting Meyer's motion for preliminary injunction because Meyer did not meet the "heavy burden" of proving that he is entitled to such "extraordinary remedy." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (noting that injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief"). Under *Winter*, Meyer is entitled to a preliminary injunction only if he has proven: (1) the likelihood of success on the merits; (2) the likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20. A plaintiff may satisfy this test by demonstrating that "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, *so long as* the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (internal quotations omitted) (emphasis added).

A. The district court erred in finding that Meyer demonstrated a likelihood of success on the merits.

In order to demonstrate PRA's liability under the TCPA, Meyer is required to prove that PRA used, and is using, an ATDS. *See* 47 U.S.C. § 227. Meyer never did this. Instead, Meyer simply alleged—on "information and belief"—that PRA's "autodialer"—its Avaya Proactive Contact Dialer—qualified as an ATDS. (ER 259-260 at ¶ 19.) Meyer produced *no evidence* to support this allegation—nothing. (*Cf.* ER 218-247.)

In its September 14 Order, the district court quoted Meyer's "information and belief" allegation and made no factual finding that PRA used an ATDS. (ER 15 at 10:7-14.) Moreover, the district court did not consider, or even cite to, the only circuit-court decision defining an ATDS in the United States—the Ninth Circuit's decision in *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009).

1. Meyer cannot demonstrate that PRA's dialers qualify as "automatic telephone dialing systems" under the TCPA.

The Supreme Court has held that courts need only look to an agency's interpretation of a statute (*i.e.*, provide "*Chevron* deference") when "Congress has [not] directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Here, such deference is not applicable because Meyer admits that the TCPA "*expressly defines*" the phrase

"automatic telephone dialing system'" (ER 231 at 6:13-14 (emphasis added)). This is true. 47 U.S.C. § 227(a)(1). Because the parties agree that the TCPA defines "automatic telephone dialing system," there is no need to look to the Federal Communication Commission's ("FCC") interpretation of the term.

This Court has already held that *Chevron* deference is not necessary with respect to the definition of an ATDS. In *Satterfield*, this Court stated that "[w]hen evaluating the issue of whether equipment is an ATDS, the statute's clear language mandates that the focus must be on whether the equipment has the *capacity* 'to store or produce telephone numbers to be called, using a random or sequential number generator.'" *Satterfield*, 569 F.3d at 951 (emphasis in original). The Court began, and ended, its inquiry of the meaning of "ATDS" with the statutory text. *Id.* at 950-51. At no time did this Court analyze, let alone defer to, the FCC's interpretation of ATDS as set out in the FCC's 2003 Order which Meyer cited. *See id.* Notably, in the *Satterfield* decision, this Court did defer to the FCC's 2003 Order on the separate question of the interpretation of the word "call;" a word that, in contrast to "ATDS," was left undefined in the TCPA. *Id.* at 951-54.

Here, the district court not only erred by looking to the FCC's interpretation of the definition of "ATDS," but it also erred by citing the FCC's "TCPA rulemaking authority." (ER 15 at 10:16-21.) Congress granted the FCC authority to interpret the TCPA not for 47 U.S.C. § 227(a)(1) (as miscited by the district court

(*see id.*)), but instead for § 227(b)(2) which explicitly provides authority "to implement the requirements *of this subsection*," referring to subsection (b). 47 U.S.C. § 227(b)(2) (emphasis added). Because the statute defines ATDS in subsection (a), and Congress's delegation of interpretative authority is limited to subsection (b), the FCC has no authority to interpret the definitions within subsection (a), including "ATDS." Accordingly, the FCC's interpretation of ATDS is unauthorized and without effect.

Unlike Meyer, PRA presented the district court with evidence that it did not possess an ATDS. (ER 121 at 1:17-21, ER 137-140 at 17:4-20:24; ER 199, 201-204 at ¶¶ 1, 8-18.) PRA's dialers simply do not have the capacity to store or produce telephone numbers to be called using a random or sequential number generator. (*Id.*) Indeed, PRA's dialers have never had this capacity. (ER 201 at ¶ 8.) PRA would be required to invest significant resources to change its dialers to achieve that capacity, and it would make no sense for PRA's business to do so. (ER 201-202 at ¶¶ 8-11.)

The question at issue is the *present* capacity of PRA's dialers to store and produce numbers using a random and sequential number generator, not what theoretical, future capacity could be possible if significant time and resources were spent by PRA to modify its dialers. (ER 41-43 at 17:21-19:15.) For example, under Meyer's theory, a restaurant with the present seating "capacity" of 150 people

would have the theoretical capacity to seat thousands (or even millions) if the restaurant were modified by knocking down and expanding its existing walls. (*Id.*) Such a contention is obviously nonsensical, just as Meyer's argument that PRA's dialers have the requisite "capacity" under the TCPA is. *See* 47 U.S.C. § 227(a)(1).

Moreover, unlike telemarketers, it does not make business sense for PRA to use dialers with the capacity to store or produce numbers using a random or sequential number generator because the vast majority of people who would be contacted randomly or sequentially would not be debtors on any of the accounts held by PRA. Thus, using random or sequential dialing would result in higher costs to PRA with no benefit. Indeed, PRA intentionally avoids calling debtors sequentially or randomly to ensure compliance with restrictions on the times of day that PRA may contact debtors, as well as to increase the chances that PRA will be able to reach the correct debtors and to collect the debt. (ER 206 at ¶¶ 7, 9-10; ER 202-203 at ¶¶ 12-16.)

2. Meyer cannot demonstrate a TCPA injury.

Under principles agreed to by the U.S. Supreme Court and numerous circuit courts of appeal, claimants alleging a violation of a federal statute must prove an injury causally related to the respective statute. For example, in *Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977), the Supreme Court held that antitrust plaintiffs must show not only injury in fact, but also that their injury was

caused by something the antitrust laws prohibited, i.e., an "antitrust injury." This same concept has been applied to the RICO statute where plaintiffs must not only show that they were injured, but also that their injury was caused by something that the RICO Act prohibits. *See, e.g.*, *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265 (1992) (plaintiff's injury must be "by reason of" RICO violation); *Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 447 (8th Cir. 2000) (applying proximate cause for RICO standing); *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991) (causation). The TCPA prohibits calls from an ATDS—a dialing system that makes calls using a random or sequential number generator. TCPA plaintiffs, therefore, must tie their injury to a dialing system that uses this specific functionality; in other words, they must show that their injury was caused by something the TCPA was designed to protect. *See Brunswick*, 429 U.S. at 489; *see also Atl. Richfield Co. v. USA Petroleum, Co.*, 495 U.S. 328 (1990). If the plaintiff cannot show this, he has no cognizable TCPA claim and is not likely to succeed on the merits. Meyer cannot show *any* injury, or any charges he incurred, resulting from calls he received from PRA. (ER 128-129 at 8:23-9:1; ER 167-198.)

Moreover, because PRA never used an ATDS to store or dial random or sequential telephone numbers (let alone cell-phone telephone numbers), Meyer cannot establish a TCPA injury.

3. Application of the TCPA to PRA in the manner suggested by Meyer violates the Constitution of the United States.

The district court did not address PRA's argument that the TCPA, if applied in the manner suggested by Meyer, constitutes a violation of PRA's Due Process rights under the Fifth Amendment of the Constitution. U.S. Const. amend. V. Therefore, this Court's review of the unconstitutionality of the TCPA under the circumstances of this case is *de novo*. In examining whether a violation of PRA's Due Process rights has occurred, the Court must consider: private interests that will be affected by this action; the risk of an erroneous deprivation of that interest, and the value of additional or alternative safeguards; and, the government's interest, including additional costs and administrative burdens that additional procedures would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The TCPA was designed to restrict "commercial telemarketing solicitations." 137 Cong. Rec. H11307 (daily ed. Nov. 26, 1991) (finding, *inter alia*, an "increased use of cost-effective telemarketing techniques" and consumer outrage over "calls to their homes from telemarketers"). For industries outside of telemarketing, the TCPA focuses on preventing seizure of "emergency or medical assistance telephone line[s]" or preventing "an inordinate burden on the consumer." *Id.* PRA does not engage in telemarketing or seizure of emergency lines. (ER 206 at ¶¶ 7-8.) And the rationale of protecting the consumer from burdensome calls is no longer viable because individuals use cellular telephones

instead of landlines more often, increasingly have no other phone number at which to be contacted,[4] and the costs of calls to cellular telephones have dramatically decreased since 1991.[5]

B. The district court applied the wrong legal standard in determining whether irreparable harm will result without a preliminary injunction.

The district court held that Meyer was not required to show irreparable harm because "[t]his is a case in which an injunction is expressly authorized by statute." (ER 16 at 11:15.) Instead, the district court applied the lesser standard that a movant "must demonstrate that the statutory conditions have been met and must demonstrate a likelihood of future violations." (ER 17 at 12:1-2.) The district court's error of law in refusing to require Meyer to demonstrate irreparable harm is reviewed by this Court *de novo*. *See Yokoyama*, 594 F.3d at 1091; *A&M Records*, 239 F.3d at 1013. Still, under any standard of review, Meyer cannot demonstrate irreparable harm, or even the lesser standard that statutory conditions have been met and there is a likelihood of future violations.

---

[4] *See, e.g.*, Justin Hall, *More landlines getting heave-ho, Survey shows more people relying on cellphones*, THE DAILY IBERIAN, Jan. 10, 2011, *available at* http://www.iberianet.com/news/article_4dc354c5-bcef-5f59-9bc5-28cca7210a9c.html

[5] *See, e.g.*, CTIA-The Wireless Association, *Background on CTIA's Semi-Annual Wireless Industry Survey Results-December 1985 to December 2010*, at 3-4 (2011) (indicating that over the last twenty years, the average monthly local bill for cellular phone service has declined from $72.74 in December 1991 to $47.21 in December 2010—a nearly 35% drop *before* adjusting for inflation), *available at* http://files.ctia.org/pdf/CTIA_Survey_Year_End_2010_Graphics.pdf.

1. The district court erred by not requiring Meyer to show irreparable harm.

The United States Supreme Court reaffirmed that preliminary injunctive relief generally requires a showing that the plaintiff "is likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. Yet, the district court relied on a line of tax-related cases (*see* ER 16 at 11:15-18 n.13) without explanation of its departure from the usual irreparable-harm requirement. The district court's decision conflicts not just with the recent *Winter* decision, but also with other cases from this Court. For example, in *American Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470 (9th Cir. 1985), this Court required a showing of irreparable harm with regard to a claim under the Clayton Act which, like the TCPA, expressly authorizes injunctive relief. *Id.* at 1473 ("Regardless of how the test for a preliminary injunction is phrased, the moving party must demonstrate irreparable harm."). Even more recently, this Court applied the traditional factors for determining the appropriateness of preliminary-injunctive relief to a case arising under ERISA, which, again, provides explicitly for injunctive relief. *Johnson v. Couturier*, 572 F.3d 1067, 1078 (9th Cir. 2009) (determining relief under 29 U.S.C. § 1132). The district court should have kept to its June 23 finding that Meyer did not suffer any irreparable harm.

2. Meyer can show neither irreparable harm nor a likelihood that violations of the TCPA will occur in the future.

Even if Meyer is required only to demonstrate "a likelihood of future violations" and that "the statutory requirements have been met" (*see* ER 17 at 12:2-4), the district court abused its discretion in holding that Meyer successfully met that standard.

a. Meyer's claims of speculative future violations of the TCPA are not sufficient to meet the burden for a preliminary injunction.

PRA ceased calling Meyer's cellular phone months before he moved for an injunction. (ER 207 at ¶ 12.) Thus, any prospective calls to Meyer are unauthorized, will not occur, and are highly speculative. Such speculative future violations fail to constitute irreparable injury sufficient to merit preliminary-injunctive relief. *See Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674-75 (9th Cir. 1988) ("Because the threat of civil liability is too attenuated and conjectural . . . , it follows that this injury is too speculative to constitute an irreparable harm justifying injunctive relief.") (internal citation omitted).

b. Meyer cannot demonstrate any injury for which damages would not be more than adequate.

Under the irreparable-harm standard, Meyer failed to show an injury for which damages would not be more than adequate. "[E]conomic injury alone does not support a finding of irreparable harm, because such injury can be remedied by a damage award." *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental,*

Inc., 944 F.2d 597, 603 (9th Cir. 1991) (internal citation omitted); *see also Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough [to constitute irreparable injury].").

The TCPA provides that a person may bring an action to recover the greater of: (1) actual monetary loss from such a violation; or (2) $500 in damages for each such violation. 47 U.S.C. § 227(b)(3)(B). Congress predetermined that $500 per violation will adequately compensate plaintiffs and deter violations of the TCPA. *See* 137 Cong. Rec. S16204 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) ("The amount of damages in this legislation is set to be fair to . . . the consumer"); *see also Penzer v. Transp. Ins. Co.*, 545 F.3d 1303, 1311 (11th Cir. 2008) (indicating that the TCPA's statutory damages account for "uncertain actual damages") (internal citation omitted). In its June 23 Order, the district court correctly found that these monetary damages would be more than adequate to compensate any claimants; the district court's reversal of its Order is an abuse of discretion. *See Rent-A-Center*, 944 F.2d at 603.

Conclusion

For these reasons, the district court's order should be vacated.

Dated: October 14, 2011 ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: s/Jennifer M. Robbins

Christopher W. Madel
Jennifer M. Robbins
ROBINS, KAPLAN, MILLER &
CIRESI L.L.P.
800 LaSalle Avenue. Suite 2800
Minneapolis, MN 55402
Telephone: 612-349-8500
Facsimile: 612-339-4181

Edward D. Lodgen (Bar No. 155168)
Julia V. Lee (Bar No. 252417)
ROBINS, KAPLAN, MILLER &
CIRESI L.L.P.
2049 Century Park East, Suite 3400
Los Angeles, CA 90067-3208
Telephone: 310-552-0130
Facsimile: 310-229-5800

ATTORNEYS FOR APPELLANT PORTFOLIO RECOVERY ASSOCIATES, LLC

Statement of Related Cases

There are no related cases pending in this Court.

Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,597 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft® Office Word Version 2003 and in a proportionally spaced typeface of 14 points or more.

Dated: October 14, 2011

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: s/Jennifer M. Robbins

Christopher W. Madel
Jennifer M. Robbins
ROBINS, KAPLAN, MILLER &
CIRESI L.L.P.
800 LaSalle Avenue. Suite 2800
Minneapolis, MN 55402
Telephone: 612-349-8500
Facsimile: 612-339-4181