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 REPLY BRIEF

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Plaintiff-Appellee Jesse Meyer fails to overcome the numerous errors underlying the district court's September 14 preliminary-judgment and limited-class-certification order, each of which requires this Court to vacate or reverse the district court's order. First, the district court's September 14, 2011 order is void on jurisdictional grounds because Meyer's July 22, 2011 Notice of Appeal divested the district court of jurisdiction, and because Judge Battaglia previously transferred the action to another judge. Meyer's arguments to the contrary exalt form over substance, are unsupported by law, and contradict the record.

Second, the district court committed clear legal error in granting Meyer's request for limited class certification because Rule 23(b)(2) applies only to final-injunctive relief, not preliminary-injunctive relief. Additionally, the district court abused its discretion due to the individualized questions of consent and the inadequacy of Meyer as a class representative. Meyer disregards the plain language of Rule 23(b)(2), baselessly conflates consent with skip-tracing, and cannot overcome the improperly overbroad class definition.

Last, the district court abused its discretion in granting Meyer's proposed preliminary injunction by failing to analyze whether Meyer was likely to demonstrate that PRA uses an ATDS as required to establish a violation of the TCPA, and by concluding that Meyer demonstrated irreparable harm, or the lesser standard that future violations of the TCPA were likely to occur. Accordingly, for

these reasons and the reasons set forth below, PRA respectfully requests that this Court vacate the district court's September 14, 2011 order.

Argument

I. The September 14, 2011 ruling entering a preliminary injunction and provisional class certification must be vacated on jurisdictional grounds.

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

It is axiomatic that "[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). In an effort to skirt this well-established rule, Meyer argues first that the district court's June 23 Order did not comply with Rule 58's "separate-document" requirement such that Meyer's "premature notice of appeal does not divest the district court of jurisdiction." (Appellee Br. 15-18.) Meyer further argues that Rule 54(b) prevents divestiture of the district court's jurisdiction over interlocutory judgments. (Appellee Br. 21-23.) But the law is clear: the district court's June 23 Order was final and appealable and, upon Meyer's July 22 Notice of Appeal, the district court no longer had jurisdiction to enter an order contradicting the Order entered and docketed on June 23. Thus, the district court's September 14 Order should be vacated.

1. The district court's June 23 Order constituted a final, appealable order.

The district court's June 23, 2011 Order constituted a final, appealable order consistent with Rule 58. *See Beaudry Motor Co. v. Abko Props., Inc.*, 780 F.2d 751, 755-56 (9th Cir. 1986) (concluding that the district court's minute order constituted "a final appealable order" where the minute order clearly put the plaintiff's counsel on notice that an order had been entered against his client, was mailed to the parties, and was entered on the docket); *Key Bar Invs. v. Cahn (In re Cahn)*, 188 B.R. 627, 630 (9th Cir. 1995) ("Even a minute entry order can be a final, appealable order 'if it fully adjudicates the issues and clearly evidences the court's intent that the order be the court's final act.'"); *see also Grun v. Pneumo Abex Corp.*, 163 F.3d 411, 422 n.8 (7th Cir. 1998) (noting that a minute order can satisfy the separate-document requirement).

Here, the June 23 Order was entered on the docket and provided clear notice to the parties that the "MOTION for Preliminary Injunction filed by Jesse Meyer [is] Denied." (ER 24.) Meyer's assertions that the June 23 Order is somehow insufficient is belied by his Notice of Appeal, which was expressly based on "the District Court's Order . . . entered in this action on June 23, 2011." (ER 71.) Further, Meyer's reliance on *Wood v. Coast Frame Supply, Inc.*, 779 F.2d 1441, 1442 (9th Cir. 1986), is misguided because the minute order in *Wood* did not reflect that summary judgment had been granted. (Appellee Br. 17.) Here, the

June 23 Order expressly stated that Meyer's motion was denied. Thus, the June 23 Order was final and appealable at the time Meyer filed his Notice of Appeal.

2. The "separate-document" requirement does not trigger an exception to the well-established rule of divestiture.

Exalting form over substance, Meyer argues that his Notice of Appeal was premature due to the district court's failure to comply with Rule 58's "separate-document" requirement, and that without Rule 58-compliance, divestiture of jurisdiction is impossible. (Appellee Br. 16-18.) But Rule 58's "separate-judgment requirement is *not jurisdictional*." *Harris v. McCarthy*, 790 F.2d 753, 756 (9th Cir. 1986) (emphasis added); *see also M. v. Benton*, 622 F.2d 370, 372 (8th Cir. 1980) (stating that court of appeals would have jurisdiction under § 1292(a)(1) if district court granted an injunction, despite any failure to comply with Rules 58 and 65).

Further, the authority that Meyer cites for the proposition that his Notice of Appeal was premature concerns neither statutory appeals as of right under 28 U.S.C. § 1292(a) nor Rule 58's separate-document requirement. Rather, the authority stands for the proposition that there is no divestiture where the order on appeal is not appealable in the first instance, a situation not present here. *See, e.g.*, *Nascimento v. Dummer*, 508 F.3d 905, 909-10 (9th Cir. 2007) (improper appeal from interlocutory discovery order denying motion to extend discovery); *Estate of Conners v. O'Connor*, 6 F.3d 656, 659 (9th Cir. 1993) (improper appeal from magistrate judge's unauthorized order awarding attorney's fees); *Ruby v. Sec'y of*

U.S. Navy, 365 F.2d 385, 387 (9th Cir. 1966) (improper appeal from nonfinal ruling dismissing complaint without dismissing action)). Here, the district court's Order concerns injunctive relief and was immediately appealable under 28 U.S.C. § 1292(a). Thus, Meyer's argument is meritless.

Whether or not a "separate document" was filed under Rule 58, the district court's June 23 Order was immediately appealable (*see supra* I.A.1.). Meyer knew this, and that is why he filed his July 22, 2011 Notice of Appeal upon which he based jurisdiction on "the District Court's Order denying Plaintiff's Motion for Preliminary Injunction entered in this action on June 23, 2011." (ER 71.) Therefore, Meyer's Notice of Appeal divested the district court of jurisdiction and its subsequent September 14 Order should be vacated.

3. Meyer's argument that Rule 54(b) precludes divestiture of the district court's jurisdiction is wrong.

Meyer's final argument against divestiture of the district court's jurisdiction is that "[d]ivesting the district court of jurisdiction here would violate Rule 54(b)," because "Rule 54(b) limits divestiture of district court's jurisdiction over *interlocutory* judgments." (Appellee Br. 22-23 (emphasis in original).) But the district court's Order concerns *injunctive relief* and was therefore immediately appealable under 28 U.S.C. § 1292(a). When an interlocutory order is appealable under § 1292(a), the district court's jurisdiction is transferred to this Court and Rule 54(b) is inapplicable. *See, e.g.*, *Smith v. Eggar*, 655 F.2d 181, 184 (9th Cir.

1981) ("Although the order appealed from is not a 'final' order in the usual sense, and no certificate has been filed under Rule 54(b), the order is sufficiently injunctive in nature to justify our taking jurisdiction under Section 1292(a)(1)."); *Sierra Club v. Dep't of Transp.*, 948 F.2d 568, 572 n.4 (9th Cir. 1991) (noting that Rule 54(b) is of no consequence where appellate jurisdiction exists under § 1292(a)(1)). Accordingly, Meyer's argument that Rule 54(b) prevents divestiture fails, and the district court's September 14 Order should be vacated.[1]

B. Judge Battaglia lacked authority or jurisdiction to issue the September 14, 2011 ruling after he ordered transfer of this action to another judge.

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 pursuant to the low-number rule. Meyer does not dispute that Judge Battaglia ordered transfer of this action before he issued his September 14 ruling.

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[1] Meyer argues that this Court lacks jurisdiction over the appeal of the district court's injunctive-class certification. (Appellee Br. 4-5). Ninth Circuit authority, however, supports this Court's jurisdiction under § 1292(a)(1) over the class-certification order. *See Paige v. California*, 102 F.3d 1035, 1039-40 (9th Cir. 1996) (holding that when a class-certification order and an injunction granting class-wide relief are appealed, courts have jurisdiction under § 1292(a)(1) over the class-certification order, and stating that because "the injunction issued here provides class-wide relief, we could not uphold it without also upholding the certification of the class"); *Immigrant Assistance Project of L.A. County Fed'n of Labor (AFL-CIO) v. INS*, 306 F.3d 842, 869 (9th Cir. 2002) (same). Moreover, to the extent Meyer argues that PRA cannot present argument regarding this Court's jurisdiction over the injunctive-class certification (Appellee Br. 4-5), jurisdictional arguments cannot be waived, even on appeal. *See Embassy of the Arab Republic of Egypt v. Lasheen*, 603 F.3d 1166, 1171 n.3 (9th Cir. 2010).

Instead, citing Rules 58(c) and 79, Meyer argues that the Transfer Order was "not effective" until it was entered in the docket on September 15, 2011. (Appellee Br. 24-25 (citing *Trust Co. v. Mallis*, 411 U.S. 381, 384 n.4 (1978)).)

Meyer's argument fails for at least two reasons. First, Meyer cannot argue that a transfer order pursuant to the "low number" rule constitutes a "judgment" from which an appeal lies. Therefore, Rule 58(c) and Meyer's other cited "authority" concerning when a "judgment is effective" is inapposite as to ascertaining the effective date of the transfer order. Second, Rule 79 merely sets forth the types of items the clerk must enter chronologically in the docket, and the contents of each entry. *See* Fed. R. Civ. P. 79(a)(2), (3). It is silent as to when orders become *effective*. Under Meyer's argument, a district court judge's order has no meaning, consequence, or effect until the clerk dockets it. Not only is this argument frivolous, Meyer goes further and asks this Court to ignore the timing of Judge Battaglia's orders and instead read his mind as to his intent. This Court obviously cannot do so — the fact remains that Judge Battaglia signed the Transfer Order before entering the September 14 ruling on the preliminary injunction, and after signing the Transfer Order, Judge Battaglia had no jurisdiction to enter a later ruling.

II. Because Rule 23(b)(2) only applies to final-injunctive relief, the district court erred in ordering class certification under that Rule for purposes of preliminary-injunctive relief.

On its face, Rule 23(b)(2) applies only to "final," and not "preliminary," injunctive relief. *See* Fed. R. Civ. P. 23(b)(2); *see also 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). Meyer's arguments to the contrary are unsupported by applicable law.

First, Meyer asserts that PRA "misconstrues" the text of Rule 23(b)(2), arguing that use of the term "appropriate" reveals how Rule 23(b)(2) may apply to preliminary-injunctive relief. (Appellee Br. 46.) But Meyer's cited authority—*De Beers Consol. Mines v. United States*, 325 U.S. 212 (1945) and *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975)—is inapposite. Neither case concerns class certification under Rule 23(b)(2). In fact, *De Beers* does not concern class certification at all. Meyer's position that Rule 23(b)(2)'s requirement of "final injunctive relief" is met by "preliminary injunctive relief" is illogical and contrary to the Rule's plain language.

Second, Meyer cites two Ninth Circuit decisions, asserting that "[t]his Court has previously affirmed preliminary injunctions in favor of classes certified under Rule 23(b)(2)." (Appellee Br. 46-47 (citing *Katie A. ex rel. Ludin v. Los Angeles*

County, 481 F.3d 1150, 1152 (9th Cir. 2007), and *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1233, 1236 (9th Cir. 1999)).) But neither case discussed certification of a Rule 23(b)(2) class for the specific purpose of a preliminary injunction. Moreover, neither case even analyzes the text of Rule 23(b)(2). Indeed, in *Barahona-Gomez*, Rule 23(b)(2) was mentioned just once to state that class notice was not required under 23(b)(2). 167 F.3d at 1236.

Additionally, Meyer failed to address PRA's argument that the district court's misapplication of the law under Rule 23(b)(2) in improperly certifying the proposed class for purposes preliminary-injunctive relief is subject to *de novo* review by this Court and constitutes a *per se* abuse of discretion. *See Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010) ("If the district court's determination was premised on a legal error, we will find a per se abuse of discretion.").

III. The district court abused its discretion in granting provisional class certification.

The district court abused its discretion by granting provisional certification of Meyer's proposed injunctive class because it: (1) erroneously conflated the issue of consent with skip-tracing, leaving the multitude of individualized questions unaddressed; (2) certified an overbroad class that restrains PRA from actions not prohibited by the TCPA; and (3) failed to analyze Meyer's personal credibility and integrity—factors relevant to his ability to act as class representative.

A. Because the issue of consent defeats Rule 23's commonality and typicality requirements, certifying the proposed injunctive class was an abuse of discretion.

The district court erred in certifying a class that fails to meet the commonality and typicality requirements of Rule 23. Contrary to Meyer's claim that the "district court found evidence that PRA did not have consent to call Meyer or other members of the Injunctive Class" (Appellee Br. 33), there were no factual findings or analysis on the issue of whether PRA had consent to call Meyer or other injunctive-class members. (ER 11 at 6:5-7.) Instead, the district court stated—without disclosing the basis for the decision—that PRA "engaged in a standardized course of conduct vis-a-vis the class members, and the Plaintiff's alleged injury arises out of that conduct." (ER 11 at 6:19-21.) But PRA's use of the investigatory skip-tracing process does not foreclose the possibility that consent was still provided by the debtor. The issues are discrete, and the district court erred when it adopted Meyer's conflated reasoning.

Meyer attempts to distinguish the holdings of other courts in which consent was held to preclude class certification, stating "[t]hose cases concern defendants who collected fax numbers from a variety of sources, some of which may have effectively conveyed consent." (Appellee Br. 49-50.) But that is precisely the issue here. Even if a debtor did not provide PRA or the original creditor with the phone number called by PRA, in some instances debtors *expressly agree* that a creditor

can call him at *any* phone number, even phone numbers obtained after the original transaction. Indeed, various creditors have included consent provisions in their applications. For example, the Visa and Mastercard Agreements through 1st Financial Bank include consent provisions allowing calls to cell phone numbers "[w]here you have provided a cell phone number directly to us or placed a cell phone call to us, or we have otherwise obtained your cell phone number" and that such calls "may be automatically dialed and/or use recorded messages." (1st Financial Bank USA (03/31/2011), *at* http:www.federalreserve.gov/ CreditCardAgreementsContent/creditcardagreement_3926.PDF.) (Appellant's Motion for Judicial Notice, Ex. A, at MJN 8-9.) Credit cards provided through Wells Fargo contain similar language. (Wells Fargo Bank, 1, (08/2010), *at* http:www.federalreserve.gov/CreditCardAgreementsContent/ creditcardagreement_4252.PDF (the bank "may from time to time make calls . . . [using] an automatic dialing device, [to] any telephone number associated with your account, including wireless telephone numbers that could result in charges to you.").) (Appellant's Motion for Judicial Notice, Ex. B, at MJN 18.)

Thus, consent remains "an essential individual issue." *Hicks v. Client Services, Inc.*, No. 07-61822, 2008 U.S. Dist. LEXIS 101129, at *19-21 (S.D. Fla. Dec. 11, 2008); *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 327 (5th Cir. 2008); *Vigus v. S. Ill. Riverboat/Casino Cruises, Inc.*, 274 F.R.D. 229, 238

(S.D. Ill. 2011) ("[D]etermining which specific calls were made to individuals protected by the TCPA cannot be made by generalized proof at a class level.") (citing *Gene*, 541 F.3d at 327-29 (plaintiff "failed to advance a viable theory of generalized proof to identify those persons, if any, to whom [the defendant] may be liable under the TCPA.")).

PRA's use of skip-tracing does not vitiate the consent that may have been provided by some of the putative class members in these agreements or through other methods. Consequently, the district court's conflation of skip-tracing with consent and certification of the class was an abuse of discretion.

B. By adopting Meyer's conflated reasoning regarding consent, the district court provisionally certified an overbroad class, and Meyer offers no solution to this problem.

"Where a class is overbroad and could include a substantial number of people who have no claim under the theory advanced by the named plaintiff, the class is not sufficiently definite." *Vigus*, 274 F.R.D. at 235 (citing *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006)). When a proposed class may include a "substantial number of people who voluntarily gave their telephone numbers" to the defendant "their inclusion in the proposed class definition renders it overbroad and the class unfit for certification." *Id.*

The provisional class certified here includes debtors who provided their express consent to be contacted on their cellular phones but whose phone numbers

were obtained through skip-tracing. For these individuals who provided consent to be contacted on their cellular telephones, consent is not negated if the specific phone number was found through skip-tracing. Therefore, their inclusion in the class renders the class, as defined, improper for certification. Meyer's reliance on the ACA Declaratory Ruling, 23 FCC Rcd 559, 564-65, 2008 FCC LEXIS 56, at *15, does not address this fatal flaw in his class definition. (*See* Appellee Br. 48.)

No more persuasive is Meyer's argument that PRA has the burden of establishing consent. (*See* Appellee Br. 52.) Indeed, other courts have held that individual issues on "affirmative defenses" may preclude class certification because "[w]hether 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." *See, e.g.*, *Gene*, 541 F.3d at 327.

Because an overbroad class is unfit for certification, the district court abused its discretion in determining that Meyer met the commonality and typicality requirements of Rule 23(a).

C. Meyer's past convictions bear directly on his credibility, making him an inadequate class representative.

The district court's only finding regarding Meyer's adequacy was that "Meyer's past convictions [do not] pose any kind of present conflict with the class." (ER 13.) The district court did not even address Meyer's personal

credibility and integrity—factors that other courts have held directly bear on one's adequacy as class representative. (*See, e.g.,* Appellant Br. 20-21 (citing cases).).

Moreover, Meyer misstates the case law cited by both parties in claiming that Meyer's credibility is only relevant if it is "tied to his claims in this action," or are "related to the issues in the litigation." (Appellee Br. 54, citing *Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1015 (N.D. Cal. 2010).) In *Harris*, the court stated: "There is inadequacy only where the representative's credibility is questioned on issues directly relevant to the litigation *or there are confirmed examples of dishonesty, such as a criminal conviction for fraud.*" *Id.* (quoting *Ross v. RBS Citizens, N.A.*, No. 09 CV 5695, 2010 U.S. Dist. LEXIS 107779, at *14 (N.D. Ill. Oct. 8, 2010) (internal quotations omitted, emphasis added).) Meyer has criminal convictions for fraud and the district court abused its discretion in failing to analyze Meyer's credibility and honesty.

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

The district court erred in granting Meyer's motion for preliminary injunction because Meyer failed to establish each of the requirements: (1) a likelihood of success on the merits; (2) a 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 v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

A. Meyer did not demonstrate a likelihood of success on the merits.

To be successful in his action against PRA, Meyer must establish that the dialers used by PRA constitute automatic telephone dialing systems (ATDS) under the TCPA. (Appellee Br. 25-35.) Yet, Meyer remains unable to point to *any* evidence that PRA's dialers have the capacity to store and produce numbers using a random and sequential number generator, as required by the TCPA. 47 U.S.C. § 227(a)(1). (*Cf.* ER 218-247.)

1. The district court did not hold that PRA's dialers qualify as ATDSs, nor did the district court attempt to analyze the question under the correct legal standard.

Contrary to Meyer's assertion that "the district court held that" the "Avaya Dialer falls within the ambit of the TCPA," (Appellee Br. 25), the district court did not make such a holding, nor did the district court hold that PRA's dialers qualify as ATDSs. (ER 15 at 10:7-14.) The entirety of the district court's one-paragraph discussion of whether PRA's dialers qualify as ATDSs consisted of a quote from Meyer's complaint and brief reference to the legislative history of the TCPA:

> With respect to the second element, the Plaintiff must demonstrate that the call was made using any automatic telephone dialing system or an artificial or prerecorded voice. Plaintiff states that on information and belief that[:]
>
> > "PRA placed the September 1, November 4, and December 14 calls using an autodialer, i.e., no human manually entered Meyer's cellular telephone number, rather, PRA's telephone system electronically dialed Meyer's cellular telephone when it placed those calls. PRA's telephone system is capable of storing, producing,

> and dialing any telephone number, and is capable of storing, producing, and dialing telephone numbers using a random or sequential number generator. PRA's telephone system otherwise constitutes an 'automatic telephone dialing system' under the meaning of 47 U.S.C. § 227(a)(1)."
>
> Compl. at ¶ 19. PRA does not dispute that the Plaintiff was called using its Avaya Proactive Contact Dialer, PRA argues only that the Avaya Proactive Contact Dialer is not an ATDS within the of the [sic] TCPA. However, based upon the legislative history of the TCPA, Congress was attempting to alleviate a particular problem–an increasing number of automated and prerecorded calls to certain categories of numbers. To that effect, the legislative history indicates Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies to ensure that the prohibition on autodialed calls not be circumvented by changing technologies. *Id., see also* 47 U.S.C. § 227(a)(1).

(*Id.* (internal citations omitted).) As is clear from the above quote, Meyer overstates the district court's decision beyond recognition: (1) the district court did not "apply[ ] the FCC's rulings"; (2) the district court did not find "that the Avaya Dialers were predictive dialers"; and (3) the district court did not hold "that the Avaya Dialers constituted ATDSs under the FCC's *2003 Report and Order*." (Appellee Br. 28.) The district court failed to apply the correct legal standard or even address the key question of whether Meyer is likely to successfully demonstrate that PRA's dialers qualify as ATDSs.

2. Meyer cannot demonstrate that PRA's dialers qualify as ATDSs under the TCPA.

Meyer argues that he "produced significant evidence supporting" the assertion that PRA's dialers are ATDSs. (Appellee Br. 31.) But the only

"evidence" cited by Meyer relates to the ability of PRAs dialers to store "more than two telephone numbers," and to "import lists of numbers" (*see* Supp ER 8 at ¶ 6 (cited at Appellee Br. 31))—which Meyer mischaracterizes as the ability to dial "computer-generated lists of telephone numbers," a claim that remains unsupported by a citation to the record. (Appellee Br. 31.) There is no evidence that PRA's dialers have "the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator." 47 U.S.C. § 227(a)(1)(A). The only evidence in the record states just the opposite. (ER 121 at 1:17-21; ER 137-140 at 17:4-20:24; ER 199-204 at ¶¶ 1, 8-18.) Indeed, Meyer admits that "reconfiguring the Avaya Dialers" would be necessary before the dialers would be able to store and call random or sequential numbers. (Appellee Br. 31.) Without investment of substantial time and resources to "reconfigure" the dialers—a task that makes no business sense for PRA to undertake (ER 201-202 at ¶¶ 8-11)—the dialers simply do not have the capacity to store or produce telephone numbers to be called using a random or sequential number generator. (ER 121 at 1:17-21; ER 137-140 at 17:4-20:24; ER 199-204 at ¶¶ 1, 8-18.) PRA's dialers have *never* had this capacity. (ER 201 at ¶ 8.)

3. Meyer cannot avoid this Court's *Satterfield* decision.

Meyer does not dispute that the TCPA "expressly defines" the phrase "automatic telephone dialing system." (*See generally* Appellee Br. 25-35; *see also*

ER 231 at 6:13-14.) But, Meyer argues, contrary to the standard set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), that the district court should ignore the clear statutory text and look to the Federal Communication Commission's (FCC) opinions regarding the definition of ATDS. (Appellee Br. 28-29.) Moreover, Meyer ignores that this Court has already held that *Chevron* deference is not necessary with respect to the definition of ATDS, and that the "statutory text is clear and unambiguous." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). Indeed, Meyer's citation to *Satterfield* for the proposition that "the TCPA's language is 'silent or ambiguous with respect to the issue at hand'" is incorrect because the cited text references *not* the definition of "ATDS," but rather the Court's analysis with respect to the word "call," a term—unlike "ATDS"—that was left undefined in the TCPA's statutory text. *Id.* at 952 (cited at Appellee Br. 30).

In an effort to cast doubt on the clarity of the statutory text that this Court has already determined to be clear and unambiguous, Meyer conflates the concepts of "use" and "capacity" and asks "how much modification is required before equipment is no longer held to have the requisite 'capacity' to be an ATDS." (Appellee Br. 30.) But the question is not about use of the dialers. Nor is the question how much modification is required before PRA's dialers *no longer* have capacity. PRA's dialers *have never had* the requisite capacity. (ER 201 at ¶ 8.)

Therefore, the dialers have not only never been used to dial numbers that were stored or produced using a random or sequential number generator, but the dialers have never had the capacity to store or produce numbers using a random or sequential number generator. No amount of purported evidence of the ability to import lists of numbers is sufficient to demonstrate that PRA's dialers have the requisite capacity under the statute's express definition of ATDS.

The district court erred by looking to the FCC's interpretation of the term "ATDS" rather than analyzing PRA's dialers under the definition clearly and unambiguously provided within the statutory text. *See Satterfield*, 569 F.3d at 951.

4. PRA properly raised Meyer's lack of injury before this appeal.

Meyer argues that PRA did not raise its argument regarding Meyer's lack of a "TCPA injury" before this appeal. (Appellee Br. 35.) Meyer is mistaken. PRA addressed Meyer's inability to demonstrate injury in its brief opposing the preliminary injunction and at the hearing before the district court. (ER 128-129 at 8:23-9:1; ER 167-198; ER 38:16-40:11.) Additionally, the question of whether Meyer suffered a TCPA injury hinges, in part, on whether he was contacted using an ATDS—an issue briefed and argued in detail below.

Because PRA's dialers do not qualify as ATDSs under the TCPA—and Meyer has failed to demonstrate otherwise—Meyer cannot tie any purported injury to a dialing system with the requisite capacity. That is, Meyer cannot show that any

injury was caused by something that the TCPA was designed to protect and, therefore, has no cognizable TCPA claim. *See Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977); *Atl. Richfield Co. v. USA Petroleum, Co.*, 495 U.S. 328 (1990). Likewise, 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.)

Accordingly, the district court erred when it found that Meyer demonstrated a likelihood of success on the merits because Meyer did not, and cannot, establish that he suffered any injury, including a TCPA injury.

5. PRA's Due Process rights will be violated if the TCPA is applied to PRA in the manner requested by Meyer.

As the district court did not address PRA's as-applied due process challenge to the TCPA, this Court's review of this issue is *de novo*. Meyer attempts to marginalize PRA's due process argument by distilling it down to an argument that "circumstances have changed since the TCPA was passed." (Appellee Br. 36.) But PRA's discussion of the original intent behind the TCPA and the manner in which it is being applied today is critical to understanding the deprivation of PRA's due process rights when the law is applied in the manner desired by Meyer.

The TCPA was written to prevent "commercial telemarketing solicitations" and the attendant invasions of consumer privacy. 137 Cong. Rec. H11307 (daily ed. Nov. 26, 1991). As applied by Meyer, the law restricts a debt collector from contacting a consumer on his or her cellular phone regarding the consumer's

defaulted-upon debt. The widespread, oftentimes exclusive, use of cellular telephones by consumers, the low-cost or no-cost to consumers for each call made or received on cellular phones, and the fact that PRA is not a telemarketer and does not engage in seizure of emergency lines (ER 206 at ¶¶ 7-8) all contribute a finding that the TCPA, if applied in the manner suggested by Meyer, constitutes a violation of PRA's Fifth Amendment Due Process rights.

B. The district court erred in not requiring Meyer to show irreparable harm.

Meyer fails to address why reliance on a line of tax-related cases (*see* ER 16 at 11:15-18 n.13), rather than the usual irreparable-harm requirement set forth in *Winter* and other cases from this Court, is warranted here. (*See* Appellant Br. 30 (discussing cases).) Instead, Meyer cites *Antoninetti v. Chipotle Mexican Grill*, 643 F.3d 1165 (9th Cir. 2010) for the proposition that when a statute provides for injunctive relief, the traditional requirements for equitable relief need not be met. Meyer fails to note, however, that *Antoninetti* involved a claim under the Disabilities Act, a federal statute that "does not authorize a claim for money damages"; consequently, "[i]njunctive relief is the sole remedy available to private parties under the Disabilities Act." *Id.* at 1174. Because injunctive relief is *not* "the sole remedy available" here, the district court should have engaged in the typical equitable-relief analysis that requires a showing of irreparable harm. The district court's failure to do so was in error.

Meyer failed to establish any injury for which money damages would be insufficient compensation—indeed he failed to establish any injury at all. *See Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). Meyer likewise failed to establish that his claims are anything more than speculative future violations of the TCPA—which are insufficient to entitle him to a preliminary injunction. *See Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674-75 (9th Cir. 1988). Accordingly, the district court's decision was an abuse of discretion.

Conclusion

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

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,322 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.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 2011, I electronically filed **Reply Brief of Defendant/Appellant Portfolio Recovery Associates, LLC** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system, including the following counsel of record:

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