**No. 11-3819**

# In the United States Court of Appeals for the Seventh Circuit

TERESA SOPPET and LOIDY TANG,
individually and on behalf of a class,

*Plaintiffs-Appellees,*

v.

ENHANCED RECOVERY COMPANY, LLC,
as successor to ENHANCED RECOVERY CORPORATION,

*Defendant-Appellant.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:10 cv 5469.
The Honorable **Matthew F. Kennelly**, Judge Presiding.

## BRIEF OF DEFENDANT-APPELLANT ENHANCED RECOVERY COMPANY, LLC

BRYAN C. SHARTLE
SESSIONS, FISHMAN, NATHAN
& ISRAEL, L.L.C.
Lakeway Two, Suite 200
3850 N. Causeway Boulevard
Metairie, LA 70002-7227
(504) 828-3700

JAMES K. SCHULTZ
SESSIONS, FISHMAN, NATHAN
& ISRAEL, L.L.C.
55 W. Monroe Street
Suite 1120
Chicago, IL 60603
(312) 578-0990

*Attorneys for Enhanced Recovery Company, LLC,*
*f/k/a Enhanced Recovery Corporation*

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**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 11-3819

Short Caption: Teresa Soppet and Loidy Tang v. Enhanced Recovery Company, f/k/a Enhanced Recovery Corp.

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Enhanced Recovery Company, formerly known as Enhanced Recovery Corporation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Sessions, Fishman, Nathan & Israel, LLC

Bronson & Kahan, LLC

Milam, Howard, Nicandri, Dees & Gillam, P.A.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ERC Holdings, LLC

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None.

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Attorney's Signature: s/ James K. Schultz Date: January 24, 2012

Attorney's Printed Name: James K. Schultz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: 55 West Monroe Street, Suite 1120
Chicago, Illinois 60603

Phone Number: 312.578.0990 Fax Number: 312.578.0991

E-Mail Address: jschultz@sessions-law.biz

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None.

Attorney's Signature: s/ Bryan C. Shartle Date: January 24, 2012

Attorney's Printed Name: Bryan C. Shartle

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: 3850 N. Causeway Blvd., Suite 200
Metairie, LA 70002-7227

Phone Number: 504.828.3700 Fax Number: 504.828.3737

E-Mail Address: bshartle@sessions-law.biz

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## JURISDICTIONAL STATEMENT

### I. Jurisdiction in the District Court

Plaintiffs-Appellees, Teresa Soppet (Soppet) and Loidy Tang (Tang) (collectively, Plaintiffs), assert claims against Defendant-Appellant, Enhanced Recovery Company, LLC, f/k/a Enhanced Recovery Corporation (ERC), under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. Subject-matter jurisdiction is invoked under 28 U.S.C. § 1331 (federal question). Federal courts may exercise federal question jurisdiction over TCPA lawsuits. *See Mims v. Arrow Financial Services, LLC*, 2012 WL 125429 (2012).

### II. Jurisdiction in the Court of Appeals

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(b). Although the order being appealed is not a final judgment, the order is nevertheless immediately appealable pursuant to 28 U.S.C. § 1292(b).

On August 21, 2011, Judge Matthew F. Kennelly of the Northern District of Illinois entered an order denying ERC's Motion for Summary Judgment. On September 2, 2011, ERC filed a motion for reconsideration or, in the alternative, certification under 28 U.S.C. § 1292(b). On September 14, 2011, the District Court denied ERC's motion for reconsideration, but granted ERC's motion for certification. On September 27, 2011, the District Court entered an order certifying for immediate appeal its August 21, 2011 order denying ERC's summary judgment motion. Later that day on September 27,

2011, ERC filed in this Court its petition for permission to appeal pursuant to 28 U.S.C. § 1292(b). On December 8, 2011, this Court granted ERC's petition for permission to appeal. On December 19, 2011, this civil appeal was docketed in this Court.

All parties in the lawsuit are subject to the appeal and have appeared in this Court. There are no claims or causes of action in the District Court, which are not before this Court. There are, however, a number of legal issues which remain with the District Court, including whether this action may be maintained as a class action under Fed. R. Civ. P. 23. The District Court has indicated no action will be taken until this Court decides ERC's appeal.

## STATEMENT OF THE ISSUES

Whether the phrase "called party" in 47 U.S.C. § 227(b)(1)(A) includes the "intended recipient of the call" for purposes of analyzing whether an autodialed call was made with the consent of the "called party."

Whether the withdrawal or revocation of consent under 47 U.S.C. § 227(b)(1)(A) must be expressly communicated to be effective.

## STATEMENT OF THE CASE

The questions before the Court involve the proper interpretation and application of the consent defense under the TCPA relating to autodialed calls to cell phones. The questions are not merely academic. The Court's answers will have a real-world impact on local, state, and federal governmental agen-

cies and a wide-range of small to large businesses that depend on the ability to lawfully call consumers at telephone numbers they have voluntarily provided and at which they wish to be contacted.

The growing popularity, use, and dependence on cell phones is the backdrop of this case. According to a recent survey by the Pew Research Center's Internet & American Life Project, 85% of Americans 18 or older own a cell phone.[1] More than ever, Americans are providing their cell phone number as their exclusive, primary, or preferred number for contact.[2] Today, more than one of every four American homes (26.6%) use a cell phone exclusively and do not have a residential, landline telephone.[3]

Due to a limited supply of cell phone numbers, many wireless service providers recycle a cell number from one subscriber to the next. As a result, a new cell phone subscriber or user may receive a call intended for the prior cell phone subscriber or user. This case, brought as a putative class action, involves such a situation.

Plaintiffs are subscribers of recycled cell phone numbers. Plaintiffs allege ERC violated the TCPA by autodialing their recycled cell phone numbers without their consent. On behalf of themselves and the putative class members they seek to represent, Plaintiffs demand statutory damages under the

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[1] *See* www.pewinternet.org, *Americans and their Gadgets.*
[2] *See* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201012.pdf.
[3] *Id.*

TCPA of $500 to $1,500 for each call made. It is undisputed that Plaintiffs were *not* the intended recipients of ERC's calls. In other words, ERC was not trying to reach Plaintiffs. Instead, ERC, a national debt collector, was trying to reach Dupree Riley (Riley) and Sherita Morgan (Morgan) relating to debts they owed AT&T, Inc. (AT&T). ERC called Riley and Morgan at the telephone numbers they provided to AT&T. However, the numbers were recycled and given to the Plaintiffs by the time ERC made the calls. As a result, Soppet received ERC's debt collection calls intended for Riley, and Tang received ERC's debt collection calls intended for Morgan.

Alleging the calls violated the TCPA cell phone provision, *i.e.*, 47 U.S.C. § 227(b)(1)(A)(iii), Plaintiffs filed separate class action lawsuits against ERC based upon the calls. Thereafter, the lawsuits were consolidated and Plaintiffs filed a consolidated class action complaint.

As discussed below in detail, the TCPA is *not* violated if the call is "made with the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). For purposes of the TCPA consent defense, ERC believes the "called party" includes the individual the caller was attempting to reach--"the intended recipient of the call." Based upon this well supported belief, ERC filed a Motion for Summary Judgment. Pursuant to its summary judgment motion, ERC sought dismissal of Plaintiffs' TCPA claims because the undisputed evidence establishes ERC had the consent of the "called parties" (*i.e.*, Riley and Mor-

gan) to make the calls and such consent (which is tied to the numbers called) was never withdrawn or revoked by anyone prior to ERC making the calls.

On August 21, 2011, the District Court entered an order denying ERC's summary judgment motion. [A-1 to A-3.] In rendering its decision, the District Court assumed ERC had the consent of the intended recipients, Riley and Morgan:

> The Court assumes for purposes of this discussion that the consent that Riley had provided four-plus years before ERC first called Soppet and the consent that Morgan had provided three years before ERC first called Tang qualifies under section 227(b)(1) [as prior express consent] . . . .

[A-2.]

The District Court held, however, that this consent was irrelevant because ERC needed to establish Plaintiffs' consent in order for the consent defense to apply. [A-2 to A-3.] The District Court ruled "the 'called party' [under § 227(b)(1)(A)] is the party that the caller actually calls -- in other words, the actual recipient of the call." [A-2.] Based upon this narrow interpretation of the phrase "called party," the District Court found Plaintiffs (not the intended recipients, Riley and Morgan) were the "called parties" with regard to ERC's calls. [A-3.] Finding ERC did not submit any evidence that Plaintiffs consented to the calls, the District Court denied ERC's summary judgment motion. [A-3.]

On September 2, 2011, ERC filed a motion for reconsideration or, in the

alternative, certification under 28 U.S.C. § 1292(b), of the District Court's August 21, 2011 order on ERC's summary judgment motion. [Docs. 76-78.] On September 14, 2011, the District Court denied ERC's motion for reconsideration, but granted ERC's motion for certification. [A-4 to A-11.] On September 27, 2011, the District Court entered an order certifying for immediate appeal its August 21, 2011 order denying ERC's summary judgment motion. [A-12.]

## STATEMENT OF THE FACTS

The facts are undisputed. In July 2005, Riley opened an account with AT&T for residential, landline telephone service. [A-1.] At the time he opened his account, he provided telephone number 708-xxx-2583 as a contact number at which he could be reached. [A-1.]

In October 2006, Morgan opened an account with AT&T for residential, landline telephone service. [A-1.] At the time she opened her account, she provided telephone number 773-xxx-8483 as a contact number at which she could be reached. [A-1.]

Both Riley and Morgan failed to pay their respective AT&T accounts. [A-1.] AT&T, therefore, retained ERC to collect the accounts. [A-1.] Along with other account information, AT&T provided to ERC the contact numbers associated with the accounts. [A-1.] AT&T provided the 2583 number for Riley's account, and the 8483 number for Morgan's account. [A-1.]

After placement of the accounts, ERC began calling the 2583 and 8483 numbers to collect the accounts. [A-1 to A-2.] In an attempt to collect the AT&T account owed by Riley, ERC called the 2583 number; in an attempt to collect the AT&T account owed by Morgan, ERC called the 8483 number. [A-1 to A-2.] However, at the time of ERC's calls, the numbers neither belonged to nor were associated with the respective consumers; instead, the 2583 number was a cell number belonging to Soppet, and the 8483 number was a cell number belonging to Tang. [A-1.]

In September 2010, Tang contacted ERC and requested for the first time that the company stop calling the 8483 number for Morgan. [A-2.] It is undisputed ERC did *not* call the 8483 number again after Tang's request. [A-2.] In contrast, Soppet never requested in writing or verbally that ERC stop calling the 2583 number. [A-1.]

## SUMMARY OF ARGUMENT

The Court should reverse the District Court's August 21, 2011 order and enter summary judgment in favor of ERC. The TCPA consent defense applies to the calls at issue. ERC had the consent of the "called parties" (*i.e.*, Riley and Morgan) to make the calls and such consent (which is tied to the numbers called) was never withdrawn or revoked by anyone (including Plaintiffs) prior to the making of the calls.

Contrary to the District Court's ruling, the phrase "called party" in 47

U.S.C. § 227(b)(1)(A) includes "intended recipient of the call." This interpretation is supported by orders issued by the Federal Communications Commission (FCC), the agency with rulemaking authority under the TCPA, which hold a debt collector lawfully autodials a debtor's cell number if the debtor provided the number to the creditor. The District Court disregarded these FCC orders, which the District Court was bound to follow under the Hobbs Act, 28 U.S.C. § 2342.

Further, the District Court's narrow interpretation of the phrase "called party" is not supported by a proper contextual reading of the TCPA. Indeed, the use of the term "recipient" in § 227(b)(1) establishes the phrase "called party" used later in the same subsection means something *more* than simply "recipient." When read in proper context, the phrase "called party" must mean both "actual recipient of the call" and "intended recipient of the call." In other words, the TCPA consent defense applies if the caller had the consent *of either* the "actual recipient of the call," *or* the "intended recipient of the call." Nothing in the TCPA prohibits this reasonable interpretation.

If the District Court's interpretation of the TCPA consent defense stands, a wide-range of governmental agencies and businesses will face significant TCPA liability even when they intend to comply with the law in good faith. As one court has correctly observed:

> Under the statute, a business is permitted to . . . call . . . persons

> who have given prior express consent . . . . When a business places such a call . . . , it does not know whether the intended recipient or a roommate or employee will answer the phone . . . . If the business is liable to whomever happens to answer the phone . . . , a business could face liability even when it intends in good faith to comply with the provisions of the TCPA.

*Leyse v. Bank of America, Nat. Ass'n*, 2010 WL 2382400, *4 (S.D. N.Y. 2010) (citations omitted).

## ARGUMENT

### I. The District Court's Denial Of ERC's Motion For Summary Judgment Was Based Upon An Improper, Narrow Interpretation Of The Consent Defense In 47 U.S.C. § 227(b)(1)(A)

#### A. Standard Of Review

This Court reviews a District Court's denial of summary judgment *de novo*. *See Belcher v. Norton*, 497 F.3d 742, 747 (7th Cir. 2007); *Magin v. Monsanto Co.*, 420 F.3d 679, 686 (7th Cir. 2005).

#### B. The TCPA Cell Phone Provision And Consent Defense

"In 1991, Congress amended the Communications Act of 1934, 47 U.S.C. § 201, *et seq.*, with the enactment of the [TCPA], Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227)." *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1150 (4th Cir. 1997). "[T]he TCPA seeks to deal with an increasingly common nuisance--*telemarketing*." *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 514 (3d Cir. 1998) (emphasis added). "In the TCPA, Congress found that un-

restricted telemarketing can be an intrusive invasion of privacy and that many consumers are outraged by the proliferation of intrusive calls to their homes from *telemarketers*." *F.T.C. v. Mainstream Marketing Services, Inc.*, 345 F.3d 850, 857 (10th Cir. 2003) (*citing* Pub. L. No. 102-243, at § 2) (emphasis added); *see also Mims*, 2012 WL 125429 at *4.

The TCPA places limitations on telemarketing calls to landlines and cell phones. Plaintiffs allege ERC, a non-telemarketer debt collector, violated the TCPA cell phone provision, *i.e.*, 47 U.S.C. § 227(b)(1)(A)(iii), by making certain debt collection calls. The TCPA cell phone provision provides:

> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to make any call (*other than a call* made for emergency purposes or *made with the prior express consent of the called party*) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service[.]

47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added).

The parties agree the issue before this Court requires an interpretation of the phrase "called party." However, the parties do not agree on the proper interpretation.

### C. The Phrase "Called Party" In 47 U.S.C. § 227(b)(1)(A) Includes "Intended Recipient Of The Call"

As noted, in denying ERC's summary judgment motion, the District Court ruled "the 'called party' [under § 227(b)(1)(A)] is the party that the caller ac-

tually calls -- in other words, the actual recipient of the call." [A-2.] The District Court's interpretation of § 227(b)(1)(A) is too narrow.

The TCPA does not include a definition for the phrases "prior express consent" or "called party." However, the FCC has issued several orders interpreting these phrases. For example, in a 2008 order, the FCC declared the following:

> Because we find that autodialed and prerecorded message calls *to wireless numbers provided by the called party* in connection with an existing debt are made with the "prior express consent" *of the called party*, we clarify that such calls are permissible.

*In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, 564 at ¶ 9 (emphasis added).

> [W]e clarify that autodialed and prerecorded message calls *to wireless numbers* that are *provided by the called party* to a creditor in connection with an existing debt are permissible as calls made with the "prior express consent" *of the called party*.

*Id.* at 559, ¶ 1 (emphasis added).

> IT IS FURTHER ORDERED that . . . autodialed and prerecorded message calls *to wireless numbers* that are *provided by the called party* to a creditor in connection with an existing debt are permissible as calls made with the "prior express consent" *of the called party* . . . .

*Id.* at 568, ¶ 17 (emphasis added).

These FCC pronouncements establish that a debt collector lawfully autodials a cell number for a debtor if the debtor provided the number to the creditor. That is precisely what occurred here.

Further, these FCC pronouncements establish that consent is tied to the number--not a particular person. The FCC did not rule calls to the debtor are made with consent; instead, the FCC ruled calls "to wireless numbers" are made with consent. This distinction proves consent is tied to the number, not the person.

The District Court's decision is in direct conflict with the 2008 FCC order, which the District Court was bound to follow per the Hobbs Act, 28 U.S.C. § 2342.[4] The District Court's decision is also contrary to numerous cases holding a debt collector lawfully autodials a cell number for a debtor if the debtor provided the number to the creditor.[5]

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[4] The Hobbs Act "vests the courts of appeals with exclusive jurisdiction to review certain orders issued by the Federal Communications Commission[.]" *Illinois Bell Telephone Co. v. F.C.C.*, 740 F.2d 465, 467 (7th Cir. 1984); *see also Indiana Bell Tel. Co., Inc. v. McCarty*, 362 F.3d 378, 389 n. 13 (7th Cir. 2004). Said another way, "[p]roceedings for judicial review of final orders of the FCC . . . may be brought only in a federal court of appeals." *City of Peoria v. General Elec. Cablevision Corp. (GECCO)*, 690 F.2d 116, 119 (7th Cir. 1982). Several lower courts have acknowledged the limitations imposed by the Hobbs Act with respect to FCC TCPA orders. *See Greene v. DirecTv, Inc.*, 2010 WL 4628734, *3 (N.D. Ill. 2010) ("The Federal Communications Commission . . . has clarified what constitutes 'express consent' under the statute pursuant to its authority to create rules and regulations implementing the TCPA. . . . A district court must accept the FCC's interpretation of the TCPA as expressed in their regulations and orders."); *CE Design Ltd. v. Prism Business Media, Inc.*, 2009 WL 2496568 (N.D. Ill. 2009); *Leckler v. Cashcall, Inc.*, 2008 WL 5000528 (N.D. Cal. 2008).

[5] *See, e.g., Sengenberger v. Credit Control Services, Inc.*, 2010 WL 1791270, *3 (N.D. Ill. 2010); *Gutierrez v. Barclays Group*, 2011 WL 579238, *2 (S.D. Cal. 2011); *Cunningham v. Credit Management, L.P.*, 2010 WL 3791104, *4-5 (N.D. Tex. 2010); *Pugliese v. Professional Recovery Service, Inc.*, 2010 WL 2632562, *7 (E.D. Mich. 2010); *Starkey v. Firstsource Advantage, LLC*, 2010 WL 2541756, *3 (W.D. N.Y. 2010); *Pollock v. Bay Area Credit Service, LLC*, 2009 WL 2475167, *9-10 (S.D. Fla. 2009); *Bates v. I.C. System, Inc.*, 2009 WL 3459740, *2 (W.D. N.Y. 2009).

In *Anderson v. AFNI, Inc.*, 2011 WL 1808779 (E.D. Pa. 2011), the court explained how the TCPA consent defense applies when a call is received by someone other than the intended recipient of the call, as occurred here. The plaintiff, Tara Anderson, was the victim of an identity thief, Tara Sampson. After receiving several calls for debts she did not owe, the plaintiff filed a lawsuit asserting, *inter alia*, a TCPA landline claim.[6] In response, the defendant filed a summary judgment motion, arguing the plaintiff lacked standing to assert her TCPA claim. The court disagreed and rendered a decision explaining the relationship between the standing issue and consent defense:

> If we assume that the term "called party" is synonymous with "intended recipient" . . . , we nonetheless do not believe that granting standing to persons other than [intended recipients] does any violence to the statute itself or to its application in practice. After all, the exception for calls "made with the prior express consent of the called party" can operate to protect a defendant from liability even if someone other than the [intended recipient] seeks to bring suit. Here, for instance, [the defendant] could conceivably claim that it had the prior express consent of Sampson [the identity thief and intended recipient of the defendant's calls] even though it is Anderson [the plaintiff and actual recipient of the defendant's calls] who brings this case.

*Anderson*, 2011 WL 1808779 at *8.

Under the *Anderson* court's rationale, an actual recipient of an autodialed call has statutory standing to pursue a TCPA claim. However, the TCPA

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[6] The TCPA landline provision imposes certain limitations on calling residential telephone lines with an "artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(B). Like the cell phone provision at issue here, the landline provision contains an exception for calls made with the "prior express consent of the called party." *Id.*

consent defense shields the defendant from liability if the company can prove it had the consent of the intended recipient to make the call. As the *Anderson* court ruled, "the exception for calls 'made with the prior express consent of the called party' can operate to protect a defendant from liability even if someone other than the [intended recipient] seeks to bring suit." *Id.*

The *Anderson* hypothetical is precisely the circumstance presented here. As explained below, although ERC's calls were received by Plaintiffs, ERC had the consent of the "called parties," Riley and Morgan, to make the calls and such consent (which is tied to the numbers) was never withdrawn or revoked by anyone (including Plaintiffs) prior to ERC making the calls.

**D. The Phrase "Called Party" Must Be Read In Proper Context**

"The primary rule of statutory construction is to give effect to the intention of the legislature." *Baltimore & O. R. Co. v. Chicago River & I. R. Co.*, 170 F.2d 654, 658 (7th Cir. 1948). "Statutory language *must be read in context* and a phrase 'gathers meaning from the words around it.'" *Jones v. U.S.*, 527 U.S. 373, 389 (1999) (emphasis added). Moreover, "[s]tatutes should receive a sensible construction, such as will effectuate legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion." *Clark v. Chicago Mun. Emp. Credit Union*, 119 F.3d 540, 546 (7th Cir. 1997) (internal quotation marks omitted).

With these fundamental rules of statutory interpretation in mind, it be-

comes clear the phrase "called party" in § 227(b)(1)(A) includes "intended recipient of the call." As discussed below, the phrase most sensibly means the actual *or* intended recipient of the call.

**1. Use Of The Term "Recipient" In Subsection (b)(1) Establishes The Phrase "Called Party" In Subsection (b)(1)(A) Means Something More Than "Recipient"**

The use of the phrase "called party" in § 227(b)(1)(A) must be properly contrasted with the use of the term "recipient" in § 227(b)(1). When properly contrasted, it is clear the phrase "called party" must mean something *more* than simply "recipient." The District Court failed to give appropriate weight to the cardinal rule that statutory text gathers meaning from the surrounding words. *See General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 596 (2004) ("Hence the second flaw in Cline's argument for uniform usage: it ignores the cardinal rule that statutory language must be read in context since a phrase gathers meaning from the words around it.") (internal quotation marks and brackets omitted).

Section 227(b)(1) uses the term "recipient" in referring to the statute's coverage to calls made from outside the United States to persons within the United States. *See* 47 U.S.C. § 227(b)(1) ("It shall be unlawful for any person within the United States, or any person outside the United States if the *recipient* is within the United States . . . .") (emphasis added). As the District Court correctly noted, "[o]ne might infer from this that the term 'called party,'

used later in section 227(b)(1), means something other than 'recipient.'" [A-2.] Despite recognizing this reasonable conclusion that results from contrasting the words in § 227(b)(1), the District Court looked elsewhere in the statute to define the phrase "called party." [A-2 to A-3.] By doing so, the District Court disregarded the "cardinal rule" of statutory interpretation that a phrase gathers meaning from the words *surrounding it*. *See General Dynamics Land Systems*, 540 U.S. at 596.

Considering the term "recipient" is used in § 227(b)(1), the phrase "called party" in § 227(b)(1)(A) must mean something more than "recipient." If Congress intended the phrase "called party" in § 227(b)(1)(A) to mean "recipient," then it would have simply used that word -- as it did in the earlier part of § 227(b)(1). But it did not. And this fact cannot be ignored and suggests the phrase "called party" has a broader meaning than "recipient."

As discussed below, the phrase "called party" in § 227(b)(1)(A) should be interpreted in a manner that avoids absurd results. When properly interpreted, the phrase "called party" means actual or intended recipient of the call. Said another way, the TCPA consent defense applies if the caller had the consent of either the "actual recipient of the call," *or* the "intended recipient of the call."

### 2. The Phrase "Called Party" Should Be Interpreted In A Manner That Avoids Absurd Results

The TCPA was *not* enacted to prohibit all autodialed calls. Interpreting the phrase "called party" in § 227(b)(1)(A) to mean only "actual recipient of the call" would, however, effectively stop all non-emergency autodialed calls. Indeed, if the District Court's narrow interpretation of the TCPA consent defense is correct, then no governmental agency or business will be able to lawfully autodial a cell phone number provided by a consumer as contact number at which she wishes to be called, unless the call is for "emergency purposes."[7] This is because a caller will never know when a number will be recycled and given to someone else, or the call will be answered by someone other than the intended recipient of the call. For this reason, several courts have correctly ruled an unintended recipient of a call is *not* the "called party." As these courts have observed, if the TCPA consent defense is exclusively based upon the happenstance of who answers the call, callers will face significant TCPA liability even when they intend in good faith to comply with the law.[8]

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[7] The "laundry list" of effected governmental agencies, businesses, and persons will be extensive and include, but not be limited to: local and state schools and universities; federal agencies, such as F.E.M.A., I.R.S., and Department of Education; doctors, physicians, dentists, and pharmacists; researchers and political candidates; banks, lending and financial institutions, and creditors; and all of their agents, independent contractors, and debt collectors.

[8] These cases primarily relate to whether the plaintiff has statutory standing to assert the TCPA claim. The standing and consent issues are distinct and distinguishable. As the *Anderson* court ruled, "granting standing to persons other than [intended recipients] does [not do] any violence to the statute itself or to its application

Simply put, the applicability of the TCPA consent defense should *not* depend on whether a relative, neighbor, stranger, or other unintended recipient answers the call. Interpreting the phrase "called party" in § 227(b)(1)(A) to include "intended recipient of the call" addresses the public policy concerns expressed in the jurisprudence regarding prevention of good faith violations of the law.

Further, if the District Court's narrow interpretation of § 227(b)(1)(A) stands, then all sorts of unintended recipients will have a viable TCPA claim

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in practice." *Anderson*, 2011 WL 1808779 at *8. This is because "the exception for calls 'made with the prior express consent of the called party' can operate to protect a defendant from liability even if someone other than the [intended recipient] seeks to bring suit." *Id.* Even if these standing cases reach the wrong conclusion on the standing issue, they are nevertheless informative because they interpret the phrase "called party" in § 227 and highlight the absurdity that would result if the phrase "called party" was interpreted to mean only "actual recipient of the call." *See, e.g.*, *Leyse*, 2010 WL 2382400 at *4 ("[I]n this case [plaintiff] is not a 'called party' within the meaning of § 227(b)(1)(B). The uncontroverted evidence shows that DialAmerica, the entity that placed the call on behalf of Bank of America, placed the call to [Ms.] Dutriaux, [plaintiff's] roommate and the telephone subscriber. DialAmerica's records demonstrate that it associated the phone number with [Ms.] Dutriaux, not with [plaintiff]. To the extent that [plaintiff] picked up the phone, he was an unintended and incidental recipient of the call."); *Meadows v. Franklin Collection Service, Inc.*, 2010 WL 2605048, *6 (N.D. Ala. 2010) ("[I]t is clear that [defendant], in calling [plaintiff's] number, was attempting to contact a debtor using the number provided by that debtor. While [plaintiff] may have answered the phone, she was not the intended recipient of the call. [Defendant's] actions violated neither the spirit nor the letter of the TCPA."), *aff'd in relevant part*, 2011 WL 479997, *4 (11th Cir. 2011) (observing if the court accepted plaintiff's argument "a debt collector that used a prerecorded message would violate the TCPA if it called the debtor's number and another member of the debtor's family answered."); *Cubbage v. Talbots, Inc.*, 2010 WL 2710628, *3 (W.D. Wash. 2010) ("[Defendant] had the 'consent of the called party,' Mitchell, to place prerecorded messages to her telephone number. The fact that her husband answered the call does not alter the legal authority to place the call."); *Cellco Partnership v. Dealers Warranty, LLC*, 2010 WL 3946713 (D. N.J. 2010).

merely because they happen to answer a call intended for another person who consented to receive the call (*e.g.*, a spouse or roommate answering a call for the other spouse or roommate). The Court should interpret the consent defense in a manner that avoids these absurd results.

### E. Subsection (d)(3) Has A Different Legislative Purpose Than Subsection (b)(1)(A); Therefore, The District Court Erred In Presuming The Phrase "Called Party" In Subsection (b)(1)(A) Must Mean The Same As The Phrase In Subsection (d)(3)

In an attempt to interpret the phrase "called party" in § 227(b)(1)(A), the District Court reviewed the use of the phrase elsewhere in the statute. [A-2 to A-3.] The District Court noted the phrase "called party" is used in § (d)(3)[9] relating to technical and procedural standards. [A-2 to A-3.] Based upon the use of the phrase in subsection (d), the District Court concluded "called party" must mean only "actual recipient":

---

[9] In pertinent part, § 227(d)(3) requires the FCC to draft technical and procedural standards for systems used to transmit artificial or prerecorded voice messages, which require that:

> (A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and
>
> (B) any such system will automatically release the *called party's line* within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the *called party's line* to be used to make or receive other calls.

47 U.S.C. § 227(d)(3) (emphasis added).

> This statutory usage of "called party" [in subsection (d)] is a clear reference to the actual recipient of a call -- it requires establishment of a standard that will release the call recipient's line under particular circumstances.
>
> The law presumes that "Congress intended the same terms used in different parts of the same statute to have the same meaning," *Perry v. First Nat'l Bank*, 459 F.3d 816, 820-21 (7th Cir. 2006), and there is nothing here to rebut the presumption. The Court concludes that the term "called party" in section 227(b)(1) refers to the actual recipient of a call, just as it does in section 227(d)(3).

[A-3.]

While the District Court applied a common rule of statutory interpretation, it failed to consider the phrase "called party" could mean both "actual recipient of the call" and "intended recipient of the call." As explained above, such an interpretation is most sensible and nothing in the TCPA prohibits this sensible interpretation. When the phrase "called party" is construed to include the actual or intended recipient of the call, any perceived inconsistency between subsection (d)(3) and (b)(1)(A) disappears because the phrase "called party" in both subsections can logically and consistently mean "actual or intended recipient of the call."[10]

Moreover, the rule of common usage is *not* "rigid." *See, e.g., Atlantic Cleaners & Dyers v. U.S.*, 286 U.S. 427, 433-34 (1932); *White v. Scibana*, 390

[10] The District Court's conclusion that § 227(d)(3)'s reference to the "called party's line" proves the phrase "called party" must mean "actual recipient" also assumes too much. The District Court improperly assumes the "line" will always belong to the "actual recipient of the call," when in fact the line may belong to someone else (the telephone subscriber) and the recipient simply answered the call.

F.3d 997, 1002 (7th Cir. 2004). "A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). Therefore, "a characterization fitting in certain contexts may be unsuitable in others." *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 262 (1995). As the Supreme Court has observed:

> Where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.
>
> It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the Legislature intended it should have in each instance.

*Atlantic Cleaners & Dyers*, 286 U.S. at 433 (citations omitted).

The purpose of § 227(d)(3) is different than the purpose of § 227(b)(1)(A). Section (d)(3) requires the FCC to create technical and procedural standards regarding the release of telephone lines, whereas § (b)(1)(A) creates an exemption for calls made with consent. Considering the different legislative purposes behind the subsections, application of the presumption of uniform

usage is arguably inappropriate here and a slightly different interpretation of the phrase "called party" in § 227(b)(1)(A) than in § 227(d)(3) would be appropriate if necessary. *See General Dynamics Land Systems*, 540 U.S. at 595, n. 8 ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.") (internal quotation marks omitted).

### F. Consent May Only Be Withdrawn Or Revoked Expressly; Consent May Not Be Withdrawn Or Revoked Tacitly, Constructively, Or Implicitly

The District Court's decision appears to be based upon the belief that the consent to call the 2583 number was constructively or implicitly withdrawn when Soppet acquired the number, and the consent to call the 8483 number was constructively or implicitly withdrawn when Tang acquired the number. Such a belief is legally incorrect.

As noted above, consent is tied to the number--not a particular person. The fact that a new subscriber obtains the number is, therefore, irrelevant because the consent is attached to the number, until the consent is withdrawn or revoked. Consent must be withdrawn or revoked expressly; consent may not be withdrawn or revoked tacitly, constructively, or implicitly. To be sure, consent is *not* withdrawn or revoked by the mere recycling of a tele-

phone number; the passage of time; or an individual's answering machine or voice mail greeting. Again, consent is attached to the telephone number, until affirmative action is taken to expressly withdraw or revoke consent.

This interpretation of the consent defense does *not* mean that companies may autodial cell phone numbers *in perpetuity* and with absolute immunity. Nor does it mean that actual recipients of autodialed cell phone calls are without protection. If the person answering the phone call wants the calls to stop, then she should simply ask the person calling to stop. Upon receipt of such a request, the consent tied to the number would be withdrawn and revoked and any future calls to the number would be without consent and subject the person making the call to liability. In other words, under this interpretation of the consent defense, a debt collector would be required to honor *all* withdrawals and revocations of consent, even if the withdrawal or revocation came from someone other than the intended recipient of the call.

## II. ERC Is Entitled To Summary Judgment Because The Undisputed Facts Establish The Calls At Issue Were Made With The Consent Of The "Called Parties"

With the understanding that the phrase "called party" in § 227(b)(1)(A) includes "intended recipient of the call," there is no doubt that ERC is entitled to summary judgment on Plaintiffs' TCPA claims. Although ERC's calls were received by Plaintiffs, ERC had the consent of the "called parties," Riley and Morgan, to make the calls and such consent (which is tied to the numbers)

was never withdrawn or revoked by anyone (including Plaintiffs) prior to the making of ERC's calls. The Court, therefore, should reverse the District Court's August 21, 2011 order and enter summary judgment in favor of ERC based upon the applicability of the TCPA consent defense.

## CONCLUSION

Based upon the foregoing, the Court should rule the phrase "called party" in § 227(b)(1)(A) includes "intended recipient of the call," reverse the District Court's August 21, 2011 order, and enter summary judgment in favor of ERC.

SESSIONS, FISHMAN, NATHAN & ISRAEL, L.L.C.

/s/ James K. Schultz
James K. Schultz
Attorneys for Defendant-Appellant,
Enhanced Recovery Company, LLC

James K. Schultz
Sessions, Fishman, Nathan & Israel, L.L.C.
55 Enhanced Monroe Street, Suite 1120
Chicago, IL 60603
Telephone: 312-578-0990
Facsimile: 312-578-0991
jschultz@sessions-law.biz

Bryan C. Shartle
Sessions, Fishman, Nathan & Israel, L.L.C.
Lakeway Two, Suite 200
3850 N. Causeway Boulevard
Metairie, LA 70002
Telephone: 504-828-3700
Facsimile: 504-828-3737
bshartle@sessions-law.biz

Attorneys for Defendant-Appellant,
Enhanced Recovery Company, LLC

## CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

The undersigned certifies that the foregoing Brief of Defendant-Appellant Enhanced Recovery Company, LLC complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,175 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The undersigned further certifies that 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 in a proportionally spaced typeface using Microsoft Word Version 97-2003 in 13 point Century Style font.

Dated January 25, 2012.

SESSIONS, FISHMAN, NATHAN & ISRAEL, L.L.C.

/s/ James K. Schultz
James K. Schultz
Attorneys for Defendant-Appellant,
Enhanced Recovery Company, LLC

## CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the appendix.

Dated January 25, 2012.

SESSIONS, FISHMAN, NATHAN & ISRAEL, L.L.C.

/s/ James K. Schultz
James K. Schultz
Attorneys for Defendant-Appellant,
Enhanced Recovery Company, LLC

## CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2012, the Brief of Defendant-Appellant Enhanced Recovery Company, LLC was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

The following participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system:

Curtis C. Warner
WARNER LAW FIRM LLC
155 North Michigan Avenue
Suite 560
Chicago, Illinois 60601

Daniel A. Edelman
EDELMAN, COMBS & LATTURNER
120 South LaSalle Street
18th Floor
Chicago, Illinois 60603

Dated January 25, 2012.

SESSIONS, FISHMAN, NATHAN & ISRAEL, L.L.C.

/s/ James K. Schultz
James K. Schultz
Attorneys for Defendant-Appellant,
Enhanced Recovery Company, LLC

# APPENDIX

# ATTACHED REQUIRED SHORT APPENDIX

## Table of Contents

**United States District Court, Northern District of Illinois**

| Name of Assigned Judge or Magistrate Judge | Matthew F. Kennelly | Sitting Judge if Other than Assigned Judge | |
|---|---|---|---|
| **CASE NUMBER** | 10 C 5469 | **DATE** | 8/21/2011 |
| **CASE TITLE** | Soppet, et al. vs. Enhanced Recovery Co. | | |

**DOCKET ENTRY TEXT**

For the reasons stated below, the Court denies ERC's motion for summary judgment [docket no. 50]. A status hearing is set for September 6, 2011 at 9:30 a.m. for the purpose of setting a schedule for any further proceedings in this case, and to discuss the possibility of settlement.

■[ For further details see text below.] Docketing to mail notices.

**STATEMENT**

Teresa Soppet and Loidy Tang have sued Enhanced Recovery Company, LLC (ERC) under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227(b)(1)(A)(iii). ERC has moved for summary judgment. For this reason, the Court views the facts in the light most favorable to plaintiffs and draws reasonable inferences in their favor.

Facts

AT&T retained ERC, a debt collection company, to collect debts owed by Dupree Riley and Sherita Morgan. When Riley opened her account with AT&T in July 2005, he gave AT&T the telephone number 708-xxx-2583 as a contact number. When Morgan opened her AT&T account in October 2006, she gave AT&T the telephone number 708-xxx-8483 as a contact number. AT&T provided these numbers to ERC when it retained ERC to collect the debts.

Since February 2007, Soppet has had cell phone with the number 708-xxx-2583. ERC called that number twenty-four times from January through September 2010 using an automated or predictive dialing system and left prerecorded messages each time. The messages were for Riley. It is clear from the contents of the prerecorded messages that ERC was trying to reach Riley. The messages advised that the recipient should delete the message if she was not Riley. Soppet's voice mail greeting informed callers that they had reached Teresa Soppet. This did not deter ERC from continuing to call the number. Soppet did not contact ERC to ask it to stop calling her number.

Tang has had the cell phone number 708-xxx-8483 since January 2007. She alleges that ERC called that number at least fifteen times from October 2009 through September 2010, using an automatic telephone dialing system. It is clear from the prerecorded messages that ERC left that it was trying to reach Morgan. A

number of the messages advised the recipient to delete the messages if she was not Morgan. Until about June 2010, Tang had a voice mail greeting informing callers they had reached Loidy Tang. This did not deter ERC from continuing to call the number. Tang says that in September 2010, she contacted ERC and requested that it stop calling her number for Morgan. ERC did not call Tang after that request.

Discussion

The TCPA provides, in relevant part, that

> [i]t shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service.

47 U.S.C. § 227(b)(1). The statute defines an "automatic telephone dialing system" as "equipment which has the capacity to store or produce telephone number to be called, using a random or sequential number generator, and to dial such numbers." *Id.* § 227(a)(1).

ERC's first argument is that Soppet and Tang were not the "called parties" or the intended recipients of the call and that for this reason they lack standing to sue under section 227(b)(1). The Court disagrees and, in this regard, adopts the discussion of this point by its colleagues Judge Charles Kocoras and Chief Judge James Holderman. *See Tang v. Medical Recovery Specialists, LLC*, No. 11 C 2109, slip op. at 3 (N.D. Ill. July 7, 2011); *D.G. ex rel. Tang v. William W. Siegel & Assocs.*, No. 11 C 599, 2011 WL 2356390, at *2 (N.D. Ill. June 14, 2011). To put it in a nutshell, the statutory term "called party" is in the statute as part of a consent defense, not as a limitation on who may sue for a violation of the statute. The plain language of section 227(b)(1) makes it clear that the "recipient" of a call violative of that provision may sue – not merely, as ERC argues, the "intended recipient." Soppet and Tang were the recipients of the calls at issue in this case.

ERC's second argument is that it had the consent of the parties it intended to call – Riley and Morgan – and that Soppet and Tang have no viable claim even though they were the actual recipients of the calls. As noted above, section 227(b)(1) contains an exception to liability for calls "made with the prior express consent of the called party." ERC contends that the "called party" is the party that the caller intended to call; Soppet and Tang contend that the "called party" is the actual recipient. The Court assumes for purposes of this discussion that the consent that Riley had provided four-plus years before ERC first called Soppet and the consent that Morgan had provided three years before ERC first called Tang qualifies under section 227(b)(1) even absent evidence that ERC had done anything to attempt to confirm that Riley and Morgan still had those phone numbers.

Section 227 contains no express definition of the term "called party." Section 227(b)(1) uses the term "recipient" in referring to statutory coverage of calls made from outside the United States to persons within the United States. One might infer from this that the term "called party," used later in section 227(b)(1), means something other than "recipient." But the usage of "called party" in section 227(b)(1) and the remainder of section 227 makes it clear, in the Court's view, that the "called party" is the party that the caller actually calls – in other words, the actual recipient of the call. In particular, section 227(d), which concerns the establishment of technical and procedural standards for facsimile machines and automated telephone dialing systems, provides among other things that

STATEMENT

> [t]he Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that--
>
> (A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and
>
> (B) any such system will automatically release *the called party's line* within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow *the called party's line* to be used to make or receive other calls.

47 U.S.C. § 227(d)(3). This statutory usage of "called party" is a clear reference to the actual recipient of a call – it requires establishment of a standard that will release the call recipient's line under particular circumstances.

The law presumes that "Congress intended the same terms used in different parts of the same statute to have the same meaning," *Perry v. First Nat'l Bank*, 459 F.3d 816, 820-21 (7th Cir. 2006), and there is nothing here to rebut the presumption. The Court concludes that the term "called party" in section 227(b)(1) refers to the actual recipient of a call, just as it does in section 227(d)(3). As a result, Soppet and Tang are the "called parties" with regard to the calls at issue in this case. Because there is no evidence that they expressly consented to receive calls from ERC, ERC is not entitled to the benefit of section 227(b)(1)'s exception to liability.

For these reasons, the Court denies ERC's motion for summary judgment [docket no. 50]. A status hearing is set for September 6, 2011 at 9:30 a.m. for the purpose of setting a schedule for any further proceedings in this case, and to discuss the possibility of settlement.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | |
|---|---|
| TERESA SOPPET and LOIDY TANG, individually and on behalf of a class, Plaintiffs, vs. ENHANCED RECOVERY COMPANY, L.L.C., as successor to ENHANCED RECOVERY CORP., Defendant. | No. 10 C 5469 Chicago, Illinois September 14, 2011 10:07 o'clock a.m. |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY

APPEARANCES:

For Plaintiff Soppet:
EDELMAN, COMBS, LATTURNER & GOODWIN, L.L.C.
BY: MR. FRANCIS R. GREENE
120 South LaSalle Street, 18th Floor
Chicago, Illinois 60603
(312) 739-4200

For Plaintiff Tang:
WARNER LAW FIRM, L.L.C.
BY: MR. CURTIS C. WARNER
155 North Michigan Avenue, Suite 560
Chicago, Illinois 60601
(312) 638-9139

BURKE LAW OFFICES, L.L.C.
BY: MR. ALEXANDER H. BURKE
155 North Michigan Avenue, Suite 9020
Chicago, Illinois 60601
(312) 729-5288

APPEARANCES (Continued):

For the Defendant:

SESSIONS, FISHMAN, NATHAN
& ISRAEL, L.L.P.
BY: MR. JAMES K. SCHULTZ
55 West Monroe Street, Suite 1120
Chicago, Illinois 60603
(312) 578-0990

COLLEEN M. CONWAY, CSR, RMR, CRR
Official Court Reporter
219 South Dearborn Street, Room 2524-A
Chicago, Illinois 60604
(312) 435-5594
*colleen_conway@ilnd.uscourts.gov*

(Proceedings in open court.)

THE CLERK: 10 C 5469, Soppet versus Enhanced Recovery.

THE COURT: Good morning.

MR. SCHULTZ: Good morning, Your Honor.

Jim Schultz on behalf of ERC.

MR. WARNER: Curtis Warner on behalf of Plaintiff Tang.

MR. GREENE: Francis Green on behalf of Plaintiff Soppet.

MR. BURKE: Alexander Burke for Plaintiff Tang.

THE COURT: Okay. So I've got a motion by the defendant to reconsider the summary judgment ruling or, in the alternative, to certify it for an interlocutory appeal under § 1292(b).

And I've got a renewed motion -- I've got motions by both of the plaintiffs, I guess, to compel class discovery. And the discovery involves -- honestly, I think it's probably justified, but it's going to be relatively voluminous and expensive and time-consuming.

The motion to reconsider is denied. I haven't been told anything in here that leads me to think I was wrong. The consent that was given by the people who originally had these phones, in my view, is not consent by the "called party" as the statute uses that term.

The Federal Communications Commission order from 2008 that the defendant cites does not suggest that the called party means anything other than the recipient of the call. It simply doesn't address the issue. And the cases that the defendant cites don't contradict the ruling.

That said -- and although there have been some other cases in this district, they really dealt primarily with the standing issue, and maybe entirely with the standing issue, and really not so much with what I'll call the quasi merits issue that I dealt with. It's not really quasi. It's a merits issue.

And, you know, in some situations, when you're looking at a 1292(b) motion, and particularly the factor about whether there's reasonable grounds for a difference of opinion or however it's phrased, it's pretty clear because there's a lot of authority going all one way or the authority's split. Not really the case here.

And my view is that this is the kind of issue that even though I think I am right, and I'm pretty sure I'm right, is subject to reasonable debate, and I do think that it would materially advance the termination of the litigation.

One of the things I take into account when I am saying that is the fact that the class is, at least from what I have been told -- and the plaintiffs' discovery motion is likely to be pretty darn huge -- it's in the six figures, I

think -- and the discovery involving that is likely to be quite voluminous -- the class certification motion sounds like is going to be opposed, and there will be issues raised about that. And so a lot of expense is going to be undertaken, none of which would be necessary if the Court of Appeals disagrees with me.

So the motion for reconsideration is denied. Augie, that's part of document number 76. But the motion for certification under § 1292(b) is granted.

What I need you to do, though, is I need you to draft an order -- it just needs to be like a two-sentence order -- that says what it is I am certifying so that everybody is on the same page. And what I am certifying is the denial of the summary judgment motion.

So if you could all sort of collectively get together -- maybe Mr. Schultz can propose an order, you guys can look at it -- and give me something on the agreed -- on the order --

MR. SCHULTZ: The e-mail?

THE COURT: The e-mail address, right. That's what I was groping for.

MR. SCHULTZ: Certainly, Your Honor.

THE COURT: And the two motions to compel, which are documents Nos. 70 and 72, are terminated without prejudice.

And so we'll just wait and see. I mean, the Court of

Appeals obviously has to decide whether to take it. We'll wait and see if they do. And I am going to give you a status hearing in -- oh, let's say two-and-a-half months. So let's say the 1st of December at 9:30 in the morning.

MR. GREENE: Thank you, Your Honor.

MR. BURKE: Thank you.

MR. WARNER: Thank you.

MR. SCHULTZ: Thank you, Your Honor.

THE COURT: All right. Take care.

(Proceedings concluded.)

# C E R T I F I C A T E

I, Colleen M. Conway, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the HONORABLE MATTHEW F. KENNELLY, one of the Judges of said Court, at Chicago, Illinois, on September 14, 2011.

*/s/ Colleen M. Conway, CSR,RMR,CRR* *09/15/11*

Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

Date

**United States District Court, Northern District of Illinois**

| Name of Assigned Judge or Magistrate Judge | Matthew F. Kennelly | Sitting Judge if Other than Assigned Judge | |
|---|---|---|---|
| **CASE NUMBER** | 10 C 5469 | **DATE** | 9/14/2011 |
| **CASE TITLE** | Soppet vs. Enhanced Recovery | | |

**DOCKET ENTRY TEXT**

Status hearing held and continued to 12/1/2011 at 9:30 AM. Motion to reconsider is denied for the reasons stated in open court (76). Motion for certification is granted. Motions to compel are terminated without prejudice (70,72).

Docketing to mail notices.

00:10

| | | |
|---|---|---|
| | Courtroom Deputy Initials: | OR |

**UNITED STATES DISTRICT COURT**
**FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 4.2**
**Eastern Division**

Teresa Soppet, et al.

Plaintiff,

v.

Case No.: 1:10–cv–05469
Honorable Matthew F. Kennelly

Enhanced Recovery Company, LLC, et al.

Defendant.

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## NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Tuesday, September 27, 2011:

MINUTE entry before Honorable Matthew F. Kennelly: The Court grants defendant's motion for certification under 28 USC 1292(b) and certifies for immediate appeal its decision of August 21, 2011 (docket entry 69) denying defendant's motion for summary judgment. As more fully explained in open court, the Court finds that the decision involves a controlling question or questions of law on which reasonable minds could differ and that immediate consideration of the matter on appeal is likely to advance the ultimate resolution of the litigation. (mk)

**ATTENTION:** This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.