UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11-3819

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
The Honorable Matthew F. Kennelly, Judge Presiding

No. 1:10-cv-5469

APPELLEES' JOINT RESPONSE TO APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 11-3819

Short Caption: Teresa Soppet and Loidy Tang v. Enhanced Recovery Company, LLC

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Teresa Soppet

(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:

Edelman, Combs, Latturner & Goodwin, LLC

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

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

N/A

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

N/A

Attorney's Signature: s/ Daniel A. Edelman Date: March 9, 2012

Attorney's Printed Name: Daniel A. Edelman

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

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N/A

Attorney's Signature: s/ Cathleen M. Combs Date: March 9, 2012

Attorney's Printed Name: Cathleen M. Combs

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

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N/A

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

N/A

Attorney's Signature: s/ James O. Latturner   Date: March 9, 2012

Attorney's Printed Name: James O. Latturner

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N/A

Attorney's Signature: s/ Francis R. Greene Date: March 9, 2012

Attorney's Printed Name: Francis R. Greene

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Loidy Tang

(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:

Warner Law Firm, LLC

Burke Law Offices, LLC

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

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

N/A

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

N/A

Attorney's Signature: s/ Curtis C. Warner   Date: March 9, 2012

Attorney's Printed Name: Curtis C. Warner

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JURISDICTIONAL STATEMENT

The jurisdictional statement of Enhanced Recovery Company, LLC, as successor to Enhanced Recovery Corporation ("ERC") is complete and correct.

ISSUES PRESENTED FOR REVIEW

ERC robocalled Plaintiffs' cell phone numbers on numerous occasions in an attempt to collect debts owed by the prior assignees of Plaintiffs' cell numbers. The prior assignees, the debtors, gave consent to the original creditor to receive autodialed calls and prerecorded messages to their cell phones; Plaintiffs did not consent to receive such calls to their cell phones.

This case raises a number of issues relating to the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq*. ("TCPA") which, *inter alia*, prohibits "any person within the United States, or any person outside the United States if the recipient is within the United States" to make calls using an automatic telephone dialing system or an artificial voice (hereinafter "autodialed calls") to a person's cellular telephone number. The first issue is:

> 1. When the prior assignee of a cell number gives consent to receive autodialed calls, has the current assignee given "prior express consent" to receive such calls for purposes of the "prior express consent of the called party" exception, 47 U.S.C. § 227(b)(1)(A), to the prohibition against autodialed calls in the TCPA?

ERC's *amicus curiae*, ACA International ("ACA") notes (Corrected Brief of ACA International as *Amicus Curiae*, in Support of the Defendants-Appellants [sic] Supporting Reversal ("ACA Brief"), p. 8n5), that, as cell phone use increases, cell phone numbers are frequently re-assigned. That fact raises a

second issue:

> 2. Must a debt collector skip trace the account debtor's name, do a cell phone "scrub," or manually dial the first call to a putative debtor before initiating a robocalling campaign to a cellular telephone number?

In its petition for interlocutory appeal, ERC asked this Court to answer a single question:

> For purposes of the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1(A), is an autodialed debt collection call to a cell phone number at which a debtor consented to receive such calls made with the consent of the "called party" if a person other than the debtor owns the cell phone number and receives the call when made?

(Petition for Interlocutory Appeal by Defendant ("ERC's Petition"), p. 3.) ERC's statement of the Issues Presented For Review departs from the question ERC petitioned this Court to answer and reflects ERC's attempt to argue a position in this Court that it did not argue below. ERC characterizes the first issue presented for review as "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'." (Brief of Defendant-Appellant Enhanced Recovery Company, LLC ("Brief"), p. 2, emphasis added).

ERC's argument to the district court was that "called party" in § 227(b)(1)(A) of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* ("TCPA") means, *and only means*, the intended recipient of an autodialed call, *i.e.*, the actual debtor. "As noted, the referenced debtors, Mr. Riley and Ms.

Morgan, were the 'called parties', *i.e.*, the intended recipients of ERC's call on the respective accounts." (R.52, p. 15.) ERC argued below that actual, but not intended, recipients of an autodialed call, such as Plaintiffs-Appellees ("Plaintiffs"), were *not*, and could never be, "called part(ies)" under § 227(b)(1)(A). "It is undisputed plaintiffs were *not* the 'called parties'." (R. 52, p.12, emphasis in the original). ERC now argues for the first time in its opening brief that "called party" includes *both* the intended *and* the actual recipient of an autodialed call.

The second issue contained in ERC's statement of the Issues Presented for Review likewise was not a question presented in ERC's petition. ("ERC's Petition"), p. 3.)

STATEMENT OF THE CASE

The TCPA prohibits autodialed calls to cell phones except in emergencies or when the caller has obtained the "prior express consent of the "called party." 47 U.S.C. §227(b)(1)(A). Here ERC called Plaintiffs' cell phone numbers in an attempt to collect debts owed by the former assignees of the numbers. At the time ERC began robocalling, Plaintiffs had had their cell numbers for approximately three years; yet ERC made no attempt before making 18 calls to Plaintiff Soppet and 29 calls to Plaintiff Tang to determine whether the numbers still belonged to the debtors or had been reassigned to these new owners. A simple skip trace, cell phone "scrub" or initial manually-dialed call would have answered that question. The district court held that ERC was not

entitled to the prior express consent defense because Plaintiffs were the "called part(ies))" and had never consented to receive ERC's autodialed calls. (ERC's Short Appendix ("App."), pp. A-1-3.)

ERC makes a new argument in its opening brief that it did not make below, and in its Statement of the Case, ERC attempts to give the impression that it made its new argument to the district court when in fact it did not. Misleadingly, ERC states: "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." (Brief, p. 4, emphasis added.)

In fact, ERC argued to the district court that *only* the *intended* recipient of an autodialed call is a "called party" for purposes of the "prior express consent of the called party" defense in §227(b)(1)(A). ERC argued that the actual, but unintended, recipient of an autodialed call was not a "called party" for purposes of that defense. (R.52, pp. 2, 8-12, 15.) Similarly, in its petition for interlocutory appeal, ERC stated that, "For purposes of the TCPA consent defense, ERC believes the "called party" is the individual the caller was attempting to reach – *the intended recipient of the call*." (ERC Petition, p. 4; *see also* pp. 7, 10-13, emphasis in the original).

ERC now argues that "called party" should be construed to mean not merely the *intended*, but also the *actual*, recipient of an autodialed call. This

argument conflicts with the brief of ERC's *amicus curiae*, ACA. ACA argues, consistent with both ERC's argument in the district court and ERC's Petition, that "called party" encompasses only the intended, and not the actual, recipient of an autodialed call. (ACA Brief, p. 21.)

STATEMENT OF FACTS

In July 2005, Dupree Riley, a complete stranger to Plaintiff Teresa Soppet, gave AT&T a telephone number ending in 2583 as a contact number when he applied for and obtained residential landline service. (R.51, Exhibit ("Ex.") B, ¶ 3; R.60, Ex. G, p. 34, lines 14-15.) In September 2006, AT&T cut off Riley's residential landline service for non-payment and, in August 2009, placed the $232.83 debt with ERC for collection. (R.51, Ex. B, ¶ 5; R.60., Ex. H, p. 13, lines 23-25; p. 14, line 1; Ex. J.)

Ms. Soppet acquired the 2583 number as her cellular telephone number in February 2007. (R.60, Ex. I, ¶ 2.) In January 2010, ERC began robocalling Ms. Soppet's 2583 cell number and leaving messages in an effort to collect on Riley's defaulted account. (R.60, Ex. E, ¶¶ 3-5; Ex J.) ERC's calls began almost *five* years after Riley had given the 2583 number to AT&T, *40* months after AT&T had cut off Riley's landline service, and some *three* years after Ms. Soppet had acquired the 2583 number for her cell phone. (R.51, Ex. B, ¶ 3; R.60, Ex. H, p. 13, lines 23-25; p. 14, line 1; Ex. I, ¶ 2.)

At the time ERC began calling, Teresa Soppet's outgoing voice mail message stated: "Hi this is Teresa, sorry I missed your call. Leave me a

message and I'll call you back." (R.60, Ex. K, ¶ 14; Ex. I, ¶ 3.) Had ERC had a human being manually place the first call to Ms. Soppet, it would have immediately learned that it was not calling Dupree Riley. Instead, ERC chose to launch a robodialing campaign that resulted in 18 calls to Ms. Soppet's cell phone and 18 messages telling her that, if she was not Dupree Riley, she should delete the message. (R.60, Ex. F, p. 32, lines 21-24; p. 36, lines 1-18; p. 56, lines 7-13; Ex. J.)

In October 2006, Sherita Morgan, a complete stranger to Plaintiff Loidy Tang, gave AT&T a telephone number ending in 8483 as a contact number when she applied for and obtained residential landline service. (R.51, Ex. B, ¶4; R.60, Ex. L, p. 24, lines 7-10.) In December 2006, AT&T cut off Morgan's residential landline service for non-payment and, in August 2009, placed the $213.15 debt with ERC for collection. (R. 51, Ex. B, ¶ 5; R.60, Ex. H, p. 16, lines 23-25; Ex. M.)

Ms. Tang acquired the 8483 number as her cellular telephone number in approximately January 2007. (R.60, Ex. L, p. 16, lines 1-5.) Beginning in October 2009, ERC began robocalling Ms. Tang's 8483 cell number and left messages in an attempt to collect on Morgan's defaulted account. (R.60, Ex. M; Ex. E, ¶¶ 3-5.) ERC's calls began almost *three* years after Morgan had given the 8483 number to AT&T, *34* months after AT&T had cut off Morgan's service, and some *33* months after Ms. Tang acquired the 8483 cell number. (R. 51 Ex. B, ¶ 5; R.60, Ex. H, p. 16, lines 23-25; Ex. L, p. 16, lines 1-5.)

At the time ERC began calling, Loidy Tang's outgoing voice mail message stated: "Hello, this is Loidy, please leave a message." (R.60, Ex. L, p. 36, line 24; p. 37, lines 1-8.) Again, if ERC had had a human being manually place the first call, it would have discovered that it was not calling Sherita Morgan. Instead, ERC began a robodialing campaign that resulted in 29 calls to Ms. Tang's cell phone and 29 messages telling her that, if she was not Sherita Morgan, she should delete the message. (R.60, Ex. F, p. 36, lines 1-18; Ex. M.)

ERC's messages were prerecorded except that the names "Dupree Riley" and "Sherita Morgan" were inserted into the messages in real time by computer technology. (R.60, Ex. F, p. 35, lines 23-24; pp. 36-37, p. 38, lines 1-16.) The prerecorded messages stated:

> Hello this message is for [Dupree Riley/ Sherita Morgan]. If you are not this person please delete this message as it is not for you. This is [] with Enhanced Recovery. We are a collection agency attempting to collect a debt and any information obtained will be used for that purpose. Please contact me about this business matter at (800) 496-8916 and provide the following reference number . . . .

(R.60, Ex. F, p. 36, lines 1-18; Ex. G, p. 32, lines 21-24; p. 33, lines 1-5.) ERC called Ms. Soppet 18 times and Ms. Tang 29 times. (R.60, Ex. J; Ex. F, p. 56, lines 7-13; Ex. M.)

At no time did ERC attempt to determine whether the contact numbers given to AT&T five and three years previously still belonged to Riley and Morgan. (R.60, Ex. F, p. 29, lines 14-17; p. 30, lines 19-22; p. 32, lines 9-19; Ex. G, p. 32, lines 21-24; p. 33, lines 1-5.) Instead, ERC told Plaintiffs to hang

up if they were not Riley and Morgan respectively, and placed the burden on Plaintiffs to apprise ERC that it was calling the wrong number. (R.60, Ex. F, p. 29, lines 14-17; p. 30, lines 19-22; p. 32, lines 9-19.) ERC could have listened to Plaintiffs' outbound voice mail messages to determine if the 2583 and 8483 numbers still belonged to Riley and Morgan, but did not do so. (R.60, Ex. F, p. 43, lines 15-24; p. 63, lines 10-16.) ERC could have run the 2583 and 8483 numbers through a cell phone scrub to determine whether or not they were cell numbers, but did not do so. (R.60, Ex. F, p. 19, 1-24, p. 20, line 1; p. 32, lines 20-24; p. 48, lines 15-24; p. 49, lines 1-18.) ERC employees did not manually call the 2583 and 8483 numbers; the calls were made using an automated telephone dialing system. (R.60, Ex. F, p. 34, lines 17-24, p. 35, lines 1-20.)

At no time did Plaintiffs give consent to either AT&T or ERC to call their respective cell phones. (R.60, Ex. G, p. 34, line 24; p. 35, lines 1-16; Ex. L, p. 12, lines 20-24, p. 13, lines 1-4.)

SUMMARY OF THE ARGUMENT

The "prior express consent of the called party" exception in § 227(b)(1)(A) refers to consent given by the current assignee of a cell phone number who actually received a call initiated by an automatic telephone dialing system or involving an artificial or prerecorded voice. The "prior express consent of the called party" in §227(b)(1)(A) does *not* permit a former assignee of a cell number to give consent to a creditor to call future assignees of the same number.

Congress enacted the TCPA to protect consumers from intrusive calls.

Congress prohibited autodialed calls to cellular telephones except in an emergency or when the called party had given prior express consent to receive such calls:

> § 227. Restrictions on use of telephone equipment
> . . . .
> (b) Restrictions on use of automated telephone equipment.
>
> (1) Prohibitions. 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–
>
> (A) 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–
> . . . .
> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the **called party** is charged for the call; . . .

47 U.S.C. §§ 227(b)(1)(A)(iii) (emphasis added). There is nothing in the text or purpose of the TCPA that remotely suggests that Congress enacted the TCPA to protect the former assignee of a cell number from autodialed calls. Congress's focus was on the current assignee of a cell number, the person who is the actual "recipient" of the autodialed calls.

The use of the term "called party" in the TCPA follows usage going back fifty years in which the person who actually answers the telephone is referred to as the "called party." *See, e.g., California v. FCC*, 75 F.3d 1350, 1357 n.9 (9th Cir. Cir. 1939).

That "called party" means the actual and not the intended recipient of a

call is unequivocally demonstrated by § 227(d) of the TCPA, which orders the Federal Communications Commission (FCC) to prescribe standards for telephone systems that transmit artificial or prerecorded voice messages. The standards must require, *inter alia*, that —

> 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)(B) (emphasis added). "Called party" here can only mean the actual recipient of the call because the *only* person who can *hang up the phone* is the person who has actually *received and answered* the call. An intended, but not actual, recipient of a call cannot hang up and terminate a call that he or she never received.

It is to be presumed that "Congress intended the same terms used in different parts of the same statute to have the same meaning". *Belom v. Nat'l Futures Ass'n*, 284 F.3d 795, 798 (7th Cir. 2002). There is no reason to think Congress intended "called party" in § 227(d)(3)(B) to mean the current assignee of a cell number and actual recipient of a call but in § 227(b)(1)(A) to mean the former assignee of a cell number and intended recipient. On the contrary, the natural construction of "called party" throughout the TCPA is that it refers to the current assignee and actual recipient of a call.

The district court did *not* violate the Hobbs Act, 28 U.S.C. § 2342, by allegedly ignoring a 2008 Federal Communication Commission ("FCC") order concerning the TCPA. The Hobbs Act has no relevance to this case because the

2008 Order did not address the questions at issue here.

ERC's argument essentially asks this Court to judicially insert some degree of intent into the statute – something akin to the "*bona fide* error" defenses contained in the Truth In Lending Act, 15 U.S.C. § 1640(c), and the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(c). Congress drafted the TCPA as a strict liability statute; intent only comes into play when assessing the measure of damages. 47 U.S.C. § 227(b)(3). The FCC, moreover, in a 2003 order considered – and rejected – a bona error defense. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14017, 2003 FCC LEXIS 3673 (2003) ("2003 Order").

Even if the TCPA did have a *bona fide* error defense of some sort, ERC's actions were not in good faith. Good faith can't be met when a caller like ERC realizes that it may be calling the wrong party and does not take simple precautions to avoid doing so.

The TCPA puts the onus on the user of an autodialer to make sure that it does not call a cell phone number unless the recipient has given prior express consent to receive such calls. This is not a difficult burden for companies like ERC to meet. In Plaintiffs' case, before ERC began autodialing, it could have easily had a human manually dial the numbers and listen to Plaintiffs' outbound voice mail messages to determine if the numbers still belonged to Riley and Morgan. (R.60, Ex. F, p. 43, lines 15-19; p. 63, lines 10-16.) At all

relevant times, Ms. Soppet's outgoing message said: "Hi this is Teresa, sorry I missed your call. Leave me a message and I'll call you back"; Ms. Tang's outgoing message said: "Hello, this is Loidy, please leave a message." (R.60, Ex. K, ¶ 14; Ex. I, ¶ 3; Ex. L, p. 36, line 24; p. 37, lines 1-8.) "Teresa" does not sound like "Dupree"; "Loidy" does not sound like "Sherita". If ERC had listened to Plaintiffs' messages, it would have known that the 2583 and 8483 numbers no longer belonged to Riley and Morgan. It could then have taken additional steps to confirm whom the numbers belonged to, such as manually calling the numbers and leaving appropriate messages, performing a skip trace, or scrubbing the number to determine if it was a cell phone.

ARGUMENT

I. Standard of Review

This Court reviews the denial of a motion for summary judgment de novo. *Campbell v. White*, 916 F.2d 421, 422 (7th Cir. Ill. 1990). Accordingly, this Court views the "record and all reasonable inference which may be drawn therefrom in a light which is most favorable to the non-moving party." *Id.* Under this standard, the district court's denial of ERC's motion for summary judgment should be affirmed.

II. Under The TCPA's "Prior Express Consent" Exception, The Former Assignee Of A Cell Number Cannot Consent For Future Assignees

The "prior express consent of the called party" exception in § 227(b)(1)(A) refers to consent given by the current assignee of a cell phone number who actually received an autodialed. The "prior express consent of the called party"

exception in §227(b)(1)(A) does *not* permit a former assignee of a cell number to give consent to a creditor to call future assignees of the same number.

Congress enacted the TCPA because it found (1) that consumers were fed up with "nuisance" calls, (2) that "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy", and (3) that public safety is put at risk "when a telemarketer ties up an emergency or medical assistance telephone line with a telemarketing call." *Congressional Findings* 5-6, Act Dec. 20, 1991, P.L. 102-243, § 2, 105 Stat. 2394. Congress also found that "the only effective means" of protecting consumers was to ban "automated or prerecorded telephone calls to the home, except when the *receiving party* consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer." *Congressional Findings* 12, Act Dec. 20, 1991, P.L. 102-243, § 2, 105 Stat. 2394 (emphasis added). The ordinary meaning of "receiving party" is the person at home who answers the phone.

In its findings, Congress used "receiving party" to refer to the actual person who receives a potentially annoying call, *i.e.*, the person who actually answers the phone. In the TCPA, the "receiving party" of a voice communication from a telemarketer is with one exception referred to as the "called party":

> § 227. Restrictions on use of telephone equipment
> . . . .
> (b) Restrictions on use of automated telephone equipment.

(1) Prohibitions. 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–

(A) 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–

. . . .

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the **called party** is charged for the call; . . .

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the **called party**, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

. . . .

(d) Technical and procedural standards

. . . .

(3) Artificial or prerecorded voice systems. The 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 —

. . . .

(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(b)(1)(A)(iii), (b)(1)(B), (d)(3)(B) (emphasis added). There is nothing in the text or purpose of the TCPA that remotely suggests that Congress enacted the TCPA to protect the former assignee of a cell number from autodialed calls. Congress's focus was on the current assignee of a cell number who is actually receiving autodialed calls.

The one exception to the use of the term "called party" in §

227(b)(1)(A)(iii) is the use of the word "recipient" in § 226(b)(1). It is plain from the context that "recipient" means the "receiver" or "receiving party" of a communication. The terms "called party" in subparagraph (A) and clause (iii) to § 227(b)(1) take their meaning from "recipient" in paragraph (1), namely "receiver" or "receiving party" of a communication.

The use of the term "called party" in the TCPA follows numerous cases going back more than fifty years in which the person who actually answers the telephone is referred to as the "called party." *See, e.g.*, *California v. FCC*, 75 F.3d 1350, 1357 n.9 (9th Cir. 1996) ("Called party refers to the person receiving the call."); *In re Bond*, 910 F.2d 831, 834 (Fed. Cir. 1990) ("In light of this disposition, the court need not resolve the question of how closely synchronized are the ring signals *heard* by the calling and called parties.") (Emphasis added.); *Gray Tel. Pay Station Co. v. Western Elec. Co., Inc.*, 101 F.2d 853, 855 (7th Cir. 1939) ("This witness identified photographs of the pay station in question, together with contemporaneous circuit drawings showing the coin control barrier in the form of a normally closed dial shunt, the means for automatically collecting or returning the deposited nickel, depending upon whether *the called party does or does not answer*.") (Emphasis added.)

That "called party" means the actual and not the intended recipient of a call is, as the district court recognized (ERC's Short Appendix ("App."), pp. A-2-3) unequivocally demonstrated by § 227(d) of the TCPA, which orders the FCC to prescribe standards for telephone systems that transmit artificial or

prerecorded voice messages. The standards must require, *inter alia*, that —

> 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)(B) (emphasis added). "Called party" here can only mean the actual recipient of the call because the *only* person who can *hang up the phone* is the person who has actually *received and answered* the call. The former assignee of a cell number, who may be the intended but not the actual recipient of a call, cannot hang up and terminate a call that he or she never received.

As the district court correctly noted (App., p. A-3), it is to be presumed that "Congress intended the same terms used in different parts of the same statute to have the same meaning"*. Belom v. Nat'l Futures Ass'n*, 284 F.3d 795, 798 (7th Cir. 2002); *Perry v. First Nat'l Bank*, 459 F.3d 816, 820-21 (7th Cir. 2006). Nothing in the TCPA suggests that Congress intended "called party" in § 227(d)(3)(B) to mean the current assignee of a cell number and actual recipient of a call but in § 227(b)(1)(A) to mean the former assignee of a cell number and intended recipient. On the contrary, the natural construction of "called party" throughout the TCPA is that it refers to the current assignee and actual recipient of a call. *CE Design, Ltd. V. Prism Bus. Media, Inc.*, 606 F.3d 443 (7th Cir. 2010) (emphasis added) (quoting *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C.R. 8752, 8779) (for purposes of § 227(b)(1)(B), an established business relation is "a prior or existing relationship

formed by a voluntary two-way communication between *the caller and the called party* . . . .")

In response, ERC makes two arguments (which it failed to make below). First, ERC argues (Brief, p. 20) that the reference to "called party" in §227(d)(3)(B) can logically refer to both a former or a current assignee of a cell number, the intended and the actual recipient of an autodialed call. But the former assignee, the intended but not actual recipient, cannot answer a call he or she does not receive; and there would be no point in Congress requiring the FCC to design regulations which allow a person who never received a call to make another call five seconds after hanging up. Statutory language should not be construed to render words or phrases in any way meaningless, redundant, or superfluous. *United States v. Misc Firearms*, 376 F.3d 709, 712 (7th Cir. 2004).

Secondly, ERC argues that § 227(d)(3)(B) and § 227(b)(1)(A) have different purposes and, therefore, the presumption that "called party" has the same meaning in both sections "is arguably inappropriate." (Brief, p. 22.) Sections 227(d)(3)(B) and 227(b)(1)(A) have the same purpose: protect consumers from unwanted and unauthorized autodialed telephone calls. Section 227(b)(1)(A) discusses what is prohibited; §227(d)(3)(B) discusses the implementation of the prohibition. There is nothing "inappropriate" about presuming that "called party" has the same meaning in both sections since the general purpose behind each section is the same.

III. ERC'S Construction Of "Called Party" Is Not Supported By The Text Of The TCPA, FCC Orders, Or Public Policy

ERC argues (Brief, p. 20) that the "most sensible" construction of "called party" is both the intended and the actual recipient of an autodialed call. This argument is meritless.

A. ERC Misconstrues The Meaning Of "Recipient" In Section 227(b)(1)

ERC criticizes the district court for allegedly failing "to give appropriate weight to the cardinal rule that statutory text gathers meaning from the surrounding words." (Brief, p. 15.) ERC goes on to argue that the reference to "recipient" in § 227(b)(1) demonstrates that "called party" includes the intended, as distinct from the actual, recipient of an autodialed call. (Brief, pp. 15-16.) The district court, however, never considered the "cardinal rule" because ERC never brought it to the district court's attention.

In any case, ERC's argument completely misconstrues the meaning of "recipient" in § 227(b)(1), which provides:

> § 227. Restrictions on use of telephone equipment
> . . . .
> (b) Restrictions on use of automated telephone equipment.
>
> (1) Prohibitions. 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–
>
> (A) 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– . . . .

47 U.S.C. § 227(b)(1)(A) (emphasis added). ERC argues that in light of the

proximity of "recipient" in § 227(b)(1) to "called party" in § 227(b)(1)(A), "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)." (Brief, p. 16.)

ERC's argument is meritless. The reference to "recipient" in § 227(b)(1) is explained by the fact that § 227(b) addresses two different potential nuisances: calls resulting in voice communications, whether live calls or voice messages (§227(b)(1)(A)-(B), (D)); and fax transmissions ("junk faxes") (§ 227(b)(1)(C)-(D)). The TCPA refers exclusively to the receiver of an autodialed call as the "called party" (§ 227(b)(1)(A)-(B); (§ 227(b)(2)(C)); the receiver of a junk fax is referred to exclusively as the "recipient" (§ 227(b)(1)(C); § 227(b)(2)(D)(ii), (iv)(I)-(II)). Because Section 227(b)(1) applies both to receivers of voice and fax communications, Congress had to find a general term in § 227(b)(1) that applied to both. Congress opted for "recipient."[1] There is nothing in the proximity of "recipient in § 227(b)(1) to "called party" in § 227(b)(1)(A) to suggest that "called party" means anything other than the current assignee of a cellular telephone number and the party who actually received an autodialed call.

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[1]The phrase in § 227(b)(1)(A) "or any person outside the United States if the recipient is within the United States" was added by Congress in 2003, twelve years after the original enactment of the TCPA because junk faxers in Canada and elsewhere were sending faxes into the United States.

B. ERC And The ACA Misconstrue The FCC's 2008 Order

1. The District Court Did Not Violate the Hobbs Act

Contrary to the arguments of both ERC (Brief, pp. 10-12) and the ACA (ACA Brief, pp. 14-18), the district court did *not* violate the Hobbs Act, 28 U.S.C. § 2342, by allegedly ignoring a 2008 FCC order concerning the TCPA. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 23 FCC Rcd. 559, 562 (2008) ("2008 Order"). The Hobbs Act has no relevance to this case because the 2008 Order did not address the questions at issue here.

The 2008 FCC order was issued in response to an ACA request for clarification that, *inter alia*, creditors and debt collectors should not be subject to the TCPA and the FCC's implementing regulations because the TCPA was enacted to address nuisance telemarketing communications, and creditors and debt collectors seeking to collect debts are not engaged in telemarketing:

> ACA filed a petition seeking clarification that the prohibition against autodialed or prerecorded calls to wireless telephone numbers in 47 C.F.R. § 64.1200(a)(1)(iii) does not apply to creditors and collectors when calling wireless telephone numbers to recover payments for goods and services received by consumers. ACA maintains that the TCPA was enacted to curtail the "onslaught of telemarketing calls," and that the use of autodialers to attempt to recover payments is not telemarketing.

2008 Order, 23 FFC Rcd at *563 (¶ 8).

Notably, the FCC rejected ACA's request for a blanket exemption for creditors and debt collectors from TCPA requirements. *Id.* at *568 (¶ 17). Instead, the FCC emphasized that "the plain language of section 227(b)(1)(A)(iii)

prohibits the use of autodialers to make *any* call to a wireless number in the absence of an emergency or the prior express consent of the called party" and that prohibition applied to debt collection calls by creditors and debt collectors. *Id.* at 565 (¶ 11) (emphasis added).

The FCC did rule that, like any other caller, to the extent a creditor or its agent has the prior express consent of the debtor to call the debtor's cell phone, the creditor was entitled to the "prior express consent" defense to liability. A creditor obtains the prior express consent of the debtor when the debtor gives his or her cell phone number to the creditor:

> [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).

> 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. We conclude that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the **cell phone subscriber** to be contacted at that number regarding the debt.

Id. at *564 (¶9) (emphasis added).

> We emphasize that prior express consent is deemed to be granted only if the wireless number was provided by the **consumer** to the creditor, and that such number was provided during the transaction that resulted in the debt owed.

Id. at *564-565 (¶10) (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). In these passages, "called party" is a person who has provided his or her cell phone number to a creditor and is the actual recipient of calls from the creditor or its debt collector agents.

The 2008 Order does not reflect any contemplation of the question at issue here, namely whether the consent given by a former assignee of a cell number constitutes "prior express consent" of the current assignee to receive autodialed calls. ACA did not ask, and hence the FCC did not address, that question. Nothing in these passages suggests that the FCC believed "called party" means the former assignee and intended recipient of an autodialed call, as distinct from the current assignee and actual recipient of an autodialed call. The FCC used "called party" as that term is used in the TCPA, namely the current assignee and the actual recipient of an autodialed call. *Anderson v. Afni, Inc.*, 10-4064, 2011 U.S. Dist. LEXIS 51368, *29 (E.D. Pa. May 11, 2011) (quoting *Watson v. NCO Group, Inc.*, 462 F. Supp. 2d 641, 644 (E.D. Pa. 2006) ("[T]he FCC has not directly addressed the issue of erroneous debt collection calls.")[2]

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[2]ERC argues that the district court ignored a number of cases in which courts have held that a debt collector lawfully autodials a cell number if the debtor provided the number to the creditor. However, none of those cases are apposite because, unlike here, they do not involve debtors who gave up their cell numbers after giving consent to be called. *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,

The district court did *not* ignore the 2008 Order. He reviewed it and correctly determined that it was not relevant to the issues of this case. In denying ERC's motion for reconsideration, the district court stated: "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." (Transcript of Proceedings Before the Honorable Matthew F. Kennelly, Document 4, p 4, lines 1-4.)

2. This Court Should Decline To Find A *Bona Fide* Error Defense In The TCPA.

ERC cites the passages quoted above from the 2008 Order to argue that it was the FCC's considered conclusion that "consent is tied to the number – not the particular person." (ERC Brief, p. 12.) But the FCC simply was not asked to address that particular question of consent, and it did not.

ERC relies on the 2008 Order to argue, in effect (Brief, pp. 22-23), that, once a cell number is given to a creditor, the creditor and its agents can call that number in perpetuity without first running a skip trace, a cell phone scrub of the number, or having a human being manually make the first call to determine if the number still belongs to the debtor. So even though Plaintiffs had had their cell numbers for approximately three years when ERC started calling, they were bound by the consent given by the debtors, Riley and

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*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).

Morgan, to ATT five and three years earlier. According to ERC, if a person who answers a call at a cell number revokes consent, then the debt collector would be required to cease calling, but absent that revocation of consent, the debt collector could keep calling in perpetuity. (Brief, p. 23.) In fact, ERC discouraged Plaintiffs from revoking consent by telling them to delete its messages if they were not Riley or Morgan. (R.60, Ex. F, p. 36, lines 1-18.)

ERC's "consent" argument says that when Riley and Morgan gave their cell numbers to AT&T, they were in effect saying "You can call this cell number in perpetuity even if I no longer have the number and have no way of answering your call." ERC's argument stretches the meaning of "prior express consent of the called party" beyond a commonsense understanding of that term. The "prior express consent of the called party" exception means that the caller can call the person who actually gave consent, not an unrelated third party.

ERC's argument shifts the cost of the highly foreseeable problem of wrong numbers onto innocent recipients of its autodialed calls. In light of the rapidity in which cell numbers change hands (Brief, p. 3; ACA Brief, p. 8n5), in light of the fact that Riley and Morgan had given their cell numbers to AT&T five and three years before ERC began calling (R.60, Ex. E, ¶¶ 3-5, Exs. J, M), in light of the fact that Riley and Morgan had defaulted on their landline accounts (R.51, ¶¶ 3, 5), ERC could not, or should not, have been surprised to learn that Plaintiffs' cell numbers no longer belonged to Riley and Morgan.

Indeed, ERC's prerecorded message acknowledged that ERC might be calling the wrong number, directing Plaintiffs to delete the message if they were not Riley and Morgan. (R.60, Ex. F, p. 36, lines 1-18.) As a debt collector, ERC was also concerned that, if its message were heard by someone other than the debtor, it might violate § 1692c of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*.

ERC could have avoided robocalling Plaintiffs at a minimal cost to itself. ERC could have run a skip trace, scrubbed their numbers, or had a human being make the first calls to those numbers manually. Also, instead of instructing Plaintiffs to delete the message if they were not Riley or Morgan, ERC could have programmed its autodialer to instruct Plaintiffs to press a key to inform ERC that it was reaching the wrong number.

In shifting the burden of dealing with wrong numbers to consumers, ERC minimizes the extent of that burden. Consumers are interrupted daily with a barrage of telephone calls from not always legitimate entities trying to sell them something. ERC is asking consumers to devote some period of their days answering the phone and telling companies they often have never heard of to stop calling. Some companies do not comply with such requests and, in the case of debt collectors, can become abusive. *See Federal Trade Commission Annual Report 2011: Fair Debt Collection Practices Act*, pp. 7-8 http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf (visited March 7, 2012) (noting an increase in complaints about debt collectors

threatening dire consequences if consumer fails to pay debt). *Abbas v. Selling Source, LLC*, 2009 U.S. Dist. Lexis 116697, *27 (N.D. Ill. 2009)(Congress found that consumers were unable to stop unwanted calls "and were particularly unable to stop the calls via direct requests" to the callers themselves.)

Moreover, ERC's argument essentially asks this Court to judicially insert some degree of intent into the statute – something akin to the "*bona fide* error" defenses in the Truth In Lending Act, 15 U.S.C. § 1640(c), and the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(c).[3] But Congress drafted the TCPA as a strict liability statute; intent only comes into play when assessing the measure of damages. 47 U.S.C. § 227(b)(3). The FCC, moreover, in a 2003 order considered – and rejected – a bona error defense:

> [W]e reject proposals to create a good faith exception for inadvertent autodialed or prerecorded calls to wireless numbers and proposals to create implied consent because we find that there are adequate solutions in the marketplace to enable telemarketers to identify wireless numbers.

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[3]Similarly, ACA complains that the district court's decision "will have the necessary effect of punishing actions taken in good faith." (ACA Brief, p. 10.) ACA also argues that the district court's decision will contribute to the "proliferation of TCPA litigation" (ACA Brief, 11) and cites statistics showing a dramatic increase in TCPA litigation between 2009 and 2011. (ACA Brief, 9.) The increase in TCPA litigation may be explained by the increase in the number of cell phones but it may also be explained by increasing abuses by debt collectors. The increase in TCPA litigation mirrors the increase in complaints about debt collectors to the Federal Trade Commission during the same period. *Federal Trade Commission Annual Report 2011: Fair Debt Collection Practices Act*, pp. 4-5 http://www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf (visited on March 7, 2012) (the FTC receives more complaints about the debt collection industry than any other, and complaints about debt collectors increased from 119,609 in 2009 to 140,036 in 2010.)

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14017, 2003 FCC LEXIS 3673 (2003) ("2003 Order"). The 2003 Order was not challenged in the appropriate venue, and thus cannot be challenged now. *CE Design, Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443, 446-448 (7th Cir. 2010). Clearly, in rejecting the idea of a *bona fide* error defense, the FCC was aware that calls are sometimes placed to wrong numbers, and that such calls can create TCPA liability. Perhaps, as a result, ACA has long warned its members that autodialed calls placed to a wrong person's cell phone are not exempt from potential liability under the TCPA. (R.60, Ex. N, p. 3 of 4.)

Even if the TCPA did have a *bona fide* error defense of some sort, ERC's actions were not in good faith. Good faith can't be met when a caller like ERC does nothing to determine whether it is calling the correct party. ERC did not run a skip trace, scrub the number, or have a human being manually dial the first call to find out the identity of the current assignee of the number; and ERC instructed Plaintiffs to delete the messages if they were not Riley or Morgan.

In *Stuart v. AR Resources, Inc.*, 10-3520, 2011 U.S. Dist. LEXIS 27027 (E.D. Pa. Mar. 16, 2011), the plaintiff was not the debtor but the defendants called and left multiple prerecorded messages in her cell phone voice mailbox. *Stuart*, 2011 U.S. Dist. LEXIS 27025, at *1-2. In denying the defendants' motion to dismiss, the court held that the only relevant question was whether

the defendants' calls fell under either of the § 227(b)(1)(A) exceptions (emergency purpose or prior express consent). *Id.* at 16-18. Since there was no indication that the calls fell under either of those exceptions, the plaintiff, even though not the intended recipient of the calls, stated a claim. *Id.*

Unlike ERC's strained reading of the 2008 Order, the holding in *Stuart* is consistent with the letter and the spirit of the 2003 Order which rejects a TCPA *bona fide* error defense. This Court should likewise reject the request of ERC and the ACA for a judicially created *bona fide* error defense.

C. ERC's Policy Arguments For Construing "Called Party" To Mean "Intended Recipient" Are Meritless

Citing a number of cases dealing with a party's statutory standing to assert a TCPA claim, ERC argues that if the district court's decision stands, "all sorts of unintended recipients will have a viable TCPA claim 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)." (Brief, pp. 18-19.) ERC's policy concerns can be addressed without removing all teeth from the TCPA.

1. The *Leyse* Line of Cases. Three of the cases cited by ERC – *Leyse v. Bank of Am., Nat'l Ass'n*, 09 cv 7654, 2010 U.S. Dist. LEXIS 58461 (S.D. N.Y. 2010), *Meadows v. Franklin Collection Service, Inc.*, 7:09-cv-00605, 2010 U.S. Dist. LEXIS 72340 (N.D. Ala. 2010) *aff'd in part*, 2011 U.S. App. LEXIS 2779 (11th Cir. Feb. 11, 2011), and *Cubbage v. Talbots, Inc.*, C09-911, 2010 U.S. Dist. LEXIS 68076 (W.D. Wa. 2010) – share a common fact pattern:

A person with present authority to do so gives consent to the defendant to call a residential landline; someone other than the person who gave consent receives the defendant's communication (either a live call or a message) and sues under the TCPA. In *Leyse*, it is a roommate; in *Meadows*, it is the mother of the debtor; in *Cubbage*, it is a spouse. In each case, the court holds, implicitly or explicitly, that the plaintiff does not have statutory standing because, as *Leyse* puts it, only the intended recipient and not the "unintended and incidental recipient of a call" has statutory standing. *Leyse*, 2010 U.S. Dist. LEXIS 58461, at *10-13.

The *Leyse* court justified its holding on policy grounds:

> If any person who receives the fax or answers the telephone call has standing to sue, then businesses will never be certain when sending a fax or placing a call with a prerecorded message would be a violation of the TCPA. Under the statute, a business is permitted to send a fax or phone call with a prerecorded message to persons who have given prior express consent or with whom the business has an existing business relationship. When a business places such a call or sends such a fax, it does not know whether the intended recipient or a roommate or employee will answer the phone or receive the fax. If the business is liable to whomever happens to answer the phone or retrieve the fax, a business could face liability even when it intends in good faith to comply with the provisions of the TCPA.

Id. at *12-13 (citations omitted). *See also Cellco Partnership v. Dealers Warranty, LLC*, 09-1814, 2010 U.S. Dist. LEXIS 106719 (D. N.J. 2010) (holding that companies did not have statutory standing because the companies' customers, not the companies, were the intended recipients of the defendants' telemarketing calls).

The holdings in *Leyse*, *Cellco*, and the other cases cited by ERC reflect

more the courts' policy concerns rather than a careful review of the text of the TCPA. As discussed above in Section II, it is clear from § 227(d)(3)(B) that "called party" means the current assignee of a cell number and the person who actually received the call because that section refers to the called party as the party who has "hung up" the phone. 47 U.S.C. § 227(d)(3)(B). It is to be presumed that Congress intended "called party" to mean the actual recipient throughout the TCPA because (1) Congress is presumed to use terms in a consistent manner throughout a statute, *Belom*, 284 F.3d at 798, (2) courts have long understood "called party" to mean the actual recipient, *California v. FCC*, *In re Bond*, and *Gray Tel. Pay Station Co.*, *supra*, and (3) Congress enacted the TCPA to protect current assignees of cell phones numbers and actual recipients of nuisance, privacy-invading calls, not former assignees and hypothetical or intended recipients of calls. *Congressional Findings* 5-6, 12, Act Dec. 20, 1991, P.L. 102-243, § 2, 105 Stat. 2394. It is to protect *any* recipient of a nuisance call that § 227(b)(3) expressly permits any "person or entity", not merely intended recipients, to seek injunctive relief and damages for violations of the Act. 47 U.S.C. 227(b)(3). *Anderson*, 2011 U.S. Dist. LEXIS at *22.

Moreover, if "prior express consent of the called party" is construed to include the former assignee of a cell number and intended recipient of an autodialed call, then the underlying purposes of the TCPA would be completely defeated and ERC would be completely insulated from liability for calling cell phones without consent. Here, for example, if Riley and Morgan are held to

have given prior express consent to AT&T to make autodialed calls to Plaintiffs' cell numbers, then Plaintiffs' legitimate claims would be defeated. Moreover, Riley and Morgan, the actual debtors, would not be able to assert claims against ERC because they did not receive any calls and lack both constitutional and prudential standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (constitutional standing requires an injury in fact); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (prudential standing prohibits a person from litigating another person's claims).

Riley and Morgan have not been affected at all by ERC's calls to Plaintiffs; most likely they are completely unaware of Plaintiffs' existence or ERC's calls to them. So, if "prior express consent of the called party" means that consent given by the prior assignees of Plaintiffs' cell numbers constitutes prior express consent of Plaintiffs, then ERC is immunized from all liability for its calls to Plaintiffs, even though protecting consumers from such nuisance calls is precisely why Congress enacted the TCPA. *Congressional Findings* 5-6, Act Dec. 20, 1991, P.L. 102-243, § 2, 105 Stat. 2394. ERC's interpretation of "prior express consent of the called party" – that the caller can call the cell number, even if the person giving consent no longer has the cell number and can no longer receive calls from the caller – contradicts the letter and the spirit of Congress's findings and the TCPA.

There are ways to address the policy and fairness concerns raised in *Leyse* and *Cellco* other than to deprive Plaintiffs their day in court. As one

court has recognized, the TCPA can be construed to protect companies from the TCPA claims of the incidental recipient of a call – the roommate in *Leyse*, the mother in *Meadows*, and the spouse in *Cubbage* – without throwing the baby out with the bath water by insulating companies from *any* TCPA liability, even reckless or abusive conduct which the TCPA was designed to deter:

> [T]he concern that seems to underlie the holdings in the *Leyse* line of cases -- that unless standing is restricted to "called parties" [i.e., intended recipients] a chance recipient of a call made to a phone line in which one has no personal interest could bring suit under the TCPA -- could likely be addressed through the requirements of constitutional standing, under which such a chance recipient would likely not be able to demonstrate injury in fact, and prudential standing, under which such a fortuitous callee would probably fall outside the TCPA's zone of interests.

Anderson, 2011 U.S. Dist. LEXIS 51368, at *21.

Here, Plaintiffs plainly do meet the requirements of constitutional and prudential standing for ERC's conduct *was* reckless and abusive. Plaintiffs experiences with ERC's calls were far different from those of the plaintiffs in *Leyse*, *Meadows*, and *Cubbage* where a roommate or a family member of the person who consented to receive the defendants' calls brought suit.

Plaintiffs were not the accidental recipients of ERC's calls like the plaintiffs in *Leyse*, *Meadows*, and *Cubbage*. Unlike in *Leyse*, *Meadows*, and *Cubbage*, which all involved residential landlines, Plaintiffs here did not share a residence with the intended recipients of the calls, or even know of Riley's or Morgan's existence until ERC started calling. (R.60, Ex. G, p. 34, lines 14-15; Ex. L, p. 24, lines 7-10.) The calls to Plaintiffs were made to their cell phones.

Because people tend to carry cell phones on their persons, it is far less likely than with a landline for anyone other than the primary user of the cell phone to answer it.

Plaintiffs had acquired the 2583 and 8483 numbers some *three* years prior to the time ERC began to call. (R.60, Ex. E, ¶¶ 3-5; Ex. I, ¶ 2; Ex. J; Ex. L, p. 16, lines 1-5; Ex. M.) At no time did ERC scrub the numbers to determine whether they were cell numbers. (R.60, Ex. F, p. 19, 1-24, p. 20, line 1; p. 32, lines 20-24; p. 48, lines 15-24; p. 49, lines 1-18.) At no time did ERC attempt a skip trace or manually dial Plaintiffs' numbers to determine whether those numbers, which had been given to AT&T five and three years previously as contact numbers, still belonged to Riley and Morgan. (R.60, Ex. F, p. 30, lines 19-22; p. 32, lines 9-19; p. 29, lines 14-17.) In light of the fact that Riley and Morgan had defaulted on their landline accounts, ERC had some reason to believe that they had defaulted on their wireless accounts as well. Often when one account is defaulted upon, multiple accounts are defaulted upon. People who file for bankruptcy typically have multiple accounts in default, not just one.

2. A Simple Preliminary Investigation By A Human Being Would Drastically Reduce The Number Of Wrong Number Calls

The TCPA puts the onus on the user of an autodialer to make sure that it does not call a cell phone number unless the current assignee of the number has given prior express consent to receive such calls. This is not a difficult

burden for companies like ERC to meet. In Plaintiffs' case, before ERC began autodialing, it could have easily had a human manually dial the numbers and listen to Plaintiffs' outbound voice mail messages to determine if the numbers still belonged to Riley and Morgan. (R.60, Ex. F, p. 43, lines 15-19; p. 63, lines 10-16.) At all relevant times, Ms. Soppet's outgoing message said: "Hi this is Teresa, sorry I missed your call. Leave me a message and I'll call you back"; Ms. Tang's outgoing message said: "Hello, this is Loidy, please leave a message." ((R.60, Ex. K, ¶ 14; Ex. I, ¶ 3; Ex. L, p. 36, line 24; p. 37, lines 1-8.) "Teresa" does not sound like "Dupree"; "Loidy" does not sound like "Sherita". If ERC had listened to Plaintiffs' messages, it would have known that the 2583 and 8483 numbers no longer belonged to Riley and Morgan. It could then have taken additional steps to confirm whom the numbers belonged to, such as manually calling the numbers and leaving appropriate messages. ERC could have run a skip trace or run the numbers through a cell phone scrub. Instead, ERC chose to make 18 and 29 autodialed calls to Ms. Soppet and Ms. Tang respectively and harass them with prerecorded messages, in violation of the TCPA. (R.60, Ex. F, p. 34, lines 17-24; p. 35, lines 1-20, 23-24; pp. 36-37, p. 38, lines 1-16.)

ERC recognized that it might be calling wrong numbers. But ERC's messages do not encourage a person whose number is being called in error to call ERC to correct the error. The messages begin: "Hello this message is for [Dupree Riley/Sherita Morgan]. If you are not this person please delete this

message as it is not for you." (R.60, Ex. F, p. 36, lines 1-18; Ex. G, p. 32, lines 21-24; p. 33, lines 1-5.) ERC called Ms. Soppet 18 times and Ms. Tang 29 times. (R.60, Ex. J; Ex. F, p. 56, lines 7-13; Ex. M.)

ERC made a calculated gamble that it could call three to five year old contact numbers without running them through a cell phone "scrub" and without checking to see whether they still belonged to its debtors. Unlike the plaintiff's claims in the *Leyse* line of cases, there is nothing unfair about Plaintiffs' claims against ERC here.

ERC argues (Brief, p. 17) that if the district court's decision stands, all non-emergency autodialed calls by government agencies and private businesses will come to a halt. There is no reason to believe this exaggerated claim. If the district court's decision is affirmed, all that will, and should, happen is users of autodialers such as ERC will take greater care before initiating a robocall campaign, running a skip trace, scrubbing numbers, having a human manually dial the first call. ERC, and other debt collectors, will not call three year old or five year old cell phone numbers without first checking that the numbers still belong to the person whom they want to contact.

ERC cites with approval the statement in *Anderson*, 2011 U.S. Dist. LEXIS 51368, *22, that a company can defend against a TCPA claim from an actual but unintended recipient of an autodialed call by raising the prior express consent defense. (Brief, pp. 13-14, 17n.8.) Following the *Leyse* line of

cases, *Anderson* assumed, without focusing on the actual meaning of "prior express consent of the called party" in the TCPA, that "called party" means the intended, as distinct from the actual, recipient of an autodialed call. As argued above in Section II, that assumption is not supported by the actual text of the TCPA.

IV. ERC'S Argument That "Called Party" Means Both The Actual And The Intended Recipient of an Autodialed Call Is Waived Because ERC Did Not Make The Argument Below

ERC criticizes the district court for failing "to consider the phrase 'called party' could mean both 'actual recipient of the call' and 'intended recipient of the call'." (Brief, p. 20.) What ERC neglects to mention is that ERC never presented the argument to the district court for its consideration. ERC argued below that *only* the intended, and not the actual, recipient of an autodialed call is a "called party" under § 227(b)(1)(A). (R.52, pp. 2, 8-12, 15.) It is only in its opening brief here that ERC argues for the first time that "called party" should be construed to mean both the intended and the actual recipients of an autodialed call. ERC's new argument is at odds with the arguments made (1) in ERC's motion for summary judgment below (R.52, pp. 2, 8-12, 15), (2) ERC's Petition (Document 1, pp. 4, 7, 10-13), and (3) ACA's brief.[4] By failing to raise its new argument below, ERC has waived it. "It is axiomatic that arguments not

[4]"Accordingly, the ACA urges the Court to read "called party" to mean the consumer that debt collector [sic] intended to call – and not the unintended recipient who happens to answer the call after the number is recycled or otherwise used by a different person." (ACA Brief, p. 21.)

raised below are waived on appeal." *Oates v. Discovery Zone*, 116 F.3d 1161, 1168 (7th Cir. 1997).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of ERC's motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daniel A. Edelman, hereby certify that on March 9, 2012, I caused to be filed the foregoing document with the Clerk of the United States Court of Appeals for the Seventh Circuit via the court's CM/ECF System, which caused to be sent notification of such filing via electronic mail to the following parties:

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TYPE VOLUME CERTIFICATION

In accordance with Fed.R.App.P. 32(a)(7)(C), I, Daniel A. Edelman, certify that this brief meets the type-volume limitation of the Seventh Circuit Rule 32(a) in that it contains 10,202 words according to the word-counting feature of Corel WordPerfect 11, the program used to produce it.

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