

414 Fed.Appx. 230, 2011 WL 479997 (C.A.11 (Ala.))  
 (Not Selected for publication in the Federal Reporter)  
 (Cite as: 414 Fed.Appx. 230, 2011 WL 479997 (C.A.11 (Ala.)))



This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)

United States Court of Appeals,  
 Eleventh Circuit.  
 Elizabeth MEADOWS, Plaintiff–Appellant,  
 v.  
 FRANKLIN COLLECTION SERVICE, INC., De-  
 fendant–Appellee.

No. 10–13474  
 Non–Argument Calendar.  
 Feb. 11, 2011.

**Background:** Owner of telephone number listed with debt collection agency, but who was not the debtor, brought action against agency, alleging violations of the Fair Debt Collection Practices Act (FDCPA) and Telephone Consumer Protection Act (TCPA). The United States District Court for the Northern District of Alabama, L. Scott Coogler, J., 2010 WL 2605048, granted summary judgment in favor of agency. Owner appealed.

**Holdings:** The Court of Appeals held that:

- (1) genuine issue of material fact existed as to whether debt collection agency called owner of telephone number listed with agency with intent to annoy or harass her;
- (2) genuine issue of material fact existed as to whether debt collection agency's follow-up activities were reasonable;
- (3) agency's use of prerecorded calls was exempt from TCPA; and
- (4) agency's repeated calling was not solicitation as would violate TCPA.

Affirmed in part, reversed in part and remanded.

#### West Headnotes

#### [1] Federal Civil Procedure 170A ⚡2494.5

170A Federal Civil Procedure  
 170AXVII Judgment  
 170AXVII(C) Summary Judgment  
 170AXVII(C)2 Particular Cases  
 170Ak2494.5 k. Debt collection practices, cases involving. Most Cited Cases  
 Genuine issue of material fact existed as to whether debt collection agency called owner of telephone number listed with agency with intent to annoy or harass her, precluding summary judgment in owner's action alleging violations of the Fair Debt Collection Practices Act (FDCPA). Fair Debt Collection Practices Act, § 806, 15 U.S.C.A. § 1692d.

#### [2] Federal Civil Procedure 170A ⚡2494.5

170A Federal Civil Procedure  
 170AXVII Judgment  
 170AXVII(C) Summary Judgment  
 170AXVII(C)2 Particular Cases  
 170Ak2494.5 k. Debt collection practices, cases involving. Most Cited Cases  
 Genuine issue of material fact existed as to whether debt collection agency's follow-up activities were reasonable when owner of number listed with agency told agency that number was incorrect for the debtors it sought, precluding summary judgment in owner's action alleging violations of the Fair Debt Collection Practices Act (FDCPA). Fair Debt Collection Practices Act, § 806, 15 U.S.C.A. § 1692d.

#### [3] Telecommunications 372 ⚡888

372 Telecommunications  
 372III Telephones

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372III(F) Telephone Service

372k888 k. Advertising, canvassing and soliciting; telemarketing. Most Cited Cases

Debt collection agency's use of prerecorded calls in calling owner of telephone number listed with agency was exempt from Telephone Consumer Protection Act (TCPA) prohibition on initiating telephone calls to residential lines using an artificial or prerecorded voice to deliver a message without express consent; agency had established business relationship with debtors it sought who had listed dialed number as their contact number, and calls were made for a commercial, non-solicitation purpose. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(2)(iii, iv).

[4] Telecommunications 372 ↪888

372 Telecommunications

372III Telephones

372III(F) Telephone Service

372k888 k. Advertising, canvassing and soliciting; telemarketing. Most Cited Cases

Debt collection agency's repeated calling of telephone number listed with it by two separate debtors was not solicitation as would violate Telephone Consumer Protection Act (TCPA) prohibition of making more than one telephone solicitation to the same person with 12 month period, even though owner of that number was neither of the debtors; agency only sought collection of the debts. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(c)(5).

\*231 Brandon L. Blankenship, Meredith L. Phillips, Blankenship Harrelson & Linton LLC, Birmingham, AL, for Plaintiff–Appellant.

John Winston Scott, Brent G. Grainger, Scott Dukes & Geisler, P.C., Birmingham, AL, for Defendant–Appellee.

Appeal from the United States District Court for the Northern District of Alabama. D.C. Docket No.

7:09–cv–00605–LSC.

Before BLACK, WILSON and COX, Circuit Judges.

PER CURIAM:

\*\*1 Elizabeth Meadows (“Meadows”) sued Franklin Collection Service, Inc. (“Franklin”), alleging that its collection practices violated the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692, and the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227. Both parties moved for summary judgment. The district court granted summary judgment in favor of Franklin as to all claims, and denied Meadows's motion. Meadows now \*232 appeals. We affirm the district court's judgment as to the TCPA claims, but reverse it as to the FDCPA claims.

We review a district court's summary judgment decision de novo, applying the same legal standards as those that governed the district court. *Capone v. Aetna Life Ins. Co.*, 592 F.3d 1189, 1194 (11th Cir.2010) (citation omitted). Summary judgment is appropriate where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a). We construe the facts and draw all reasonable inferences in favor of the non-moving party. *Abel v. S. Shuttle Servs., Inc.*, 620 F.3d 1272, 1273 n. 1 (11th Cir.2010) (citation omitted). We therefore state the facts in the light most favorable to Meadows, the non-moving party.

Meadows did not owe any of the debts that were the subject of the telephone calls at issue in this case. Those calls concerned the collection of debts owed by Meadows's daughter, Elizabeth Meadows Taylor (“Taylor”), and by the family that previously owned Meadows's telephone number, the Tidmores. Taylor lived with Meadows from 2000 until April 2008, except for a six-month period (May 2006 to October 2006) in which she lived in a trailer on Meadows's property. Meadows's telephone number at her residence was assigned to the

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Tidmores until May 2006, at which point Meadows acquired it.

From May 2006 until March 2009, **Franklin** called **Meadows's** residence multiple times per week regarding either the Tidmore or Taylor debts. According to Franklin's policy, collection calls are made on a per debt basis, so the more debts that a debtor has with Franklin the more calls that Franklin makes to a debtor. Taylor had fifteen debts with Franklin. It is unclear how many debts the Tidmores had with Franklin. While the parties dispute the volume and frequency of the calls, Meadows testified that she received about 300 calls over a two and a half year period regarding either the Taylor or the Tidmore debts. Meadows would receive up to three calls a day.

Most of these calls were made using an automatic dialer, which delivered prerecorded messages without the capability of human interaction. While the parties dispute the number of live conversations **Meadows** had with **Franklin**, **Meadows** testified that she spoke with a live Franklin representative at least four or five times in regard to the Tidmores and the same number of times regarding Taylor. During these conversations, **Franklin** asked **Meadows** for contact information on the Tidmores and Taylor, and asked Meadows to give messages to Taylor. **Meadows** told **Franklin**, as early as May 2006, that she was not the debtor, and that she did not know or wish to provide location information for the debtors. And, she asked that Franklin stop calling. Franklin continued to call many more times, until March 2009.

#### A. FDCPA Claims

**\*\*2** Meadows contends that the district court erred in granting summary judgment in favor of Franklin on her 15 U.S.C. § 1692d claims.<sup>FN1</sup> Section 1692d prohibits a debt collector, such as Franklin, from engaging in conduct "the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." Section 1692d then provides a non-exhaustive list of prohibited conduct. Particularly

relevant to this appeal, **\*233** section 1692(d)(5) prohibits a debt collector from "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number." In enacting the FDCPA, Congress meant to ensure that "every individual, whether or not he owes the debt, has a right to be treated in a reasonable or civil manner." *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1178 (11th Cir.1985) (internal quotation marks and citation omitted). And, we have established that "claims under § 1692d should be viewed from the perspective of a consumer whose circumstances makes [sic] him relatively more susceptible to harassment, oppression, or abuse." *Id.* at 1179. "Ordinarily, whether conduct harasses, oppresses, or abuses will be a question for the jury." *Id.*

FN1. Meadows does not challenge the dismissal of her claims asserted under § 1692c(a)(1) and § 1692c(b).

In granting Franklin's motion for summary judgment, the district court concluded as a matter of law that Franklin's calls were not made with an intent to annoy, abuse, or harass Meadows. The district court found that the approximately 300 calls that **Meadows** received from **Franklin** were not unreasonable because they were spread out over two and a half years, from October 2006 to March 2009.<sup>FN2</sup> The district court also reasoned that Franklin's collection practices were not unreasonable because many of its calls to Meadows went unanswered, as Meadows had caller identification and knew the calls were not for her. The district court also rejected Meadows's argument that, once she informed Franklin that the debts were not her own or that Taylor no longer lived with her, Franklin should have stopped calling. The district court reasoned that Franklin must be permitted to perform reasonable follow-up activities to ensure that the phone number it possesses is incorrect. Otherwise, "a debtor would need only to say that the collection agency had the wrong number to short-cir-

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cuit the collection process.” (Dkt. 110 at 15.)

FN2. The parties dispute the exact number of calls made to **Meadows**. **Franklin** claims that approximately 200 calls were made on the Taylor debts and twenty-seven were made on the Tidmore debts. **Meadows** claims the total number of calls is closer to 300. At the summary judgment stage, we take the facts in the light most favorable to **Meadows**, the non-moving party.

[1] We find that the district court erred in granting summary judgment in favor of **Franklin** on the § 1692d claim. Taking the facts in the light most favorable to **Meadows**, she received approximately 300 calls over a two and a half year period regarding debts she did not owe and people she did not know. **Meadows** testified that occasionally she would receive up to three calls a day. Most of the hundreds of calls **Franklin** placed to **Meadows** used an automated dialer, a machine capable of continuously dialing and leaving messages without human interaction. **Franklin**, moreover, continued to call **Meadows** until March 2009 despite being informed in May 2006 that the debts were not her own and that the debtors did not live with her. **Meadows** further testified that **Franklin's** phone calls eventually made her feel harassed, stressed, upset, aggravated, inconvenienced, frustrated, shaken up, intimidated, and threatened on occasion. And, several times the calls woke her up from sleep and caused her difficulty sleeping. (Dkt. 84–1 at 84–85, 94, 95–96, 134–35, 153, 202–03.) Considering the volume and frequency of the calls, **Meadows's** testimony that she informed **Franklin** of its mistake in May 2006, and **Meadows's** testimony regarding the emotional stress caused by the calls, we find that there is a genuine issue of material fact as to whether **Franklin** caused **Meadows's**\*234 telephone to ring with the intent to annoy or harass her.

\*\*3 We reject **Franklin's** contention that its telephone calls were not harassing because **Meadows** did not answer them. The plain language of §

1692d prohibits “ *causing a telephone to ring ... with intent to annoy, abuse or harass any person at the called number.*” (emphasis added). The statute itself recognizes that answering the phone is not necessary for there to be harassment. This makes good sense because a ringing telephone, even if screened and unanswered, can be harassing, especially if it rings on a consistent basis over a prolonged period of time and concerns debts that one does not owe. As **Meadows** testified, even though she did not answer every call, she had to stop whatever she was doing to see who was calling. And, the reason **Meadows** did not answer the calls was because she had previously told **Franklin** multiple times that she did not owe the debt and the debtors did not live with her. Thus, a reasonable juror could find that **Franklin's** telephone calls were harassing even though **Meadows** did not answer many of the calls.

[2] We recognize that **Franklin's** records indicated that **Meadows's** phone number belonged to the Tidmores and to Taylor, and that **Franklin** may have been attempting to reach those actual debtors with its phone calls. And, we recognize that when a debt collector is told that a certain telephone number for a particular debtor is incorrect, the debt collector must be able to perform reasonable follow-up activities to ensure that the number they possess is actually incorrect. In this case, however, there is a factual dispute as to whether **Franklin's** follow-up activities were reasonable. The reasonableness of **Franklin's** follow-up activities turns in part on when and in what manner **Meadows** informed **Franklin** that she did not owe the debts and that Taylor did not live with her. **Meadows** testified that she told **Franklin** in May 2006 that her phone number no longer belonged to the Tidmores, she did not know the Tidmores, and the Tidmore debt was not hers. After receiving this information, **Franklin** continued to call **Meadows** regarding the Tidmore debt until early 2009. In addition, **Meadows** has produced evidence that Taylor lived in her own home with her own phone number from May 2006 to October 2006, and from April 2008 through March

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2009. Meadows testified that during these time periods, in which Taylor was not living with Meadows and had her own phone number, Meadows informed Franklin that the debts belonged to Taylor and that Taylor did not live with her. Franklin nonetheless continued to call Meadows's phone number. <sup>FN3</sup> Taking these facts as true, a reasonable jury could conclude that Franklin's calling practices were harassing because Franklin continued to call Meadows despite being on notice that she was not the debtor and that \*235 her phone number was not correct for Taylor or the Tidmores.

FN3. Franklin disputes many of these facts. According to Franklin, it did not speak with Meadows regarding the Tidmores until November 2006, and it removed Meadows's number from the Tidmore account after being informed it was incorrect. Franklin also contends that it did not speak with Meadows regarding Taylor until 2007, and that Meadows did not request Franklin to stop making calls regarding the Taylor debts until October 2008.

Because this case is at the summary judgment stage, and Meadows is the non-moving party, we must take the facts in the light most favorable to her. We also note that even if Meadows did not ask Franklin to stop calling until October 2008, Franklin's own collection notes show that it called Meadows nearly seventy times after that date.

In sum, viewing the evidence in the light most favorable to Meadows, a reasonable juror could conclude that Franklin intended to annoy, abuse, or harass Meadows through its collection practices. We therefore reverse the district court's grant of summary judgment in favor of Franklin on the § 1692d claim.

#### B. TCPA Claims

\*\*4 Meadows contends that the district court

erred in granting summary judgment in favor of Franklin on her TCPA claims. Meadows alleges that Franklin violated two provisions of the TCPA. We address each claim in turn.

[3] Meadows first alleges that Franklin violated 47 U.S.C. § 227(b)(1)(B). That section makes it unlawful "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 [Federal Communications] Commission under paragraph (2)(B)." The FCC has created two regulatory exemptions that are applicable to the debt-collection calls in this case. First, the FCC exempts from the TCPA's statutory prohibition against prerecorded calls any call "made to any person with whom the caller has an established business relationship at the time the call is made[.]" 47 C.F.R. 64.1200(a)(2)(iv). Second, the FCC exempts any call "made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation[.]" 47 C.F.R. 64.1200(a)(2)(iii).

The FCC has made clear that these two exemptions "apply where a third party places a debt collection call on behalf of the company holding the debt." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8773, ¶ 39 (July 26, 1995). The FCC has also clarified that "all debt collection circumstances involve a prior or existing business relationship." *Id.* at 8771-72, ¶ 36.

We agree with the district court that Franklin did not violate the TCPA because its prerecorded debt-collection calls are exempt from the TCPA's prohibitions on such calls to residences. Franklin had an established business relationship with the debtors (Taylor and the Tidmores), and was attempting to contact them at Meadows's number. Because Franklin had an existing business relationship with the intended recipient of its prerecorded calls, and the calls were made for a commer-

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cial, non-solicitation purpose, we conclude that those calls are exempt from the TCPA's prohibitions of prerecorded calls to residences.

We reject Meadows's argument that because she is a non-debtor, then the debt-collection exemptions do not apply because she did not have an established business relationship with Franklin. As the district court noted, the FCC has determined that all debt-collection circumstances are excluded from the TCPA's coverage, and thus the exemptions apply when a debt collector contacts a non-debtor in an effort to collect a debt. Otherwise, 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.

[4] **Meadows** also contends that **Franklin** violated 47 U.S.C. § 227(c)(5). That section prohibits an entity from making more than one "telephone solicitation" to the same person within a twelve-month period. **Meadows** argues that **Franklin's** calls constituted "telephone solicitations" \*236 under the TCPA, and thus **Franklin** violated § 227(c)(5) by calling **Meadows** more than once in a twelve-month period.

\*\*5 For purposes of the TCPA, the FCC has defined a "telephone solicitation" as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. 64.1200(f)(12). Despite the undisputed fact that **Franklin** called **Meadows** in order to collect the debts of others, **Meadows** argues that the debt-collection calls were nonetheless "telephone solicitations." According to **Meadows**, **Franklin's** telephone calls, which sought to collect the debts of Taylor and the Tidmores from those individuals, were implicit attempts to ask **Meadows** to pay the debt herself. As a result, **Franklin**, by calling **Meadows** about the debts of others, was actually asking **Meadows** to "purchase her privacy and peace" and "invest in its service of debt collection" because the calls would continue if **Meadows** did

not pay the debt herself.

We reject **Meadows's** invitation to stretch and distort the meaning of "telephone solicitation." It is undisputed that **Franklin** did not try to sell anything to **Meadows**, and did not offer to provide her any services. **Meadows** admits as much. (Dkt. 84-1 at 78:9-21.) Moreover, the FCC has unequivocally stated that "calls solely for the purpose of debt collection are not telephone solicitations and do not constitute telemarketing" and "calls regarding debt collection ... are not subject to the TCPA's separate restrictions on 'telephone solicitations.'" *IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991*, 23 FCC Rcd. 559, 565, ¶ 11 (Jan. 4, 2008). In our view, the definition of a "telephone solicitation," especially in light of the FCC's ruling interpreting that definition, is clear and does not include implicit "purchases of peace" and investments in services that **Franklin** never offered to **Meadows**. We accordingly find that **Franklin's** calls were not telephone solicitations, and affirm the district court's grant of summary judgment in favor of **Franklin** on the § 227(c)(5) claim.

AFFIRMED IN PART, REVERSED IN PART,  
 AND REMANDED.

C.A.11 (Ala.),2011.  
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Only the Westlaw citation is currently available.

United States District Court,  
 N.D. Illinois,  
 Eastern Division.  
 Diego FRAUSTO, Plaintiff,  
 v.  
 IC SYSTEM, INC., Defendant.

No. 10 CV 1363.  
 Aug. 22, 2011.

Alexander Holmes Burke, Burke Law Offices,  
 LLC, Chicago, IL, for Plaintiff.

David M. Schultz, Avanti Deepak Bakane, Peter E.  
 Pederson, Jr., Hinshaw & Culbertson, LLP, Chica-  
 go, IL, for Defendant.

**MEMORANDUM OPINION AND ORDER**

JAMES B. ZAGEL, District Judge.

\*1 Defendant IC System (“Defendant” or “IC”) collects debts on behalf of the popular electronic payment service PayPal. IC contacted Plaintiff Diego Frausto (“Plaintiff” or “Frausto”) in an attempt to collect a debt Frausto allegedly owed to the auction website eBay. In a second amendment complaint, Frausto sought individual relief under the Fair Debt Collection Practices Act and made a class claim under the Telephone Consumer Protection Act.

The parties have reached agreement on the FD-CPA claim. As for the TCPA claim, Defendant moved for summary judgment, Plaintiff cross-moved and also moved for class certification. Taking the summary judgment motion first,<sup>FN1</sup> I grant it for Defendant.

FN1. The Seventh Circuit generally disfavors this approach. *Thomas v. City of Peoria*, 580 F.3d 633, 635 (7th Cir.2009) (“First ruling on the merits of the federal

claims, and then denying class certification on the basis of that ruling, puts the cart before the horse, as we have emphasized.”) (citing cases). There are, however, recognized exceptional circumstances. *See, e.g. Mira v. Nuclear Measurements Corp.*, 107 F.3d 466, 475 (7th Cir.1997) (“While we agree that it is the better policy for a district court to dispose of a motion for class certification promptly and before ruling on the merits of the case, the failure to follow this preferred procedure does not necessarily amount to reversible error.”). Here, the parties have agreed to my ruling on summary judgment before the class certification decision. No doubt a stipulation is a recognized exception to the usual course of considering class certification first.

**STATEMENT OF FACTS**

Plaintiff Diego Frausto opened a PayPal account in December of 2003. During the registration process, Frausto provided his name, email address, street address, bank account information, and a phone number.

In addition to this personal information, Frausto consented to PayPal's user agreement. Among other provisions, the agreement contains the following:

**1.10 Calls to You.** By providing PayPal a telephone number (including a wireless/cellular telephone), you consent to receiving autodialed and prerecorded message calls from PayPal at that number.

**1.2 Your Privacy.** Protecting your privacy is very important to PayPal. Please review our Privacy Policy in order to better understand our commitment to maintaining your privacy, as well as our use and disclosure of your Information.

The Privacy Policy indicates that PayPal may

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use customer's personal information, among other things, to resolve disputes and collect fees.

Frausto used his PayPal account as part of a sale he made on the online auction site eBay. Frausto sold a handbag to a third party who in turn claimed it was damaged. Frausto offered a refund, minus a twenty percent restocking fee. The buyer refused and took the dispute to PayPal. PayPal decided in favor of the buyer, gave the buyer a refund, and debited Frausto. The end result was a negative balance of \$254.41 in Frausto's account.

PayPal contracts its debt collection function to Defendant IC Systems. Defendant admits sending collection letters and placing at least three calls to the number Frausto provided also attempting to collect the debt. Plaintiff asserts there were as many as thirty-eight calls to his number.

#### I. STANDARD OF REVIEW

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party bears the initial burden of showing that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If the moving party meets this initial burden, the nonmoving party must then go beyond the pleadings and "designate specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A district court views all evidence and inferences in the light most favorable to the nonmoving party. *Id.* at 255. On cross-motions for summary judgment, the court applies this standard to both motions; in other words, it must view all facts and draw all reasonable inferences in a light most favorable to the party against whom the motion is made. *Tate v. Long Term Disability Plan for Salaried Employees*

of *Champion Int'l Corp.* # 506, 545 F.3d 555, 559 (7th Cir.2008).

#### II. ANALYSIS

\*2 In relevant part, the Telephone Consumer Protection Act ("TCPA") makes it unlawful for persons

(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 ... cellular telephone service.

47 U.S.C. § 227(b)(1)(A)(iii).

Interpreting the "prior express consent" exception, the FCC has declared:

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. In the 1992 *TCPA Order*, the Commission determined that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.

*In re: Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C.R. 559, ¶ 9 (F.C.C.2007). For purposes of this provision, third-party debt collectors step into the shoes of the creditor on whose behalf they are recovering the debt. *Id.* at ¶ 10. The burden of establishing consent

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is on the creditor. *Id.* The FCC's declaratory rulings on this subject bind me pursuant to the Hobbs Act, see 47 U.S.C. § 402, and in any event the parties do not question the rulings.

The dispositive issue here is the application of the “prior express consent” defense to the facts of this case. Defendant claims the defense applies because Plaintiff provided his mobile phone number in applying for his PayPal account, that that number is the one used to pursue the debt, and that for purposes of pursuing the debt they step into the shoes of PayPal. Plaintiff counters that the terms of PayPal's agreement only authorize PayPal itself to use his number to contact him regarding the debt. He further argues that he revoked his consent.

Plaintiff's first argument is plainly off the mark, because even if I assume that the contract limited use of his number to PayPal, the FCC's ruling makes it clear that Defendant is, for purposes of the TCPA “PayPal” when it calls Plaintiff. See *In re: Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C.R. at ¶ 9 (F.C.C.2007).

As to Plaintiff's argument that he revoked his consent, he cites my ruling in *Sengenberger v. Credit Control Servs., Inc.*, 2010 WL 1791270, \*4 (N.D.Ill. May 5, 2010). In that case, plaintiff debtor sued a collection agency for its use of auto-dialed, pre-recorded calls. *Id.* at \*3. In disputing the defendant's “prior express consent” argument, the plaintiff argued that even if he had consented to the calls in the first instance, he revoked his consent by sending a letter via certified mail in which he disputed the debt and demanded the defendant to seek its calls. *Id.* at \*4. Specifically the plaintiff argued that the letter invoked the following provision of the Fair Debt Collection Practices Act:

\*3 If the consumer notifies the debt collector in writing within the thirty-day period [after receiving the initial communication] that the debt, or any portion thereof, is disputed ..., the debt collector shall cease collection of the debt, or any

disputed portion thereof, is disputed ..., the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification or judgment and a copy of such verification is mailed to the consumer by the debtor.

15 U.S.C. § 1692g(b). Interpreting that provision, I found that the plaintiff had effectively revoked his consent for calls placed after defendant received the letter, which was duly shown by plaintiff's certified mail receipt. *Sengenberger*, 2010 WL 1791270 at \*4.

The problem for Plaintiff here is that he has sent no such letter. Tellingly, though Plaintiff cites to *Sengenberger* and the relevant FDCPA provision in his brief, he points to no facts on the record in this case that support their application here. With no evidence of written notification to the debtor after receiving calls, I find that Plaintiff did not revoke his consent pursuant to 15 U.S.C. § 1692g(b).

FN2

FN2. Plaintiff additionally argues that he did not provide consent as that term is defined under the Minnesota Collection Agencies Act. Minn.Stat. § 332.37(13). But this argument is made for the first time in Plaintiff's response to Defendant's motion for summary judgment—the first time Minnesota state law was referenced in the case, despite Plaintiff having filed two amended complaints and his own motion for summary judgment. Because the argument is brought in for the first time so late in the game, I do not consider it. *Grayson v. O'Neill*, 308 F.3d 808, 817 (7th Cir.2002) (“a plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment” (quoting *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir.1996))).

### III. CONCLUSION

For the reasons stated above, Plaintiff's motion

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for summary judgment is DENIED and Defendant's motion is GRANTED. The motion for class certification is DENIED AS MOOT.

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Only the Westlaw citation is currently available.

**This decision was reviewed by West editorial staff and not assigned editorial enhancements.**

United States District Court,  
 W.D. New York.  
 Dale M. BATES, Plaintiff,  
 v.  
 I.C. SYSTEM, INC., Defendant.

No. 09-CV-103A.  
 Oct. 19, 2009.

Amanda R. Jordan, Kenneth R. Hiller, Law Offices of Kenneth Hiller, Amherst, NY, for Plaintiff.

Steven R. Rosenblatt, Gregory Neil Harris, Segal, McCambridge, Singer & Mahoney, Ltd., New York, NY, Andrew J. Wells, Phillips Lytle LLP, Buffalo, NY, for Defendant.

#### DECISION AND ORDER

RICHARD J. ARCARA, Chief Judge.

\*1 On January 29, 2009, plaintiff Dale Bates filed this action against defendant I.C. System, Inc., alleging violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, and the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227.

On April 30, 2009, defendant filed a motion to dismiss plaintiff's TCPA claim. Plaintiff opposed defendant's motion and on October 2, 2009, this Court heard oral argument on the motion. For the reasons stated, the motion is denied.

#### BACKGROUND

In his complaint, plaintiff alleges that he incurred a credit card debt to Washington Mutual and that he later defaulted on this debt. Defendant was hired by Washington Mutual to collect on the debt. In an effort to do so, plaintiff alleges that defend-

ant: (1) contacted his ex-fiancé and told her that plaintiff owed a debt; (2) called him by telephone several times per week, often multiple times per day; (3) left multiple messages on plaintiff's telephone answering machine stating that the call was in reference to a business matter, but failing to identify that the defendant was seeking to collect on a debt; (4) contacted him at his place of employment and threatened to contact the attorney general if a co-worker refused to cooperate in putting plaintiff on the phone; (5) refused to heed plaintiff's demands to cease calling him; and (6) made multiple telephone calls to plaintiff's cellular telephone using an artificial or prerecorded message even after plaintiff asked the defendant to stop.

#### DISCUSSION

In ruling on a motion to dismiss, this Court must accept all factual allegations in the complaint as true, and draw all reasonable inferences in the plaintiff's favor. *See Ashcroft v. Iqbal*, --- U.S. ---, ---, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir.2002). To survive a motion to dismiss, a complaint must contain sufficient factual content to allow the district court "to draw the reasonable inference that the defendants are liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949; *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (a complaint must plead "enough facts to state a claim to relief that is plausible on its face").

Defendant moves for dismissal of plaintiff's TCPA claim asserting that plaintiff fails to state a claim for relief. Defendant asserts that the TCPA specifically exempts calls from parties with a prior existing business relationship, and that debt collection calls necessarily involve a prior existing business relationship.

The plaintiff responds, noting that the TCPA differentiates between calls made to cellular and residential lines. With regard to the latter, the de-

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defendant correctly notes that debt collection calls to a residential line are exempt from the TCPA. *See* 47 U.S.C. § 227b(1)(B). However, with regard to cellular telephone calls, the plaintiff correctly asserts that those calls are governed by 47 U.S.C. § 227b(1)(A)(iii), which provides:

\*2 It shall be unlawful for any person ...to make any call ... using any automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone number assigned to a ... telephone cellular service ... for which the party is charged for the call.

*See* 47 U.S.C. § 227b(1)(A)(iii).

Plaintiff's complaint alleges that the defendant made unauthorized telephone calls to plaintiff's cellular telephone using an artificial or prerecorded message. Plaintiff's complaint clearly states a cognizable cause of action under the TCPA.

In its replay, the defendant asserts that, pursuant to an FCC Declaratory Ruling of December 28, 2007 ("2007 FCC Ruling"), *see* 23 F.C.C.R. 559, autodialed and prerecorded messages made to wireless numbers provided by the called party in connection with a credit card application for the existing debt are permissible as having been made with "prior express consent" of the called party. The defendant is correct that the 2007 FCC Ruling clarified that autodialed and prerecorded telephone calls made to wireless numbers are permissible when made with the "prior express consent" of the called party, and that prior express consent can be evidenced by providing a creditor with one's cellular telephone number on a credit card application. The FCC emphasized, however, 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 564-65. The FCC went on to note that the

burden is on the creditor to demonstrate that prior express consent exists. *Id.*

The defendant's reply appears to infer that plaintiff provided such prior express consent in connection with his credit card application. If the defendant can establish that plaintiff did so and that no material issue of fact exists on that issue, defendant will likely succeed on a motion for summary judgment. However, this is a motion to dismiss, not a motion for summary judgment. In a motion to dismiss, all factual allegations in the complaint are presumed true. In ¶ 35 of the complaint, plaintiff alleges that the defendant called his cellular telephone using artificial and prerecorded messages "without having plaintiff's consent." Because the Court must presume that allegation to be true at this juncture, and because the complaint cites a cognizable cause of action under the TCPA, the defendant's motion to dismiss the plaintiff's second cause of action is denied.

#### **CONCLUSION**

For the reasons stated, the defendant's motion to dismiss is denied.

SO ORDERED.

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