No. 19-16947

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAM LAMKIN,

Plaintiff – Appellee

v.

PORTFOLIO RECOVERY ASSOCIATES, LLC,

Defendant – Appellant

Appeal from the United States District Court
for the Eastern District of California
No. 2:18-cv-03071-WBS-KJN
Honorable William B. Shubb, Senior District Judge

APPELLEE'S ANSWERING BRIEF

April 10, 2020

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INTRODUCTION

The Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), prohibits the use of an automatic telephone dialing system to call cell phones without the called party's prior express consent.

In 2003 and again in 2008 the Federal Communications Commission ("FCC") specifically ruled that predictive dialers (devices with the capacity to dial stored numbers automatically, like the Avaya Predictive Dialer used by Portfolio Recovery Associates, LLC ("PRA")) are automatic telephone dialing systems ("ATDS") subject to regulation under the TCPA. PRA was on notice that it could not use its predictive dialer to make calls to cell phones without the called party's consent. Yet, PRA made the calls at issue in this lawsuit anyway. PRA used its automated dialing system to place over 500 calls to Pam Lamkin ("Lamkin"), including 199 telephone calls to her cell phone. PRA did not have Lamkin's consent to call her cell phone. ER 278: 7-12.

Because PRA stipulated at the lower court to facts showing that the Avaya Predictive Dialer is an ATDS under *Marks v. Crunch San Diego, LLC*, PRA argued to the District Court that *Marks* did not apply. *See Marks*, 904 F.3d 1041, 1052 (9th Cir. 2018) (device with the capacity to dial stored numbers automatically is an ATDS). The District Court properly rejected this argument

and granted summary judgment under this Court's precedent of *Marks* and *Duguid v. Facebook, Inc.* ER 11,14. *See Duguid*, 926 F.3d 1146, 1151–52 (9th Cir. 2019)(*Marks* is controlling on the issue of the definition of an ATDS).

In an attempt to escape the consequences of *Marks*, PRA now, for the first time on appeal, raises arguments that *Marks* was "wrongly decided" and that the *Marks* interpretation of an ATDS is unconstitutional. Neither of those arguments was made to the District Court. Those new arguments are not properly before this Court and they should be deemed forfeited.

The panel decision in *Marks* and this Court's decision to deny rehearing en banc in *Marks*, along with the *Duguid* decision, continue to control the outcome of this case. PRA's argument essentially is that it is dissatisfied with the decision in *Marks* and would like it to be overturned. That ship has sailed.

In addition, this Court has reviewed the decision in *Marks* and confirmed that its definition of an ATDS is controlling and that the post-*Marks* TCPA is constitutional. *See Duguid*, 926 F.3d at 1151–52, 1156-57. This panel is bound by the decisions in *Marks* and *Duguid* and there are no compelling reasons for this Court to hear this appeal *en banc*.

In fact, the holding in *Marks* was adopted by the Second Circuit just this week. On Tuesday the Second Circuit issued its opinion in *Duran v. La Boom*

Disco, Inc., ___ F.3d ___, 2020 WL 1682773 (2d Cir. Apr. 7, 2020). The Second Circuit followed the holding in *Marks* and ruled that the definition of an ATDS encompasses computerized systems that automatically dial from a stored list of telephone numbers. *Id.* at *1 n. 5 The Second Circuit stated, "[t]he Ninth Circuit, which we follow here, concluded that an ATDS can, indeed, make calls from stored lists." *Id.*

This opinion in *Duran* undermines PRA's contention that *Marks* is an "outlier" that must be addressed by this Court en banc. It also reinforces Lamkin's argument that if there is a Circuit split that needs to be resolved, there is a procedure for resolving that split, and it is not this appeal.

STATEMENT ON JURISDICTION

Lamkin agrees with and hereby adopts PRA's Statement of Jurisdiction.

STATEMENT OF THE ISSUES

1. Whether this Court's rulings in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018) and *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1151–52 (9th Cir. 2019) control the definition of an "automated telephone dialing system."

2. Whether PRA willfully or knowingly violated the TCPA when it disregarded the authoritative guidance from the Federal Communication Commission that a predictive dialer was an automated telephone dialing system.

STATEMENT OF THE CASE

A. Legal Background

1. A bipartisan Congress enacted the TCPA to stop the scourge of robocalls.

Enacted by Congress in 1991, the TCPA is a landmark federal law designed to protect all Americans from the aggravation and inconvenience of prerecorded or automated calls to cellular telephones, telemarketing calls, and unwanted junk faxes. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 47 U.S.C. § 227 ("TCPA").

"Senator Hollings, the TCPA's sponsor, described these calls as 'the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone out of the wall.'" *Marks*, 904 F.3d at 1044; *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255–56 (11th Cir. 2014) (quoting 137 Cong. Rec. 30821 (1991)). Similarly, Congressman Markey noted "the aim of this

legislation is ... to secure an individual's right to privacy that might be unintentionally intruded upon by these new technologies. For this reason, the legislation addresses live unsolicited commercial telemarketing to residential subscribers." 137 Cong. Rec. 11310 (1991).

Congressional findings in 1991 underpinning the TCPA elaborate on these concerns. Congress expressly found:

> (5) Unrestricted telemarketing ... can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.
>
> (6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.
>
> . . .
>
> (12) **Banning such 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, is **the only effective means of protecting telephone consumers from this nuisance and privacy invasion**.
>
> (13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 – 95 (emphasis added); *see generally*, *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 371–73 (2012) (stating that TCPA "bans certain practices invasive of privacy").

Specifically, on the issue of robocalls, the TCPA placed "restrictions on the use of automated telephone equipment" to stem "the proliferation of intrusive, nuisance calls . . . from telemarketers." Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394–95. Automated calling technology gave telemarketers a cheap and scalable business model for inundating the public, resulting in an explosion of nuisance calls. *Id.* at 2394 ("The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques . . . More than 300,000 solicitors call more than 18,000,000 Americans every day.").

Similarly, Congress understood the specific harms that could result from a consistent bombardment of mobile devices and so forbade any person from making any call using an automatic telephone dialing system to any telephone number assigned to cellular telephone service, unless made "for emergency purposes" or with the "prior express consent of the called party." 47 U.S.C. § 227(b)(1) (A)(iii).

The TCPA is the product of overwhelming bipartisan support, enjoying both Democratic and Republican cosponsors in the Senate, and passing both

houses by voice vote in November 1991. *S.1462 – Telephone Consumer Protection Act of 1991 - Actions*, Congress.gov, https:// www.congress.gov/bill/102nd-congress/senate-bill/1462/ actions.

2. The TCPA deters countless robocalls and protects Americans from scammers who use robocalls to prey on consumers.

Since 1991, the TCPA has stopped countless numbers of calls from reaching mobile phones that sit in people's pockets, purses and automobiles. Public and private enforcement has helped discourage telemarketers and others from using automated calling technology to contact consumers without their prior consent.

In 2003, Congress bolstered the TCPA by passing the Do-Not-Call Implementation Act, 15 U.S.C. § 6151–6155, thereby authorizing the Federal Trade Commission ("FTC") to establish the national Do Not Call Registry to facilitate compliance with the TCPA's prohibition on calling landlines. The Do Not Call Registry provides a wildly popular means for citizens to notify telemarketers and others that their calls are unwelcome, with 239,472,857 registered phone numbers as of 2019. FTC, *National Do Not Call Registry Data Book for Fiscal Year 2019,* p. 5 (2019).

Nevertheless, the need for the TCPA's protections is ongoing, especially as automated telephone calls continue to proliferate. "Unwanted calls are far and away the biggest consumer complaint to the FCC with over 200,000 complaints each year – around 60 percent of all the complaints [the FCC] receive[s]." FCC, *The FCC's Push to Combat Robocalls & Spoofing*, https://www.fcc. gov/about-fcc/fcc-initiatives/fccs-push-combat-robocalls-spoofing. Likewise, in each of fiscal years 2018 and 2019, the FTC received over five million complaints about unwanted telemarketing calls. FTC, *National Do Not Call Registry Data Book for Fiscal Year 2019*, p.6 (2019).

The FTC's figures almost certainly understate the problem's scope as many consumers do not contact the FTC to make a complaint. It has been reported that Americans received over 30 billion robocalls in 2017 alone. Herb Weisbaum, *It's Not Just You—Americans Received 30 Billion Robocalls Last Year*, NBC News, Jan. 17, 2018. The number of robocalls has almost doubled in just two years with 58.5 billion robocalls reported for 2019. *See Americans Hit by Over 58 Billion Robocalls in 2019, Says YouMail Robocall Index*, Cision PR Newswire (Jan. 15, 2020), https://www.prnewswire.com/news-releases/americans-hit-by-over-58-billion-robocalls-in-2019-says-youmail-robocall-index-300987126.html.

Likewise, *The New York Times* has reported extensively on the exploding number of robocall complaints and widespread consumer outrage about illegal telemarketing. Gail Collins, *Let's Destroy Robocalls*, N.Y. Times, Mar. 1, 2019; Tara Siegel Bernard, *Yes, It's Bad. Robocalls, and Their Scams, Are Surging*, N.Y. Times, May 6, 2018.

It is self-evident that without those protections and statutory remedies of the TCPA, the already-enormous number of unwanted robocalls would exponentially increase, as the low cost and high scalability of automated call technology would grant anyone with a product or service the unfettered ability to assault the full public with a nonstop wave of unwanted calls around the clock.

B. Factual and Procedural Background

1. Nature of PRA's business.

PRA is a debt buyer that purchases defaulted credit card and other consumer debt and then attempts to collect the debt from the alleged debtor. ER 280: 17-22. PRA utilizes call centers to make approximately two million

telephone calls a day to the alleged debtors.[1] Each day PRA uses its Avaya Predictive Dialer to automatically make more than a million of those calls. It used the Avaya Predictive Dialer to make all 199 auto-dialed calls about which Lamkin complained in the court lower court. ER 621, ¶¶2-3. The calls relate to a single 20-year-old expired credit card debt account PRA purchased from another debt buyer.

PRA initially received Lamkin's residential telephone number. ER 309, ¶ 8. Not satisfied with calling Lamkin on her residential number PRA began the skip-tracing process to find her cell number.

PRA had a systematic process by which it reached out to the third-party credit reporting agencies for any contact information those agencies might have on debtors such as Lamkin. PRA ultimately discovered Lamkin's cell phone number by running a mini credit report during the skip-tracing process. ER 279: 18-25.

During the relevant time period PRA had no systematic process in place to determine whether a debtor such as Lamkin had provided prior express

[1] PRA's Rule 30(b)(6) representative Josh Cherkasly (PRA Assistant Vice-President of Production in charge of PRA's calling systems) testified that PRA uses its dialing system to make approximately two million calls a day. ER 296: 2-10; ER 299: 4-14.

consent before PRA began making autodialed calls to such debtors with its Avaya Predictive Dialer. ER 622, ¶14. PRA simply loaded all available phone numbers applicable to the new accounts and begin the process of contacting the debtors without first making a determination of whether the debtor had provided prior express consent to receive autodialed calls. ER 622, ¶15. Consistent with this policy, when PRA discovered Lamkin's cell phone number, PRA loaded Lamkin's cell phone number into its Avaya Predictive Dialer and begin auto dialing Lamkin's cell phone. With regard to Lamkin's account, PRA made no distinction between cellular numbers and residential numbers for purposes of the TCPA. ER 623, ¶16.

2. PRA's Avaya Predictive Dialer.

Marks held that an ATDS includes any "device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator." 904 F.3d at 1043. In doing so the *Marks* court stated, "the statutory definition of ATDS is not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includes devices with the capacity to dial stored numbers automatically." *Id.* *Marks* further held that any system that "dials numbers automatically" is an ATDS, even if a person must add the phone numbers to

the platform and "flip the switch" to make it broadcast the messages. *Id.* at 1053.

It is uncontested that PRA used a predictive dialer to make the calls to Lamkin and that its Avaya Predictive Dialer "dialed stored numbers automatically." *Marks*, 904 F.3d at 1043. PRA stipulated that:

- the Avaya Proactive Contact Technology used by PRA to make the calls is a predictive dialer;
- the calls were dialed using Defendant's Avaya Proactive Contact Technology's predictive dialing mode (the "Avaya Predictive Dialer");
- the Avaya Predictive Dialer had the ability to store telephone numbers to be called and in fact stored telephone numbers to be called; and
- the Avaya Predictive Dialer had the ability to dial without human intervention telephone numbers stored in a database and in fact dialed without human intervention telephone numbers stored in a database.

ER 622, ¶¶ 11-13.

A predictive dialer in general, and PRA's Avaya Predictive Dialer specifically, stores and dials telephone numbers automatically.[2] As the District

[2] Predictive dialing is a computerized method for automatically dialing lists of telephone numbers commonly used in call center operations. Predictive dialing is a type of automatic telephone dialing to make outbound telephone calls for sales, telemarketing, collections, information surveys or other purposes.

Court noted, PRA used its Avaya Predictive Dialer to "prevent[] PRA from losing man hours dialing debtor phone numbers" by "calling those numbers via electronic means." ER 13; *see also* ER 538. Thus, PRA's Avaya Predictive Dialer qualifies as an ATDS under the holding in *Marks*.

The Avaya Predictive Dialer is also the same dialer that the Ninth Circuit found was an ATDS in *Meyer v. Portfolio Recovery Assocs., LLC.*, 707 F.3d 1036, 1043 (9th Cir. 2012) (Court ruled on this exact dialer). ER 623, ¶ 17.

3. The robo-dialed calls to Lamkin's phone numbers.

After purchasing the debt, PRA began robo-dialing Lamkin. PRA used

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Predictive dialing provides the capability to "predict" the availability of call center agents that can respond to the outbound calls that have been dialed by the predictive dialing system and answered by the called party. Called parties that answer a predictively dialed outbound call typically experience a distinctive and recognizable pause due to the time interval during which the call is redirected and connected to an available call center agent.

This type of computerized predictive dialing requires the automatic system to store telephone numbers to be called. The numbers stored electronically are automatically and directly dialed by the dialing system equipment. The list of telephone numbers to be called by the equipment is made available to the dialing system as part of setting up each call or calling campaign. ER 352, ¶¶ 18, 20; ER 355, ¶ 26.

In the current case PRA stipulated that each of the calls at issue was made with a predictive dialer and each was made in the predictive dialing mode. *See* ER 621, ¶ 2; 622, ¶¶7-8.

its Avaya Predictive Dialer to robo-dial Lamkin's residential number 237 times. Not satisfied with calling Lamkin on her home number, PRA also began calling Lamkin on her cell phone. After loading Lamkin's cell number into its Avaya Predictive Dialer, PRA made 199 autodialed calls to Lamkin on her cell phone. ER 281: 24-25; 282: 1. All of these 199 calls were at issue in the litigation in the court below. PRA only stopped calling Lamkin when it was required to do so under the Fair Debt Collection Practices Act.[3] 15 U.S.C. § 1692c(c).

4. Previous class action litigation against PRA.

In December of 2010, a class action was brought against PRA alleging violations of the TCPA. *In re Portfolio Recovery Associates, LLC. Telephone Consumer Protection Act Litigation*, No. 11-MD-2295-JAH-BGS. *See* ER 312-321. The plaintiff in the class action alleged that PRA was violating the TCPA because it was using an ATDS to contact the debtors on their cell phones without their consent. Additionally, numerous individual lawsuits against PRA were being filed in District Courts around the country also

[3] Lamkin sent a written request to cease all communications which triggered the statutory requirements under federal debt collection laws for PRA to stop calling her. ER 207, ¶¶ 14-15.

alleging that PRA violated the TCPA. An MDL was created and the individual cases against PRA were transferred to the MDL court in the Southern District of California. ER 341-42.

Under the guidance of Magistrate Judge Skomal, the class action portion of the MDL settled for approximately $18 million. The class action settlement was granted final approval on January 25, 2017. *See* ER 325. Lamkin opted-out of that settlement class. *See* ER 335.

5. Proceedings in the District Court.

After opting out of the class action settlement, Lamkin filed her case in the court below and challenged the 199 autodialed calls she received on her cell phone. As the facts are undisputed, cross-motions for summary judgment were submitted to the District Court.

PRA argued that *Marks* did not control the definition of an ATDS and that the District Court instead should look to *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009) for the definition of an ATDS. ER 171-72. PRA unsuccessfully argued that the *Satterfield* definition of an ATDS was different than the *Marks* definition of an ATDS. *Id.* The District Court rejected PRA's argument, finding that *Marks*, as reinforced by *Duguid*, controls. ER 11. The District Court specifically found that the arguments PRA made as to why

Marks was not controlling had been rejected by the Ninth Circuit in its denial to rehear *Marks* en banc. ER 10 n.4.

PRA made no argument to the District Court that *Marks* was "wrongly decided" or that the decision in *Marks* was improper based on constitutional grounds. Those arguments were not presented to the District Court. *See* ER 168-176; ER 178-180; ER 122-130; ER 45-51.

After finding that *Marks* controlled the liability aspect of the case, the District Court turned to the issue of the proper amount of statutory damages. ER 11-14. The District Court exercised its discretion to treble the damages, finding that PRA made calls to Lamkin cell phone, PRA knew it did not have permission to call her cell phone, and PRA knew it was using an automated system. *See id.*

This appeal followed.

SUMMARY OF THE ARGUMENT

The issue PRA put before the District Court was whether *Marks* or *Satterfield* controlled the definition of an ATDS. The District Court correctly held that *Marks*, as reinforced by *Duguid,* controls that definition. The law-of-the-circuit rule requires that this panel follow the *Marks* and *Duguid* decisions. "[U]nder the law-of-the-circuit rule, we are bound by decisions of prior panels[]

unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decisions." *California v. U.S. Dep't. of Health & Human Services*, 941 F.3d 410, 421 (9th Cir. 2019). In apparent recognition that *Marks* indeed controls, PRA changes course.

First, in an effort to avoid the consequences of *Marks*, PRA all but abandons its argument that *Satterfield* controls and now instead urges this Court to re-evaluate its decision in *Marks*. *See* Opening Brief of Defendant-Appellant (Dkt. Entry 17) ("**Appellant's Br.**"), p. 14-32. The issues PRA now attempts to advance on appeal are that *Marks* is wrong under various canons of statutory construction and that *Marks* was incorrectly decided because it did not consider the canon of constitutional avoidance. *See id.* However, because these issues were not raised before the District Court, they should not be considered for the first time on appeal; they have been forfeited. *See In re Mortg. Store, Inc.*, 773 F.3d 990, 998 (9th Cir. 2014).

Next, PRA pivots to asking that this appeal be heard en banc in an effort to overturn *Marks*. PRA's justifications for en banc consideration are not persuasive. A split in the circuit courts on the definition of an ATDS is not sufficient to justify en banc consideration. This Court in *Marks* was aware that its decision created a split with the Third Circuit, yet this Court denied a request

for rehearing en banc. Additionally, the constitutional issues PRA now raises were known to this Court in *Duguid*, addressed by this Court in *Duguid*, and rejected by this Court in *Duguid.*

There are no "exceptional circumstances" that warrant this Court's en banc attention. Facebook has filed a petition for a writ of certiorari with the Supreme Court regarding the definition of an ATDS. If the definition needs attention, the Supreme Court can settle the issue. No more of this Court's resources need be directed to an analysis of the *Marks* and *Duguid* decisions.

The exceptional circumstances PRA attempts to invent, if they exist, are self-imposed. Society does not require that PRA's business model be predicated on robo-calling consumers in an attempt to collect expired debt. PRA has a choice on how it conducts its business; consumers have no choice in their battle to prevent unwanted invasions of their privacy through calls to their cell phones.

Finally, with regard to the specifics of this case and the District Court's finding that PRA acted willfully, PRA's argument that its current reading of the TCPA makes its conduct in 2008 through 2010 "objectively reasonable" is

meritless.[4] PRA's current view of the law is not relevant. The appropriate time frame to judge PRA's actions is based on what was known at the time of the offending calls. *Syed v. M-I, LLC*, 853 F.3d 492, 504 (9th Cir. 2017). When the calls were made, the FCC had repeatedly held that a predictive dialer is an ATDS. That was the law of the land at the time the calls were made to Lamkin. PRA ignored these FCC rules and intentionally used its Avaya Predictive Dialer to automatically call Lamkin's cell phone knowing it did not have consent. The District Court properly trebled the damages awarded to Lamkin for a willful or knowing violation.

STANDARD OF REVIEW

This Court reviews the "District Court's grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party in order to determine whether there are any genuine issues of material fact." *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1049 (9th Cir. 2018), *cert. dismissed*, 139 S. Ct. 1289 (2019) (citing *Thomas v. Ponder*, 611 F.3d 1144, 1149–50 (9th Cir. 2010)).

[4] PRA made the offending telephone calls to Lamkin's cell phone from February of 2008 to August of 2010.

ARGUMENT

I. *Marks v. Crunch San Diego, LLC* and *Duguid v. Facebook, Inc.* are controlling and under *Marks* and *Duguid*, the Avaya Predictive Dialer is an ATDS.

The main issue before this Court on this appeal is simple: do *Marks* and *Duguid* control? Because the answer is "yes," *Marks* mandates an affirmation of the District Court's finding that the Avaya Predictive Dialer is an ATDS.

Recognizing that this Court's decision in *Marks* sinks PRA's ship, PRA attempts to float a variety of new arguments as lifeboats, hoping one will reach this Court. *See* **Appellant's Br.**, p 14-37. Inappropriately attempting to have arguments heard on appeal through a backdoor approach, PRA argues every way conceivable that *Marks* was wrongly decided and, therefore, it should be either ignored completely or overturned en banc. *See id.* However, as is more fully explained below, PRA asserts for the first time on appeal that *Marks* was incorrectly decided and did not bring such argument before the District Court; therefore, PRA cannot do so now.

In deciding what constitutes an ATDS, this Court in *Marks* held that an ATDS includes any "device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator." 904 F.3d at 1043. In doing so this Court stated, "the statutory

definition of ATDS is not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includes devices with the capacity to dial stored numbers automatically." *Id.*

Marks reversed a lower court decision that held that any system that "lacks a random or sequential number generator" is not an ATDS. *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1292 (S.D. Cal. 2014), *vacated and remanded*, 904 F.3d 1041 (9th Cir. 2018). *Marks* is directly on point and compels affirmation here of the District Court's finding that PRA's Avaya Predictive Dialer is an ATDS. *See* ER 11. This is so because PRA's Avaya Predictive Dialer is a device "with the capacity to dial stored numbers automatically." *See* ER 622, ¶¶ 11-13; *Marks*, 904 F.3d at 1043.

Consistent with *Marks*, although decided years before *Marks*, this Court had also ruled that PRA's Avaya Predictive Dialer is an ATDS. *See Meyer*, 707 F.3d at 1043. More importantly, subsequent to *Marks*, this Court held that *Marks* is the controlling authority on the definition of an ATDS. *See Duguid*, 926 F.3d at 1151–52.

A. *Marks* and *Duguid* are binding on this Panel of the Court of Appeals because of the law-of the-circuit rule.

In *California v. U.S. Dep't. of Health & Human Services,* this Court set

forth the well-settled, deeply rooted law-of-the-circuit rule that governs this case. *See* 941 F.3d 410, 421 (9th Cir. 2019) (citing *Miranda v. Selig*, 860 F.3d 1237, 1243 (9th Cir. 2017)). This Court explained that, "under the law-of-the-circuit rule, we are bound by decisions of prior panels[] unless an en banc decision, Supreme Court decision, or subsequent legislation undermines those decisions." *Id.* (internal quotation marks and alterations omitted). *See also, Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 637 (9th Cir. 1993).

The law-of-the-circuit rule is a subset of stare decisis. *See Miranda*, 860 F.3d at 1243. The Supreme Court has said that "*[s]tare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

As strongly as PRA desires this Panel of the Court to find that *Marks* was wrongly decided and wants this Court to now completely change the definition of an ATDS, the law-of-the-circuit rule prevents the Panel from so doing. In *Marks*, this Court held that "the statutory definition of ATDS . . . includes devices with the capacity to dial stored numbers automatically." 904 F.3d at 1043. In *Duguid*, this Court held that *Marks* is the controlling authority

on the definition of an ATDS. *See Duguid*, 926 F.3d at 1151–52. Thus, twice this Court has set forth the definition of an ATDS to include devices with the capacity to dial stored numbers automatically (such as the Avaya Predictive Dialer). Because the law-of-the-circuit-rule "promotes the evenhanded, predictable, and consistent development of legal principles" and "contributes to the . . . integrity of the judicial process," the rule dictates that this Panel of this Court follow *Marks*, as the District Court in this case did. *Payne*, 501 U.S. at 827. *See* ER 11. Under *Marks* and *Duguid*, therefore, the Avaya Predictive Dialer is an ATDS and the District Court's holding should be affirmed.[5]

[5] PRA attempts to circumvent this well settled law by citing a Ninth Circuit case it claims holds that "circuit precedent [is] no longer controlling where [the] prior panel did not consider an argument the later panel finds persuasive." *See United States v. Vroman*, 975 F.2d 669, 672 (9th Cir. 1992). PRA's reliance on this case is misplaced. This case and the case upon which it relies do not so hold. *Vroman* held that a prior opinion was not controlling because it simply did not involve the same issue to be resolved. *See id. See also Scott v. Gino Morena Enterprises, LLC*, 888 F.3d 1101, 1109 (9th Cir. 2018)(The Court noted that *Vroman* stood for the proposition that "a prior opinion was not controlling because it did not involve the same issue.") Here PRA seeks to resolve the same issue that was before *Marks* and *Duguid*, *i.e.*, whether PRA's device it used to call Lamkin is an ATDS under the TCPA. This is not a new issue; it was addressed and ruled upon in *Marks* and *Duguid*. PRA is simply bringing up new arguments regarding an issue that has already been decided. Thus, the law-of-the-circuit rule and its only listed exceptions continues to be the law of the Ninth Circuit regarding adherence to previous panel decisions.

B. In ignoring the law-of-the-circuit rule and asserting that *Marks* was wrongly decided and not binding, PRA makes two arguments it did not raise at the District Court level; arguments not raised in the court below are forfeited.

Ignoring the law-of-the-circuit rule, PRA asserts that *Marks* was wrongly decided and is not binding. *See* Appellant's Br. 9-12, 14-25, 26-32. In so doing, PRA makes two arguments *not addressed* at the District Court level: 1) *Marks* was wrongly decided under various tools of statutory construction (Appellant's Br. 9-11, 14-25), and 2) *Marks* is not binding because it held that the TCPA's textual definition of an ATDS was ambiguous and, under the canon of constitutional avoidance, any ambiguity must be resolved against *Marks'* interpretation of the definition of an ATDS (Appellant's Br. 11-12, 26-32).

It is well settled in the Ninth Circuit that issues/arguments not raised in the court below are forfeited. *See In re Mortg. Store, Inc.*, 773 F.3d 990, 998 (9th Cir. 2014); *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978); *Ege v. Express Messenger Sys. Inc.*, 745 F. App'x 19, 20 (9th Cir. 2018). The Ninth Circuit has stated that it has discretion to hear a forfeited argument on appeal, however, but will do so only if there are "exceptional circumstances." *In re Mortg. Store, Inc.*, 773 F.3d at 998 (citing *El Paso City of Tex. v. Am. W. Airlines, Inc. (In re Am. W. Airlines)*, 217 F.3d 1161, 1165 (9th Cir.2000)). The

Ninth Circuit "will only excuse a failure to comply with this rule [(*i.e.*, requirement to preserve argument for appeal by raising it at the District Court level)] when necessary to avoid a manifest injustice." *Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006) (quoting *Meanel v. Apfel*, 172 F.3d (9th Cir. 1999)) (internal quotations omitted).

The Ninth Circuit will exercise its discretion and address a forfeited argument/issue in three *and only* three circumstances: (1) when review is required to prevent a miscarriage of justice or to preserve the integrity of the judicial process, (2) when a new argument/issue arises while appeal is pending because of a change in the law, [or] (3) when the argument/issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed. *In re Mortg.*, 773 F.3d at 998 (citing *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir.2010)(quoting *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir.1985)))(quotations and internal quotations omitted)(emphasis added). With respect to the third exception, the Ninth Circuit has made it clear that:

> [t]he evident principle underlying this exception is that the party against whom the issue is raised must not be prejudiced by it. Thus, if he might have tried his case [(in the court below)], differently **either by developing new facts in response to or advancing distinct legal arguments against the issue,** it should not be permitted to be raised for the first time on appeal.

Patrin, 575 F.2d at 712 (emphasis added).

This case is before the Court on appeal from the District Court's grant of Lamkin's Motion for Summary Judgment (ER 618-619) and denial of PRA's Motion for Summary Judgment (ER 156-157). *See* ER 2, 14; App. Br. p. 40. In all of its filings in both Motions for Summary Judgment, PRA set forth only one line of argument: *Marks* conflicts with *Satterfield v. Simon & Schuster, Inc.*, *Satterfield* controls, and, under *Satterfield*, the Avaya Predictive Dialer is not an ATDS. *See* ER 168-176; ER 178-180; ER 122-130; ER 45-51.

1. PRA's argument that *Marks* was wrongly decided under various tools of statutory construction meets none of the exceptions and is forfeited.

PRA spends a great deal of its Opening Brief going through canons of construction in an attempt to support its contention that "*Marks* is wrong under . . . [various] tools of statutory construction." Appellant's Br. p. 15. *See* Appellant's Br. pp. 15-21. PRA spends another great portion of its Opening Brief attempting to discredit each point of statutory construction upon which *Marks* relies in its finding that an ATDS "includes devices with the capacity to dial stored numbers automatically." *Marks,* 904 F.3d at 1043. *See* Appellant's Br. pp. 21-25.

As stated previously, in all of its filings in both Motions for Summary Judgment, PRA only argued that *Marks* conflicts with *Satterfield*, *Satterfield* controls, and, under *Satterfield*, the Avaya Predictive Dialer is not an ATDS. *See* ER 168-176; ER 178-180; ER 122-130; ER 45-51.

PRA made none of the arguments it now sets forth regarding various tools of statutory construction, and that *Marks* was wrongly decided because of such statutory construction. *Compare* Appellant's Br. pp. 15-25 *and* ER 168-176; ER 178-180; ER 122-130; ER 45-51. None of the exceptions set forth above apply to PRA's new arguments it now makes that *Marks* was wrongly decided based on canons of statutory construction, and, therefore, such arguments are forfeited.

The first two exceptions do not apply here. There can be no contention that a review of these arguments is needed "to prevent a miscarriage of justice or to preserve the integrity of the judicial process." PRA simply chose not to argue these points before the District Court. The canons of construction upon which it now relies were available to PRA then, but it chose to ignore them. There has occurred no intervening event that would cause a miscarriage of justice, save the fact that PRA's argument to the District Court failed so it is now attempting to find other end-arounds to *Marks* and *Duguid* and the District

Court's reliance upon them. *See* ER 8-11. Similarly, there can be no contention that these arguments have arisen while this appeal has been pending because of a change in the law. Such is not the case here.

With regard to the third exception, this Court has held that if the party against whom the new arguments are raised might have tried her case in the court below differently "either by developing new facts in response to or advancing distinct legal arguments against the issue," such new arguments "should not be permitted to be raised for the first time on appeal." *Patrin*, 575 F.2d at 712. Because the canons of construction arguments were not raised, Lamkin had no chance to advance legal arguments against the statutory construction arguments at the District Court level, and, therefore, the third exception does not apply. *See id.* PRA has forfeited any right to now argue tools of statutory construction, and that *Marks* was wrongly decided because of such statutory construction.

2. PRA's argument that *Marks* is not binding because of the canon of constitutional avoidance meets none of the exceptions and is forfeited.

PRA spends another significant portion of its Opening Brief arguing that *Marks* is not binding because it held that the TCPA's textual definition of an ATDS was ambiguous and, under the canon of constitutional avoidance, any

ambiguity must be resolved against *Marks'* interpretation of the definition of an ATDS. *See* Appellant's Br. 11-12, 26-32. Constitutional avoidance is a canon of construction that has been in existence for centuries. *See, e.g., Knights Templars' & Masons' Life Indem. Co. v. Jarman,* 187 U.S. 197, 205 (1902). The canon stands for the proposition that, where the language of a statute is ambiguous, the interpretation that "is clearly in accordance with the provisions of the Constitution" is "preferred." *Id.* PRA's new argument on appeal appears to be that this canon causes *Marks* to be non-binding because: 1) The *Marks* definition of an ATDS will act to cover all smartphones; 2) such coverage is unconstitutional.

Again, in all of its filings in both Motions for Summary Judgment, PRA only argued that *Satterfield* controls this case, and under *Satterfield*, the Avaya Predictive Dialer is not an ATDS. *See* ER 168-176; ER 178-180; ER 122-130; ER 45-51. PRA did not argue *Marks* is not binding under the canon of constitutional avoidance. *Compare* Appellant's Br. pp. 11-12; 26-32, *and* ER 168-176; ER 178-180; ER 122-130; ER 45-51. Again, none of the exceptions set forth above apply to PRA's argument that *Marks* is not binding under the canon of constitutional avoidance, and, therefore, such argument should not be considered on this appeal.

Once more, the first two exceptions do not apply. There can be *no* contention that a review of this issue is needed "to prevent a miscarriage of justice or to preserve the integrity of the judicial process." Although the constitutional avoidance canon has been in existence for centuries, PRA ignored it at the District Court level. The canon of constitutional avoidance was available to be argued by PRA, PRA simply chose not to include it in its assertions at the District Court. There has occurred no significant intervening event that would cause a miscarriage of justice, save the fact, again, that PRA's argument to the District Court failed so it is now attempting to find other arguments against *Marks* and *Duguid* and the District Court's reliance upon them. *See* ER 8-11. Similarly, there can be no contention that this argument has arisen while this appeal has been pending because of a change in the law. Again, such is not the case here.

Regarding the third exception, there is no question that if Lamkin had been presented with the constitutional avoidance argument at the District Court level, she would have "develop[ed] new facts in response to or advance[ed] distinct legal arguments against the [canon of constitutional avoidance]" *Patrin*, 575 F.2d at 712. For example, with respect to the constitutionality of the TCPA as interpreted by *Marks*, Lamkin would have marshalled evidence

and made arguments regarding the numerous alternative ways robo-callers like PRA could communicate with debtors, thus rendering the *Marks* interpretation constitutional because it would survive intermediate scrutiny. *See Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876-77 (9th Cir. 2014); *Duguid*, 926 F.3d at 1153, 1157 (TCPA is content-neutral and, therefore, subject to intermediate scrutiny which requires it to be "narrowly tailored to advance the 'government's significant interests in residential privacy'" and requires it to leave open "'ample alternative channels of communication.'")(quoting *Moser v. Fed. Commc'ns Comm'n,* 46 F.3d 970, 975 (9th Cir. 1995)). Because the constitutional avoidance argument was not raised, Lamkin had no chance to marshall such evidence and advance legal arguments against the canon of constitutional avoidance at the District Court level; therefore, the third exception does not apply. *See id.*

Further, if PRA had asserted the constitutional avoidance argument at the District Court level, it would necessarily, as a condition precedent, have "[drawn] into question the constitutionality" of the TCPA as interpreted by *Marks.* Fed. R. Civ. P. 5.1(a). Such challenge would have invoked PRA's obligation to serve notice on the United States Attorney General in order for the United States to intervene. *See id.* Because PRA did not assert the

argument, and because it did not notify the United States Attorney General, Lamkin had no chance to benefit from the arguments that could have been advanced by the government at the District Court level. By failing to follow the procedures of Federal Rule 5.1, Lamkin, the party against whom the constitutional avoidance issue is now being raised, is absolutely "prejudiced" by PRA's failure to raise the issue at the District Court level. As a consequence, under *Patrin*, the third exception does not apply. *See* 575 F.2d at 712.

For these reasons, PRA has forfeited any right to now argue *Marks* is not binding because of the canon of constitutional avoidance.

C. An additional reason the Court should not consider the constitutional avoidance argument is because this Court, in *Duguid v. Facebook*, has already been presented with the argument that the *Marks* decision sweeps all smartphones into the definition of an ATDS; in *Duguid*, this Court reaffirmed the definition of an ATDS set forth in *Marks* and reaffirmed the constitutionality of the TCPA after *Marks*.

Even if this Court determines that the issue of constitutional avoidance is not forfeited, this Court should recognize that it has already faced the argument that *Marks*' definition of an ATDS captures smartphones, threatening such definition's constitutionality, and rejected it.

PRA appears to be arguing here that the interpretation of an ATDS in *Marks* now saddles the TCPA with an overbreadth problem and, therefore, such

interpretation is unconstitutional. However, in *Duguid,* this Court reaffirmed the definition of an ATDS set forth in *Marks* and reaffirmed the constitutionality of the TCPA after *Marks*.

The Ninth Circuit has on four occasions ruled that the TCPA is constitutional. *See Moser v. F.C.C.*, 46 F.3d 970, 975 (9th Cir. 1995); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014), aff'd, 136 S. Ct. 663 (2016), as revised (Feb. 9, 2016); *Duguid,* 926 F.3d at 1156-57; *Gallion v. United States*, 772 F. App'x 604, 605 (9th Cir. 2019). Both *Duguid* and *Gallion* were decided after *Marks*; when making those two rulings, the Ninth Circuit was aware of the definition of an ATDS as set forth in *Marks*.

In those four rulings, this Court consistently held that the TCPA (without the government debt exception),[6] is content-neutral, subject to intermediate scrutiny and consistent with the First Amendment. *Duguid,* 926 F.3d at 1153 (citing *Gomez,* 768 F.3d at 876; *Moser,* 46 F.3d at 975). The statute satisfies intermediate scrutiny because it is narrowly tailored to advance the "government's significant interest in residential privacy" and leaves open

[6] In so doing, the *Duguid* Court first severed a constitutionally offending government debt collection exception to the TCPA. 926 F.3d at 1153-56. The debt collection exception to the TCPA is not relevant to this case.

"ample alternative channels of communication." *Duguid*, 926 F.3d at 1153 (citing *Moser*, 46 F.3d at 974; *Gomez*, 768 F.3d at 876–77).

By way of background, after Congress amended the autodialer provision to include a government-debt exception in 2015, the TCPA faced a new wave of First Amendment challenges. *See, e.g.*, *Fontes v. Time Warner Cable, Inc.*, No. 214CV02060CASCWX, 2018 WL 5901158, at *2 (C.D. Cal. Aug. 20, 2018); *Woods v. Santander Consumer USA Inc.*, No. 2:14-CV-02104-MHH, 2017 WL 1178003, at *3 (N.D. Ala. Mar. 30, 2017); *Brickman v. Facebook, Inc.*, 230 F. Supp. 3d 1036, 1044 (N.D. Cal. 2017). Defendants in TCPA cases argued that the government-debt exception rendered the autodialer provision content based and that, after the Supreme Court's decision in *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218 (2015), the provision must be subjected to strict scrutiny—which, they argued, the provision could not satisfy. *See id.* Then, in June 2019, this Court in *Duguid* sustained this challenge to the government-debt exception. *Duguid*, 926 F.3d at 1153-56. At the same time, however, this Court concluded that the government-debt exception was severable because eliminating that exception would remove the source of constitutional infirmity. *Id.* at 1156-57. This Court explained that "[e]xcising the debt-collection exception preserves the fundamental purpose of the TCPA and leaves . . . the

same content-neutral TCPA that [the Ninth Circuit] upheld—in a manner consistent with *Reed*—in *Moser* and *Gomez*." *Duguid*, 926 F.3d at 1157.

In severing the government-debt exception, this Court reaffirmed its decisions in *Moser* and *Gomez* that the autodialer provision survives intermediate scrutiny. *See Duguid*, 926 F.3d at 1153, 1157. And, to the extent that there was any doubt about the court's conclusion in *Duguid*, the following month this Court reaffirmed that "[b]ecause we conclude in *Duguid* that the unconstitutional debt-collection exception is severable, the TCPA is restored to its pre-2015 status and is constitutional under our precedents." *Gallion*, 772 F. App'x at 606. This Court thus confirmed that the autodialer provision, as severed in *Duguid*, satisfies intermediate scrutiny and remains constitutional under the First Amendment.

As stated previously, the Ninth Circuit was aware of its own holding in *Marks* and decided *Duguid* (and *Gallion*) against the backdrop of that case, which it had decided just months prior. In fact, *Duguid* explicitly addressed *Marks*, endorsing its construction of the ATDS definition. *See* 926 F.3d at 1151-52. The *Duguid* court rejected Facebook's attempt to "narrow[] *Marks*," *id.* at 1151, which would – according to Facebook – have excluded smartphones from the autodialer definition. *See id.* ("Facebook responds that *Marks* cannot possibly

mean what it says, lest the TCPA be understood to cover ubiquitous devices and commonplace consumer communications . . . [including] smartphones because they can store numbers and, using built-in automated response technology, dial those numbers automatically."). The Ninth Circuit rejected Facebook's assertion that *Marks*'s definition of an autodialer would capture all smartphones and noted that the "argument that any ATDS definition should avoid implicating smartphones provides no reason to adopt" a construction other than the one in *Marks*. *Id.* at 1152; *see also id.* ("We are unpersuaded by Facebook's strained reading of *Marks* and the TCPA.").

In short, *Duguid* reaffirmed the holding of *Marks* and held that the autodialer provision is "the same content-neutral TCPA that we upheld—in a manner consistent with *Reed*—in *Moser* and *Gomez*." *Id.* at 1157. Thus, *Duguid* implicitly rejected the argument PRA seeks to advance here—that the *Marks* court's construction of the autodialer definition renders the autodialer provision unable to satisfy intermediate scrutiny and therefore unconstitutional under the First Amendment.

In deciding *Duguid*, the Ninth Circuit was well aware of the specific argument PRA raises here, because it was raised in an amicus brief in *Marks*

and by the appellee in its petition for rehearing en banc in *Marks*. In an amicus brief in that case, it was argued that

> reading the TCPA to restrict all equipment with the ability to dial from a prepared list leads to irrational and unconstitutional results. For example, common smartphone apps enable users to send text messages to groups of contacts. . . . Under *Marks*' theory, smartphones on which these apps have been installed would qualify as ATDS equipment . . . . These results are absurd and would violate the First Amendment.

Brief of Amicus Sirius XM Radio Inc. Supporting Appellee, 2015 WL 9449409 at *16, *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018). The appellee in *Marks* also made a smartphone/constitutionality overbreadth argument in its petition for rehearing en banc, and such petition was unanimously denied. *See* Appellee's Pet. for Reh'g *En Banc*, *Marks v. Crunch San Diego, LLC*, No. 14-56834, p. 16 (9th Cir. Oct. 4, 2018); Order, *Marks v. Crunch San Diego, LLC*, No. 14-56834 (9th Cir. Oct. 30, 2018). Had this Court found this argument compelling it could have adopted a different construction of the TCPA's autodialer definition—but it did not.

Furthermore, an amicus brief in *Duguid* again presented the same argument before the Court. *See* Brief of Amicus Chamber of Commerce of the United States of America Supporting Appellee, 2018 WL 6044855 at *10,

Duguid v. Facebook, 926 F.3d 1146 (9th Cir. 2019) ("Under the interpretation suggested . . . the TCPA may reach far beyond autodialed calls, to restrict all calls made from devices that have the ability to autodial, even if the ability is never used and even if the particular call at issue is placed manually."). There, too, though this Court had the opportunity to consider such argument, it chose not to, instead clearly and unequivocally reaffirming its holding in *Marks.* It declined to endorse then – just as the *Marks* court had declined to endorse earlier – the view that *Marks*'s construction of the autodialer definition necessarily captures the smartphones that millions of Americans use every day. *See Duguid*, 926 F.3d at 1152.

Accordingly, PRA's argument regarding the constitutionality of the TCPA under the *Marks* definition of an ATDS not only was not raised in the lower court and is not properly before this Court, it was rejected by this Court in *Duguid*.

A District Court has recently recognized that the Court in *Duguid* did just that. In *Meza v. Sirius XM Radio Inc.*, No. 17-CV-02252-AJB-JMA, 2020 WL 905588 (S.D. Cal. Feb. 25, 2020), Sirius XM raised the smartphone and constitutionality issue in the context of a motion to dismiss. 2020 WL 905588, at *7-8. The court noted that "Sirius XM appears to disagree with the Ninth

Circuit's *interpretation* of the ATDS provision in *Marks*, arguing that the way the Ninth Circuit has defined an ATDS results in an overbroad restriction on speech." *Id.* at *7 (emphasis added). The District Court, in denying the motion to dismiss, stated that "in *Duguid v. Facebook, Inc.*—which was decided after *Marks*—the Ninth Circuit examined the very issue Sirius XM raises now." *Id.*

Ultimately, PRA's fight is with the Ninth Circuit's decision in *Marks*: it thinks that the construction of the ATDS definition endorsed by this Court is broader than Congress intended. But that argument had its day in court, and it did not prevail. While PRA may be dissatisfied that this Court did not endorse a different construction of the ATDS definition in *Marks* – or, for that matter, did not strike down all of the autodialer provision as unconstitutional in *Duguid* – those cases are the law of this Circuit. Therefore, any attempt by PRA to retread such constitutional arguments against *Marks* should be rejected in this appeal.

D. In an attempt to avoid the law-of-the-circuit rule, PRA urges this Court to hear this case en banc, *without basis*.

Marks and *Duguid* are controlling in this case and, just as en banc consideration was denied in *Marks*, so should it be denied here. Federal Appellate Rule 35(a) dictates the few circumstances under which a hearing en

banc may be ordered: "A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard . . . by the court of appeals en banc. **An en banc hearing . . . is not favored** and **ordinarily will not be ordered** unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance. Fed. R. App. P. 35(a) (emphasis added).

En banc courts are the exception, not the rule." *United States v. American–Foreign S.S. Corp.*, 363 U.S. 685, 689, 80 S.Ct. 1336, 4 L.Ed.2d 1491 (1960). They are "not favored," (Fed. R.App. P. 35), and "convened only when extraordinary circumstances exist" (*American–Foreign S.S. Corp.*, 363 U.S. at 689).

All of the arguments PRA now makes for the first time on appeal were made in the appellant's petition for rehearing en banc in *Mark*. *See* Appellee's Pet. for Reh'g En Banc, *Marks*, No. 14-56834 (Oct. 4, 2018) (Appellee asserted: a) *Marks* conflicts with *Satterfield* creating an intra-circuit conflict at p. 7; b) *Marks* is incorrect under canons of statutory construction at p. 8-14; c) Marks creates a circuit split that will result in more uncertainty and litigation at p. 14-16; and d) *Marks* revives smartphone/constitutionality overbreadth

argument at p. 16). The *Marks* Panel voted to deny Appellee's Petition for Rehearing and Petition for Rehearing En Banc. Further, the Panel stated in its Order: "The full court has been advised of the petition for Rehearing En Banc and *NO* Judge has requested a vote on whether to rehear the matter en banc." *See* Order, *Marks*, No. 14-56834 (Oct. 30, 2018) (emphasis added); *see* Appellee's Pet. for Reh'g En Banc, *Marks*, No. 14-56834 (Oct. 4, 2018).

1. PRA's argument that en banc review is warranted because *Marks* conflicts with *Satterfield* is incorrect.

Noted by the District Court in this case, in *Marks*, where the Ninth Circuit unanimously denied the appellee's petition for rehearing en banc, appellee's first argument for rehearing was that *Marks* conflicted with *Satterfield*. ER 10 n. 4; *See* Appellee's Pet. for Reh'g En Banc, *Marks*, No. 14-56834, p. 7 (Oct. 4, 2018). *Compare Marks*, 904 F.3d 1041 *with Satterfield*, 569 F.3d 946. As was the case then, this argument has no traction now.

The District Court in this case ruled that *Satterfield* does not conflict with *Marks*. ER 9. The District Court explained that "[t]he *Satterfield* court discussed only the meaning of the term 'capacity.'" *Id.* The District Court reiterated that [t]he scope of that capacity under the TCPA was not at issue [in *Satterfield*]," and that on appeal the *Satterfield* Court was addressing only the

capacity issue. *See Id; see Satterfield,* 569 F.3d at 951("We find that the District Court focused its analysis on the wrong issue . . . the focus must be on whether the equipment has the *capacity* 'to store or produce telephone numbers to be called, using a random or sequential number generator. . . . Since the District Court did not focus its decision on this issue, we must then review the record. . ")(emphasis included); *see also Marks,* 904 F.3d at 1051 n.6 ("Our statement in *Satterfield* that 'the statutory text is clear and unambiguous' referred to only one aspect of the text: whether a device had the *capacity 't*o store or produce telephone numbers . . . .'") (emphasis in original).[7]

In so deciding, the District Court made an important observation regarding the *Satterfield* decision:

> The court in *Satterfield* indeed had no reason to address whether a predictive dialer must generate random or sequential numbers to be an ATDS because in the 2003 Order, "the FCC . . . defined 'automatic telephone dialing system' to include predictive dialers." *Meyer*, 707 F.3d at 1043). The Ninth Circuit heard *Satterfield* in 2009. Only after the D.C. Circuit vacated the FCC's 2003 interpretation of what consists an ATDS in 2018 could courts opine on the issue. *See Marks,* 904 F.3d at 1049 n.4 ("An appellate court lacks authority to consider a challenge to an FCC order that is

[7] In its discussion, the Court of Appeal in *Marks* addressed and distinguished the statement in *Satterfield* that the statutory text is "clear and unambiguous." The *Marks* court explained that this statement applied only to the "capacity" issue. *Marks*, 904 F.3d at 1051, n. 6. While PRA obviously does not like the *Marks* decision, the panel in *Marks* explained why there is no conflict between *Marks* and *Satterfield.*

> brought after sixty days from the date when the FCC releases the final order to the public."); *see also U.S. W. Commc'ns, Inc. v. Jennings*, 304 F.3d 950, 958 n.2 (9th Cir. 2002) (stating that "properly promulgated FCC regulations currently in effect must be presumed valid" when not challenged under the Hobbs Act).

ER 10-11.

Further, the District Court pointed out that this Court's subsequent decision in *Duguid* confirmed that *Marks*, not *Satterfield*, is the law on whether a device that dials stored numbers automatically is an ATDS. ER 11 (citing *Duguid*, 926 F.3d at 1151). In *Duguid*, this Court again addressed the definition of an ATDS. 926 F.3d at 1151. This Court in *Duguid* stated that *Marks* "construed *ACA International* to wipe the definitional slate clean." *Id.* at 1149-50. This Court in *Duguid* went on to recognize that *Marks* "rearticulated the definition of an ATDS." *Id.* at 1150. *Duguid* thus concluded that the *Marks* definition of an ATDS "govern[ed] [the] appeal" before it, just as it does in the present appeal.

Accordingly, just as the District Court concluded, the *Duguid* Court confirmed that *Marks* does not conflict with *Satterfield*. Therefore, there is no intra-circuit conflict that an en banc hearing needs to resolve. An en banc hearing is not warranted here. Moreover, the District Court's holdings should be affirmed.

2. PRA's argument that en banc review is warranted because the *Marks* decision conflicts with other Courts of Appeal decisions is not persuasive.

PRA's apparent argument that en banc consideration is warranted because this proceeding involves a question of exceptional importance due to a split in the circuits is not persuasive. This Court in *Marks* did not deem it so then, and it continues to not be so now. *See* Order, *Marks,* No. 14-56834 (Oct. 30, 2018); Appellee's Pet. for Reh'g En Banc, *Marks,* No. 14-56834 (Oct. 4, 2018), p. 14-16.

When *Marks* was decided, this Court was fully aware that its decision conflicted with the Third Circuit's ruling, finding the Third Circuit's reasoning to be unpersuasive. *See Marks*, 904 F.3d at 1052 n. 8 (discussing *Dominguez v. Yahoo, Inc.*,894 F.3d 116, 120 (3rd Cir. 2018). Additionally, the appellee made the same argument in appellant's petition for rehearing en banc in *Marks,* and such petition was unanimously denied. *See* Order, *Marks*, No. 14-56834 (Oct. 30, 2018); Appellee's Pet. for Reh'g En Banc, *Marks,* No. 14-56834 (Oct. 4, 2018), p. 14-16.

As stated previously, the Supreme Court holds that "[e]n banc courts are the exception, not the rule." *American–Foreign S.S. Corp.*, 363 U.S. at 689. They are "not favored," (Fed. R. App. P. 35), and "convened only when

extraordinary circumstances exist" (*American–Foreign S.S. Corp.*, 363 U.S. at 689). A split on this issue was before *Marks* and in denying en banc consideration, this Court did not perceive such split to create a "question of exceptional importance" meriting en banc treatment. Fed. R. App. P. 35(a)(2); Fed. R. App. P. 35(b)(1)(b); *Marks*, 904 F.3d at 1052 n. 8; Order, *Marks*, No. 14-56834 (Oct. 30, 2018).[8]

Nevertheless, PRA argues to this Court that because there is a circuit split on the ATDS issue, there now exists a "question of exceptional importance" warranting en banc treatment. *See* Appellant Br., 36-37.

It is an exceptional leap to say that a circuit split absolutely warrants a hearing en banc on an issue. As a matter of fact, the Seventh Circuit who recently ruled on the definition of an ATDS at issue here refused the

[8] PRA relies on two rules for this proposition. The Ninth Circuit Rule upon which PRA relies in petitioning for hearing en banc, by its terms, applies to petitions for *rehearing en banc* only, not hearings en banc; therefore, it is not applicable. Even if it was applicable, the substance of the issue must "substantially affects a rule of national application in which there is an overriding need for national uniformity." *See* 9th Cir. R. 35-1. PRA makes no factual argument that this is the case here and cannot do so. The Federal Appellate Rule upon which PRA relies sets forth the situations where a party *may* petition for hearing en banc; it in no way stands for the proposition that a hearing en banc *will be granted* when there is a circuit split on an issue. *See* Fed. R. App. P. 35(b); Fed. R. App. P. 35(b)(1)(b).

Appellant's Petition for Rehearing En Banc. Order, *Gadelhak v. AT&T Services, Inc.*, No. 19-1738 (7th Cir. Mar. 10, 2020). The "circuit split" was not enough for any judge in the Seventh Circuit to ask for a rehearing en banc.

Examples abound in the Ninth Circuit where petitions for en banc consideration were denied even though there was a split in the circuits on the issue at hand. *See* Order, *Marks*, No. 14-56834 (Oct. 30, 2018). *See, e.g.*, *Martin v. City of Boise*, 920 F.3d 584, 588 (9th Cir.), *cert. denied sub nom. City of Boise, Idaho v. Martin*, 140 S. Ct. 674 (2019)(rehearing en banc denied even though decision created circuit splits on multiple issues); *Sali v. Corona Reg'l Med. Ctr.*, 907 F.3d 1185, 1189 (9th Cir. 2018) (rehearing en banc denied even though four of five other circuits disagreed with panel on the issue); *Doe I v. Nestle USA, Inc.*, 788 F.3d 946, 947 (9th Cir.), *as amended* (June 10, 2015), *publication ordered* 788 F.3d 801 (9th Cir. 2015)(rehearing en banc denied even though decision created circuit split with two other circuits); *Moore v. Biter*, 742 F.3d 917, 918, 921-22 (9th Cir. 2014)(rehearing en banc denied even though decision created circuit split); *In re Penrod*, 636 F.3d 1175, 1176 (9th Cir. 2011)(rehearing en banc denied even though decision caused a split between Ninth Circuit and eight other circuits to address the issue); *United States v. Alderman*, 593 F.3d 1141 (9th Cir. 2010)(rehearing en banc denied

even though decision created a split with seven other circuits); *United States v. Jenkins*, 518 F.3d 722, 723 (9th Cir. 2008)(rehearing en banc denied even though decision created a split with other circuits); *Ramadan v. Keisler*, 504 F.3d 973, 978 (9th Cir. 2007)(rehearing en banc denied even though panel's decision created a split between Ninth Circuit and all seven other circuits to consider the issue); *United States v. Patterson*, 406 F.3d 1095, 1100-01 (9th Cir. 2005)(rehearing en banc denied even though decision continued a split among the circuits); *Finley v. Nat'l Endowment for the Arts*, 112 F.3d 1015, 1016 (9th Cir. 1997)(rehearing en banc denied even though panel decision conflicted with two other circuits).[9]

In support of its argument that en banc consideration is warranted here, PRA asserts that the Ninth Circuit is in the minority on this issue, and that it is even a so-called "outlier" by its *Marks* and *Duguid* rulings.[10] *See* Appellant Br.,

[9] It should also be noted that the defendant in *Duguid* has filed a petition for certiorari on the *Marks* definition of an ATDS, and such petition has been docketed. *See* Petition for Writ Certiorari, *Duguid*, (No. 19-511), Oct. 17, 2019; Docketing Petition for Certiorari, *Facebook, Inc., v. Duguid*, (No. 19-511), Oct. 21, 2019. Thus, the more appropriate avenue to address the circuit split on this issue has been taken.

[10] PRA attempts to argue that the *Marks* and *Duguid* rulings cause the Ninth Circuit to also be at odds with the D.C. Circuit's ruling in *ACA Int'l v. FCC,* 855 F.3d 687 (D.C. Cir. 2018). *See* Appellant Br. p. 37. However, in *ACA Int'l*, the D.C. Circuit recognized that the FCC could adopt the definition of an

36-37. Arguments such as these have consistently failed to warrant en banc consideration in the Ninth Circuit, and it should be no different here. For example, in *Ramadan v. Keisler*, a petition for rehearing en banc was denied even though the decision made the Ninth Circuit an "outlier" and caused a split between itself and all seven other circuits to address the issue at hand. 504 F.3d at 978. In *In re Penrod*, a petition for rehearing en banc was denied even though the decision caused a split between the Ninth Circuit and *eight* other circuits to address the issue. 636 F.3d at 1176 (emphasis added). In *United States v. Alderman*, a petition for rehearing en banc was denied even though the panel decision caused a split between the Ninth Circuit and seven other circuits. 593 F.3d at 1141.

The Second Circuit opinion in *Duran v. La Boom Disco, Inc.*, ___ F.3d ___, 2020 WL 1682773 (2d Cir. Apr. 7, 2020) shows that *Marks* is not such an outlier. Instead *Marks* is consistent with at least one other circuit opinion.

Because PRA's arguments that a hearing en banc is warranted due to a split in the circuits is not persuasive, en banc consideration should be denied by this Court.

ATDS set forth in *Marks*, it just didn't adequately do so in the 2015 Declaratory Ruling. *Id.* at 703. *See also Marks*, 904 F.3d at 1047. Thus, PRA's argument is without merit.

II. PRA's Calls to Lamkin Constituted Willful Violations of the TCPA

The parties do not dispute that the TCPA allows for trebled damages for knowing or willful violations. Nor does PRA argue that trebling the damages was an abuse of discretion by the District Court. Instead, PRA argues that as a matter of law it could not have committed a willful or knowing violation. As discussed below, PRA's contentions are without merit and treble damages were properly awarded.

A. The District Court correctly set forth the standard for determining a willful or knowing violation because it found that intent to violate the statute was not necessary.

The District Court correctly noted that the TCPA, the FCC and the Ninth Circuit are all silent on the definition of the phrase "willful or knowingly."[11] The District Court held that a defendant willfully or knowingly violates the TCPA when the defendant intends or knows "that it was performing each of the elements of a TCPA claim (*i.e.*, [1] that it was making a call, [2] to a person who did not provide prior express consent, [3] using an automated system)."

[11] While the TCPA does not define willful, the Communications Act of 1943, of which the TCPA is a part, defines willful as "the conscious or deliberate commission or omission of such act, irrespective of any intent to violate any provision[ ], rule or regulation." 47 U.S.C. § 312(f)(1).

This is the correct standard under which a knowing or willful violation should be judged. *See Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1313 (11th Cir. 2020)([defendant] "knowingly used prohibited technology to contact someone it knew had revoked her consent. That's a willful violation of the Act"); *Haysbert v. Navient Solutions, Inc.*, No. 15–4144 PSG (Ex), 2016 WL 890297, at *10 (C.D. Cal. March 8, 2016) (citing *Lary v. Trinity Physician Fin. & Ins. Servs.*, 780 F.3d 1101, 1107 (11th Cir. 2015)); *Olney v. Progressive Cas. Ins. Co.*, 993 F. Supp. 2d 1220, 1227 (S.D. Cal. 2014); *Harris v. World Fin. Network Nat. Bank*, 867 F. Supp. 2d 888, 895 (E.D. Mich. 2012)). Additionally, a plaintiff need not show that the defendant knew his conduct would violate the TCPA. *See Wakefield v. ViSalus, Inc.*, No. 3:15-CV-1857-SI, 2019 WL 2578082, at *1 (D. Or. June 24, 2019).

Trebled damages are also appropriate when the defendant's conduct was reckless. The Fourth Circuit recently addressed this issue in *Krakauer v. Dish Network, L.L.C.*, 925 F. 3d 643 (4th Cir. 2019). It stated, "Dish would only be liable if its actions demonstrated indifference to ongoing violations and a conscious disregard for compliance with the law. *Id.* at 662 (citing *United States v. Blankenship*, 846 F.3d 663, 673 (4th Cir. 2017)). This is a familiar willfulness standard that is common to many areas of law. *See Safeco Ins. Co.*

of Am. v. Burr, 551 U.S. 47, 57 (2007) ("[W]here willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, *but reckless ones as well*.")(emphasis added). *Krakauer*, 925 F. 3d at 662 (emphasis added). These standards should be adopted by this Court.

B. Because the FCC's authoritative guidance on whether a predictive dialer was an ATDS is not subject to a range of plausible interpretations, the violations were willful.

PRA asserts that it cannot be liable for an award of treble damages because its actions were "at minimum, objectively reasonable." The test for a willful or knowing violation, however, is not whether a violator's actions were "objectively reasonable" as suggested by PRA. Even if, *arguendo*, that were the test, PRA cannot meet such test.

1. The law during the time period during which the calls were made is standard by which PRA's conduct should be judged.

First, PRA implies that the recently created circuit split (after the *ACA International v. Federal Communications Commission* decision in March of 2018) on the definition of an ATDS means as a matter of law it's conduct could not have been a willful or knowing violation. *ACA Int'l v. Fed. Commc'ns*

Comm'n, 885 F.3d 687 (D.C. Cir. 2018). *See* Appellant's Br. p. 38. Recent interpretations are not the standard by which to judge the conduct of PRA here.

Notably, the calls that violated the TCPA were made by PRA from February of 2008 to August of 2010. ER 571-582. That is the correct time frame by which to judge PRA's actions. *See Syed v. M-I, LLC*, 853 F.3d 492, 504 (9th Cir. 2017). In *Syed*, a case discussing whether a defendant "willfully failed to comply" with the Fair Credit Reporting Act, this Court evaluated what was known "at the time [defendant] procured [plaintiff's] consumer report" (which is when the statutory violation occurred). *Id.* at 504. The question thus becomes, for PRA, what was known when PRA violated the statute.

Applying *Syed* to the current case, the status of the law during the time period during which PRA made the offending calls to Lamkin (February 2008 to August 2010) is the relevant status of the law by which PRA's conduct is judged.

2. The FCC's rulings were authoritative and binding.

Beginning with the FCC's Order in 2003 and continuing until March of 2018 when the FCC's 2003, 2008 and 2012 Declaratory Rulings were overturned under a Hobbs Act appeal in *ACA International,* the definition of an ATDS under the TCPA included predictive dialers like the one PRA used in

this case. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14,014 (2003); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559 (2008); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 15,391 (2012). (The orders hereinafter referred to as the "2003 Order," "2008 Order," "2012 Order," respectively). Thus, the FCC had authoritatively and specifically ruled on this issue and its rulings were the controlling authority on the issue. Those rulings were the law of the land and could only have been overturned by a Hobbs Act appeal. [12]

In view of these rulings, in 2008 to 2010 when PRA made the calls at issue, PRA could not have objectively believed that calling with a predictive dialer was permissible. The FCC had twice spoken on that issue. The FCC made perfectly clear that a predictive dialer was an ATDS.

In 2003 the FCC stated:

> We believe the purpose of the requirement that equipment have the "capacity to store or produce telephone numbers to be called" is to ensure that the prohibition on autodialed calls not be

[12] At all material times the FCC rulings had the force of law in all federal District Courts under the Hobbs Act. *Marks*, 904 at 1049 n. 4.

> circumvented. Therefore, **the Commission finds that a predictive dialer falls within the meaning and statutory definition of "automatic telephone dialing equipment" and the intent of Congress**.

2003 Order at ¶ 131(emphasis added).

As if the 2003 Order was not clear enough, in 2008 the FCC affirmed its position and stated:

> In this Declaratory Ruling, **we affirm that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA's restrictions on the use of autodialers.** In its Supplemental Submission, ACA argues that the Commission erred in concluding that the term "automatic telephone dialing system" includes a predictive dialer. ACA states that debt collectors use predictive dialers to call specific numbers provided by established customers,44 and that a predictive dialer meets the definition of autodialer only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists.
>
> The Commission found that, based on the statutory definition of "automatic telephone dialing system," the TCPA's legislative history, and current industry practice and technology, **a predictive dialer falls within the meaning and definition of autodialer and the intent of Congress.** The Commission noted that the evolution of the teleservices industry had progressed to the point where dialing lists of numbers was far more cost effective, but that the basic function of such dialing equipment, had not changed—the capacity to dial numbers without human intervention. The Commission noted that it expected such automated dialing technology to continue to develop and that Congress had clearly anticipated that the FCC might need to consider changes in technology.

2008 Order at ¶ 12-13 (emphasis added).

PRA ignores these Declaratory Rulings and offers no argument to the Court as to how these orders could be read to give an "objectively reasonable" understanding that a predictive dialer was not an ATDS.

The Declaratory Rulings simply cannot be read that way. Beginning with the FCC's order in 2003 and continuing until March of 2018 when the FCC's 2003, 2008 and 2012 Declaratory Rulings were overturned, the TCPA included predictive dialers like the one PRA used in this case. The FCC had authoritatively and specifically ruled on this issue and was the controlling authority on the issue. It could only have been overturned by a Hobbs Act appeal. Therefore, during the time that PRA made the offending calls to Lamkin the only objectively reasonable interpretation of the administrative agency authoritative guidance was that predictive dialers are an ATDS.

While PRA argues that it complied with *Satterfield* regarding the definition of an ATDS, that argument is misplaced. As the District Court noted, the *Satterfield* court discussed only the meaning of the term "capacity." The scope or contours of that capacity under the TCPA was not decided in *Satterfield*. The Court in *Satterfield* was not asked to decide, for example,

whether "using a random or sequential number generator" (47 U.S.C. § 227(a)(1)) applied to the word "store" or to the word "produce" or to both.

Indeed, the Court in *Satterfield* had no reason to address whether a predictive dialer must generate random or sequential numbers to be an ATDS because in the 2003 Order, "the FCC . . . defined 'automatic telephone dialing system' to include predictive dialers." *Meyer*, 707 F.3d at 1043. The Ninth Circuit heard *Satterfield* in 2009. Only in 2018 after the D.C. Circuit vacated the FCC's 2003 interpretation of what consists an ATDS could courts opine on the issue. Simply, *Satterfield* does not say what PRA claims it says. *Satterfield* did not reach the question of a predictive dialer or dialing from a stored list.

Thus, during the time that PRA made the offending calls to Lamkin the only objectively reasonable interpretation of the administrative agency authoritative guidance was that predictive dialers are an ATDS. The FCC's authoritative guidance on whether a predictive dialer is an ATDS is not subject to a range of plausible interpretations.

PRA's citation to *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007) is of no help to PRA. In *Safeco* the Court was addressing a situation in which there had been no authoritative guidance from an administrative agency. *Id.* at 70. In the current case the FCC had twice ruled on the issue.

Also, PRA's assertion that by adopting the standard used by the District Court would turn every violation of the TCPA into a willful or knowing violation is also of no help to it and is simply not correct. Recently, District Courts in this circuit have found violations of the TCPA but ruled that such violations were not willful or knowing. Not every violation is a willful or knowing violation. *See Aussieker v. Staccato Properties, LLC,* No. 219CV0089TLNDBPS, 2019 WL 7184554, at *5 (E.D. Cal. Dec. 26, 2019), *report and recommendation adopted,* No. 2:19-CV-00089-TLN-DB, 2020 WL 704596 (E.D. Cal. Feb. 12, 2020)(in default judgment context plaintiffs proved liability but plaintiffs presented "nothing from which [the court] could make a ruling' that the violation was "knowing and/or willful"); *N.L. by Lemos v. Credit One Bank, N.A.*, No. 2:17-CV-01512-JAM-DB, 2019 WL 1428122, at *2 (E.D. Cal. Mar. 29, 2019)(Plaintiff did not demonstrate that the [defendant] …should have known that they were calling a person who did not provide prior express consent"); *Ellis v. Energy Enter. USA, Inc.*, No. 17-CV-00497-VKD, 2018 WL 6816112, at *6 (N.D. Cal. Nov. 20, 2018), *report and recommendation adopted sub nom. Ellis v. Energy Enterprises USA, Inc.*, No. 17-CV-00497-LHK, 2018 WL 6719163 (N.D. Cal. Dec. 21, 2018)(in default judgment context plaintiff proved liability but "the record before the

Court [was] not sufficient to establish that [defendant] acted knowingly or willfully.").

In summary the undisputed facts are that PRA:

- received Lamkin's number only from a third-party credit reporting agency (ER 279:18-25);
- had no systematic process in place to determine whether a debtor provided prior express consent before initiating telephone calls to him/her using the Avaya Predictive Dialer (ER 622, ¶ 14);
- loaded all available phone numbers applicable to the new account and began the process of contacting the debtor without first making a determination of whether the debtor had provided prior express consent to receive auto-dialed calls (ER 622, ¶ 15); and
- knew it was calling Lamkin's cell phone (ER 623, ¶ 19).

The FCC had authoritatively ruled that a predictive dialer was an ATDS. PRA can hardly now complain that its actions were not willful or knowing in using the Avaya Predictive Dialer to place nearly 200 calls to Lamkin's cell phone. The District Court's award of treble damages should be affirmed.

CONCLUSION

In light of the applicable binding precedent, Lamkin respectfully requests that the District Court's decision be affirmed in full.

Dated: April 10, 2020

Respectfully submitted:

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By: */s/ Chris R. Miltenberger*
Chris R. Miltenberger

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiff-Appellee is not aware of any related cases.

Dated April 10, 2020

The Law Office of Chris R. Miltenberger, PLLC

By: */s/ Chris R. Miltenberger*
Chris R. Miltenberger

Attorney for Plaintiff-Appellee Pam Lamkin

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Office 365 Times New Roman 14-point font.

Dated April 10, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated April 10, 2020

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