

December 22, 2014

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Notice of Ex Parte – CG Docket No. 02-278**
Wells Fargo

Dear Ms. Dortch:

On December 18 and 19, 2014, Monica Desai of Squire Patton Boggs (US) LLP, counsel to Wells Fargo, held meetings with the staff of the Federal Communications Commission (FCC or Commission). On December 18, Ms. Desai held meetings with the following staff: Kurt Schroeder (Chief, Consumer Policy Division); Richard Mallen (Office of General Counsel); Valery Galasso (Special Advisor and Confidential Assistant, Office of Commissioner Rosenworcel); Amy Bender (Legal Advisor, Office of Commissioner O’Rielly); and Nicholas Degani (Legal Advisor, Office of Commissioner Pai). On December 19, Ms. Desai met with Mark Stone (Deputy Bureau Chief, Consumer & Governmental Affairs Bureau).

In the meetings, Ms. Desai focused on why it is appropriate from a policy perspective to interpret “called party” to mean “intended recipient” with respect to the statutory provision providing a defense against TCPA liability for calls made with the “prior express consent of the called party.”¹ Ms. Desai also noted the legal and policy arguments set forth in the Petition for Declaratory Ruling filed by Consumer Bankers Association (CBA).² Specifically, in response to staff questions regarding how to limit unintended consequences of the “intended recipient” approach, Ms. Desai reiterated points made in a

¹ 47 U.S.C. § 227(b)(1)(A)(iii). *See also* Wells Fargo Notices of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed July 21, 2014 (July 21 Ex Parte); June 19, 2014 (June 19 Ex Parte); and May 15, 2014 (May 15 Ex Parte)).

² Consumer Bankers Association, *Petition for Declaratory Ruling*, CG Docket No. 02-278 (filed Sept. 19, 2014); *see also* Consumer Bankers Association, *Comments of Consumer Bankers Association in Support of its Petition for Declaratory Ruling*, CG Docket No. 02-278 (filed Nov. 17, 2014).

filing previously submitted by Wells Fargo, outlining the various protections that remain for a person who receives unwanted calls intended for another person.³

First, interpreting “called party” to mean “intended recipient” does not give a caller a blank slate to call a number forever, even after it changes hands. Instead, once a caller is aware that the number changes hands it will be left to the jury to determine whether or not the caller was actually still trying to reach its customer in good faith. The jury will be left to assess the subjective good faith of the caller considering facts such as: i) was the caller informed the number had changed hands?; ii) when was the last time the caller reached the customer at that number?; iii) how many times did the caller call the number without a response?; iv) what policies/training does the caller have in place to show diligence in attempting to reach only its customer? The Commission can and should provide guidance to courts and future juries as to the factors they should take into account in assessing the subjective good faith of a caller claiming use of the “express consent defense.”

Second, the “intended recipient” interpretation does not result in a former subscriber binding a new subscriber by his/her consent. The new subscriber is not bound by the actions of the former customer; rather the caller is simply provided a defense where it can honestly demonstrate that it did not know the number had changed hands and other indicia of good faith are present to the satisfaction of the jury. The new subscriber still has standing to bring his lawsuit – but the calling party may have the workable defense that Congress expressly intended.

Third, interpreting “called party” to mean “intended recipient” is unrelated to the “willfulness/knowing” standards of the statute.⁴ While it is true that a jury may oftentimes conclude that a caller “knowingly” harassed a third-party when there are strong enough indicia that the calling party was aware the number had changed hands, that is but *one* way that a party may demonstrate a willful/knowing violation of the statute. The trebling provision has other uses outside this context – such as where a calling party actually reaches its customer on a number it knew it lacked consent to dial. Moreover there is ample room for a jury to determine that a calling party was not trying to reach its customer in subjective good faith – i.e. that it was reckless with respect to the risk the number had changed hands – without having to find it necessarily “knew” the number had changed hands. Even if a calling party argued that it did not know the number changed hands and it was, in good faith, intending to reach its former customer, the jury may consider:

- i) the volume of calls and the great length of time that has passed since the last time the caller reached the customer;
- ii) specific individual factors, such as whether the Plaintiff had a voicemail with a different name on it and the ability of the calling party to detect the content of voicemail messages;

³ See Wells Fargo Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed July 31, 2014).

⁴ 47 U.S.C. § 227(b)(3).

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iii) the presence or absence of policies designed to assure that the caller reaches the customer; and

iv) the fact, if present, that the Plaintiff never informed the calling party that the number had changed hands.

The jury will weigh these considerations and make a determination based upon the evidence before it and considering the factors enumerated above, and any other factors it believes are germane. It is possible on these facts that the jury considers the caller really was trying to reach its customer in good faith throughout the entire time period. On the other hand, evaluating those factors, the jury could conclude that the calling party “knew” the number had changed hands, triggering the possibility of trebling, in the court’s discretion.

Accordingly, by interpreting the phrase “called party” to mean “intended recipient” the statute applies as Congress intended it to apply – providing a defense for a calling party that does everything right, while at the same time protecting consumers from unwarranted and harassing calls where a calling party is reckless with respect to its dialing practices.

Respectfully submitted,



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