

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of the)
)
Rules and Regulations Implementing)
) **CG Docket No. 02-278**
the Telephone Consumer Protection)
)
Act of 1991)

**Joe Shields Comment on the 06-05-15 Ex Parte Presentation of Wells Fargo &
Company**

Wells Fargo continues to argue that called party under the TCPA can only mean “intended” called party despite the fact that called party is used the same throughout the TCPA. Called party is used consistently through the TCPA to mean the actual subscriber or recipient of the call. An interpretation of called party to mean “intended called party ignores the fact that an intended called party cannot be charged for a call, cannot be provided with the identity of the caller and cannot hang up on a call. Wells Fargo admits that only the actual subscriber or user of the cell phone can hang up on a call. See Wells Fargo Ex Parte 06-05-15 Page 7 para. 1. Wells Fargo’s argument that called party is used differently throughout the statute ignores Congressional intent to protect the privacy of the actual subscriber or user of the cell phone.

Simply put an “intended” called party’s privacy is not invaded by a call that reaches someone else that is the actual subscriber or user of the cell phone number. The interpretation that called party can only mean “intended” called party makes nonsense of the intent of Congress to protect the privacy of those receiving automatically dialed or prerecorded/text message calls.

Further, Wells Fargo ignores the fact that every court that has the opportunity to address the “intended” called party to reassigned number defense has overwhelmingly rejected the defense! See attached list of 32 Federal District courts and 2 Federal Appellate courts that have rejected the “intended” called party defense.

Not one court in addressing reassigned number calls to cell phones has interpreted called party to mean “intended recipient”. Wells Fargo’s argument is delusional at best and could lead to sanctions if used as an affirmative defense!

Wells Fargo lost the exact same argument in the District Court for the Southern District of Florida and the 11th Circuit Court of Appeals.

Wells Fargo made multiple calls using an autodial system to a cell phone number assigned to Lynn Breslow. Breslow did not consent to Wells Fargo’s use of an autodial system to call the number. Although Breslow was the named account holder for the cell phone number, she was not the primary user of the phone. **The cell phone was used exclusively by her minor child, “R.B.”**

Wells Fargo argued that this former customer—the intended recipient of the autodial call - was the “called party” for purposes of § 227, and because he had consented to being called via automatic dialing system, the TCPA’s prohibition did not apply. The District Court concluded that the “called party” for purposes of [47 U.S.C.] § 227(b)(1)(A)(iii) was not [the] Former Customer, but the Plaintiffs,” Breslow and R.B.

Breslow v. Wells Fargo Bank, NA, 755 F. 3d 1265 - Court of Appeals, 11th Circuit 2014.

If Wells Fargo’s interpretation had been accepted by the court then every child that gets their 1st cell number would lose the protection of the TCPA and would be subjected to untold numbers of “intended” called party calls and text messages. Seriously, is the Commission going to trash a child’s delight at having their own cell phone with untold numbers of “intended” called party calls and text messages from banks, debt

collectors and every possible industry that will inevitably claim to be calling an “intended” called party!

Wells Fargo’s claim that “Federal courts have interpreted the phrase “called party” in myriad ways...”¹ has no legal basis what so ever and Wells Fargo knows that. “To stay this action based on an issue not within the "special competence of [the] administrative agency," *Reiter*, 507 U.S. at 268, and **that is being uniformly applied throughout this Circuit and others** is not warranted. *Shehan v. Wells Fargo Bank, NA*, Dist. Court, ND Alabama 2014. What Wells Fargo is doing with its petition and comments in this proceeding is making the same delusional arguments hoping for a different outcome with the Commission.

Wells Fargo insists that the TCPA will continue as normal if the Commission adopts a one call “intended” called party exemption or safe harbor. Wells Fargo overlooks the fact that everyone that is assigned a new cell phone number will lose the protection of the TCPA. Since there are no “new” cell phone numbers that can be assigned every number assigned to new cell phone users is a reassigned number. Under a one call to a reassigned number exemption or safe harbor everyone opening a new cell phone account or changing from one account to another will lose the protection of the TCPA. The onus to comply with the TCPA will be forced on the called party instead of the caller! Placing the onus to comply with the TCPA on the consumer whose privacy is invaded contradicts the intent of Congress.

¹ Wells Fargo Ex Parte 06-05-15 (D)(4).

A one call exemption or safe harbor ignores how consumers screen their calls. The majority of consumers do not answer calls from callers they do not recognize². That will lead to numerous calls from unknown caller ID numbers that are invading the privacy of the called party. Contrary to Wells Fargo's claim, the unanswered calls are causing the cell phone to ring thus invading the privacy of the actual subscriber or user of the cell phone³.

Further, consumers do provide their new cell phone numbers to those that they want to stay in contact with when they are assigned a new number. If they don't provide their new number to a business then they obviously are not interested in calls from that business. Further, Congress could have written in an "intended" called party exemption but did not do so. Consequently, only some delusional interpretation of the TCPA would hold that called party means "intended" called party.

Claims that wrong number calls are the norm for new cell phone subscribers lowers cell phone numbers to the level of land lines. Such a claim ignores the intent of Congress to distinguish cell phone privacy from land line privacy. Clearly, there is a difference. Automatically dialed calls or prerecorded calls from pollsters, politicians and debt collectors to land lines without consent do not violate the TCPA. The same calls to cell phone numbers violate the TCPA if made without consent.

In my lifetime I have had dozens of wrong number calls to my landline but I can count on one hand how many wrong number calls I have had to all of my cell numbers.

² Spoofing of local numbers has become prevalent by scammers and debt collectors and is an attempt to deceive a called party into thinking the call is from someone within their area code.

³ Some cell phone carriers charge 1 minute for a call whether answered or not.

Rarely if ever do I get a wrong number call on my cell number. Even then most wrong number calls are simply dialed wrong by some individual.

On the other hand I receive dozens of calls meant for the previous subscriber by businesses. The reason is most often the callous and indifferent treatment of cell numbers by businesses. Their automated systems ignore disconnected number announcements and continue to call incessantly until someone is forced to respond to the call. The reason is obvious – once a number is programmed to be called it is cheaper to let the dialer make nonstop calls then to pay someone to add the number to a list of numbers not to be called by the dialer.

Wells Fargo dismisses without basis the infallible method of removing disconnected numbers before they are reassigned. Wells Fargo's only reason for dismissing a clearly infallible method of avoiding calling reassigned numbers is that some numbers are temporarily disconnected. There is no disconnected number announcement on temporarily disconnected numbers. A temporarily unreachable announcement is clearly different from a disconnected number announcement.

Wells Fargo claims that a disconnect announcement is played when someone has not set up their voice mail. Seriously, where is Wells Fargo getting its information from? The answer is they are making up delusional arguments to support their position without any facts to back up their delusion. Clearly, a voice mail has not been set up announcement is not the same as a disconnect announcement! A disconnect announcement is not reached even when an account on hold for nonpayment is called.

Wells Fargo claims that a substantial number of commenters covering a wide group of industries all agree the Commission should clarify that “called party” means

“intended” recipient. Obviously, the TCPA is working as it was envisioned by Congress. Evidence of the success of TCPA lawsuits is that key players “covering a wide group of industries” are lobbying the Commission to relax TCPA regulations so that those industries can carry on as usual with little or no fear of consumer lawsuits.

Very few attorneys are willing to file individual TCPA lawsuits and Commission enforcement has been lackluster at best. Those facts have led to the callous and indifferent treatment of cell numbers by legitimate companies forcing consumers to seek recourse through class action representation.

Class action TCPA law suits have led to increased awareness of the illegal behavior of legitimate companies in regards to their callous and indifferent treatment of cell numbers. “if class actions can be said to have a main point, it is to allow the aggregation of many small claims that would otherwise not be worth bringing, and thus to help deter lawless defendants from committing piecemeal highway robbery, a nickel here and a nickel there, that adds up to real money, but which would not be worth the while of an individual plaintiff to sue on.” *Miller v. McCalla*, 198 F.R.D. 503, 506 (N.D. Ill. 2001).

Wells Fargo admits that they are seeking a definition of autodialer that will circumvent the TCPA. “...what constitutes dialing technology **that can be used...**” Wells Fargo Ex Parte 06-05-15 (E) (1). Congress did not enact the TCPA specifically to allow callers to use automated dialing equipment. Attempts to create a work-around such as preview dialers should be rejected by the Commission. Preview dialers can be used by low paid foreign workers to dial by click hundreds of calls per minute that are then routed to banks, debt collectors and any number of businesses that want to evade the TCPA.

The Commission should keep the prior determination that any device that stores numbers to be called and then dials those numbers without human intervention is an autodialer. Further, the Commission must retain the prior express consent requirement for all automated calls to cell numbers. Prior express consent has worked for more than 24 years and should not be eliminated because of the convenience of the caller. That is the real reason for the many petitions before the Commission.

The TCPA has become an impediment to businesses that want to use cheap automatically dialed or prerecorded/text message calls to reach consumers on their cell phones. Businesses claim consumers want such calls yet when asked most consumers do not like robocalls. The same arguments were made about the national do not call list claiming without any basis that consumers “wanted” telemarketing calls. In the latest FTC Biennial Report to Congress 223,429,112 numbers were registered on the list. Such a large number speaks for itself on whether telemarketing calls are wanted or not.

Automatically dialed or prerecorded/text message calls made without the called party’s consent will not be welcomed by consumers. In the February 19th, 2015 Notice of Ex Parte Presentation filed by the National Consumer Law Center 58,000 individuals signed a “Tell the FCC: No robocalls to cell phones without our consent.” petition. Therefore, it is critical that such calls be made only to those that have requested them and that such calls be limited to the purpose for which consent was given.

Without the TCPA’s prior express consent to cell numbers consumers would be overwhelmed by a tsunami of automatically dialed or prerecorded/text message calls from every possible industry. Simply because consumers are migrating to more cell phone usage is not a legitimate reason to treat cell phones the same as land lines.

The Commission must reject any and all attempts to create exemptions for automatically dialed or prerecorded message/text calls to cell numbers without consent of the called party. The Commission must reject any and all attempts to create a definition of autodialer that does not take into account how dialers work in today's world - storing numbers and then dialing those numbers without human intervention. The Commission must reject any and all attempts from every possible industry to weaken the TCPA for their own selfish purposes.

Respectfully submitted,

_____/s/_____

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Case Law On Called Party Is The Current User or Subscriber Of The Cell Phone Number And Rejecting The “Intended” Called Party Interpretation

1. *Soppet v. Enhanced Recovery Co., L.L.C.*, 679 F.3d 637 (7th Cir. 2007). “Standing to bring a private right of action is recognized for the person who answers a call to their cell phone, even if the caller intended to reach a different person.”
2. *Kane V. National Action Fin. Servs., Inc.*, 2011 WL 6018403 (E.D. Mich. Nov. 7, 2011) ““called party” means the person subscribing to the called number at the time the call was made.”
3. *Harris v. World Financial Network National Bank et al*, 867 F.Supp.2d 888 (2012) WL 1110003] “Like Kane, Plaintiff has received calls on his own cellular phone from a party using an automated dialing system and intending to reach someone else.”
4. *Alea London Ltd. v. American Home Services, Inc.*, 638 F.3d 768, 776 (11 Cir. 2011) “The TCPA is essentially a strict liability statute which imposes liability for erroneous unsolicited [calls].”
5. *Dawson v. Am. Dream Home Loans*, No 06CV000513, 2006 WL 2987104 (Ohio Com. Pl. Oct. 4, 2006) “...provides for a cause of action for any person who receives an unsolicited fax and does not limit the cause of action to the intended recipient of an unsolicited fax.”
6. *Breslow v. Wells Fargo Bank, NA*, 857 F. Supp. 2d 1316 - Dist. Court, SD Florida 2012. “The use of ‘called party’ to unambiguously refer to the actual recipient in another section of the TCPA is compelling evidence that the term carries the same meaning in other provisions.” “Accordingly, the Court finds that the “called party” for the purposes of § 227(b)(1)(A)(iii) was not Former Customer, but the Plaintiffs”
7. *Olney v. Progressive Casualty Ins. Co.*, 2014 WL 294498 (S.D. Cal., Jan. 24, 2014) “Defendant’s position that only the intended recipient has standing to bring a claim under the TCPA **has been squarely rejected in no less than twenty cases**, (emphasis added) cases that are factually similar to the instant case.”
8. *Gutierrez v Barclays* Case No. 10-cv-1012 DMS (BGS) (S.D. Cal. Feb. 9, 2011) “Instead, the Court is persuaded by Plaintiffs’ argument that the TCPA is intended to protect the telephone subscriber, and thus it is the subscriber who has standing to sue for violations of the TCPA.”
9. *Osorio v. State Farm Bank, F.S.B.*, 746 F. 3d 1242 (11th Cir. 2014) “We accordingly reject State Farm’s argument that the “intended recipient” is the “called party” referred to in 47 U.S.C. § 227(b)(1)(A)”.
10. *Swope v. Credit Management LP*, 2013 WL 607830 (E.D. Mo. 2013) “**Numerous courts** that have considered this issue have held a party to be a ‘called party’ if the defendant intended to call the individual’s number, and that individual was the regular user and carrier of the phone.”
11. *Page v. Regions Bank*, 2012 WL 6913593 “...the district court held that the plaintiff qualified as a “called party” because he was “the regular user and carrier of the cellular telephone...” “[t]he fact that the telephone number was registered to [his] fiancée’s name does not change this result.”
12. *Agne v. Papa John’s International, Inc.*, 286 F.R.D. 559, 565 (W.D. Wash. 2012) “... the plaintiff had standing to sue under the TCPA even though she was merely

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- “an authorized user of her shared cellular plan” and “her ex-husband was the primary account holder.”
13. *Manno v. Healthcare Revenue Recovery Group, LLC*, 289 F.R.D. 674 (S.D. Fla. 2013) The thrust of these decisions and others is that a plaintiff’s status as the “called party” depends not on such technicalities as whether he or she is the account holder or the person in whose name the phone is registered, but on whether the plaintiff is the regular user of the phone...” (emphasis added)
 14. *Zybuvo v. NCSPlus, Inc.*, No. 12-cv-6677 (S.D.N.Y. Sept. 15, 2014) "...under the TCPA, the "called party" is the subscriber assigned the cell phone number at the time the allegedly improper calls are made..."
 15. *Jamison v. First Credit Servs., Inc.*, 2013 WL 3872171, (N.D. Ill. July 29, 2013) (noting that Soppet “suggests that the subscriber is the person who pays the bill”).
 16. *Cellco v. Plaza Resorts*, 2013 WL 5436553 (finding that a subscriber who transfers primary use of a cell phone also transfers “the right to consent to the receipt of otherwise prohibited calls,” thus conferring standing to the regular user of the cell phone).
 17. *Nunes v Twitter Inc.*, Case No.: 14-cv-02843-VC (S.D. CA Nov. 26th 2014) This argument fails for all the reasons provided by Judge Easterbrook in *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637 (7th Cir. 2012). Accordingly, Twitter's motion to dismiss is denied.
 18. *Tang v. William W. Siegel & Associates*, 791 F. Supp. 2d 622, 625 (N.D. Ill. 2011) “Even if the TCPA only affords a right of relief to the “called party,” this Court finds that Plaintiff was the called party because Siegel intended to call Plaintiff’s cellular telephone number and Plaintiff is the regular user and carrier of the phone.”
 19. *Warnick v. Dish Network LLC*, Dist. Court, D. Colorado 2014, “I adopt the *Olney* rationale, and find that summary judgment should be denied as to the argument that DISH is not liable because Warnick was not the intended recipient. *See also Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, (7th Cir. 2012) (“The phrase ‘intended recipient’ does not appear anywhere in § 227, so what justification could there be for equating ‘called party’ with ‘intended recipient of the call?’”).
 20. *Brown v. Enterprise Recovery Systems, Inc.*, No. 02-11-00436-CV (Tex. App. Aug. 22, 2013), **We agree with other courts** that have determined that a person has standing even if the person is not the "intended recipient" of the call...”
 21. *Abrantes v Northland Group Inc.*, (N.D. CA April. 13th 2015) “**The fact that numerous courts have interpreted the term “called party”** weighs against a stay on primary jurisdiction grounds.”
 22. *Jordan v. Nationstar Mortgage LLC* No. 14-CV-00787-WHO, 2014 WL 5359000 “...the TCPA requires consent from the person who was actually called, not the person the caller asserts it was attempting to call.” “**That “called party” has been interpreted consistently by multiple courts** suggests that interpretation of the phrase is does not require special expertise.”
 23. *Molnar v. NCO Financial Systems, Inc.*, Dist. Court, SD California 2015 In interpreting the “clear and unambiguous language” of the TCPA, district courts in

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- the Ninth Circuit have repeatedly declined to insulate telemarketers from liability for calling reassigned numbers.
24. *Prater v. Mediacredit Inc.*, 45 F. Supp. 3d 1038 (E.D. Mo. 2014) (refusing to issue stay pending ruling on petitions addressing whether express consent attaches to cellular number or actual recipient of call and whether safe harbor exists for calls to reassigned number)
 25. *Shehan v. Wells Fargo Bank N.A.*, No. 1:14-CV-00900-JHE, 2014 WL 5529365, at *1 (N.D. Ala. Nov. 3, 2014) “As to the second factor, the Eleventh Circuit has spoken directly to this issue, **providing direct guidance for a uniform interpretation of the statute** throughout the Circuit. Wells Fargo has not provided, and the undersigned has not found, any other circuit court that has interpreted "called party" differently or that has created an exception to the rule.
 26. *Helwig v. Diversified Consultants, Inc.*, Dist. Court, WD Wisconsin 2015”... (**courts have ruled consistently** on meanings of statutory terms at issue without need to defer to commission). Citing *Jordan*, 2014 WL 5359000 at *8
 27. *Soulliere v. Central Florida Investments, Inc.*, Dist. Court, MD Florida 2015 “Plaintiff is not precluded from having standing as it is not disputed that he was the primary or regular user of his cell phone and received the calls at issue.
 28. *Sterling v. Mercantile Adjustment Bureau, LLC*, Dist. Court, WD New York 2014 “Thus, the “evil” at which the TCPA was aimed was the “recipients[’] . . . invasion of privacy” (id.). Since Jane Doe no longer uses the cellular telephone number at issue, her privacy cannot possibly be invaded by MAB’s automated calls to that number, nor could her previous consent excuse the invasion of the *current* user’s privacy.
 29. *Beiler v. GC Services LP*, Dist. Court, MD North Carolina 2014, “Finally, GCS seeks a referral for the FCC to determine "whether `wrong number' non-telemarketing calls can give rise to a violation of the TCPA." (Doc. 21 at 3.) But GCS makes no effort to substantiate this request. The ACA International petition does not present this question directly, but seeks a safe harbor for such wrong-number calls. **GCS fails to show that the current law is unclear on this question** or that the FCC would even have the statutory authority to create the type of safe-harbor sought by ACA International.”
 30. *Moore v. Dish Network LLC*, Dist. Court, ND West Virginia 2014, “The TCPA therefore contains no language indicating that one must be the individual the caller intended to reach to sue under it. **A vast majority of the courts** that have addressed this issue have interpreted "called party" in this manner and allowed unintended recipients of calls, like Moore, to recover for violations of § 227(b)(1)(A)(iii).” Citing *Osorio*, 746 F.3d at 1250-52
 31. *Fini v. Dish Network LLC*, 955 F. Supp. 2d 1288 - Dist. Court, MD Florida 2013, “Replacing "called party" in this sentence with "intended party" would render the statute nonsensical. Plaintiff's interpretation — that "called party" refers to the actual recipient of the call — is far superior.”
 32. *Hofer v. Synchrony Bank*, Dist. Court, ED Missouri 2015, “...**at least one Court of Appeals** has already addressed this very issue and held that the “called party” exception in § 227(b)(1) requires the consent of the "person subscribing to the

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- called number at the time the call is made." Citing *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 643 (7th Cir. 2012).
33. *Maraan v. Dish Network, LLC*, Dist. Court, SD Ohio 2014, “...**we join the Moore court, and several others**, that reject the notion that only the "called party"—again defined by Dish as the intended recipient of the call—has standing to sue. See Moore, 2014 WL 5305960, at *7-8 (citing, inter alia, Manno, supra, 289 F.R.D. at 682; Page v. Regions Bank, 917 F. Supp. 2d 1214, 1217 (N.D. Ala. 2012); Harris v World Fin. Network Nat'l Bank, 867 F. Supp. 2d 888, 894 (E.D. Mich. 2012); Swope v. Credit Mgmt., L.P., No. 4:12CV832, 2013 WL 607830, at *3 (E.D. Mo. Feb. 19, 2013)).
34. *Meyer v. Diversified Consultants, Inc.*, 2014 WL 5471114 (M.D.Fla. 2014) “...Defendant correctly notes that the Eleventh Circuit recently held that “‘called party,’ for purposes of § 227(b)(1)(A)(iii) [of the TCPA], means the subscriber of the cell phone service.”