

May 15, 2014

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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 May 13 and 14, 2014, Shannon Gausman, Senior Counsel, Wells Fargo Law Department; Larry Tewell, Senior Vice President, Consumer Credit Solutions Collections & Servicing, Wells Fargo & Company; Eric Troutman, Partner, Severson & Werson, along with Monica Desai of Patton Boggs LLP, counsel to Wells Fargo, held meetings with various individuals at the Federal Communications Commission (FCC) to discuss one narrow but important issue surrounding the Telephone Consumer Protection Act (TCPA): the challenges to diligent and compliance-oriented companies such as Wells Fargo when making, through no fault of its own, calls to numbers previously provided by consumers on credit or other applications, but subsequently transferred to another person without the knowledge of the calling party. Wells Fargo reiterated its position that callers should not be liable for these calls if the call was made in good faith to a wireless number for which a caller had been given prior express consent to call, and emphasized that the only way for the FCC to give meaning to the statute is to interpret “called party” as “intended recipient.”<sup>1</sup>

The meetings on May 13 were held with: (1) Valery Galasso (special advisor and confidential assistant to Commissioner Rosenworcel); (2) Nicholas Degani (legal advisor to Commissioner Pai); (3) Amy Bender (legal advisor to Commissioner O’Rielly); and (4) Adonis Hoffman (chief of staff and senior legal advisor to Commissioner Clyburn). The meetings on May 14 were held with: (1) Maria Kirby (legal advisor to Chairman Wheeler); and (2) Kurt Schroeder (Division Chief, Consumer Policy Division), John B. Adams (Acting Deputy Division Chief, Consumer Policy Division), Aaron Garza (Front Office Legal Advisor), and Kristi Lemoine (Attorney Advisor, Consumer Policy Division), all in the Consumer and Governmental Affairs

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<sup>1</sup> See 47 U.S.C. § 227(b)(1)(A) (creating an exception to the general prohibition against making a call using an automated telephone dialing system to a cell phone, if the “called party” has provided prior express consent); see also Comments of Wells Fargo, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Rulemaking of ACA International*, CG Docket No. 02-278, at 5 (filed Mar. 24, 2014) (“Wells Fargo Comments”).

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Bureau (CGB). Ms. Desai and Mr. Troutman also held a separate meeting by phone with Mark Stone, Deputy Bureau Chief of CGB, on May 14.

Consistent with its comments, Wells Fargo emphasized that the term “called party” should be “interpreted and clarified to mean ‘intended recipient’ of the call,” thus exempting any call made in good faith to the number last provided by the intended call recipient, until such time when the (1) customer updates its contact information, or (2) a new party notifies the company that the number has been reassigned.<sup>2</sup> As explained in more detail below, Wells Fargo more specifically discussed: (1) the efforts the company takes to ensure that it is contacting a person who has given prior express consent for a particular call; (2) the practical difficulties associated with the “solutions” being touted in the marketplace, and the impossibility of solving for such “wrong number” calls; (3) the TCPA lawsuits served on Wells Fargo, particularly for wrong number calls; (4) ideas for solutions that will honor the intent of the TCPA, protect consumers, and allow Wells Fargo to engage in normal business communications without being subject to devastating lawsuits; and (5) the need for the Commission to clarify explicitly that the “called party” within the meaning of the express consent exemption is the intended recipient of the call.

**I. Wells Fargo makes every effort to ensure it is contacting consumers that have provided prior express consent to receive calls.**

As explained during the meeting, Wells Fargo takes its compliance obligations very seriously. The company communicates with its clients for many reasons, including for the purpose of conveying important, time-sensitive information. Wells Fargo will place calls, leave recorded messages or send communications—including texts—to alert consumers of possible fraud or suspected identity theft, unauthorized transactions, financial relief options, due date reminders, account balance thresholds, and other reasons that serve to benefit consumers.<sup>3</sup> Wells Fargo noted that manual calls may be appropriate where a cell phone number is “newly associated with a customer” and also articulated how manual calls are impractical when servicing expansive consumer portfolios. Finally, using a manual system allows less control over the launch of the call, creates more difficulty tracking calls, and provides a higher chance calls will violate various state and local enactments governing timing and frequency of calls.

Since the financial crisis, banks and loan services have been given even more responsibility to stay in touch with their customers, including, for example, as a result of Consumer Financial Protection Bureau servicing rules and the government’s Home Affordable Modification Program.<sup>4</sup> Many customers prefer to interact with the company via mobile phone, and expect to receive alerts and other communications via text and in other ways most efficiently facilitated through the use of modern technology. Thus, the use of modern technology is critical not only to making calls, but also to staying compliant with the myriad federal, state, and even local laws and rules that govern such communications.

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<sup>2</sup> Wells Fargo Comments at 6.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Ibid.*

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As the TCPA has evolved over the years, Wells Fargo has adapted applications, promissory notes, cardholder agreements, terms & conditions, call center scripts, and even online account disclosures to inform consumers and properly obtain their consent to use mobile phone numbers. The company also refreshes and reconfirms the accuracy of information such as cell phone numbers and consumer consent on a regular basis. In addition, Wells Fargo includes consumer empowering “quit” or “stop” commands in the text channel. Outbound pre-recorded scripts include specific instructions for wrongly called parties to make the bank aware of a reassigned number and have calls stopped. Wells Fargo keeps close track of all the relevant rules and guidance, and incorporates this information into its systems quickly. Finally, the company scrubs numbers to see if they belong to a wireless account, and proactively runs its database of numbers through a process to double-check whether any of those numbers have been ported to a cell phone number.

Yet despite all of these proactive measures, no caller can solve for the problem of reassigned numbers. Wells Fargo also reiterated during the meetings, as have others in their comments, that there is absolutely no benefit to the company in dialing the wrong number, or making contact with someone other than the intended call recipient.<sup>5</sup> To the contrary, it is a waste of time, money, and effort.

## **II. Absent specific notification by the intended recipient, companies have no way of definitively determining if a number has been transferred to a different person.**

According to the Wall Street Journal, “[t]elephone companies recycle as many as 37 million telephone numbers each year”—approximately one-eighth of all wireless phone numbers.<sup>6</sup> And, there is no comprehensive national subscriber database that matches names and numbers. Indeed, CTIA-the Wireless Association has confirmed that “there is no reasonable means for companies that make informational and other non-telemarketing calls to wireless numbers for which they have obtained prior express consent, to know if such numbers are actually assigned to someone other than the consenting party or if they have been reassigned.”<sup>7</sup>

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<sup>5</sup> See, e.g., Comments of ACA International, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling of United Healthcare Services, Inc.*, CG Docket No. 02-278, at 2 (dated Mar. 10, 2014) (ACA March 10 Comments). See also Comments of CTIA – The Wireless Association, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling of United Healthcare Services, Inc.*, CG Docket No. 02-278, at 4 (dated Mar. 10, 2014) (CTIA March 10 Comments) (citing the *United Healthcare Services, Inc., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, at 2 (filed Jan. 16, 2014) (United Healthcare Petition)(describing targeted informational calls for which there is no incentive or benefit in contacting anyone other than the intended recipient)).

<sup>6</sup> United Healthcare Petition at 5 (citing Alyssa Abkowitz, *Wrong Number? Blame Companies’ Recycling*, WALL STREET JOURNAL (Dec. 1, 2011). See also Chamber of Commerce of the United States, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; United Healthcare Services, Inc. Petition for Expedited Declaratory Ruling Regarding Reassigned Wireless Telephone Numbers*, CG Docket No. 02-278, at 1 (dated Mar. 10, 2014)(same).

<sup>7</sup> CTIA March 10 Comments at 4 (citing the United Healthcare Petition at 3).

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As a result, Wells Fargo must rely on its customers to provide updated contact information—which unfortunately does not always happen. While there are certain services that claim they are able to determine if a number has been reassigned, this determination cannot be made with any degree of accuracy that is useful for mitigating risk against a “wrong number” call. The advertised “solutions” only provide a “probability” or a “confidence score.” The experience of Wells Fargo was that those databases generally contain approximately 85% of numbers (often missing are subscribers of both large and smaller cellular carriers). Of those 85%, approximately 27% are listed only as “wireless caller”—with no name associated with the number. Of the remainder, sometimes the names are mismatched, and abbreviations or nicknames are included. Other challenges with the databases resulted from the use of “family plans” through which one person may be listed as the “subscriber,” covering various members of the family, including children, parents, grandparents, and siblings—who sometimes also have different last names. As a result, these “solutions” are not reliable, and ironically can serve to undermine the efficiencies that using an autodialer provides in the first place.

### **III. Wells Fargo is faced with numerous lawsuits based on numbers that have been transferred without Wells Fargo’s knowledge.**

As Wells Fargo stated in its comments, “[t]oday, even if a caller is acting in good faith and intending to contact a customer who had given consent, these callers . . . are subject to class action lawsuits and liability under the TCPA if it is a reassigned or wrong number.”<sup>8</sup> During the past four years, Wells Fargo has seen a significant up-tick in the number of cases (both putative class actions and individual cases) where the TCPA is the primary cause of action. Case filings increased over 300% from 2010 to present. The outside counsel cost of defending these cases, many of which are frivolous, has been nearly \$3 million dollars. This does not include the cost of the internal resources that are devoted to managing these cases and mitigating the risk associated therewith, nor does it include the cost of settlement of the cases (the majority of which are confidential).

Wells Fargo is currently facing a putative nationwide class action lawsuit stemming from calls placed to a cellular phone number provided to Wells Fargo by its customer on an application for a consumer credit card.<sup>9</sup> Unbeknownst to Wells Fargo, the cell phone number changed hands soon after the application for credit was submitted. Wells Fargo called the number on the credit application, intending to reach the person who had given express consent to be contacted at that exact number. Wells Fargo made prerecorded calls to the intended recipient that included clear and specific opt-out instructions. As soon as Wells Fargo’s agents were informed that the number had changed hands they quickly updated Wells Fargo’s system to ensure that no further calls were placed. After being informed that the number had changed hands, not a single additional call was placed to that number again. Nonetheless the person who picked up the phone sued Wells Fargo under the TCPA, bringing a purported nationwide class action against it on behalf of every single non-Wells Fargo customer that received an autodialed call from Wells Fargo over the last four years. A copy of the Complaint is attached hereto as Exhibit “A.”

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<sup>8</sup> Wells Fargo Comments at 5.

<sup>9</sup> See *Heinrichs vs. Wells Fargo Bank*, Case No. 3:13-cv-05434-WHA (N.D. Cal., action filed Nov. 22, 2013).

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Whether or not Wells Fargo will face liability in *Heinrichs* turns on the application of the TCPA's ambiguous express consent exemption, and how the FCC interprets the term "called party." As we discuss in more detail in section IV below, if the "called party" for purposes of the express consent exemption is the intended recipient - Wells Fargo's customer (i.e. the person who provided Wells Fargo express consent, and therefore the person that Wells Fargo was attempting to contact in good faith based on that express consent) then it should not be liable. While there are several court decisions interpreting "called party" as "intended recipient," unfortunately, the phrase "called party" has also been interpreted in at least three other different ways ("recipient," "subscriber," and "regular user of the phone") - making it impossible for a caller to understand definitively the current state of the law.<sup>10</sup> Accordingly, Wells Fargo asked the district court to stay the *Heinrichs* litigation on the grounds that the Commission has primary jurisdiction to interpret and implement the TCPA to ensure a uniform rule of law. The district court granted the motion and ordered the case stayed for six months to give the Commission time to consider these important issues. A copy of the Order staying the *Heinrichs* litigation is attached hereto as Exhibit "B."

**IV. Wells Fargo emphasizes the need for the Commission to clarify expeditiously that a "called party" under the TCPA is the "intended recipient"—the person the caller intended to call based on the prior express consent provided to the caller.**

Wells Fargo reiterated the need for the Commission to act expeditiously given the pending stay in the *Heinrichs* case, and to provide desperately needed clarity in this area. Wells Fargo emphasized that the FCC should, in the first instance, clarify that non-telemarketing autodialed calls to wireless numbers (where the call was made in good faith to a customer that had given prior express consent) are outside the reach of the TCPA. Wells Fargo agrees with the United Healthcare Petition that the Commission has several avenues for granting clarification on this issue.<sup>11</sup>

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<sup>10</sup> Cases finding that "called party" means "intended recipient" include *Cellco Partnership v. Dealers Warranty, LLC*, No. 09-1814 (FLW), 2010 WL 3946713, at \*10 (D. N.J. Oct. 5, 2010) (finding that the phrase "called party" means "the intended recipient of the call"); and *Leyse v. Bank of Am.*, No. 09-7654, 2010 WL 2382400, at \*4 (S.D.N.Y. June 14, 2010) (unintended recipient not the "called party" because businesses will have no way of knowing whether the individual on the other end has given prior express consent). See also *Kopff v. World Research Grp., LLC*, 568 F.Supp.2d 39, 40-42 (D.D.C. 2008) (unintended recipient of faxes lacks standing to sue). However, there are also cases finding "called party" means "recipient" (see, e.g. *Meyer v. Portfolio Recovery Associates, LLC*, 707 F. 3d 1036, 1043 (9th Cir. 2012)); cases finding "called party" means "regular user of the phone" (see, e.g., *Manno v. Healthcare Revenue Recovery Group, LLC*, 289 F.R.D. 674, 682 (S.D.Fla.2013) ("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 and whether the defendant was trying to reach him or her by calling that phone") and cases finding "called party" means "subscriber" (see, e.g., *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 643 (7th Cir. 2012) (defining the "called party" in Section 227(b)(1) as "the person subscribing to the called number at the time the call is made").

<sup>11</sup> See United Healthcare Petition at 10-11. If the FCC believes that it must go through a rulemaking process, Wells Fargo supports the safe harbor framework set forth in the ACA International Petition for Rulemaking. See Petition for Rulemaking of ACA International, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; *Petition for Rulemaking of ACA International*, CG Docket No. 02-278, at 15-17 (dated Jan. 31, 2014) (ACA Petition). As noted in the ACA Petition, such a safe harbor is not unprecedented, as the

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The phrase “called party” as used in the “express consent” language of the TCPA has never been interpreted by the FCC and the *Heinrichs* court has stayed the pending litigation in order to give the FCC, in the first instance, the opportunity to provide clarity on this issue.<sup>12</sup> As discussed during the meeting, Wells Fargo recommends the Commission take this opportunity to clarify that the meaning of “called party” here is actually the caller’s “intended recipient,” for a number of reasons.

1. *The purpose of the “called party” phrase in the express consent exception is to provide a meaningful defense from frivolous lawsuits – the only interpretation providing a meaningful defense is “intended recipient.”* Wells Fargo emphasized the fact that Congress intended “express consent” to be a meaningful defense under the TCPA, and that it becomes meaningless if a company relies on the express consent it receives, only to be made liable later when the number is transferred to a different subscriber without the knowledge of the caller—and without any way of knowing with any acceptable degree of confidence that the number has been reassigned.<sup>13</sup>
2. *Common sense dictates that where a caller, in good faith, uses a number specifically provided to the caller for the express purpose of contact, and finds out only after the call is made that the number belongs to someone else, the caller should not be liable for violating federal law.* It is an impossible legal standard to apply liability to the caller based only on circumstances that arise after the call is placed, or at the very least, circumstances outside the knowledge of the dialer at the time the call was made, when there was no way for the caller to know that the phone number had changed hands.
3. Federal courts have interpreted the phrase “called party” in four different ways: “intended recipient,” “current subscriber,” “regular user of the phone” and “the person who happened to answer the phone.” Out of these four different court interpretations, the only workable standard is “intended recipient.” For example, interpreting “called party” as the “subscriber” does not make sense in the “family plan” or work context, through which millions of phones habitually are used by persons who do not pay the phone bill and whose name does not appear on the phone account.<sup>14</sup> Yet, a non-subscribing user of a cell phone

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Commission established one for telephone numbers recently ported from wireline to wireless service. *Id.* See also Ex Parte Notice – ACA International Petition for Rulemaking, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 2 (dated Mar. 10, 2014)(March 10 Ex Parte).

<sup>12</sup> See Exhibit B.

<sup>13</sup> See 47 U.S.C. § 227(b)(1)(A)(stating that, “[i]t shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice”). See also 47 C.F.R. § 64.1200(a)(1).

<sup>14</sup> Most, if not all, mobile phone carriers offer family plan phone accounts and business phone accounts. See, e.g., Daniel Cooper, AT&T unveils Mobile Share, lets you add 10 devices to a single plan (July 18, 2012), publicly available at <<http://www.engadget.com/2012/07/18/att-mobile-share/>>; Kevin C. Tofel, You’ll likely save money with Verizon’s “Share Everything” plans (June 12, 2012) (“Verizon’s new ‘Share Everything’ plans use one bucket of data for up to 10 devices on an account.”), publicly available at <http://gigaom.com/2012/06/12/youll-likely-save-money-with-verizons-share-everything-plans/>; T.J.

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often provides that number as their contact information on which to be called or texted.<sup>15</sup> Nor does it make sense when taking into account other provisions within the TCPA incorporating the term “called party” – a term that is repeated multiple times within the statute. For example, the TCPA requires that a system sending a pre-recorded message to a phone line release the line “within 5 seconds of the time ... the called party has hung up ...” 47 U.S.C. § 227(d)(3)(B). A subscriber to a phone line that does not actually “use” a phone could never “hang up” because she/he does not physically possess the phone at the time of the call—someone else does. Hence, in this particular provision, “called party” can only mean “answerer,” not “subscriber.”<sup>16</sup>

It is also critical to understand that Wells Fargo is not requesting permission to call, in perpetuity, a recycled number that no longer belongs to the party it originally intended to reach. Once Wells Fargo is informed that the number no longer belongs to the intended recipient, it must stop contacting that number, or it should be held liable.

Finally, Wells Fargo notes that the Commission is uniquely empowered to make the clarification it urges because only it can issue a ruling that assures uniformity across the country.<sup>17</sup> Because the phrase “called party” is ambiguous and because the “intended recipient” interpretation urged by Wells Fargo is a semantically permissible interpretation of the vague statute, the Commission’s clarification must be given *Chevron* deference even by the courts that had previously misinterpreted the Act.<sup>18</sup>

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McCue, What Phone Should I Get? Ting Cell Phone Plans For Business (Forbes Sept. 25, 2012) (Ting offers “[u]nlimited devices per account with pooled usage”), publicly available at <http://www.forbes.com/sites/tjmccue/2012/09/25/what-phone-should-i-get-ting-cell-phone-plans-for-business-owners/>; Nat’l Fed. of Independent Bus., Employee Cell Phone Plans: When to Offer and How to Choose the Right One, publicly available at <http://www.nfib.com/business-resources/business-resources-item?cmsid=52257>.

<sup>15</sup> Such scenarios are not far-fetched in litigation, either. See e.g., *Jordan v. ER Solutions, Inc.*, 900 F. Supp. 2d 1323, 1324-25 (S.D.Fla. 2012) (The phone number was registered to husband under a family plan. Wife used the phone, paid the bill for use of that phone, and consented to be called); *Agne v. Papa John’s Int’l, Inc.*, 286 F.R.D. 559, 565 (W.D. Wash. 2012) (Ex-husband was primary account owner on shared cellular plan and paid the bill. Ex-wife owned and used the phone.)

<sup>16</sup> The *Soppet* decision is flawed because it assumes that a single definition of “called party” works for every use of the phrase in the TCPA. The *Soppet* court found that “called party” means “subscriber” as used in one place in the statute and then simply assumes on that basis that it means “subscriber” everywhere in the statute. *Soppet* failed to recognize the ambiguity in the statute and did not attempt to reconcile the meaning of the phrase “called party” in each location in the TCPA. See *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637.

<sup>17</sup> See *Charvat v. EchoStar Satellite, LLC*, 630 F. 3d 459, 466-467 (6th Cir. 2010)(the Commission has interpretive authority over the Act to clarify its terms).

<sup>18</sup> *National Cable & Telecomm’s Assn. v. Brand X Internet Services*, 545 U.S. 967, 982, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) (judicial precedent does not foreclose an agency from interpreting differently an ambiguous statute that the agency has been charged with implementing – “Only a judicial precedent holding

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In conclusion, Wells Fargo reminds the Commission that the *Heinrichs* lawsuit mentioned above has been stayed for the pendency of this proceeding. As a result, Wells Fargo urges the Commission to act expeditiously and clarify that a “called party” under the TCPA express consent exemption means the caller’s intended party.

Respectfully submitted,



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that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”).

# **EXHIBIT A**

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

**MARK HEINRICHS;  
INDIVIDUALLY AND ON BEHALF  
OF ALL OTHERS SIMILARLY  
SITUATED,**

Plaintiff,

v.

**WELLS FARGO BANK, N.A.,**

Defendant.

**Case No.: C 13-05434 WHA**

**CLASS ACTION**

**FIRST AMENDED COMPLAINT FOR  
DAMAGES AND INJUNCTIVE RELIEF  
PURSUANT TO THE TELEPHONE  
CONSUMER PROTECTION ACT, 47  
U.S.C. § 227, ET SEQ.**

**JURY TRIAL DEMANDED**

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## INTRODUCTION

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- 2 1. MARK HEINRICHS (“Plaintiff”) brings this First Amended Class Action Complaint for
- 3 damages, injunctive relief, and any other available legal or equitable remedies, resulting from
- 4 the illegal actions of WELLS FARGO BANK, N.A. (“Defendant”) in negligently contacting
- 5 Plaintiff on Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection
- 6 Act, 47 U.S.C. § 227 et seq., (“TCPA”), thereby invading Plaintiff’s privacy. Plaintiff alleges
- 7 as follows upon personal knowledge as to himself and his own acts and experiences, and, as
- 8 to all other matters, upon information and belief, including investigation conducted by their
- 9 attorneys.
- 10 2. The TCPA was designed to prevent calls and messages like the ones described within this
- 11 complaint, and to protect the privacy of citizens like Plaintiff. “Voluminous consumer
- 12 complaints about abuses of telephone technology – for example, computerized calls
- 13 dispatched to private homes – prompted Congress to pass the TCPA.” *Mims v. Arrow Fin.*
- 14 *Servs., LLC*, 132 S. Ct. 740, 744 (2012).
- 15 3. In enacting the TCPA, Congress intended to give consumers a choice as to how creditors and
- 16 telemarketers may call them, and made specific findings that “[t]echnologies that might allow
- 17 consumers to avoid receiving such calls are not universally available, are costly, are unlikely
- 18 to be enforced, or place an inordinate burden on the consumer.” TCPA, Pub.L. No. 102–
- 19 243, § 11. Toward this end, Congress found that
- 20 [b]anning such automated or prerecorded telephone calls to the home,
- 21 except when the receiving party consents to receiving the call or when such
- 22 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.
- 23 *Id.* at § 12; *see also Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009)
- 24 (citing Congressional findings on TCPA’s purpose).
- 25 4. Congress also specifically found that “the evidence presented to the Congress indicates that
- 26 automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the
- 27 type of call....” *Id.* at §§ 12-13. *See also, Mims*, 132 S. Ct. at 744.
- 28 5. As Judge Easterbrook of the Seventh Circuit recently explained in a TCPA case regarding

1 calls to a non-debtor similar to this one:

2 The Telephone Consumer Protection Act ... is well known for its  
3 provisions limiting junk-fax transmissions. A less-litigated part of the Act  
4 curtails the use of automated dialers and prerecorded messages to cell  
5 phones, whose subscribers often are billed by the minute as soon as the call  
6 is answered—and routing a call to voicemail counts as answering the call.  
7 An automated call to a landline phone can be an annoyance; an automated  
8 call to a cell phone adds expense to annoyance.

9 *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638 (7th Cir. 2012).

#### 10 JURISDICTION AND VENUE

- 11 6. This matter in controversy exceeds \$5,000,000, as each member of the proposed Class of tens  
12 of thousands is entitled to up to \$1,500.00 in statutory damages for each call that has violated  
13 the TCPA. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1332(d)(2).  
14 Further, Plaintiff alleges a national class, which will result in at least one Class member  
15 belonging to a different state. Therefore, both elements of diversity jurisdiction under the  
16 Class Action Fairness Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.  
17 This Court also has federal question jurisdiction because this case arises out of violation of  
18 federal law. 47 U.S.C. §227(b); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012).
- 19 7. Venue is proper in the United States District Court for the Northern District of California  
20 pursuant to 28 U.S.C. § 1391(b)-(c) and 1441(a) because Defendant is headquartered in the  
21 City and County of San Francisco, California; Defendant is deemed to reside in any judicial  
22 district in which it is subject to personal jurisdiction at the time the action is commenced;  
23 Defendant’s contacts with this District are sufficient to subject it to personal jurisdiction; and  
24 a substantial part of the events giving rise to the claims occurred in this District.

#### 25 PARTIES

26 Plaintiff is, and at all times mentioned herein was, a citizen and resident of the State of  
27 California. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47  
28 U.S.C. § 153 (10).

8. Plaintiff is informed and believes, and thereon alleges, that Defendant is, and at all times  
mentioned herein was, a corporation whose State of Incorporation and principal place of

1 business is in the State of California. Defendant, is and at all times mentioned herein was, a  
2 corporation and is a “person,” as defined by 47 U.S.C. § 153 (10). Plaintiff alleges that at all  
3 times relevant herein Defendant conducted business in the State of California and within this  
4 judicial district.

- 5 9. On information and belief, the decisions complained of herein, relating to the use of an  
6 “automatic telephone dialing system” and/or using “an artificial or prerecorded voice” to call  
7 consumers’ cellular telephones without their prior express consent, originated from Wells  
8 Fargo in San Francisco, California. For any and all decisions that originated at Wells Fargo  
9 business locations outside of San Francisco, California, those decisions required approval  
10 from Wells Fargo’s San Francisco, California headquarters, thereby providing Wells Fargo  
11 authority and control over the actions complained of herein.

#### 12 **FACTUAL ALLEGATIONS**

- 13 10. Beginning in or around March 2013, Defendant contacted Plaintiff on Plaintiff’s cellular  
14 telephone number ending in 1270, in an attempt to collect an alleged outstanding debt owed  
15 by an unknown third party named Scott.
- 16 11. In attempting to collect Scott’s alleged debt from Plaintiff, Defendant has initiated  
17 approximately 20 telephone calls to Plaintiff’s cellular telephone.
- 18 12. Defendant used an “automatic telephone dialing system”, as defined by 47 U.S.C. § 227(a)(1)  
19 to place its calls to Plaintiff seeking to collect the alleged debt allegedly owed by “Scott”  
20 using an “artificial or prerecorded voice” as prohibited by 47 U.S.C. § 227(b)(1)(A).
- 21 13. Because these calls were prerecorded, Plaintiff had no ability to request that the calls end nor  
22 to voice Plaintiff’s complaints regarding the calls to a real person.
- 23 14. This ATDS has the capacity to store or produce telephone numbers to be called, using a  
24 random or sequential number generator.
- 25 15. These telephone communications constituted telephone solicitations as defined by 47 U.S.C. §  
26 227(a)(4).
- 27 16. Defendant’s calls constituted calls that were not for emergency purposes as defined by 47  
28 U.S.C. § 227(b)(1)(A)(i).

1 17. Defendant's calls were placed to telephone number assigned to a cellular telephone service for  
2 which Plaintiff incurs a charge for incoming calls pursuant to 47 U.S.C. § 227(b)(1).

3 18. Plaintiff does not owe the alleged debt Defendant sought to collect, is not a customer of  
4 Defendant's services and has never provided any personal information, including Plaintiff's  
5 cellular telephone number, to Defendant for any purpose whatsoever. Furthermore, Plaintiff  
6 does not know nor has ever known "Scott." Accordingly, Defendant never received, nor  
7 could it have received, Plaintiff's "prior express consent" to receive calls using an automatic  
8 telephone dialing system pursuant to 47 U.S.C. § 227(b)(1)(A).

9 19. These telephone communications by Defendant, or its agent, violated 47 U.S.C. § 227(b)(1).

10 **CLASS ACTION ALLEGATIONS**

11 20. Plaintiff brings this action on behalf of himself and on behalf of all others similarly situated  
12 ("the Class").

13 21. Plaintiff represents, and is a member of the Class, consisting of all persons within the United  
14 States who were not account holders of Defendant at the time they received any telephone call  
15 from Defendant or its agent/s and/or employee/s to said person's cellular telephone made  
16 through the use of any automatic telephone dialing system or with an artificial or prerecorded  
17 voice, which call was not made for emergency purposes, within the four years prior to the  
18 filing of this Complaint, where Defendant acquired the telephone number called from a  
19 person or source other than the Class member

20 22. Defendant and its employees or agents are excluded from the Class. Plaintiff does not know  
21 the number of members in the Class, but believes the Class members number in the  
22 thousands, if not more. Thus, this matter should be certified as a Class action to assist in the  
23 expeditious litigation of this matter.

24 23. Plaintiff and members of the Class were harmed by the acts of Defendant in at least the  
25 following ways: Defendant, either directly or through its agents, illegally contacted Plaintiff  
26 and the Class members via their cellular telephones by using an ATDS, thereby causing  
27 Plaintiff and the Class members to incur certain cellular telephone charges or reduce cellular  
28 telephone time for which Plaintiff and the Class members previously paid, and invading the

1 privacy of said Plaintiff and the Class members. Plaintiff and the Class members were  
2 damaged thereby.

3 24. This suit seeks only damages and injunctive relief for recovery of economic injury on behalf  
4 of the Class, and it expressly is not intended to request any recovery for personal injury and  
5 claims related thereto. Plaintiff reserves the right to amend the Class definition to seek  
6 recovery on behalf of additional or other persons as warranted as facts are learned in further  
7 investigation and discovery.

8 25. The joinder of the Class members is impractical and the disposition of their claims in the  
9 Class action will provide substantial benefits both to the parties and to the court. The Class  
10 can be identified through Defendant's records or Defendant's agents' records.

11 26. There is a well-defined community of interest in the questions of law and fact involved  
12 affecting the parties to be represented. The questions of law and fact to the Class predominate  
13 over questions which may affect individual Class members, including the following:

- 14 a) Whether, within the four years prior to the filing of this Complaint, Defendant or  
15 its agents initiated any telephonic communications to the Class (other than a  
16 message made for emergency purposes or made with the prior express consent of  
17 the called party) to a Class member using any automatic dialing and/or SMS  
18 texting system to any telephone number assigned to a cellular phone service;
- 19 b) Whether Defendant can meet its burden of showing it obtained prior express  
20 consent (i.e., consent that is clearly and unmistakably stated);
- 21 c) Whether Defendant's conduct was knowing and/or willful;
- 22 d) Whether Plaintiff and the Class members were damaged thereby, and the extent of  
23 damages for such violation; and
- 24 e) Whether Defendants and its agents should be enjoined from engaging in such  
25 conduct in the future.

26 27. As a person that received at least one telephonic communication from Defendant's ATDS  
27 without Plaintiff's prior express consent, Plaintiff is asserting claims that are typical of the  
28

1 Class. Plaintiff will fairly and adequately represent and protect the interests of the Class in  
2 that Plaintiff has no interests antagonistic to any member of the Class.

3 28. Plaintiff and the members of the Class have all suffered irreparable harm as a result of the  
4 Defendants' unlawful and wrongful conduct. Absent a class action, the Class will continue to  
5 face the potential for irreparable harm. In addition, these violations of law will be allowed to  
6 proceed without remedy and Defendant will likely continue such illegal conduct. Because of  
7 the size of the individual Class member's claims, few, if any, Class members could afford to  
8 seek legal redress for the wrongs complained of herein.

9 29. Plaintiff has retained counsel experienced in handling class action claims and claims  
10 involving violations of the Telephone Consumer Protection Act.

11 30. A class action is a superior method for the fair and efficient adjudication of this controversy.  
12 Class-wide damages are essential to induce Defendant to comply with federal law. The  
13 interest of Class members in individually controlling the prosecution of separate claims  
14 against Defendant is small because the maximum statutory damages in an individual action  
15 for violation of privacy are relatively minimal. Management of these claims is likely to  
16 present significantly fewer difficulties than those presented in many class claims.

17 31. Defendant has acted on grounds generally applicable to the Class, thereby making appropriate  
18 final injunctive relief and corresponding declaratory relief with respect to the Class as a  
19 whole.

20 **FIRST CAUSE OF ACTION**

21 **VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT**

22 **47 U.S.C. § 227 ET SEQ.**

23 32. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though  
24 fully stated herein.

25 33. The foregoing acts and omissions of Defendant constitutes numerous and multiple negligent  
26 violations of the TCPA, including but not limited to each and every one of the above-cited  
27 provisions of 47 U.S.C. § 227 et seq.  
28

1 34. As a result of Defendant's negligent violations of 47 U.S.C. § 227 et seq, Plaintiff and the  
2 Class are entitled to an award of \$500.00 in statutory damages, for each and every violation,  
3 pursuant to 47 U.S.C. § 227(b)(3)(B).

4 35. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct  
5 in the future.

6 **SECOND CAUSE OF ACTION**

7 **KNOWING AND/OR WILLFUL VIOLATIONS OF THE**

8 **TELEPHONE CONSUMER PROTECTION ACT**

9 **47 U.S.C. § 227 ET SEQ.**

10 36. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though  
11 fully stated herein.

12 37. The foregoing acts and omissions of Defendant constitutes numerous and multiple knowing  
13 and/or willful violations of the TCPA, including but not limited to each and every one of the  
14 above-cited provisions of 47 U.S.C. § 227 et seq.

15 38. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227 et seq,  
16 Plaintiff and The Class are entitled to an award of \$1,500.00 in statutory damages, for each  
17 and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

18 39. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct  
19 in the future.

20 **PRAYER FOR RELIEF**

21 Wherefore, Plaintiff respectfully requests the Court grant Plaintiff and the Class members the  
22 following relief against Defendant:

- 23 • As a result of Defendant's violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for  
24 himself and each Class member \$500.00 in statutory damages, for each and every  
25 violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- 26 • As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(b)(1),  
27 Plaintiff seeks for himself and each Class member \$1,500.00 in statutory damages, for  
28 each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

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- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- An award of attorneys' fees and costs to counsel for Plaintiff and the Class;
- An order certifying this action to be a proper class action pursuant to Federal Rule of Civil Procedure 23, establishing an appropriate Class and any Subclasses the Court deems appropriate, finding that Plaintiff is a proper representative of the Class, and appointing the lawyers and law firms representing Plaintiff as counsel for the Class;
- Any other relief the Court may deem just and proper.

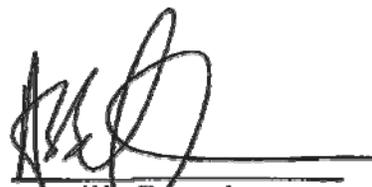
**TRIAL BY JURY**

40. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Dated: January 15, 2014

Respectfully submitted,

**KAZEROUNI LAW GROUP, APC**

  
**Abbas Kazerounian**

ATTORNEY FOR PLAINTIFF

# **EXHIBIT B**

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK HEINRICHS, individually and  
on behalf of all others similarly situated,

Plaintiff,

v.

WELLS FARGO BANK, N.A.,

Defendant.

No. C 13-05434 WHA

**ORDER GRANTING  
MOTION TO STAY**

**INTRODUCTION**

In this putative class action brought under the Telephone Consumer Protection Act, defendant moves to stay this action. To the extent stated below, the motion is **GRANTED**.

**STATEMENT**

The sole basis for relief in this action is premised on liability under Section 227 of Title 47 of the United States Code. The parties agree that a called party’s express consent is required before a call can be placed using an automated telephone dialing system. Where the parties differ is whether “called party” under Section 227(b)(1)(A) means “current subscriber” of the cell phone number or, as Wells Fargo Bank, N.A. contends, “intended recipient.” The problem arises when a cell phone number is reassigned from someone who gave consent to someone who did not without notice to the caller.

Wells Fargo now moves to stay the action pending resolution of two dispositive petitions to the Federal Communications Commission. Both petitions — one seeking declaratory ruling and the other formal rulemaking — essentially ask the FCC to shield

1 robocallers from liability if they intend to call persons who gave prior express consent to  
2 receive automated calls (Troutman Exh. G; Exh. H). The FCC has invited public comment as to  
3 both petitions. The deadline for both has now passed. The FCC is now poised to either deny  
4 the petition or to proceed to proposed rulemaking.

#### 5 ANALYSIS

6 Our court of appeals has not directly addressed what the specific definition of “called  
7 party” is under Section 227(b)(1)(A). District courts in our circuit have generally rejected the  
8 “intended recipient” definition. *See Olney v. Progressive Cas. Ins. Co.*, No. 13-cv-2058, 2014  
9 WL 294498, at \*3 (S.D. Cal. Jan. 24, 2014) (Judge Gonzalo P. Curiel) (standing under TCPA  
10 not limited to intended recipient); *Gutierrez v. Barclays Group*, No. 10-cv-1012, 2011 WL  
11 579238, at \*5 (S.D. Cal. Feb. 9, 2011) (Judge Dana M. Sabraw) (adopting subscriber  
12 definition). But a stay was granted, however, in a recent district court action because the  
13 defendant there filed a petition with the FCC “to confirm that there is a good faith exception to  
14 liability under the TCPA for situations such as this one.” *Matlock v. United Healthcare*  
15 *Services, Inc.*, No. 13-cv-02206, 2014 WL 1155541, at \*2 (E.D. Cal. Mar. 20, 2014) (Chief  
16 Judge Morrison C. England, Jr.). That petition is cited by Wells Fargo in the instant action.  
17 Wells Fargo itself has not filed a petition related to the current issue.

18 The Seventh and Eleventh Circuits, while not binding in this district, have ruled that  
19 “called party” means current subscriber under Section 227(b)(1)(A). *Soppet v. Enhanced*  
20 *Recovery Company., LLC*, 679 F.3d 637, 643 (7th Cir. 2012); *Osorio v. State Farm Bank,*  
21 *F.S.B.*, No. 13-10951, 2014 WL 1258023, at \*7 (11th Cir. 2014). These decisions highlight a  
22 particularly complicated issue that needs uniformity in administration.

23 Section 227(b)(2) grants the FCC authority to promulgate regulations to implement the  
24 TCPA. Pursuant to said authority, the FCC has requested public comment on two petitions that  
25 would be dispositive of the very issue presented by the instant civil action, namely — what  
26 “called party” means under the TCPA. Indeed, Wells Fargo contends in its brief that “[d]istrict  
27 courts are bound to follow the FCC’s orders interpreting the TCPA and circuit courts grant  
28 these rulings *Chevron* deference” (Br. 6).

1 With the deadline for public comment having passed for both petitions, the next step by  
2 the FCC is to decide whether to propose a rule change to deal with the issue (Hutchinson Decl.  
3 ¶ 5). In light of the distinct possibility that the FCC will clarify (or not) whether the theory of  
4 the pending civil action is viable, this action will be stayed until the sooner of six months or  
5 such closer time as the FCC decides to act or rule in such a way as to eviscerate the pending  
6 action. There is minimal prejudice in doing so as this action is young and the FCC's guidance  
7 will be determinative of the underlying basis for relief. Counsel shall file a joint statement  
8 advising this Court of the status of the FCC petitions by **NOON ON OCTOBER 15, 2014**.

9 **CONCLUSION**

10 To the extent stated above, Wells Fargo's motion to stay is **GRANTED**. Counsel's joint  
11 statement is due by **NOON ON OCTOBER 15, 2014**.

12  
13 **IT IS SO ORDERED.**

14  
15 Dated: April 15, 2014.

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18 WILLIAM ALSUP  
19 UNITED STATES DISTRICT JUDGE  
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