

**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)

**Shields Submission For The Record on the ACA Petitions, Comments and Reply
Comments Dealing With Attempts To Create a “Intended Called Party” Exemption**

ACA filed reply comments with the Commission on April 8th, 2014. In those reply comments ACA stated:

One opposition comment also places great emphasis on caselaw regarding the definition of “called party” under the TCPA, while ignoring caselaw to the contrary.

As pointed out in my comments there are well over 2 dozen court decisions exactly on point with the subject of called party. ACA has not provided any case law to the contrary. The 2 or 3 cases that ACA has referred are nowhere near on point.

To add yet another case with excruciating detail on who the “called party” is from the 11th US Court of Appeals I submit for the record the attached *Breslow v. Wells Fargo* case. The *Breslow* decision puts to rest any reliance by ACA or any similarly situated petitioner or commentor on *Meadows v. Franklin Collection Serv., Inc.*, 414 F. App’x 230 (2011). The court stated in addressing reliance on *Meadows*: “In short, *Meadows* does not support Wells Fargo’s argument that “called party” means intended recipient.”

The 11th US Court of Appeals joins the well-reasoned decision of the 7th US Court of Appeals and concluded that: “...called party,” for purposes of § 227(b)(1)(A)(iii) means the subscriber to the cell phone service or user of the cell phone called. We

therefore affirm.” The court further held that: “The Seventh Circuit’s well-reasoned opinion provides further support for our conclusion that “called party,” for purposes of § 227(b)(1)(A), means the subscriber or user of the cell phone.

In short there is no “intended called party” defense in the TCPA. Neither is there a defense that a cell phone number was reassigned without notice an argument made by Wells Fargo which was summarily dismissed by the court.

This submission also addresses the Ex Parte presentation of Wells Fargo on May 15th, 2014 and the misrepresentations made therein. Specifically, the 11th Court of Appeals directly addressed the attempt of Wells Fargo to create a policy argument. In referring to the 7th circuit decision the 11th circuit Court of Appeals held:

“The court also rejected a policy argument similar to the one Wells Fargo makes here: the manner in which the public utilizes cell phones has changed, thus making the use of autodialing systems more risky and driving up the cost of doing business. The Seventh Circuit noted—and we agree—that although the TCPA may not comport with current cell phone trends, it is not for the courts to make “substantive changes designed to make the law ‘better.’” Id. at 642. “Nor should a court try to keep a statute up to date. Legislation means today what it meant when enacted.”

Consequently, just as the courts cannot “update” the TCPA neither can the Commission do so at the behest of the ACA or Wells Fargo.

Respectfully submitted,

_____/s/_____

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