

June 19, 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:

Monica Desai of Squire Patton Boggs LLP, counsel to Wells Fargo, held discussions with several FCC staff regarding the significant issue of what “called party” means under the Telephone Consumer Protection Act (TCPA),¹ and urged that callers should not be held liable for calls to numbers for which prior express consent has been provided, but which, unknown to the caller, have been reassigned or otherwise used by someone else *after* prior express consent was given to call that particular number. Ms. Desai emphasized that given the differing court interpretations of “called party,” it is up to the FCC to create a consistent, national, and rational framework for addressing any liability for such calls. Those discussions were held with Kris Monteith (Chief, Consumer and Governmental Affairs Bureau (“CGB”)) and separately with Mark Stone (Deputy Bureau Chief, CGB) on June 17, 2014; and Kurt Schroeder (Chief, Consumer Policy Division, CGB), and John B. Adams (Deputy Division Chief, Consumer Policy Division, CGB) by phone on June 19.

During the discussions, Ms. Desai discussed *Breslow v. Wells Fargo*,² and *Osario vs. State Farm Bank, F.S.B.*,³ two decisions issued within three months of each other in which different panels of the same U.S. Circuit Court of Appeals came to different conclusions regarding the meaning of “called party” under the TCPA—further underscoring the need for the FCC to address this issue.

¹ Telephone Consumer Protection Act of 1991, Pub L. No. 102-243, 105 Stat. 2394, codified at 47 U.S.C. § 227.

² *Breslow v. Wells Fargo*, Case No. 12-14564, 2014 U.S. App. Lexis 10457 (11th Cir. June 5, 2014)(*Breslow I*); *Breslow v. Wells Fargo*, Case No. 12-14564, 2014 U.S. App. Lexis 10623 (11th Cir. June 9, 2014)(*Breslow II*)(*vacating Breslow I*).

³ *Osario v. State Farm Bank, F.S.B.*, 746 F. 3d 1242, 1251 (11th Cir. Mar. 28, 2014).

In *Breslow I*, the Court acknowledged that “neither the TCPA nor the regulations promulgated by the Federal Communication Commission (the ‘FCC’) define the term ‘called party,’” that “the term itself [is] ambiguous,” and that “[t]he term ‘called party’ is found seven times in 47 U.S.C. § 227, but it is used in seemingly different ways.”⁴ Ultimately, given the absence of FCC guidance on this point, the *Breslow I* Court concluded based on legislative history that the term “called party” means the “subscriber to the cell phone service or the user of the cell phone called.”⁵ A few days later, the Court vacated its opinion in *Breslow I* and replaced it with a new opinion stating that it was required to follow the opinion issued three months earlier by a different panel of the 11th Circuit Court of Appeals, which had instead concluded that “called party” only means “subscriber to the cell phone service.”⁶ The initially differing definitions of “called party” issued by different panels of the same U.S. Court of Appeals within less than three months, reflects that this is not an issue that the FCC should leave to courts to decide.

Moreover, not only is the *Breslow/Osario* interpretation wholly unworkable as a practical matter—but as emphasized by some other courts considering this exact same issue, the “subscriber” interpretation renders the “prior express consent” exception meaningless as a statutory defense.⁷

Ms. Desai explained why the *Breslow/Osario* interpretation is wrong as a matter of policy, discussed the ineffectiveness of the “solutions” being touted in the marketplace, and then reiterated a regulatory proposal set forth by Wells Fargo that will simultaneously honor the intent of the TCPA, protect consumers, and allow diligent and compliance-oriented companies to engage in normal business communications without being subject to devastating lawsuits.

I. The *Breslow* interpretation creates an unclear and unworkable standard for callers, and effectively negates the TCPA’s prior express consent defense.

In the *Breslow* case, the underlying facts were not in dispute. The plaintiff was the subscriber of the telephone number—and her minor child the phone’s primary user—at the time Wells Fargo made calls to the number.⁸ Wells Fargo had dialed the cell phone number of a former customer who had listed that phone number on a Wells Fargo account application.⁹ Wells Fargo was unaware that the cell phone number was no longer assigned to the former customer, and the former customer never revoked his consent or requested that Wells Fargo cease calling the number.¹⁰ Upon

⁴ *Breslow I* at *6, 8.

⁵ *Id.* at *6.

⁶ *Breslow II* at *6 (citing *Osario*).

⁷ *Cello P’ship v. Dealers Warranty, LLC*, No. 09–1814 (FLW), 2010 U.S. Dist. LEXIS 106719, at 33–34 (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 U.S. Dist. LEXIS 58461 at *15–16 (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).

⁸ *Breslow I* at *2–3.

⁹ *Id.* at *3.

¹⁰ *Id.* at *3–4.

discovering that the phone number no longer belonged to its former customer, Wells Fargo never called the number again.¹¹

The plaintiff sued Wells Fargo for calling on the number that was expressly provided by the company's former customer on his account application. On interlocutory appeal, the court addressed the narrow question of the meaning of the term "called party," and concluded that either the "subscriber" or the "user" of the phone is the "called party" under the TCPA.¹² In reaching this conclusion, the Court found that the term "called party" susceptible to many different, reasonable interpretations, and finding that the FCC had not addressed this issue, examined the express language of the TCPA for guidance.¹³ Having no luck there, the court looked at the legislative history. Like the statute, the court found that the legislative history also refers to the term "called party" in a number of different ways that could suggest any number of different meanings. Ultimately, while noting the statute may be outdated, the Court concluded that "called party" means the "subscriber" or "user" of the number.

Relegated to a footnote in the original *Breslow I* decision, is the recognition that this interpretation places a substantial burden on the caller, which the court addresses by stating: "Wells Fargo remains free to use live telemarketers, who can confirm that the customer is still using the cell phone number he or she provided. Of course, even if Wells Fargo confirms that the consent remains valid, that confirmation is good only for that moment in time."¹⁴

Breslow/Osario—whether concluding that "called party" means "subscriber" or "subscriber and user," creates an utterly unworkable standard for callers. It is completely impractical for businesses like Wells Fargo to manually call each customer to "reconfirm" prior express consent.¹⁵ Using a manual system for each call either to "confirm" first that the number still belongs to the intended call recipient, or generally just to make such calls, is counterproductive and unmanageable—and itself will annoy consumers. Indeed, the very concept of using the statutory defense of "prior express consent" is meant to relieve the need to confirm with each new call that consent has been given. To interpret the statute otherwise removes the prior express consent exception in its entirety by making it meaningless.

II. The Commission must quickly clarify that a "called party" under the TCPA is the "intended recipient."

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

¹¹ *Breslow v. Wells Fargo Bank, N.A.*, 857 F.Supp.2d 1316, 1317 (S. D. Fla. 2012).

¹² *Id.* at *5.

¹³ *Id.* at *6-9.

¹⁴ *Id.* at *24 nt.15.

¹⁵ See Reply Comments of United Healthcare Services, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 8-16 (dated Mar. 24, 2014)(specifically, Section III, titled, "Requiring Callers to Re-Obtain 'Prior Express Consent' Before Every Call or Requiring Manual Dialing is Contrary to the TCPA and Could Prompt Unnecessary Calls").

answer the phone.”¹⁶ 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” context, or even taking into account other provisions within the TCPA incorporating the term “called party.” Indeed, in both the “family plan” context and the work context, 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. Yet, a non-subscribing user of a cell phone often provides that number as contact information on which to be called or texted.

Ms. Desai 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 clarify that non-telemarketing autodialed calls to wireless numbers (where the call was made in good faith to a customer that had been given prior express consent) are outside the reach of the TCPA. Wells Fargo agrees with United Healthcare Petition that the Commission has several avenues for granting clarification on this issue.¹⁷

The Commission is in a unique position to clarify this point because only the Commission can issue a ruling that assures uniformity across the country.¹⁸ In this instance, the Commission’s

¹⁶ Cases finding that “called party” means “intended recipient” include *Cellco P’ship*, 2010 U.S. Dist. LEXIS 106719, at 33-34 (finding that the phrase “called party” means “the intended recipient of the call”); and *Leyse v. Bank of Am.*, 2010 U.S. Dist. LEXIS 58461 at *15-16 (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*, 568 F.Supp.2d at 40-42 (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*, No. 11cv1008AJB, 2011 U.S. Dist. LEXIS 156610, at *21, *aff’d*, 696 F.3d 943, *amended*, 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, 682-83 (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”).

¹⁷ *See* United Healthcare Petition, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; United Healthcare Services Inc. Petition for Declaratory Ruling Regarding Reassigned Wireless Telephone Numbers*, CG Docket No. 02-278 at 10-11 (dated Jan. 16, 2014)(United Healthcare Petition). 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. As noted in the ACA March 24 Comments, such a safe harbor is not unprecedented, as the Commission established one for telephone numbers recently ported from wireline to wireless service. *See* ACA International Petition for Rulemaking, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 15-17 (dated Jan. 31, 2014) (ACA March 24 Comments). *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).

¹⁸ *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.)

clarification would be given *Chevron* deference even by the courts that had previously misinterpreted the Act.¹⁹

As Wells Fargo has previously explained, 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 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.²⁰ From a policy perspective, it is important for the FCC to recognize that 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. In addition, 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 to making these calls. Placing a manual call prior to each of these various types of calls just to “confirm” the number is still correct, is absurd—and would itself be an irritant to consumers.

Wells Fargo continues to implement various mechanisms to ensure that it informs consumers and properly obtains their consent to use mobile phone numbers. Compliance-oriented companies such as Wells Fargo should not be subjected to devastating liability under the TCPA for attempting to contact a consumer at a number that the consumer expressly provided for contact. Some of the measures the company employs include refreshing and reconfirming the accuracy of information such as cell phone numbers and consumer consent on a regular basis; providing specific instructions on outbound scripts for wrongly called parties to make the bank aware of a reassigned number and have calls stopped; and scrubbing numbers to see if they belong to a wireless account, and proactively running its database of numbers through a process to double-check whether any of those numbers have been ported to a cell phone number.²¹

Even with all of these measures in place, there is absolutely no way to effectively solve the problem of reassigned numbers.²² While some companies may tout their ability to determine in real time whether a number has been reassigned, such solutions do not effectively mitigate the risk of wrong number calls. The advertised “solutions” merely provide a “probability” or a “confidence score.” The experience of Wells Fargo was that those databases generally contain approximately 85% of numbers, and often miss 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

¹⁹ *Nat'l. Cable & Telecomms. Assn. v. Brand X Internet Servs.*, 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 that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”).

²⁰ See Wells Fargo Notice of Ex Parte at 2, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (dated May 15, 2014)(May 15 Wells Fargo Ex Parte).

²¹ May 15 Wells Fargo Ex Parte at 3.

²² *Id.*

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 unnamed 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.

This is particularly critical as a policy matter to take into account, as “[t]elephone companies recycle as many as 37 million telephone numbers each year”—approximately one-eighth of all wireless phone numbers.²³ Significantly, there is no comprehensive national subscriber database that matches names and numbers. 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.”²⁴

As a result, Wells Fargo ultimately has no choice but to rely on their customers to provide updated contact information—which unfortunately does not always happen. The fact remains that there is no benefit to Wells Fargo from dialing the wrong number—rather, doing so is a waste of time, money, and effort.

²³ 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).

²⁴ CTIA Comments at 4. *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 (dated Mar. 10, 2014).

In sum, and consistent with comments Wells Fargo has made in this proceeding, Ms. Desai 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.²⁵ Ms. Desai reiterated the need for the Commission to promptly provide clarity on this point, in order to provide a consistent, national, and rational framework for governing liability for this category of wrong number calls.

Respectfully submitted,



Monica S. Desai
Squire Patton Boggs, LLP
2550 M Street, NW
Washington, DC 20037
202-457-7535
Counsel to Wells Fargo

cc:

Maria Kirby
Adonis Hoffman
Valery Galasso
Nicholas Degani
Amy Bender
Kris Monteith
Mark Stone
Kurt Schroeder
John B. Adams
Aaron Garza
Kristi Lemoine

²⁵ Wells Fargo May 15 Ex Parte at 2.