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July 21, 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 (US) LLP, counsel to Wells Fargo, informs the Commission herein of a recent Supreme Court decision[1] supporting the position advanced by Wells Fargo that the term "called party" under the Telephone Consumer Protection Act (TCPA)[2] must mean "intended recipient."[3] The Court provided a stern reminder to agencies that in interpreting statutory ambiguities, "words of a statute must be read in their context with a view to their place in the overall statutory scheme,"[4] that "[a] statutory provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . .because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law,"[5] and that agencies must operate "within the bounds of

[1] *Utility Air Regulatory Group v. Environmental Protection Agency*, Nos. 12-1146, 12-1248, 12-1254, 12-1268, 12-1269, and 12-1272, 2014 U.S. LEXIS 4377 (June 23, 2014).

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

[3] *See* Wells Fargo Ex Parte Notices, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278 (filed May 15, 2014 (Wells Fargo May Ex Parte Notice) and June 19, 2014 (Wells Fargo June Ex Parte Notice)).

[4] *Utility Air Regulatory Group*, at *15 (citing *Environmental Defense v. Duke Energy Corp.*, 549 U. S. 561, 574 (2007)).

[5] *Utility Air Regulatory Group*, at *17 (citing *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988)).

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reasonable interpretation."[6] As explained in more detail below, consistent with the need to interpret the term "called party" in a way that does not render other parts of the statute meaningless and to apply a reasonable interpretation, the FCC should clarify that "called party" must mean "intended recipient."

Wells Fargo further re-emphasizes here that, given the differing court interpretations of the term "called party," the FCC has the responsibility to set forth a consistent, national definition of that term. Several courts have found correctly that "called party" must mean the "intended recipient," and that to find otherwise renders the "prior express consent" defense useless.[7] But, there are other cases finding that "called party" means "recipient,"[8] "regular user of the phone,"[9] or "subscriber."[10] Wells Fargo recently submitted an ex parte notice in this proceeding bringing to the Commission's attention *Breslow v. Wells Fargo*,[11] and *Osario v. State Farm Bank, F.S.B.,*[12] two decisions issued within three months of each other in which even different panels of the *same* U.S. Circuit Court of Appeals came to different conclusions regarding the meaning of "called party" under the TCPA.[13] The Commission is uniquely positioned to rectify the harm resulting from such inconsistent interpretations.

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[6] *Utility Air Regulatory Group* at *19-20, 28; *see also* Arlington v. Federal Communications Commission, 133 S. Ct. 1863, 1869-1871, 185 L. Ed. 2d 941, 951-953 (2013)("*Arlington*").

[7] *Cellco 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")*(subsequent affirmation vacated and remanded due to ambiguity regarding whether the affirmation was based on the grounds that plaintiff was not a called party or rested on an issue of state law*)(*Cellco Partnership*); 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)(*Leyse*). *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] *See, e.g. Meyer v. Portfolio Recovery Associates, LLC*, 707 F. 3d 1036, 1043 (9th Cir. 2012).

[9] *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").

[10] *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").

[11] *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*).

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

[13] *See generally*, Wells Fargo June Ex Parte Notice.

I. Interpreting "called party" to mean anything other than "intended recipient" in Sections 227(b)(1)(A) and (B) would eviscerate the statutory defense of prior express consent, making it meaningless in the context of the TCPA.

The Supreme Court reiterated that "words of a statute must be read in their context with a view to their place in the overall statutory scheme,"[14] and a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme … because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[15] At the same time, the Court reminded agencies to regulate in a way that would be consistent with "common sense."[16] The Court has also emphasized the even more "fundamental principle of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[17] The Court further emphasized that "the presumption of consistent usage '*readily yields' to context.*"[18] In other words, "context" is critical and trumps any forced reading that may otherwise defy common sense or may be unreasonable.

Unfortunately some courts have failed to heed this advice and have misinterpreted the phrase "called party" as used in section 227(b)(1)(A) and (B) simply because—in their view—the phrase means "subscriber" in other portions of the statute.[19] But, contrary to the assumptions in these cases, the phrase "called party" clearly cannot be meaningfully interpreted to mean "subscriber" in every instance where the phrase appears in the statute.[20] As the Supreme Court's new decision makes clear, therefore, the proper task for this agency is to apply the correct meaning to the phrase as it appears in the context of the statute's "express consent" exemption. Hence, it is *not* enough to merely find that the phrase may have a different meaning in another part of the statute and stop the analysis.

Congress clearly and specifically intended "prior express consent" to be a defense under the TCPA. While the phrase "called party" has four possible meanings,[21] only one of

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[14] *Utility Air Regulatory Group*, at *15 (citing *Environmental Defense* v. *Duke Energy Corp.*, 549 U. S. 561, 574 (2007)).

[15] *Id.* at *17.

[16] *Id.* at *14.

[17] *Utility Air Regulatory Group,* at *15 (citing *Environmental Defense* v. *Duke Energy Corp.,* 549 U. S. 561, 574 (2007)).

[18] *Id.* (emphasis supplied).

[19] *See, e.g. Soppet v. Enhanced Recovery Co.,* 679 F.3d 637, 639-640 (7th Cir. 2012).

[20] For example, "called party" is referenced three times in 47 U.S.C. § 227(d)(3)(B): "The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that . . . any such system will automatically release the **called party's** line within 5 seconds of the time notification is transmitted to the system that the **called party** has hung up, to allow the **called party**'s line to be used to make or receive other calls." In this subsection, "subscriber" does not make sense if the subscriber is not actually using the phone at the time of the incoming call.

[21] 1. The person the dialer was trying to reach; 2. The person that actually answers the phone; 3. The subscriber to the phone line (regardless of whether he/she actually answers the phone); or 4. The regular user of the phone. As previously shown in Wells Fargo's filings, different federal courts have adopted all four of these different definitions in various cases.

those meanings makes sense in the context of the express consent preemption—"intended recipient." After all, a caller cannot know who will answer the phone when the number is dialed or who may be paying for the phone line, or "regularly using" the phone line. And, the Commission has interpreted the phrase "called party" to mean the functional equivalent of "debtor" or "customer"[22] providing further support that "called party" means "intended recipient."

As explained in detail previously, Wells Fargo makes exceptional efforts to ensure it is contacting customers that have provided prior express consent to receive calls.[23] Wells Fargo relies, as it must and as it is entitled to do under the statutory scheme, on the prior express consent it receives to make a phone call to a particular person at a particular phone number. And as explained previously, Wells Fargo has no way of knowing with certainty whether a number has been reassigned, whether the subscriber to a particular phone number is the same person who provided consent, or whether some person other than the person who provided consent is going to just happen to pick up the phone.[24] The prior express consent defense is rendered meaningless if Wells Fargo is unable to rely on that prior express consent when making a call, especially for reasons completely beyond the company's control.

As stated succinctly by the United States District Court of the Southern District of New York when it found that "called party" must be interpreted as "intended recipient,"

> If any person who received the fax or answers the telephone call has standing to sue, then businesses will never be certain when sending a fax or placing a call with a prerecorded message would be a violation of the TCPA. Under the statute, a business is permitted to send a fax or phone call with a prerecorded message to persons who have given prior express consent or with whom the business has an existing business relationship. … When a business places such a call or sends such a fax, it does not know whether the intended recipient or a roommate or employee will answer the phone or receive the fax. If the business is liable to whoever happens to answer the phone or retrieve the fax, a business could face liability even when it intends in good faith to comply with the provisions of the TCPA.[25]

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[22] *See. e.g. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 23 FCCR 559. 2008 WL 65485. at *3 (Jan. 4. 2008) ("In this ruling. we clarify that autodialed and prerecorded message calls to wireless numbers that are provided by the called party to the creditor in connection with an existing debt are permissible as calls made with the 'prior express consent' of the called party"); *see also Rules and Regulations Implementing Telephone Consumer Protection Act of 1991,* FCC 92-443, ") 7 FCC Rcd at 8769. ¶31 (Oct. 16, 1991)("1992 TCPA Ruling) ("[T]he called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications.").

[23] Wells Fargo May Ex Parte Notice at 2-3.

[24] Wells Fargo May Ex Parte Notice at 3-4.

[25] *Leyse* at *12-13.

Similarly, the United States District Court for the District of New Jersey found that the "intended recipient" interpretation is "in accord with the statutory scheme" because:

> The statutory scheme simply cannot support an interpretation that would permit any "person or entity" to bring the claim for a violation, regardless of whether that person or entity was the called party (i.e., the intended recipient of the call). Under such an interpretation, the exception contemplated by Congress in Section 227(b)(1)(A) for calls made with "the prior express consent of the called party" would be rendered meaningless. Accordingly, this Court finds that under the statute's plain meaning, it is the intended recipient of the call that has standing to bring an action for a violation of Section 227(b)(1)(A)(iii).[26]

For these same reasons, Wells Fargo should not be held liable when making a call to a person at a phone number that the person expressly consented should be used for such a call. Liability should not attach simply because another person other than the intended recipient of the call happens to pick up the phone, or the subscription to the phone number is not held under the name of the person who provided consent (for example with a family plan[27] or a work-related phone), or 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.[28]

This is especially true in a climate where 57% of U.S. households rely either exclusively or predominantly on wireless telephone service,[29] and where telephone

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[26] *Cellco Partnership* at *34-35.

[27] *See* Wells Fargo May Ex Parte Notice at 6 & n.14 (explaining that "[m]ost, 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. 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/timccue/2012/09/25/what-phone-should-i-get-ting-cell-phone-plans-forbusiness-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.nfb.com/business-resources/business-resourcesitem? cmsid=52257."). *See also id.* at n.15 (noting that "[s]uch 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.)").

[28] Wells Fargo May Ex Parte Notice at 6.

[29] Center for Disease Control, National Health Interview Survey, "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2013 (July 2014) http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201407.pdf

companies "recycle as many as 37 million telephone numbers each year— approximately one-eighth of all wireless phone numbers."[30] As Wells Fargo has explained previously, there is no national subscriber database that matches names and numbers to ensure accuracy in this regard.[31] In fact, according to CTIA-the Wireless Association, "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."[32]

It is plain "common sense" that when a caller, in good faith, calls a number specifically provided to the caller with prior express consent to call, and is informed only after the call is made that the number either belongs to someone else or someone else has just happened to answer the phone, the caller must not be subjected to potentially devastating liability under federal law.[33] Because an interpretation of "called party" other than "intended recipient" would produce an effect that would effectively nullify the statutory defense of "prior express consent," any other interpretation would be incompatible with the TCPA, incompatible with the application of "common sense," and therefore inconsistent with the Supreme Court's recent ruling.

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[30] 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).

[31] Wells Fargo May Ex Parte Notice at 3.

[32] 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)).

[33] The Commission cannot expect that under circumstances where Wells Fargo must rely on its customers to update contact information as it changes—which unfortunately does not always happen—that the company will be liable for the customers' failure to provide such information. *See* Wells Fargo May Ex Parte Notice at 4 (explaining that, "[w]hile 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.").

The only reasonable interpretation of "called party" in context, in connection with the phrase "prior express consent," is "intended recipient." An agency interpretation that is "'inconsisten[t] with the design and structure of the statute as a whole'—does not merit deference."[34] It is this aspect of the Supreme Court's opinion that Wells Fargo urges the Commission to pay special attention to when making its decision here. The Commission's holding is entitled to substantial deference, but only to the extent that the interpretation is *reasonable* and *accounts for the context in which the term is used in the statute*.

To be clear, Wells Fargo is not requesting indefinite permission to call recycled numbers that no longer belong to the party whom it originally had intended to reach. Calls to noncustomers are a waste of resources and money, and are unproductive. Indeed, once Wells Fargo is informed that a number no longer belongs to the intended recipient, it stops contacting that number. Thus, consistent with its comments in this proceeding, Wells Fargo emphasizes that the term "called party" should be interpreted and clarified to mean "intended recipient" of the call, 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.[35]

In conclusion, Wells Fargo notes that it continues to battle expensive, frivolous lawsuits on this very question, costing the company millions of dollars in litigation defense fees, plus significant use of internal resources. Even now, Wells Fargo is fighting a class action lawsuit based on calls the company made to a cell phone number provided to Wells Fargo on an application for a consumer credit card.[36] After the cell phone number was subsequently reassigned—without Wells Fargo's knowledge—Wells Fargo made prerecorded calls to the intended recipient that included clear and specific opt-out instructions. Once the company learned that the phone number no longer belonged to the consumer that provided the prior express consent, Wells Fargo ceased calling the number. Regardless, Wells Fargo was still sued by the person to whom the number was reassigned. The litigation in that case has been stayed pending FCC action, but whether the stay remains in place is purely a matter of judicial discretion.

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[34] *Utility Air Group* at *17 (citing *University of Tex. Southwestern Medical Center* v. *Nassar*, 570 U. S. ___, ___ (2013) (slip op., at 13).

[35] Comments of Wells Fargo at 6, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278 (Mar. 24, 2014).

[36] *See Heinrichs v. Wells Fargo Bank,* Case No. 3:13-cv-05434-WHA (N.D. Cal., action filed Nov. 22, 2013).

The tenets of statutory interpretation compel the Commission to adopt the "permissible meaning[] [that] produces a substantive effect . . . compatible with the rest of the law."[37] Pursuant to this framework, and the arguments set forth herein, Wells Fargo respectfully requests that the Commission promptly clarify that "called party" under the TCPA means "intended recipient" of the call, in order to give effect to the statutory defense of "prior express consent."

Respectfully submitted,

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[37] *Utility Air Regulatory Group*, at *17.