

July 31, 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:

On July 29, 2014, Monica Desai of Squire Patton Boggs (US) LLP, counsel to Wells Fargo, Michael Selle (Senior Counsel, Litigation, Wells Fargo Law Department), Sylvia Johnson (Senior Counsel, Strategy and Operational Risk Group, Wells Fargo Law Department), Larry Tewell (Senior Vice President, Consumer Credit Solutions Collections & Servicing, Wells Fargo & Company), and Eric Troutman (Partner, Severson & Werson), held a series of meetings with Federal Communications Commission (FCC or Commission) staff. The purpose of the meetings was to continue advocating that the Commission interpret “called party” under the TCPA to mean “intended recipient”¹ as well as to provide guidance and background information related to a possible “safe harbor” framework for reassigned numbers or other “wrong number” calls.

Those meetings were held with Maria Kirby (Legal Advisor, Office of the Chairman); Adonis Hoffman (Senior Legal Advisor, Office of Commissioner Clyburn), Sharon Lin and Laura Arcadipane (Legal Interns, Office of Commissioner Clyburn); Valery Galasso (Special Advisor and Confidential Assistant, Office of Commissioner Rosenworcel); Amy Bender (Legal Advisor, Office of Commissioner O’Rielly); and Nicholas Degani (Legal Advisor, Office of Commissioner Pai). A meeting was also held with the following staff from the Consumer and Governmental Affairs Bureau: Mark Stone (Deputy Bureau Chief); Kurt Schroeder (Chief, Consumer Policy Division); John B. Adams (Acting Deputy Division Chief, Consumer Policy Division); Aaron Garza (Front Office Legal Advisor); and Kristi

¹ See Wells Fargo Notices of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed July 21, 2014 (July 21 Ex Parte); June 19, 2014 (June 19 Ex Parte); and May 15, 2014 (May 15 Ex Parte)).

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Lemoine (Attorney Advisor, Consumer Policy Division). In addition, Wells Fargo met with the following staff from the Office of General Counsel: Suzanne Tetreault (Deputy General Counsel, Office of the General Counsel); Marcus Maher (Assistant General Counsel); and Richard Mallen (Attorney Advisor).

In the meetings, Wells Fargo focused on the challenges created by non-telemarketing calls made to numbers where prior express consent was obtained, but where – through no fault of the caller – the caller reached someone other than the intended recipient (i.e., the number was reassigned, or someone other than the person who provided consent answered the phone because that person was the subscriber of the phone line, normally used the phone, or just happened to answer the phone at the time the call was made). Wells Fargo supports other petitioners and commenters who have requested similar relief from the Commission under these narrow circumstances.²

Wells Fargo has offered support for two different approaches for relief from TCPA liability for this narrow class of “wrong number calls:” (1) a clarification by the FCC that “called party” under the TCPA means “intended recipient” in the context of the statutory defense provided by the TCPA for calls made with the “prior express consent of the called party”;³ or (2) a safe harbor framework that allows relief for callers who obtain appropriate express consent, act in good faith in dialing the telephone number expressly provided by the customer – with no intent to call any person other than the individual who had provided consent to be called – and through no fault of the caller someone other than the person who provided the prior express consent answers the call. Wells Fargo also urges the Commission

² United Healthcare Services, Inc. Petition for Expedited Declaratory Ruling at 7-11, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; *Petition for Expedited Declaratory Rulemaking*, CG Docket No. 02-278 (filed Jan. 16, 2014) (noting that “parties should not be liable under the TCPA for calls to reassigned numbers when they are not aware of the reassignment); *Petition for Rulemaking of ACA International* at 15-17, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; *Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (Jan. 31, 2014) (explaining that “the Commission should establish a safe harbor for non-telemarketing calls when the debt collector had previously obtained appropriate consent and had no intent to call any person other than the person who had previously provided consent to be called, or had no reason to otherwise know that the called party would be charged for the incoming call”); *Stage Stores, Inc. Petition for Expedited Declaratory Ruling Regarding Reassigned Wireless Telephone Numbers* at 4, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; *Petition for Expedited Declaratory Ruling Regarding Reassigned Wireless Telephone Numbers*, CG Docket No. 02-278 (filed Jan. 16, 2014) (“Stage Stores submits there should be an exception to liability under the TCPA for autodialed marketing calls, including text messages, made to reassigned wireless numbers where the caller had obtained prior express consent to make such marketing calls, but the wireless number has been reassigned without notice to the caller, provided the caller updates its records and ceases calls to that wireless number within a reasonable time period after being informed that the number has been reassigned.”).

³ 47 U.S.C. § 227(b)(1)(A)(iii).

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to provide guidance to courts that taking proactive precautionary measures to facilitate calling the “intended recipient” – such as the types of measures implemented by Wells Fargo – are reflective of, and should be taken into account when assessing, the potential liability of the calling party.

Wells Fargo continued to emphasize that the most simple and lasting solution to the challenging issue of non-telemarketing calls answered by someone other than the intended recipient would be to clarify that “called party” must mean “intended recipient.”

However, to the extent that the FCC prefers a “safe harbor” framework going forward, and does not want to decide on the meaning of “called party” at this time, Wells Fargo emphasized the importance of providing retroactive relief, or a corresponding waiver framework or waiver guidelines. This would be absolutely essential so as not to penalize companies that in good faith simply attempted to contact a person who provided prior express consent to be contacted at a phone number they provided for that purpose. Wells Fargo also offered flexible parameters that would support a determination that a call falls within a “safe harbor” exception, and noted the importance of making sure that any “safe harbor” or waiver/retroactive relief framework does not inadvertently exclude small and mid-sized companies through unduly arduous or rigid standards.

A. The FCC should clarify that “called party” in section (b)(1)(A) of the TCPA means “intended recipient” – this is the most rational interpretation of the statute, and the simplest and best way to move forward.

At the meetings, we discussed in detail the legal arguments set forth in filings submitted by Wells Fargo on this issue, and we reiterate again here that the only rational and logical interpretation of “called party” within the context of the TCPA is “intended recipient.”⁴ Interpreting “called party” to mean anything other than “intended recipient” in the context of the TCPA would be contrary to Supreme Court precedent and would eviscerate the statutory defense of permitting calls when the caller has obtained the “prior express consent of the called party.”

In the *Utility Air Regulatory Group* decision, 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,”⁵ 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.”⁶ The Court also reminded agencies to regulate in a way that would be consistent with “common sense.”⁷

⁴ See *supra* note 1. A copy of the ex parte filing submitted July 21, 2014, which summarizes those arguments, is attached to this filing.

⁵ *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 at *15 (June 23, 2014)(citing *Environmental Defense v. Duke Energy Corp.*, 549 U. S. 561, 574 (2007)(*Utility Air Regulatory Group*)).

⁶ *Id.* at *17.

⁷ *Id.* at *14.

The Court 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.”⁸ The Court further explained that “the presumption of consistent usage ‘readily yields’ to context.”⁹ Interpreting the words of a statute to be consistent with context is critical and overrides any forced reading that may otherwise defy common sense or that may be unreasonable. Thus, 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.

In this case, it is critical to take into account that the context for interpreting the phrase “called party” is in connection with the statutory defense of “prior express consent.” That is, Congress specifically exempted from TCPA liability autodialed calls if the caller had obtained the “prior express consent of the called party.”¹⁰ The phrase should be considered in its proper context. Wells Fargo further emphasized that the defense becomes meaningless – defeating the intent of Congress – if a company, relying on the express consent it receives from its customer, is later made liable when the number is transferred to a different subscriber without the knowledge of the caller. This is so because there is no way of knowing with any acceptable degree of confidence that the number has been reassigned.

Federal courts have interpreted the phrase “called party”¹¹ in myriad ways, including “intended recipient,” “current subscriber,” “regular user of the phone” and “the person who happened to answer the phone.” Applying a “current subscriber” standard literally requires businesses to seek the consent of those paying their customer’s cell phone bills, rather than the customers themselves. This is obviously intrusive upon privacy and is not what Congress could have intended. This is especially true with the proliferation of family plans and business accounts. Similarly, interpreting “called party” as “regular user” or the “person who happens to pick up the phone” makes it equally impossible for the statutory defense of

⁸ *Id.* at *15 (citing *Environmental Defense v. Duke Energy Corp.*, 549 U. S. 561, 574 (2007)).

⁹ *Id.* (emphasis supplied).

¹⁰ 47 U.S.C. § 227(b)(1)(A)(iii).

¹¹ Cases finding that “called party” means “intended recipient” include *Cellco P’ship v. Dealers Warranty*, No. 09-1814 (FLW), 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.*, No. 09-7654, 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 Koppff v. World Research Grp., LLC*, 568 F.Supp.2d at 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*, 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); and cases finding “called party” means “subscriber” (*see, e.g., Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 643 (7th Cir. 2012).

“prior express consent” to have any meaning – as a caller attempting to contact the person who had expressly provided consent to be called has no way of predicting who will happen to pick up the phone, or who might be the “regular user” of the phone if that “regular user” is different from the person who had provided express consent for the call at that number.

As Wells Fargo also emphasized, interpreting “called party” to mean “intended recipient” does not give a caller a blank slate to call a number forever, even after it changes hands. Instead, once a caller is aware that the number changes hands it will be left to the jury to determine whether or not the caller was actually still trying to reach its customer in good faith. The jury will be left to assess the subjective good faith of the caller considering facts such as: i) was the caller informed the number had changed hands?; ii) when was the last time the caller reached the customer at that number?; iii) how many times did the caller call the number without a response?; iv) what policies/training does the caller have in place to show diligence in attempting to reach only its customer? Hence, rather than set a “bright line” test moving forward, Wells Fargo urges the Commission to interpret “called party” to mean “intended recipient” while merely providing guidance to future juries as to the factors they should take into account in assessing the subjective good faith of a caller claiming use of the “express consent defense.”¹²

Wells Fargo also noted that its interpretation does not result in a former subscriber binding a new subscriber by his/her consent. The new subscriber is not bound by the actions of the former customer; rather the caller is simply provided a defense where it can honestly demonstrate that it did not know the number had changed hands and other indicia of good faith are present to the satisfaction of the jury. The new subscriber still has standing to bring his lawsuit – but the calling party may have the workable defense Congress intended.

Finally, Wells Fargo reminded the Commission that interpreting “called party” to mean “intended recipient” is unrelated to the “willfulness/knowing” standards of the statute.¹³ While it is true that a jury may oftentimes conclude that a caller “knowingly” harassed a third-party when there are strong enough indicia that the calling party was aware the number had changed hands, that is but *one* way that a party may demonstrate a willful/knowing violation of the statute. The trebling provision certainly has other uses outside this context – such as where a calling party actually reaches its customer on a number it knew it lacked consent to dial. Moreover there is ample room for a jury to determine that a calling party was not trying to reach its customer in subjective good faith – i.e. that it was reckless with respect to the risk the number had changed hands – without having to find it necessarily “knew” the number had changed hands.

¹² This is especially important as technology continues to evolve and change. Whatever prospective rules/limitations/regulations are imposed by the Commission in a rulemaking runs the risk of becoming less relevant over time.

¹³ 47 U.S.C. § 227(b)(3).

Here's an example. If a jury is presented with evidence from a Plaintiff that he has been subscribing to a number since March of 2013, and has received 200 autodialed calls in that time intended for Customer X, he will ask the jury to award him statutory damages for each of those calls. As a defense, the calling party will argue that it did not know the number had changed hands and that it was – in good faith – still trying to reach its former customer. The jury may consider:

- i) the volume of calls and the great length of time that has passed since the last time the caller reached the customer;
- ii) specific individual factors, such as whether the Plaintiff had a voicemail with a different name on it and the ability of the calling party to detect the content of voicemail messages;
- iii) the presence or absence of policies designed to assure that the caller reaches the customer; and
- iv) the fact, if present, that the Plaintiff never informed the calling party that the number had changed hands.

The jury will weigh these considerations and make a determination based upon the evidence before it and considering the factors enumerated above, and any other factors it believes are germane on the issue of subjective good faith. It is possible on these facts that the jury considers the caller really was trying to reach its customer in good faith throughout the entire time period. This is especially likely if the calling party has robust policies such that it is clear the institution takes its responsibility to avoid errant calls seriously. It is also possible on these facts, however, that the jury finds that although the calling party did not actually “know” the number had changed hands, it nonetheless was sufficiently reckless as to that possibility so as to defeat a “good faith” showing as to *some* or *all* of the calls (“good faith” is, after all, a defense the calling party must prove.)¹⁴ Finally, of course, the jury could conclude on these facts that the calling party actually did “know” the number had changed hands, triggering the possibility of trebling, in the court’s discretion.

Accordingly, by interpreting the phrase “called party” to mean “intended recipient” the statute applies as Congress intended it to apply – providing a steadfast defense for a calling party that does everything right, while protecting consumers from unwarranted and harassing calls where a calling party is reckless with respect to its dialing practices.

Only the FCC can provide a consistent national interpretation. The FCC is empowered to make this clarification, which will have immediate retroactive effect. The

¹⁴ Importantly, not all 200 calls need be treated equally. Perhaps the jury finds that the first 50 calls were placed with subjective good faith. Then it may award statutory damages on 150 of the calls but immunize the calling party on the first 50. This determination will be made on an individual basis by the jury based on the evidence before it in each case.

Circuit Courts must give deference to this determination, even if they had previously held otherwise.¹⁵ Wells Fargo urged the Commission to make this clarification expeditiously.

B. There is no reliable database that would reflect reassigned numbers.

There is no viable market solution or database that solves the challenges created by reassigned cell phone numbers.¹⁶ The “solutions” that are being advertised do not actually “solve” the issue, and do not provide anywhere close to sufficient accuracy to adequately mitigate risk. The challenges arise from carrier databases that contain dissimilar amounts of consumer detail, may not designate a consumer name to every cell phone number in a plan or are restricted from sharing consumer cell phone information due to privacy laws. Vendors that purport to solve for this conundrum merge private and public data to reach a *likelihood* that a certain cell phone number belongs to or is being used by a consumer. Unfortunately, “likelihood” and “associations” are inadequate to mitigate risk in the face of business-altering class litigation expense. There is no public directory of reassigned numbers and consumers may change numbers without notifying callers – accordingly there is no practical way to be completely certain that the number provided by the consumer still remains with that consumer.¹⁷ Neither is there access to real-time mobile carrier data, and vendor offerings claiming to have solutions are imperfect and have unacceptable false-positive identifications.

Moreover, even when a number has not been reassigned, there are numerous complicating factors that can arise. For instance, consumers may forward their calls from the numbers for which they provided prior express consent to other numbers that may be answered by other people. Or, family plans and work-related plans regularly contain multiple cell phone numbers under a single subscriber, and as a result consumer identification information (such as name and address data) may not correlate to the phone number provided and the person who provided prior express consent.

For these reasons it is impractical for American business to bear the full burden of cell phone number accuracy, particularly under a statute imposing strict liability. Instead, consumers should share at least some of the responsibility with businesses – consumers by informing businesses when their cell phone number changes or they are receiving calls

¹⁵ See *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 982, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005).

¹⁶ See Comments of CTIA – The Wireless Association at 4, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Rulemaking of United Healthcare Services, Inc.*, CG Docket No. 02-278 (filed Mar. 10, 2014)(explaining 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”).

¹⁷ ACA Comments at 2, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Rulemaking of United Healthcare Services, Inc.*, CG Docket No. 02-278 (filed Mar. 10, 2014).

intended for someone else, and businesses by incorporating practices that make it easy for consumers to stop unwanted and misdirected calls.

C. A “Safe Harbor” framework must be flexible, and allow for both prospective and retroactive relief, or provide guidelines under which a waiver would apply when a caller in good faith attempts to contact a person who had provided prior express consent to be called.

If the Commission does not move forward with a clarification of the term “called party,” then Wells Fargo suggests that a flexible safe harbor framework would be workable if it allowed for either retroactive relief, or if the Commission provided guidelines for a waiver from liability under certain circumstances. A “safe harbor” should apply (a) when there is some indicia that a call is made in good faith, (b) it is made to a number previously provided to the caller expressly for contact purposes, (c) prior express consent is appropriately obtained, and (d) someone other than the person who provided prior express consent answers the call, through no fault of the caller.

Wells Fargo notes that it only seeks to call the intended party at the phone number expressly provided for such calls, and is not seeking a safe harbor to autodial a customer through an alternative number that was not expressly provided or affirmed by the intended party. Wells Fargo also believes that once it has actual knowledge that the contact number is wrong or the person no longer wishes to be contacted at that number, then the safe harbor would no longer apply. This way, the “safe harbor” could not be used to circumvent liability, but at the same time, the TCPA would not be used to assess liability in circumstances when calls are made in good faith to a number that has been expressly provided.

As it has in previous filings and in its meetings with the Commission, Wells Fargo reiterates that a retroactive exemption is necessary, and/or guidelines for a waiver framework for past calls made in good faith. This is particularly important given that there is no solution for wrong number calls, the meaning of “called party” was interpreted in the first federal court cases on point as “intended recipient” and has since that time not been consistently interpreted by courts, and that the phrase has not been interpreted at all by the FCC.¹⁸

Moreover, a “safe harbor” will only work if the approach allows companies the flexibility to choose the safeguards or precautionary measures that will work best for them, and if the abilities of small and mid-sized companies are considered. It is vitally important that the Commission ensure that whatever benchmark framework is proposed does not render the statutory defense meaningless.

A safe harbor should apply in favor of callers that take precautionary measures in contacting the number given by the consumer who provided prior express consent. In outlining possible ideas for a safe harbor framework, Wells Fargo noted the types of efforts the company undertakes to endeavor to contact a customer who has provided the prior

¹⁸ See *supra* note 11.

express consent to receive calls.¹⁹ For example, the company has previously explained that it has proactively adapted applications, customer agreements, terms and conditions, and certain call center scripts 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 as opportunities arise. In addition, Wells Fargo includes consumer empowering “QUIT” or “STOP” commands in the text channel. Wells Fargo keeps close track of all the relevant rules and guidance, and timely incorporates this information into its procedures and systems.

Companies can similarly put in place these or other types of internal procedures that will lower the possibility of calling someone other than the party the company intends to call.²⁰ There should not be a “one size fits all” approach. Instead, companies should have the flexibility to be able to choose which procedures will work best depending on the size of the company, the particular circumstances of the transaction, or the particular industry. But all companies seeking protection under a “safe harbor” framework should be generally expected to (1) establish procedures designed to obtain appropriate consent; (2) take proactive measures to facilitate text, prerecorded voice calls, and autodial calling a number provided or affirmed by the consumer; and (3) make it easy for consumers to edit and update contact information and/or to stop unwanted calls.

Wells Fargo believes that it is appropriate to expect companies to design safeguards and procedures to obtain the appropriate consent, and make consumers aware they are providing consent to call their cell phone. Some ideas related to this include incorporating language in credit applications, loan agreements, cardholder agreements, and terms and conditions associated with account activation and setup that explain the prior express consent requirement and inform the consumer of their rights and the companies’ responsibilities under the TCPA.

Wells Fargo also believes it is appropriate to expect companies to make a meaningful effort to facilitate accurately calling the number expressly provided by the customer. Wells Fargo has suggestions in this regard, and offers this information only to provide a frame of reference for the Commission, but not to infer that all companies should rigidly be required to implement the same procedures and practices. It is critical for the Commission to understand that companies should be able to choose safeguards that may work best under the particular circumstances under consideration. Wells Fargo checks phone numbers newly associated with an account through a Wells Fargo database to determine whether special handling is required. Wells Fargo also manually dials new-to-account cell phone numbers

¹⁹ May 15 Ex Parte at 2-3.

²⁰ See, e.g., Notice of Ex Parte filed by Mark Brennan, Partner, Hogan Lovells, Counsel to United Healthcare Services, Inc., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed July 28, 2014) at 6 (listing the various types of precautionary measures that a company can take, including “[p]roviding a mechanism for an individual to update his or her contact information and “[t]aking steps to encourage or require (i.e., through contractual provisions) an individual to notify the caller if his or her telephone number changes).

(obtained from noncustomer sources – e.g. family, roommates, partners) to first affirm that this is the right person and to confirm consent prior to placing the number into automated channels. Wells Fargo checks vendor databases as a precaution to determine: (a) whether a phone number is tied to a residential or wireless line, and (b) whether any landline numbers have been converted to cell phone numbers. Further, policy, procedures and training of employees can be useful for emphasizing the importance of updating demographics, including customer identity and associated cell phone accuracy, and also for implementing special procedures to update records quickly when there is actual knowledge that a number has been reassigned.

Wells Fargo further believes that companies should make it simple for consumers to edit and update contact information, and to stop unwanted calls. Because callers are almost completely reliant on consumers for updates to contact information, particularly where prior express consent has been given, companies must endeavor to do whatever they can to help facilitate consumers' ability to provide such information. Example ideas are instances where consumers can access account information digitally, i.e., on the web or via an application on a mobile device, or using postal mail, or other means might be easy-to-use methods for updating contact information. Also, another avenue for companies to consider would be to send text messages (with a "QUIT" or "STOP" command) and/or to allow consumers to update their information via text. Prerecorded calls can include instructions that consumers must follow to report that the wrong person or number has been reached.

It is critically important for the Commission to understand, however, that manually "pre-calling" numbers already previously confirmed is an unworkable requirement at the scale of today's businesses and certainly not timely in the event of fraud, ID theft, or even mass alerts that consumers desire and request. Such an approach is entirely inconsistent with the ability to make calls in reliance upon the statutory defense of "prior express consent." In addition, it is imperative for the Commission to understand that even the most thoughtful set of standards that may be set today run the risk of being less relevant over time.

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Finally, it would be useful for the Commission to provide guidance to courts – either by moving forward with interpreting “called party” in the context of the prior express consent defense, or by explaining to the courts that precautionary measures to facilitate calling the “intended recipient” should be taken into account when assessing any potential liability of the calling party in the case of a text, prerecorded voice, or autodialed calls reaching a reassigned or wrong number.

Respectfully submitted,



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ATTACHMENT

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 decision¹ 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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4836-1887-0044.3.

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.

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

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

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 plan²⁷ 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

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-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.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.

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.

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.