

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**In the Matter of the** )  
 )  
**Rules and Regulations Implementing** )  
 ) **CG Docket No. 02-278**  
**the Telephone Consumer Protection** )  
 )  
**Act of 1991** )

**Reply Comments of Joe Shields on the Comments of Wells Fargo on the Petition  
For Expedited Declaratory Ruling of Stage Stores**

Wells Fargo is claiming that “...there is no practical way to be completely certain that the number provided by the consumer still remains with that consumer from one call to the next.” Wells Fargo insists that only a 100% accurate solution is acceptable. That is clearly an unreasonable approach. Wells Fargo should be using every resource available to it to comply with the TCPA rather than dismissing all solutions because none are 100% accurate. The National do-not-call list is not 100% accurate. That does not mean that Wells Fargo can ignore the National do-not-call list because it is not 100% accurate.

Despite Wells Fargo’s protestations there are resources that provide a comprehensive, up-to-date, reference that can be used to determine if a cell number still belongs to a consenting cell phone subscriber. According to Becky Burr (Neustar Deputy General Counsel and Chief Privacy Officer and former FTC Attorney-Advisor), Neustar’s TCPA compliance services “use continuously updated and **highly accurate phone data** (emphasis added) that gets updated multiple times per minute to tell you instantly . . . whether the subscriber name that you have matches.” Neustar is not the only one offering such a service. Infutor, Nextmark List or Contact Center Compliance offers the same or similar service.

It is evident from the many petitions and comments that one side is clearly lying about the capability to determine if a cell number still belongs to a consenting cell phone subscriber. The Commission can easily determine which side that is – it is the side that has been sued for violating the TCPA then comes running to the Commission for a get out of jail free card. Simply because the lie is repeated over and over again doesn't make it a true fact.

Wells Fargo also insists that called party should mean “intended” called party. Of the many courts<sup>1</sup> that have addressed the issue of prior express consent of the called party not one has found that “calling someone else” or an “intended” called party was an acceptable affirmative defense. The cases cited by Wells Fargo, similar petitions and commenor supporting an “intended” called party exemption are not on point on this issue and are taken out of context as has been pointed out in earlier comments on the issue. Two of the courts recently deciding against Wells Fargo’s position, which Wells Fargo also takes out of context, are *Osorio v. State Farm Bank, F.S.B.*, 746 F. 3d 1242 (11th Cir. 2014); *Breslow v. Wells Fargo Bank, NA*, 857 F. Supp. 2d 1316 - Dist. Court, SD Florida 2012.<sup>1</sup>

Consequently, Wells Fargo’s insistence that only “intended recipient” is workable fails to take into account how the more than 3 dozen courts and 2 appellate courts came to the same conclusion that called party is the current subscriber or user of the cell phone number. Therefore, Wells Fargo has manufactured an issue or controversy where there really is none.

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<sup>1</sup> It should be noted here that the Breslow court on 06/09/14 on its own motion vacated the original opinion and adopted a new opinion in line with the 11<sup>th</sup> circuit Osorio decision that the called party “...for purposes of § 227(b)(1)(A)(iii), means the subscriber to the cell phone service.”

The true reason for Wells Fargo's comments becomes apparent in section V of their comments suggesting that the Commission issue retroactive relief or waiver "for past calls". Clearly, Wells Fargo is seeking an end run around the properly filed TCPA claims against Wells Fargo. Wells Fargo is spending a great deal of time and money on their attempt at an end run around the courts. If Wells Fargo had used a teeny tiny bit of that time and money and used the services of Neustar or a comparable service Wells Fargo would not have been sued.

It is easily seen that those that are lying to the Commission consider that the TCPA is frivolous. It may be frivolous to those that make millions of automated calls every day. Yet it is the only law holding back a tsunami of automated calls that if unchecked would threaten the very existence of the cell phone network. I trust the Commission will see through this lie and will not allow this tsunami to occur.

There is no "intended" in the TCPA. The Commission cannot add the word "intended" to the statute. If the Commission does step outside the confines of the statute and creates an "intended" called party exemption a Hobbs challenge will surely ensue. I trust the Commission will not fall for the commentor's lies and create an exemption that will conflict with the TCPA.

Respectfully submitted,

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