Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	**CG Docket No. CG 02-278**
	)	
	)	
Rubio's Restaurant, Inc. Petition for Expedited Declaratory Ruling	)	
	)	
	)	

To: The Commission

COMMENTS OF WELLS FARGO

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Dated: September 12, 2014

Wells Fargo respectfully submits these comments in support of the Rubio's Restaurant, Inc. ("Rubio's") Petition for Expedited Declaratory Ruling and requests that the Federal Communications Commission ("FCC") clarify that communications to a wireless number are outside the ambit of Telephone Consumer Protection Act ("TCPA") liability in the following limited circumstance: when the caller had prior express consent to call a particular number, but, through no fault of the caller, someone other than the person who provided the prior express consent answers the call.[1] Wells Fargo seeks a clarification by the FCC that "called party" under the TCPA means "intended recipient." In the alternative, Wells Fargo supports a "safe harbor" for this limited category of calls, but only if the Commission also provides retroactive relief for such calls, or provides a path for a waiver. Wells Fargo has more fully briefed its position on the points discussed herein in recent comments, which are attached hereto for ease of reference.[2]

Background. Wells Fargo is a global company providing personalized banking, insurance, investment, mortgage, and consumer finance services and guidance. Wells Fargo uses a variety of technologies to communicate with its clients to convey important, time-sensitive information including placing calls, leaving recorded messages, and alerting consumers of possible fraud, suspected identity theft, unauthorized transactions, financial relief options, due date reminders, and

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[1] Rubio's Restaurant, Inc., Petition for Expedited Declaratory Ruling, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed August 11, 2014). Wells Fargo also supports similar petitions. *See* Stage Stores, Inc. Petition for Expedited Declaratory Ruling, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed June 4, 2014) ("Stage Stores Petition"); United Healthcare Services, Inc. Petition for Expedited Declaratory Ruling, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed Jan. 16, 2014); Petition for Rulemaking of ACA International, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278 (filed Jan. 31, 2014).

[2] *See* Comments of Wells Fargo to Stage Stores Petition, CG Docket No. 02-278 (Aug. 8, 2014) (attached). Wells Fargo has also submitted various ex parte filings with detailed legal and policy arguments. *See* Wells Fargo ex parte filings in CG Docket No. 02-278 dated May 15, 2014; July 21, 2014; and July 31, 2014.

account balance thresholds.[3] Wells Fargo has implemented mechanisms to obtain appropriate consent prior to dialing any mobile phone number using an automated telephone dialing system.[4] However, it is important for the FCC to recognize that it is impossible to use a manual system to engage in these frequent and required communications with millions of customers.

Wells Fargo is currently facing a putative nationwide class action lawsuit stemming from calls placed to a cellular phone number provided to Wells Fargo by its customer on an application for a consumer credit card.[5] The cell phone number changed hands soon after the application for credit was submitted, without Wells Fargo's knowledge. Wells Fargo called the number on the credit application, intending to reach the person who had given express consent to be contacted at that exact number. As soon as Wells Fargo learned the number had changed hands, it updated its system to make sure the number was not called again. Whether or not Wells Fargo will face liability in *Heinrichs* turns on how the FCC interprets the term "called party." The case has been stayed and is awaiting the Commission's interpretation.[6]

Calls Made to Numbers Provided with Prior Express Consent Should Not Trigger TCPA Liability. Wells Fargo agrees with Rubio's and others[7] that callers should not be held liable

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[3] *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 (May 15, 2014) ("May 15 Wells Fargo Ex Parte").

[4] Pursuant to 47 U.S.C. § 227.

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

[6] The district court granted the motion and ordered the case stayed for six months to give the Commission time to consider these important issues. The court has requested that the FCC Office of the General Counsel provide a status update related to the Commission's consideration of these issues. *Heinrichs v. Wells Fargo Bank,* Case No. 3:13-cv-05434-WHA, Request to the Office of the General Counsel of the Federal Communications Commission, (N.D. Cal., Sept. 3, 2014).

[7] *See e.g.*, Comments of Twitter, Inc. in Support of Stage Stores, Inc.'s Petition for Expedited Declaratory Ruling at 3, CG Docket No. 02-278 (Aug. 8, 2014) ("Twitter Comments") ("There has been an epidemic of TCPA class action lawsuits—more than 1,200 in 2013 alone — demanding massive windfalls for communications that the TCPA was never intended to cover. As a result of

for calls made to numbers for which prior express consent was provided, but have been reassigned or otherwise used by someone else without the caller's knowledge. Further, as others have noted, such liability, and the resulting "epidemic" of suits filed under a "gotcha" theory, should not be applied to communications that fall outside Congress' intended scope for the TCPA.[8] Although Wells Fargo makes exceptional efforts to ensure it is contacting customers that have provided prior express consent to receive calls,[9] it is common sense that callers have no way of predicting whether someone other than the person who provided consent for the call will happen to answer the phone. Ultimately, Wells Fargo and other companies must rely – as is contemplated by Congress – on the prior express consent they have received to make a phone call to a particular person at a particular phone number.[10] Critically, Wells Fargo is not seeking to call, in perpetuity, any reassigned number that is no longer associated with the intended recipient of the call. Wells Fargo only requests that the FCC should remove from TCPA liability any call made in good faith to the number last provided by the intended call recipient, *until such time when* (1) the customer updates the pertinent contact information; or (2) the company is notified that the number dialed is no longer valid for contacting the intended recipient.[11]

It is Impossible to "Solve" for Wrong Number Calls. There is no public directory of reassigned numbers and consumers may change numbers without notifying callers. Equally critical, there is no viable market solution or database that solves the challenges created by reassigned cell

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this hyper-litigious environment, innovative companies increasingly must choose between denying consumers informative calls and texts that they request or being targeted by TCPA plaintiffs' attorneys filing shake-down suits. **No company should be put to such a choice.**") (internal citations omitted) (emphasis added).

[8] Twitter Comments at 3, 5-6.

[9] May 15 Wells Fargo Ex Parte at 2-3.

[10] 47 U.S.C. § 227(b)(1)(A)(iii), (b)(2)(A-B).

[11] For a more extensive discussion please see Wells Fargo Comments to the Stage Stores Petition at 6-8.

phone numbers. Wells Fargo has leveraged its resources to investigate numerous solutions, and each one fails in various significant respects. As confirmed by 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."[12] Given the lack of a reassigned number database and the fallibility of the solutions currently on the marketplace, calling parties must be able to rely on the intended recipient of the call to provide updated information.[13]

The FCC must clarify that "Called Party" for Purposes of the "Prior Express Consent" Defense Means "Intended Recipient." Congress clearly and specifically intended "prior express consent" to be a defense under the TCPA.[14] Interpreting "called party" to mean anything other than "intended recipient" in the context of the TCPA would be contrary to common sense, and would render meaningless the statutory defense that allows callers to rely on the "prior express consent of the called party," particularly for reasons beyond the control of the calling party.

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[12] Comments of CTIA – The Wireless Association at 4, *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 (Mar. 10, 2014).

[13] For a more extensive discussion of the problems associated with marketplace "solutions," please see Wells Fargo Comments to the Stage Stores Petition at 8-10. Others have expressed similar concerns. *See* Reply Comments of Stage Stores, Inc., CG Docket No. 02-278 (Aug. 26, 2014) (explaining problems with Neustar services in response to multiple commenters' suggestions); Reply Comments of the Computer & Communications Industry Association (CCIA) at 2, CG Docket No. 02-278 (Aug. 25, 2014) ("The Neustar database cannot, in its current incarnation, eliminate the risk that a business will send a marketing or informational message to a reassigned mobile phone number. Neustar itself acknowledges that its database does not capture as much as 30% of mobile phone numbers used in the United States. The FCC should not mandate reliance on a technology that is 70% accurate.") (internal citations omitted); Reply Comments of United Healthcare Services, Inc. at 12, CG Docket No. 02-278 (Mar. 24, 2014) ("Neustar claims to provide the most comprehensive coverage; however, it only claims to encompass 80% of wireless and hard-to-find telephone numbers.").

[14] 47 U.S.C. § 227(b)(1)(A)(iii).

Importantly for purposes of *Chevron* deference, the phrase "called party" is plainly vague.[15] Indeed, federal courts have interpreted the phrase "called party" in at least four different ways. 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.[16] Earlier this week, this holding was reiterated by the District Court of New Jersey – the *third* United States District Court in which plaintiff (or his roommate) had filed a putative TCPA suit regarding the *same, single phone call*.[17] In agreeing with the line of cases finding that "called party" means "intended recipient," the court emphasized that "to hold business callers liable for unintended communications would exponentially expand the number of potential plaintiffs and would unfairly impose liability on such callers when acting in good faith to comply with the provisions of the TCPA."[18]

Other courts have held differently, finding that "called party" means "current subscriber," "regular user of the phone" and/or "the person who happened to answer the phone."[19] The proper analysis – and the one the FCC should follow – is to consider the purpose of the phrase "called

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[15] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[16] Cases finding that "called party" means "intended recipient" include *Cellco Partnership v. Dealers Warranty, LLC*, No. 09–1814 (FLW), 2010 WL 3946713, at *10 (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 WL 2382400, at *4 (S.D.N.Y. June 14, 2010) *("Leyse I")* (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 sanding to sue).

[17] *Leyse v. Bank of Am.*, No. 11-7128, ECF No. [31] (D.N.J. Sept. 8, 2014) (unpublished opinion) ("Leyse II") (following the Southern District of New York's holding in *Leyse I* and holding that plaintiff lacks standing because he was not the intended recipient of the call).

[18] Id. at 12. The court also noted the Southern District of New York's 2010 conclusion that Leyse's action ""ha[d] the whiff of the inappropriate' considering the same facts and cause of action were being contested in [the Western District of North Carolina]." Id. at 4, citing *Leyse I* at *17.

[19] *See, e.g. Meyer v. Portfolio Recovery Associates, LLC*, 707 F. 3d 1036, 1043 (9th Cir. 2012) (called party means "recipient"); *Manno v. Healthcare Revenue Recovery Group, LLC*, 289 F.R.D. 674, 682 (S.D.Fla. 2013) (called party means "the regular user of the phone"); *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 643 (7th Cir. 2012) (called party means "subscriber").

party" in the context of the "express consent" exemption so as to give the phrase the meaning that best comports with the purpose of the exemption and the application of the statute generally.[20]

Interpreting "called party" as "regular user" or the "person who happens to pick up the phone" makes it impossible for the statutory defense of "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.

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, does not serve the purpose of the TCPA, and is not what Congress could have intended. Moreover, a closer examination of the analysis by the Seventh Circuit in adopting the "subscriber" approach reflects that this approach does not make sense. There the court merely observed that "called party" means "subscriber" as used in a *different* section of the TCPA (section 227(b)(1)(A)(iii)), and then stated without meaningful analysis that courts are to presume that the use of the same phrase means the same thing throughout a statute,[21] concluding that "called party" must mean "subscriber" for purposes of the express consent exemption too.[22]

But this was not the proper analysis. The phrase "called party" plainly has different meanings as used in different contexts throughout the statute.[23] The task, therefore, is to determine the proper

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[20] *See Util. Air Regulatory Group v. E.P.A.,* 134 S. Ct. 2427, 2441 (June 23, 2014).

[21] *Soppet*, 679 F.3d at 639-640.

[22] *Id*. at 640.

[23] For example, the TCPA requires that a system sending a pre-recorded message to a phone line release the line "within 5 seconds of the time … the called party has hung up …." 47 U.S.C. § 227(d)(3)(B). A subscriber to a phone line that does not actually "use" a phone could never "hang

meaning of the phrase *in context*. Indeed, the United States Supreme Court recently chided the Environmental Protection Agency for thoughtlessly applying the credo "the same word means the same thing" when context – and common sense – reflected that Congress intended otherwise.[24] For the reasons set forth above, the only possible meaning of the phrase "called party" in the *context* of the express consent exemption is "intended recipient;" all other interpretations render the defense meaningless.

Not surprisingly, therefore, the first three district courts to look at the phrase "called party" in the context of the express consent exemption found that the phrase meant "intended recipient."[25] 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 whomever 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.[26]

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up" because she/he does not physically possess the phone at the time of the call – someone else does. Hence, in this particular provision, "called party" can only mean "answerer," not "subscriber."

[24] *Util. Air Regulatory Group v. E.P.A.*, 134 S.Ct. 2427, 2441 (June 23, 2014); *see also Roberts v. Sea-Land Serv., Inc.*, 132 S.Ct. 1350, 1360 (2012) ("[T]he presumption that 'identical words used in different parts of the same act are intended to have the same meaning ... readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.'")

[25] *See Kopff*, 568 F. Supp. 2d 39 at 40-42 (only intended recipient of transmission has standing to sue); *Leyse I*, No. 09-7654, 2010 WL 2382400 at *4 (same); *Cellco Partnership,* No. 09–1814 (FLW) at *10 (finding that the phrase "called party" means "the intended recipient of the call").

[26] *Leyse I* at *12-13. As described above, this holding was reiterated earlier this week by the District Court of New Jersey, when the same plaintiff filed another TCPA action, based on the same single phone call. *Leyse II*.

Further, the Seventh Circuit was incorrect as a factual matter in concluding that "[f]or cell service, the subscriber and the person who answers almost always are the same, given the norm that one person does not answer another's cell phone."[27] Obviously, 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 names do not appear on the phone account. Yet, a non-subscribing user of a cell phone often provides that number as their contact information on which to be called or texted.[28] Finally, while the Seventh Circuit supports its conclusion that "called party" means "subscriber" by pointing out that intended recipient" appears nowhere in the TCPA,[29] neither does the word "subscriber."

It is clear that of the four different court interpretations of the phrase "called party," the only workable standard is "intended recipient." However, courts continue to struggle with the phrase, resulting in a cottage industry of TCPA class action litigation, where plaintiffs' attorneys take advantage of the statute's ambiguity.[30]

The FCC is uniquely empowered to issue a clarification of the term "called party" within the context of the prior express consent defense. Given the differing court interpretations of the term, it has an urgent responsibility to do so.

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[27] *Soppet*, 679 F. 3d at 640.

[28] Such scenarios are not far-fetched in litigation, either. *See e.g.*, *Jordan v. ER Solutions, Inc.*, 900 F.Supp.2d 1323, 1325 (S.D. Fla. 2012) (the phone number was registered to husband under a family plan while 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 (W.D. Wash. 2012) (ex-husband was primary account owner on shared cellular plan and paid the bill while ex-wife owned and used the phone).

[29] *Soppet*, 679 F. 3d at 640.

[30] For a more extensive legal and policy analysis regarding why "called party" must mean "intended recipient" in the context of the "prior express consent" defense, please see Wells Fargo Comments to the Stage Stores Petition at 11-17.

If the FCC does not move forward with a clarification of the term "called party," then Wells Fargo suggests a flexible safe harbor framework that allows for either retroactive relief or FCC-provided guidelines for a waiver from liability under certain circumstances. Without such relief, businesses will be forced to choose between eliminating communications with their customers in the manner those customers desire, or risking devastating litigation. The impact of such tradeoffs is real. Twitter recently characterized this situation in dire terms: "In truth, the only way that Twitter can realistically avoid making 'calls' to recycled cell phone numbers is simply to stop sending texts altogether. Twitter can only imagine the backlash if it announced it was terminating the delivery of Tweets by text to users who asked to receive them that way."[31] The FCC must act promptly to provide clarity on this point in order to ensure a consistent national, and rational, framework for governing liability for this category of wrong number calls.

Respectfully submitted,

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[31] Twitter Comments at 9, noting also that "In enacting the TCPA, Congress could not have intended for legitimate businesses like Twitter to choose between risking massive liability or denying consumers the chance to receive useful text messages that they have expressly requested. To the contrary, the statute's legislative history makes clear that Congress did not want to inhibit 'expected or desired communications between businesses and their customers.'"

Attachment

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	**CG Docket No. CG 02-278**
Telephone Consumer Protection Act of 1991	)	
	)	
Stage Stores, Inc. Petition for Expedited	)	
Declaratory Ruling Regarding Reassigned	)	
Wireless Telephone Numbers	)	

To: The Commission

COMMENTS OF WELLS FARGO

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EXECUTIVE SUMMARY

The Telephone Consumer Protection Act of 1991 ("TCPA") was originally enacted to relieve consumers of the burden of unwanted and intrusive telemarketing calls. In recent years, however, the TCPA is being used in courts across the country to extract limitless damages and awards from companies attempting in good faith to call customers who have provided a telephone number for that exact purpose, but through no fault of the caller, the caller reached someone other than the customer who had provided that consent.

Wells Fargo submits these comments in support of the Stage Stores, Inc. Petition for Expedited Declaratory Ruling, which seeks Commission clarification that communications to a wireless number do not trigger TCPA liability when the caller has prior express consent to call that number, but that number has been reassigned without notice to or knowledge of the caller.

In connection with this, Wells Fargo reiterates its request that the Commission clarify expeditiously that "called party" under Section (b)(1)(A) of the TCPA must mean "intended recipient" of the call, as that is the only interpretation that does not eviscerate the statutory defense of allowing calls to wireless numbers made with the "prior express consent of the called party," and is the only interpretation that is rational and reasonable in the context of that particular subsection. Alternatively, Wells Fargo supports a limited safe harbor for certain of these calls.

Finally, Wells Fargo suggests that the Commission consider providing guidance to courts – either by moving forward with interpreting "called party" in the context of the prior express consent defense, or by explaining to courts that precautionary measures to facilitate calling the "intended recipient" should be taken into account when assessing any potential liability of the calling party.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	**CG Docket No. CG 02-278**
	)	
	)	
Stage Stores, Inc. Petition for Expedited Declaratory Ruling Regarding Reassigned Wireless Telephone Numbers	)	

To: The Commission

COMMENTS OF WELLS FARGO

Wells Fargo respectfully submits these comments in support of the Stage Stores, Inc. Petition for Expedited Declaratory Ruling and requests that the Commission clarify that communications to a wireless number are outside the ambit of TCPA liability when the caller had prior express consent to call, but someone other than the person who provided the prior express consent answers the call.[1]

Wells Fargo has offered support for two different approaches for relief from TCPA liability for this narrow class of "wrong number calls." In the first instance, Wells Fargo seeks a clarification by the FCC that "called party" under the TCPA means "intended recipient." If the Commission chooses not to move forward with that approach, then, in the alternative, Wells Fargo supports a

[1] Stage Stores, Inc. Petition for Expedited Declaratory Ruling Regarding Reassigned Wireless Numbers, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed June 3, 2014)("Stage Stores Petition"). Wells Fargo also supports similar petitions. *See* United Healthcare Services, Inc. Petition for Expedited Declaratory Ruling Regarding Reassigned Wireless Numbers, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed Jan. 16, 2014)("United Healthcare Petition"); Petition for Rulemaking of ACA International, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278 (filed Jan. 31, 2014).

safe harbor that grants both retroactive and limited prospective relief for callers who previously obtain appropriate consent, act in good faith in dialing the telephone number provided by the customer – with no intent to call any person other than the individual who had provided consent to be called – and someone other than the person who provided that prior express consent happens to answer that call.

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," however, Wells Fargo emphasizes the importance of providing retroactive relief at a minimum to entities that implemented safeguards and procedures reflecting the good faith of the calling party in attempting to contact the person who provided prior express consent to be contacted. In furtherance of this approach, Wells Fargo suggests ideas for the types of indicators that would support a determination that a call falls within a "safe harbor" exception and would therefore qualify for retroactive relief. Wells Fargo also notes the importance of making sure that medium- and smaller-sized companies not be burdened by unduly arduous or rigid standards.

I. Background

Founded in 1858, Wells Fargo is a global company providing personalized banking, insurance, investment, mortgage, and consumer finance services and guidance through a variety of channels making communications convenient for its customers – through more than 10,000 stores; 12,000 ATMs; an accessible, interactive website; online mobile applications; social media platforms; and via telephone – across the United States and in 34 other countries around the world. Specifically, Wells Fargo is focused on accommodating the unique needs of each customer, simplifying financial transactions to allow customers 24-hour targeted and speedy access to a panoply of accounts, and discovering and implementing methods for improving customers' overall banking experience. Most importantly, Wells Fargo supports financial innovation and customer

choice – especially with regard to the way in which customers choose to access and stay abreast of changes to their Wells Fargo accounts.

Wells Fargo uses these various technologies to communicate with its clients for any number of reasons, the most important of which is to convey important, time-sensitive information. For example, 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 for other reasons that benefit consumers.[2] Allowing customers to interact with the company via their mobile phones and to receive alerts and other communications via text are important ways in which Wells Fargo uses modern technology to educate and inform its consumers.

Wells Fargo has implemented and continues to adopt evolving mechanisms to inform consumers and to properly obtain their consent prior to dialing any mobile phone number using an automated telephone dialing system.[3] Consistent with various federal laws, such as the Consumer Financial Protection Bureau servicing rules and the government's Home Affordable Modification Program, banks and loan services are required to communicate with their customers with increasing frequency.[4] Thus, the use of modern technology is critical not only to making calls, but also to staying compliant with the myriad federal, state, and even local laws and rules that govern such communications.

Wells Fargo believes it is appropriate to expect companies to design safeguards and procedures to obtain appropriate consent, make consumers aware that they are providing consent to

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

[3] *See* 47 U.S.C. § 227.

[4] Wells Fargo May 15 Ex Parte at 2.

call their cell phone, and make a meaningful effort to facilitate accurately calling the number expressly consented to by the customer.[5] But from a policy perspective, it is important for the FCC to recognize that it is impossible to use a manual system to engage in these types of timely and regular structured communications with millions of customers, as there would be little control over the launch of the call, and it would be extremely difficult to track calls or ensure that calls comply with various state and local laws governing timing and frequency of calls. Also, placing a manual call prior to any other communication just to "confirm" the number is still correct simply cannot work in the real world – and would itself be an irritant to consumers.

As a result, while Wells Fargo – like many other businesses both large and small serving the needs of a 21st century client base – must adapt to new technologies for the sake of its customers and in a way that best facilitates normal and expected business communications. Similarly, regulatory agencies must similarly keep up with evolving needs through regulatory changes and clarifications that allow companies to improve the consumer experience in a way that is consistent with improvements to technology and with common sense.

Wells Fargo has seen a significant up-tick in the number of cases (both putative class actions and individual cases) where the TCPA is the primary cause of action. Case filings increased over 300% from 2010 to present, and the cost of outside counsel cost to defend these cases – many of which are frivolous – has been nearly $3 million dollars. This figure excludes the cost of the internal resources that are devoted to managing these cases and mitigating the related risk; nor does it include the cost of settlement of the cases (the majority of which are confidential).[6]

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[5] *See* Wells Fargo Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 at 9 (filed July 31, 2014)("Wells Fargo July 31 Ex Parte").

[6] Wells Fargo May 15 Ex Parte at 4.

For example, Wells Fargo is currently facing a putative nationwide class action lawsuit stemming from calls placed to a cellular phone number provided to Wells Fargo by its customer on an application for a consumer credit card.[7] The cell phone number changed hands soon after the application for credit was submitted, and without Wells Fargo's knowledge. Wells Fargo called the number on the credit application, intending to reach the person who had given express consent to be contacted at that exact number. Wells Fargo made prerecorded calls to the intended recipient that included clear and specific opt-out instructions. As soon as Wells Fargo's agents were informed that the number had changed hands they quickly updated Wells Fargo's system to ensure that not a single additional call was placed to that number again. Nonetheless the person who happened to answer the calls sued Wells Fargo under the TCPA, bringing a purported nationwide class action against the company on behalf of every single non-Wells Fargo customer that received an autodialed call from Wells Fargo over the last four years.

Whether or not Wells Fargo will face liability in *Heinrichs* turns on how the FCC interprets the term "called party."[8] As discussed in more detail below, if the "called party" for purposes of the express consent exemption is the person who provided Wells Fargo express consent, and therefore the person that Wells Fargo was attempting to contact in good faith based on that express consent, then the company is not liable. Unfortunately, courts have interpreted the phrase "called party" in at least four different ways, so it is impossible to understand definitively the current state of the law.[9]

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

[8] *See infra* note 9 for more detailed discussion of how "called party" has been interpreted by courts.

[9] Cases finding that "called party" means "intended recipient" include *Cellco Partnership v. Dealers Warranty, LLC*, No. 09–1814 (FLW), 2010 WL 3946713 at *10 (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 WL 2382400 at *4 (S.D.N.Y. Jun. 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

Accordingly, Wells Fargo asked the district court to stay the *Heinrichs* litigation on the grounds that the Commission has primary jurisdiction to interpret and implement the TCPA to assure a uniform rule of law.[10]

II. Callers Should Not Be Held Liable For Calls To Numbers For Which Prior Express Consent Has Been Provided, But Which, Through No Fault Of The Caller, The Caller Reached Someone Other Than The Intended Recipient.

Wells Fargo agrees with Stage Stores and others that callers should not be held liable for calls made to numbers for which prior express consent was 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 number. As Wells Fargo has explained previously in this docket, the company makes exceptional efforts to ensure it is contacting customers that have provided prior express consent to receive calls.[11] It is common sense that companies have no way of predicting whether someone other than the person who provided consent for the call will happen to answer the phone. Common sense also dictates that TCPA liability should not attach simply because a person other than the intended recipient of the call happens to pick up the phone, because the subscription to the phone number is not held under the name of the person who provided consent (for example with a

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(D.D.C. 2008) (unintended recipient of faxes lacks sanding to sue). However, there are also cases finding "called party" means "recipient" - *see, e.g., Meyer v. Portfolio Recovery Associates, LLC*, 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 (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").

[10] The district court granted the motion and ordered the case stayed for six months to give the Commission time to consider these important issues.

[11] Wells Fargo May 15 Ex Parte at 2-3.

family plan or a work-related phone[12]), because the consumer provided the wrong phone number, or because the number is transferred to a different subscriber without the knowledge of the caller.[13] Ultimately, Wells Fargo must rely – as is contemplated by the TCPA statutory scheme – on the prior express consent it receives to make a phone call to a particular person at a particular phone number.

For these reasons, and as described more fully below, the FCC should clarify that calls made to wireless numbers (where the call was made in good faith to a customer that had given prior express consent to make the call) are not subject to liability under the TCPA. Notwithstanding the efforts Wells Fargo has made, it is impossible to ensure 100% accuracy, and compliance-oriented companies continue to be unfairly subjected to devastating liability under the TCPA. Failure to act in this regard will only facilitate the continued and unchecked boom of frivolous and costly TCPA lawsuits currently clogging up an already saturated court system.

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[12] *See* Wells Fargo May 15 Ex Parte 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 Offerand 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.)").

[13] To complicate matters, neither the Commission nor any other agency has required the creation and maintenance of a national subscriber database that matches names and numbers to ensure accuracy in this regard.

It is critical for the Commission to understand that Wells Fargo is not requesting permission to call, in perpetuity, reassigned numbers that no longer belong to the parties it originally intended to reach. Indeed, once Wells Fargo is informed that the number no longer belongs to the intended recipient, it stops contacting that number – to avoid TCPA liability, to refrain from disturbing consumers that are not Wells Fargo clients, and because Wells Fargo derives no benefit from wasting the time, money, and effort to dial the wrong number. Wells Fargo simply requests that the FCC should remove from TCPA liability any call made in good faith to the number last provided by the intended call recipient, *until such time when* (1) the customer updates its contact information, or (2) the company is notified that the number dialed is no longer valid for contacting the intended recipient.

III. It Is Impossible To "Solve" For Reassigned Or Wrong Number Calls, And Absent Specific Notification By The Intended Recipient, Companies Have No Way Of Definitively Determining If A Number Has Been Transferred To A Different Person.

CTIA – The Wireless Association confirms 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."[14] Wells Fargo agrees, and reiterates the need for relief from TCPA liability given the lack of a reassigned number database, the fallibility of the solutions currently on the marketplace, and the unavoidable need to rely on consumers for updated information.

[14] 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 United Healthcare Petition at 2)(describing targeted informational calls for which there is no incentive or benefit in contacting anyone other than the intended recipient).

There is no public directory of reassigned numbers, and consumers may change numbers without notifying callers. As a result, 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.[15] Nor is there access to real-time mobile carrier data. In fact, even when a number has not been reassigned, 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. Also, family plans and work-related plans regularly contain multiple cell phone numbers under a single subscriber. Consequently, consumer identification information (such as name and address data) may not correlate to the phone number provided and to the person who provided prior express consent.

Equally critical, there is no viable market solution or database that solves the challenges created by reassigned cell phone numbers.[16] The "solutions" being advertised do not actually "solve" the issue, and do not provide sufficient accuracy to adequately mitigate litigation risk. For example, carrier databases that contain dissimilar and inconsistent amounts of consumer detail do not designate a consumer name to every cell phone number in a plan. In fact, the use of "family plans" or "business plans" through which one person or entity may be listed as the "subscriber," covering various unnamed members of the family, or various employees, are common and not accounted for in commercial databases. And many times, carriers are restricted from sharing consumer cell phone information due to privacy laws. Also, while some companies may tout their ability to determine in real time whether a number has been reassigned, such solutions do not

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[15] ACA Comments, *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 at 2 (filed Mar. 10, 2014).

[16] *See* CTIA March 10 Comments at 4 (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").

effectively mitigate the risk of wrong number calls.[17] Vendor offerings claiming to have solutions are imperfect and have unacceptable false-positive identifications.[18] Many vendors simply 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, determining probability is inadequate in the face of massive class litigation expense.

Wells Fargo and other companies subject to the TCPA are therefore left to rely on their customers to provide updated contact information – which unfortunately does not always happen. Relying on the consumer to (1) provide the correct information in the first place and (2) update that information when it changes, is especially important in a climate where 57% of U.S. households rely either exclusively or predominantly on wireless telephone service,[19] and where telephone companies "recycle as many as 37 million telephone numbers each year – approximately one-eighth of all wireless phone numbers."[20]

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[17] Interestingly, presumably in response to recent increases in litigation, "solutions" for removing litigious consumers from company contact lists are also being advertised. For example, one advertisement states: "Introducing the Litigious Consumer Phone Scrub Interested in identifying potentially litigious consumers by phone number? WebRecon now offers that! Isolate and remove the riskiest phones from your dialer prior to every dialing campaign, and preempt potential TCPA/FDCPA litigation. More information here: WebRecon Litigious Consumer Phone Scrub."

[18] On average, 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 number. Of the remainder, sometimes the names are mismatched, and abbreviations or nicknames are included, or they are unable to account for family or business plans. As a result, these "solutions" are unreliable, and can undermine the efficiencies that using an autodialer provides in the first place. Wells Fargo May 15 Ex Parte at 4.

[19] Centers for Disease Control and Prevention, National Health Interview Survey at 3, "Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2013 (July 2014) (available at http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201407.pdf).

[20] 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 Comments, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991;*

IV. The Commission Must Clarify That "Called Party" Means "Intended Recipient."

Congress clearly and specifically intended "prior express consent" to be a defense under the TCPA.[21] The only rational and logical interpretation of "called party" within the context of the TCPA subsection allowing for autodialed calls when the caller has obtained the "prior express consent of the called party" is "intended recipient."[22] Interpreting "called party" to mean anything other than "intended recipient" in the context of the TCPA would be contrary to common sense, and would eviscerate the statutory defense that allows calls when the caller has obtained the "prior express consent of the called party." 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. Not surprisingly, therefore, the first three district courts to look at the issue all interpreted the phrase to mean "intended recipient."[23]

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 paces 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 whomever happens

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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).

[21] 47 U.S.C. § 227(b)(1)(A)(iii).

[22] *See generally* Wells Fargo Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (filed July 21, 2014)("Wells Fargo July 21 Ex Parte").

[23] *See Kopff v. World Research Grp., LLC*, 568 F. Supp. 2d 39, 40-42 (D.D.C. 2008)(only intended recipient of transmission has standing to sue); *Leyse v. Bank of Am.*, No. 09-7654, 2010 WL 2382400 at *4 (S.D.N.Y. June 14, 2010) (same); *Cellco Partnership v. Dealers Warranty, LLC*, No. 09-1814 (FLW), 2010 WL 3946713 at *10 (D.N.J. Oct. 5, 2010) (finding that the phrase "called party" means "the intended recipient of the call").

> 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.[24]

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).[25]

It is true that the Seventh Circuit[26] rejected the "intended recipient" interpretation and follows a "subscriber" approach similar to the Eleventh Circuit.[27] But as the phrase "called party" is undeniably ambiguous, this ruling does not prevent the FCC from adopting a contrary view.

There is good reason not to follow the analysis adopted in *Soppet*. *Soppet*'s approach is too simple, and does not make sense in context. There the Court merely observed that "called party" means "subscriber" as used in a *different* section of the TCPA (section 227(b)(1)(A)(iii)),[28] and then states without analysis that courts are to presume that the use of the same phrase means the same thing throughout a statute.[29] It thus concludes that "called party" must mean "subscriber" for purposes of the express consent exemption too.[30]

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[24] *Leyse*, 2010 WL 2382400 at *12-13.

[25] *Cellco Partnership*, 2010 WL 3946713 at *34-35.

[26] *See Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 640 (7th Cir. 2012).

[27] *Osorio v. State Farm Bank, F.S.B.*, 746 F. 3d 1242 (11th Cir. 2014).

[28] *Soppet*, 679 F. 3d at 639.

[29] *Id*. at 639-640.

[30] *Id*. at 640.

Soppet's formulaic approach does not take into account the policy considerations at the heart of the Commission's work. This is especially true as the United States Supreme Court recently chided the Environmental Protection Agency not to thoughtlessly apply the credo "the same word means the same thing" when context – and common sense – reflect that Congress intended otherwise.[31]

The proper analysis – and the one the FCC should follow – is to consider the purpose of the phrase "called party" in the context of the "express consent" exemption so as to give the phrase the meaning that best comports with the purpose of the exemption and the application of the statute generally.[32] Giving due consideration to the meaning of the phrase "called party" in the specific context of the consent exemption – which *Soppet* simply does not do – leads to the conclusion that "called party" means "the person the dialer was attempting to reach." This is so because the purpose of the phrase is to define the individual from whom a caller can reliably obtain consent for the purpose of placing subsequent calls.

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."[33] In its recent *Utility Air Regulatory Group* decision, the Supreme Court explained that "words of a statute must be read in their context and with a view to their place in the

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[31] *Utility Air Regulatory Group v. E.P.A.*, 134 S.Ct. 2427, 2441 (June 23, 2014) (sternly admonishing the EPA that "the presumption of consistent usage 'readily yields' to context"); *see also Roberts v. Sea-Land Serv., Inc.*, __ U.S. __, 132 S.Ct. 1350, 1360 (2012) ("[T]he presumption that 'identical words used in different parts of the same act are intended to have the same meaning ... readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.'")(citing *General Dynamics Land Systems, Inc. v. Cline*, 540 U. S. 581, 595, 124 S. Ct. 1236, 157 L. Ed. 2d 1094 (2004));

[32] *Roberts*, 132 S. Ct. at 1360; *Utility Air Regulatory Group*, 134 S. Ct. at 2441.

[33] 47 U.S.C. § 227(b)(1)(A)(iii).

overall statutory scheme,"[34] 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."[35] The Court also reminded government agencies to regulate in a way that is consistent with "common sense."[36] The Court emphasized the even more "fundamental canon 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."[37] The Court further explained that "the presumption of consistent usage '*readily yields' to context*."[38] 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 inconsistent with the Supreme Court's recent ruling. Accordingly, the Commission must evaluate the phrase "called party" in the context of the "prior express consent" statutory defense.[39]

The Commission is uniquely empowered to issue this much needed clarification and provide a consistent national interpretation that assures uniformity across the country, and that has retroactive effect. In fact, the FCC not only has the power to set forth a consistent, national definition of "called party," but given the differing court interpretations of the term, it has an urgent responsibility to do so.

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[34] *Utility Air Regulatory Group,* 134 S. Ct. at 2421 (citing *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007)).

[35] *Id.* at 2442 (citing *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988)).

[36] *Id.* at 2441.

[37] *Id.* (citing *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000)).

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

[39] *See* Wells Fargo July 31 Ex Parte at 4.

Federal courts have interpreted the phrase "called party" in four different ways. As described above, 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. Other courts have held differently, finding that "called party" means "current subscriber," "regular user of the phone," and/or "the person who happened to answer the phone." Wells Fargo discusses each of these interpretations below.

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, does not serve the purpose of the TCPA, and is not what Congress could have intended – especially given the proliferation of family plans and business accounts. Interpreting "called party" as the "subscriber" makes no sense at all in the "family plan" context, or even taking into account other provisions within the TCPA incorporating the term "called party."[40] 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 their contact information on which to be called or texted.[41]

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[40] For example, the TCPA requires that a system sending a pre-recorded message to a phone line release the line "within 5 seconds of the time … the called party has hung up …." 47 U.S.C. § 227(d)(3)(B). A subscriber to a phone line that does not actually "use" a phone could never "hang up" because she/he does not physically possess the phone at the time of the call – someone else does. Hence, in this particular provision, "called party" can only mean "answerer," not "subscriber."

[41] Such scenarios are not far-fetched in litigation, either. *See e.g.*, *Jordan v. ER Solutions, Inc.*, 900 F. Supp. 2d 1323, 1325 (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 (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.)

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 "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.

It is clear that of these four different court interpretations, the only workable standard is "intended recipient," but courts continue to struggle with the phrase, resulting in a cottage industry of TCPA class action litigation, where plaintiffs' attorneys take advantage of the statute's ambiguity. Wells Fargo recently submitted an ex parte notice in this proceeding bringing to the Commission's attention *Breslow v. Wells Fargo*,[42] and *Osorio v. State Farm Bank, F.S.B.,*[43] 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.[44]

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."[45] Ultimately, given the absence of FCC guidance on this point, the *Breslow I* Court concluded based on legislative history that the term

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[42] *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*).

[43] *Osorio*, 746 F.3d at 1251.

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

[45] *Breslow I*, 2014 U.S. App. Lexis 10457 at *8.

"called party" means the "subscriber to the cell phone service or the user of the cell phone called."[46] 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."[47] 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.

V. Alternatively, Wells Fargo Suggests The Commission Adopt A Safe Harbor Framework That Is Flexible And Allows For Both Prospective And Retroactive Relief, Or Provide Guidelines Pursuant To Which A Waiver Would Apply

If the Commission does not move forward with a clarification of the term "called party," then Wells Fargo suggests a flexible safe harbor framework that allows for either retroactive relief, or Commission-provided guidelines for a waiver from liability under certain circumstances. Wells Fargo believes that 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. As explained previously, 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

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[46] *Id*. at *6.

[47] *Breslow II*, 2014 U.S. App. Lexis 10623 at 6.

no longer apply.[48] 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. Wells Fargo reiterates that a retroactive exemption is necessary, and/or guidelines for a waiver framework for past calls made in good faith. 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 medium- and small-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.

Good faith callers that take precautionary measures in contacting the number given by the consumer who provided prior express consent should have the opportunity to avail themselves of the safe harbor both retroactively and prospectively. Wells Fargo is not advocating a one-size-fits-all approach; it is better for companies to 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, so long as they are lowering the possibility of calling someone other than the party the company intends to call.[49] Thus, 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 texting, prerecorded voice calling, and autodial

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[48] Wells Fargo July 31 Ex Parte at 8.

[49] *See, e.g.,* United Healthcare Services, Inc. Notice of Ex Parte, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 at 5 (filed July 28, 2014)(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").

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 also believes it is appropriate to expect companies to make a meaningful effort to facilitate accurately calling the number expressly provided by the customer, and has described its practices in more detail above. Wells Fargo further believes that companies should make it simple for consumers to edit and update contact information, and to stop unwanted calls. Companies can do this by providing opportunities to access and update account information digitally, i.e., on the web or via an application on a mobile device, or using postal mail, or other means that might be easy-to-use methods for updating contact information. Also, companies can send text messages (with a "QUIT" or "STOP" command) and/or to allow consumers to update their information via text. In addition, prerecorded calls can include instructions that consumers must follow to report that the wrong person or number has been reached.

Finally, Wells Fargo believes the Commission should provide concrete 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.

VI. Conclusion

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, and reminds the Commission that the *Heinrichs* lawsuit mentioned above has been stayed for the pendency of this proceeding.

Wells Fargo emphasizes in the first instance that the term "called party" should be interpreted and clarified to mean "intended recipient" of the call, thus exempting from liability any call made in good faith to the contact number expressly provided by the intended call recipient, until such time when the (1) customer updates its contact information, or (2) the company is notified that the number dialed is no longer valid for contacting the intended recipient. By interpreting the phrase "called party" as "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. If the Commission chooses instead to implement a safe harbor framework for this narrow category of calls, then it is critical that the Commission implements a flexible approach and provides retroactive relief, or a corresponding waiver framework, for callers that have demonstrated indicia of attempting in good faith to contact a person at a number provided for such contact. The Commission must act promptly to provide clarity on this point in order to ensure a consistent, national, and rational framework for governing liability for this category of wrong number calls.

Respectfully submitted,

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