

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of:)	GC Docket No. 02-278
)	
Petition of Akin Gump Strauss Hauer & Feld LLP for Clarification)	GC Docket No. 05-338
)	

**PETITION OF AKIN GUMP STRAUSS HAUER & FELD LLP FOR
EXPEDITED CLARIFICATION OR DECLARATORY RULING**

Akin Gump Strauss Hauer & Feld LLP (“Akin Gump”)¹ requests that the Commission expeditiously clarify the definition of “sender” under the “Junk Fax Rules”² of the Telephone Consumer Protection Act of 1991 (“TCPA”), pursuant to Sections 1.41 and/or 1.2 of the Federal Communications Commission (the “Commission” or “FCC”) rules.³ As the Commission knows, there is confusion in the courts about how to interpret the Commission’s regulations with respect to “sender” liability in Junk Fax cases; there also are pending FCC petitions that implicate identifying the liable sender.⁴ In this petition, Akin Gump adds to the pending petitions by asking

¹ Akin Gump has a nationwide practice representing businesses with regard to compliance with the FCC’s rules and regulations implementing the TCPA and defendants in class action litigation concerning alleged violations of the TCPA.

² The rules regarding unsolicited fax advertisements, or “junk faxes” are found in 47 C.F.R. § 64.1200(a)(4), (f).

³ 47 C.F.R. §§ 1.41, 1.2.

⁴ Issues related to “sender” liability have been raised with regard to two petitions for declaratory ruling filed in this docket: *Insights Association, Inc. et al., Petition for Declaratory Ruling*, CG Dkt. No. 02-278 (filed Oct. 30, 2017) (*Insights Petition*) and *RingCentral, Inc., Petition for Expedited Declaratory Ruling*, CG Dkt. No. 02-278 (filed July 6, 2016) (*RingCentral Petition*). The RingCentral Petition directly requests the Commission to clarify its “sender” definition for unsolicited fax advertisements. *RingCentral Petition* at 1. Although the underlying litigation has now been resolved by the Ninth Circuit Court of Appeals, the Ninth Circuit did not address the FCC’s “sender” definition. See *Supply Pro Sorbents, LLC v. RingCentral, Inc.*, No. 17-16528 (9th Cir. Nov. 20, 2018). This aspect of RingCentral’s petition remains unresolved. The Insights Association petition did not directly raise the issue of sender liability under the Junk Fax Rules, but in comments to that petition, Anderson + Wanca, a plaintiffs’ firm in TCPA class action litigation, implied that the Commission’s sender definition imposes strict liability on any entity whose goods or services are advertised or promoted in an unsolicited fax, a claim that would read out half of the definition of “sender” under the Junk Fax Rules. *Anderson + Wanca Comments on Petition for Declaratory Ruling of Insights Association and AAPOR*, GC Dkt. No. 02-278, 7-8 (filed June 22, 2018).

the Commission to clarify what it meant in the *2006 Junk Fax Order*,⁵ when it said that the party whose goods and services are advertised in an unsolicited fax *is not always* the liable sender:

We . . . emphasize that under the Commission’s interpretation of the facsimile advertising rules, the sender is the person or entity on whose behalf the advertisement is sent. In *most* instances, this will be the entity whose product or service is advertised or promoted in the message. As discussed above, the sender is liable for violations of the facsimile advertising rules. . . .⁶

Sound logic supports the approach articulated by the FCC in 2006 because either the advertiser or the fax broadcaster could be liable for TCPA violations, and the FCC’s TCPA regime recognizes that responsible companies should be able to protect themselves against exposure to substantial damage awards.⁷ Notwithstanding this sound logic, however, the Commission did not explain the instances in which the exception would apply, and that is the clarification Akin Gump seeks in this petition.

Absent Commission clarification, numerous advertisers around the country have fallen victim to unscrupulous, dishonest or rogue fax broadcasters, and have been left open to liability in the courts even though they were not the source of offending TCPA conduct. Indeed, many advertisers over the years have fallen victim to unscrupulous fax broadcasters that misrepresent their credentials and business practices in order to induce advertisers to do business with them,

⁵ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd. 3787 (2006) (“*2006 Junk Fax Order*”).

⁶ *Id.* at 3808 para. 39 (emphasis added).

⁷ See, e.g., *Advanced Methods to Target and Eliminate Unlawful Robocalls*, GC Docket 17-59, Second Report and Order, FCC 18-177, Sec. E (adopted Dec. 12, 2018) (adopting a safe harbor from TCPA liability for callers that chose to use a reassigned numbers database because, inter alia, not adopting the safe harbor would demand the impossible of callers and could cause callers to be overly cautious and stop making wanted, lawful calls); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al.*, CG Dkt. No. 02-278, WC Dkt. No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8007-10, paras. 85-92 (2015) (recognizing the Commission’s duty to make compliance feasible) (“*2015 Declaratory Ruling and Order*”).

and then go on to purposefully or recklessly commit TCPA violations.⁸ When such fax broadcasters engage in deception, fraud, blatant contract violations and misrepresentations, their clients (the advertisers) are stripped of their ability to control the fax campaign or ensure compliance with the TCPA. In these instances, it is only equitable that the fax broadcaster alone should be held liable.⁹ Providing this clarification will help discourage exploitative practices by rogue fax broadcasters and trial lawyers who abuse the TCPA’s private right of action, both of which victimize innocent advertisers.¹⁰

Akin Gump requests, therefore, that the Commission clarify that the exception articulated in the *2006 Junk Fax Order* applies, and a fax broadcaster is the sole liable “sender,” when it both commits TCPA violations and engages in deception or fraud against the advertiser (or blatantly violates its contract with the advertiser) such that the advertiser cannot control the fax campaign or prevent TCPA violations. This petition, other pending petitions for declaratory ruling, and a series of divergent cases in the federal district courts and circuit courts, all call out for Commission clarification and guidance about the liable “sender” under the Junk Fax Rules.

⁸ See, e.g., *Siding & Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886, 888 (6th Cir. 2016) (noting that the fax broadcaster assured the advertiser that it had a pre-existing relationship with the potential fax recipients and all faxes would be “100 percent legal”) (“*Siding*”).

⁹ If the advertiser is later put on notice of, and recklessly disregards, obvious TCPA violations by its fax broadcaster and subsequently fails to act to stop that behavior, then it may be reasonable under appropriate circumstances for the advertiser and the fax broadcaster to be jointly liable for faxes sent after the advertiser learned of the violating conduct and failed to take appropriate remedial measures.

¹⁰ Chairman Pai has frequently cited use of the private right of action by plaintiffs’ lawyers to ensnare unsuspecting business owners in class action lawsuits as a further reason for the FCC to tread lightly in expanding the conduct that may produce liability under the TCPA. See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al.*, CG Dkt. No. 02-278, CG Dkt. No. 05-338, Order, 29 FCC Rcd. 13998, 14015 (2014) (Statement of Commissioner Ajit Pai, Concurring in Part and Dissenting in Part) (“Subjecting small businesses to crippling suits at the behest of predatory trial lawyers only serves the interests of those self-same lawyers, not the American public.”); *2015 Declaratory Ruling and Order* at 8072 (Dissenting Statement of Commissioner Ajit Pai) (noting that the FCC “could be shutting down the abusive lawsuits by closing the legal loopholes that trial lawyers have exploited to target legitimate communications between businesses and consumers.”).

I. THE REQUESTED CLARIFICATION IS GROUNDED IN SOUND JUDICIAL POLICY AND CONGRESSIONAL INTENT.

The requested clarification, offering protection for advertisers around the country who have fallen victim to unscrupulous fax broadcasters, is well-grounded in the judicial policy of preventing expensive and unnecessary litigation that causes rational actors to accept liability rather than undergo the expense of a trial.¹¹ More Junk Fax cases should be decided at the summary judgement phase. Commission clarification of the exception from the *2006 Junk Fax Order* will encourage this result, when it is the right result.

To be clear, a court declining to decide a TCPA case at the summary judgment stage almost always condemns a defendant to settle the case. As the Commission is aware, incentives to settle these cases before they go to trial are strong, even where the advertiser is not at fault, because of the substantial, and uncapped, statutory damages imposed by the TCPA.¹² The pressure to settle is even more pronounced in junk fax cases that require determination of “sender liability” because confusion about the law, which the FCC could clarify, “makes it difficult to accurately evaluate the strength of a defendant’s litigation position, which in turn creates added pressure on the

¹¹ See, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-64 (2007) (holding that in order to overcome dismissal an antitrust complaint must include enough factual matter to suggest that an agreement is made, and explaining that such a standard is warranted because of the high cost of discovery in antitrust cases and the judicial interest in preventing defendants from having to bare such costs in the face of a largely groundless claim); Fed. R. Civ. P. 56 adv. comm. note (1963) (“The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.”)

¹² See, e.g., Wahlquist, Becca J., U.S. Chamber Institute for Legal Reform, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages* 2-6 (Oct. 2013) available at http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF (explaining how quickly statutory damages under the TCPA can pile up in regard to a single marketing campaign and the resulting high motivation to settle class action TCPA lawsuits; and providing examples of settlement amounts). Since the publication of this report, Capital One settled a TCPA class action for a record \$75 million. Dena Aubin, *Bank of America in Record Settlement Over “Robocall” Complaints*, Reuters, Oct. 1, 2013, available at <http://in.reuters.com/article/2013/09/30/bankofamerica-robocalls-settle-idINL1N0HQ0HU20130930>.

defendant to settle the action.”¹³ Providing the requested clarification would clarify the scope of the law and offer courts the tool they need to decide these cases, when appropriate, at the summary judgement stage.

The requested clarification also is supported by Congressional intent. Congress directed the FCC, in crafting the Junk Fax Rules, to consider the “most effective methods of preventing facsimile advertising abuses.”¹⁴ Placing liability at the source of the offending behavior fulfills this legislative directive: it punishes the party abusing facsimile advertising and deters future abuses. Liability for violations of the Junk Fax Rules should be appropriately and justifiably laid at the “source of the offending behavior.”¹⁵ The exception to sender liability articulated in the *2006 Junk Fax Order* has the same goal. As the Eleventh Circuit noted in the *Sarris* case, “[b]y construing the sender as the party ‘on whose behalf facsimiles are transmitted,’ the FCC has placed liability at the source of the offending behavior that Congress intended to curtail.”¹⁶

II. THE REQUESTED CLARIFICATION ARISES DIRECTLY FROM THE FCC’S 2006 JUNK FAX ORDER AND IS SUPPORTED BY FCC POLICIES REGARDING TCPA LIABILITY.

When the FCC initially adopted rules implementing the TCPA, it made clear that “the entity or entities *on whose behalf* facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements.”¹⁷ Then, in its *2006 Junk Fax Order*,

¹³ Daniel T. Stabile, The “Strangest Statute” Chief Justice Roberts Has Seen: Uncertainties of Litigating TCPA “Junk Fax” Class Actions, 89 Fla. Bar J. 30 (2015).

¹⁴ H. Rpt. 102-317, at 25 (1991).

¹⁵ *Cin-Q Automobiles, Inc. v. Buccaneers Limited Partnership*, No. 8:13-CV-1592, 2014 U.S. Dist. LEXIS 174134, at *11-12 (M.D. Fla. Dec. 17, 2014) (citing *Palm Beach Golf Ctr.-Boca Inc. v. Sarris*, 771 F.3d 1274, 1287 (11th Cir. 2014) (“*Sarris*”)) (“*Cin-Q*”).

¹⁶ *Sarris*, 771 F.3d at 1287.

¹⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Dkt. No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd. 12391, 12407 para. 35 (1995) (emphasis added).

the FCC codified the definition of the “sender” of “junk faxes” for purposes of TCPA liability.¹⁸ A “sender,” the FCC explained, is “the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.”¹⁹ As discussed above, the Commission’s new reference to an entity whose goods or services are advertised or promoted in the message was not meant to serve as an independent basis of liability.²⁰ Rather, if the Commission intended to extend TCPA liability to a new group of persons and entities (an advertiser, for example, that did not authorize the facsimiles), the FCC could only have done so through a notice and comment rulemaking proceeding.²¹ No notice was given, however, nor comments requested, regarding expansion of the scope of “sender” liability under the FCC’s Junk Fax Rules.²² The Commission’s own statements since the adoption of the rule confirm that the focus of sender liability belongs to the party “on whose behalf” a message is sent. In a letter brief submitted to the Eleventh Circuit, the FCC stated, “[the 2006] codification is consistent with the Commission’s pre-existing uncodified interpretation that ‘the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements.’”²³

¹⁸ *2006 Junk Fax Order*, 21 FCC Rcd. at 3808 para. 39.

¹⁹ *Id.* at 3822 (codified at 47 C.F.R. § 64.1200(f)(10)).

²⁰ *See infra* notes 5-7 and accompanying text.

²¹ *Joint Petition Filed by Dish Network, LLC, et al. for a Declaratory Ruling Concerning the Telephone Consumer Protection Act*, 28 FCC Red 6574, 6586 (noting that in order to expand liability under the TCPA, the Commission would have to conduct a notice and comment rulemaking).

²² *See, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Dkt. No. 02-278, CG Dkt. No. 05-338, Notice of Proposed Rulemaking and Order, 20 FCC Rcd 19758 (2005) (not proposing a definition for “sender” under the Junk Fax Rules nor discussing or requesting comments on such a definition)

²³ Letter from Laurence N. Bourne, Counsel, Federal Communications Commission, to John Ley, Clerk of Court, United States Court of Appeals for the Eleventh Circuit (July 17, 2014) (ECF Dkt. No. 55) (“*Sarris Letter Brief*”).

In determining “on whose behalf” a facsimile advertisement was sent, many courts have focused on the extent and nature of the advertiser’s control over the fax broadcaster and final approval of the fax broadcasting campaign.²⁴ Where a fax broadcaster violates the TCPA, and the advertiser lacked the ability to control or supervise the fax broadcaster, either because of fraud, dishonesty, or the fax broadcaster’s blatant disregard for its contractual obligations to the advertiser, then the advertiser is not in control, and it would not be just to hold the advertiser liable for the fax broadcaster’s actions.

This is precisely the reasoning applied by the court in *Bridgeview*. In this case, the United States District Court for the Northern District of Illinois had before it a lawsuit brought against a defendant seeking to advertise his business within Terre Haute. He contracted a fax broadcaster for that purpose, and he approved the design and content of facsimiles to go to 100 individuals within Terre Haute. In a clear violation of those instructions, the fax broadcaster sent the approved faxes to almost 5,000 individuals within and outside of Terre Haute.²⁵

In determining which entity was the liable “sender” (the advertiser or the fax broadcaster), the district court focused on the meaning of the exception to sender liability in the *2006 Junk Fax Order* on which Akin Gump seeks clarity in this petition.²⁶ The court noted that “[t]he FCC itself does not appear to endorse a rule of strict liability because, as explained in the 2006 [*Junk Fax Order*], a person whose goods or services are advertised in an unsolicited fax will not always be a ‘sender.’”²⁷ The district court concluded that the phrase “on whose behalf,” taken together with

²⁴ See, e.g., *Bridgeview Health Care Ctr. Ltd. v. Clark*, No. 09-c-5601, 2015 U.S. Dist. LEXIS 45710, at *20-21 (N.D. Ill. Apr. 8, 2015) (citing *Sarris*, 771 F.3d at 1288), *aff’d on other grounds*, 816 F.3d 935 (7th Cir. 2016) (“*Bridgeview*”).

²⁵ See *Id.* at *2, 21; *Bridgeview Health Care Ctr. Ltd.*, 816 F.3d at 936, 939.

²⁶ See *Bridgeview*, 2015 U.S. Dist. LEXIS 45710 at *17.

²⁷ *Id.* at *19-20.

the FCC's exception to sender liability, required consideration of factors surrounding an advertiser's level of control over the fax broadcaster and the fax advertisements to determine whether the exception to sender liability should apply.²⁸ The district court found that the defendant advertiser did not direct the fax broadcaster to send faxes beyond Terre Haute. Quite the contrary, the advertiser had no reason to think or foresee the fax broadcaster would do so. In the district court's view, the faxes that were sent beyond Terre Haute were not sent "on behalf of" the advertiser. The advertiser in *Bridgeview* was plainly the victim of actions undertaken by its fax broadcaster, without its knowledge and contrary to its authorizations, and, as such, should not incur any liability based on unforeseeable rogue actions.

The district court in *Bridgeview* reached the right result, and was subsequently upheld by the Seventh Circuit, but not until after the advertiser was forced to endure an expensive trial and appeal. Providing the clarification requested by Akin Gump herein will result in more courts applying the exception, where appropriate, to relieve innocent advertisers of sender liability at the summary judgment phase.²⁹

²⁸ *Id.* at *20-21.

²⁹ For example, in *Cin-Q*, the district court concluded, after determining that the defendant was the victim of a "tortured path of lies and deceit" by the fax broadcaster(s), that assessing sender liability should focus on identifying the source of the offending behavior. *Cin-Q*, 2014 U.S. Dist. LEXIS 174134, at *8. The judge seized on the exception articulated in the 2006 *Junk Fax Order* on which Akin Gump seeks clarification, and said: "[The 2006 Junk Fax Order] implies that a necessary condition to being a "sender" is that the facsimile is sent on their behalf, and that, in at least some instances, an entity whose product or service is advertised or promoted will not be a sender. This speaks to a much more reasonable interpretation . . ." *Id.* at *5-6. Unfortunately, however, in the absence of FCC guidance about how to apply the exception, the district court declined to determine the issue on summary judgement and rather chose to interpret the Eleventh Circuit's decision in *Sarris* to require that the question of sender liability go to a jury. In *Sarris*, the Eleventh Circuit stated ". . . under the summary judgment standard, the question of on whose behalf the fax advertisement was sent is a question to be decided by a jury." *Sarris*, 771 F.3d at 1287-88. In *Cin-Q*, Judge Porcelli cites to this quote and concludes ". . . the Eleventh Circuit has unflinchingly defined the matter as engendering "a question of fact to be decided by a jury." *Cin-Q*, 2014 U.S. Dist. LEXIS 174134, at *25-26. Guidance from the FCC clearly articulating that fraud by a fax broadcaster triggers the exception to sender liability, however, would prevent courts dealing with unscrupulous fax broadcasters from feeling compelled to send to the jury the question of "on whose behalf" a fax was sent.

III. THE REQUESTED CLARIFICATION WOULD FURTHER THE PUBLIC INTEREST BY RESOLVING JUDICIAL CONFUSION AND THEREBY BRING UNIFORMITY AND EQUITY TO THE TREATMENT OF ADVERTISERS IN JUNK FAX CASES.

As the Commission is aware, there is substantial confusion in the federal courts regarding the scope of sender liability in junk fax cases and application of the exception articulated in the *2006 Junk Fax Order*. In fact, there is conflict among the, Sixth, Seventh, and Eleventh Circuits regarding how to determine the liable “sender” when a fax is transmitted by a party other than the entity whose goods and services are advertised.³⁰ District courts in the First, Eighth, and Ninth Circuits also have adopted divergent standards for “sender” liability that fall somewhere between the Seventh Circuit’s agency approach and the Sixth Circuit’s strict liability approach.³¹ Unfortunately, in all of these situations, the advertisers are often forced to either endure an expensive and risky trial or accept liability early on through a settlement. The result is divergent treatment for innocent advertisers based simply on the venue of their case and whether or not the subject fax was sent before or after the FCC codified its sender definition in the *2006 Junk Fax Order*.³² The FCC could resolve this judicial confusion by providing the clarification requested by Akin Gump.

³⁰ *Compare Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 937 (7th Cir. 2016) (holding that “agency principles are properly applied” to determine if a party is the directly liable sender of a fax advertisement), *with Imhoff Investment, L.L.C. v. Alfocino, Inc.*, 792 F.3d 627, 634 (6th Cir. 2015) (concluding that direct liability for violations of the TCPA attaches to the entity whose goods are advertised, without any need to ascertain the entity “on whose behalf” a fax advertisement was sent) (“*Imhoff*”), and *Sarris*, 781 F.3d at 1257-58 (adopting a multifactor test for determining “on whose behalf” a fax advertisement was sent aimed at placing liability at the source of the offending behavior).

³¹ *See Physician’s Healthscore, Inc. v. Vertex Pharms., Inc.*, 247 F. Supp. 3d 138 (D. Mass. 2017) (citing to *Imhoff* and *Sarris* in holding that “the only relevant consideration” in determining sender liability is whether “the defendant has hired an independent contractor to transmit facsimiles advertising the defendant’s goods or services.”); *Bais Yaakov v. Varitronics, LLC*, Civil No. 14-5008, 2015 U.S. Dist. LEXIS 44016, at *__ (D. Minn. Apr. 3, 2015) (following *Sarris* and *Cin-Q* in rejecting strict advertiser liability); *Supply Pro Sorbents, LLC v. RingCentral, Inc.*, No. C 16-02113, 2016 U.S. Dist LEXIS 140033, at *__ (N.D. Cal. Oct. 7, 2016) (generally following *Siding* to hold that fax advertisers are strictly liable under the FCC’s sender definition).

³² For example, although both *Imhoff* and *Siding* are Sixth Circuit cases in which the defendant hired a fax broadcaster to send fax advertisements on its behalf, in *Imhoff* the Sixth Circuit held that the defendant was

IV. CONCLUSION

Without FCC guidance, the actions of fraudsters and “rogue fax broadcasters” will continue to damage advertisers who have had the misfortune to be associated with them, and to give rise to nuisance suits by out of control plaintiffs firms. Providing the clarification requested by Akin Gump will protect innocent advertisers from being forced to settle meritless TCPA cases, and embolden courts to offer relief to innocent advertisers at the summary judgement phase.

Akin Gump requests that the Commission clarify that the exception articulated in the *2006 Junk Fax Order* applies, and a fax broadcaster is the sole liable “sender,” when the fax broadcaster both commits TCPA violations and engages in deception or fraud against the advertiser (or blatantly violates its contract with the advertiser) such that the advertiser cannot control the fax campaign or prevent TCPA violations. This petition, other pending petitions for declaratory ruling, and a series of divergent cases in the federal district courts and circuit courts, all call out for Commission clarification and guidance about the liable “sender” under the Junk Fax Rules.

Date: February 26, 2019

Respectfully submitted,

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strictly liability for any TCPA violation committed by the fax broadcaster merely because its goods were advertised in those faxes whereas in *Siding* the Sixth Circuit instructed the district court to examine the amount of control the defendant exerted over the fax broadcaster in order to determine whether the fax broadcaster had sent the fax “on behalf of” the defendant. *Imhoff*, 792 F.3d at 643; *Siding*, 822 F.3d at 891-96. The stated basis for this disparate treatment was merely that the faxes in *Siding* were sent prior to 2006. *Id.*