

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

In the Matter of:

Akin Gump Strauss Hauer & Feld LLP
Petition for Expedited Clarification or
Declaratory Ruling

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) CG Docket No. 02-278

) CG Docket No. 05-338
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REPLY COMMENTS OF AKIN GUMP STRAUSS HAUER & FELD LLP

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EXECUTIVE SUMMARY

Akin Gump's Petition in this proceeding makes a simple request – please explain and clarify what the Commission meant in the *2006 Junk Fax Order*, when it said: “We take this opportunity to 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.” Akin Gump asks the Commission to clarify or provide examples of the relevant “instances” in which the fax broadcaster, and not the advertiser, is the liable “sender” – instances in which the fax broadcaster has so broken the control of the advertiser over the fax campaign that it must be said that the fax advertisement was sent “on behalf of” the fax broadcaster.

In these reply comments, Akin Gump is pleased to note that most commenters agree with Akin Gump that the Commission should clarify when the liable “sender” of a facsimile advertisement is *not* the advertiser. Most commenters also agree with Akin Gump that one of the “instances” in which the liable sender is not the advertiser is 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. In this situation, it is only equitable that the fax broadcaster, alone, is liable for any TCPA violations it commits.

The only opposition to Akin Gump’s request comes from two plaintiff’s firms who suggest the inequitable result that advertisers always should be liable for junk fax TCPA violations, even if they are victims of fraud or sabotage. Their position is that advertisers should be held liable even when a fax broadcaster goes rogue, even when control between the fax broadcaster and the advertiser is broken by the fraud and deceit of the fax broadcaster, even when the advertiser is kept

so in the dark that it does not know about and cannot prevent TCPA violations. One commenter suggests that any advertiser that engages with a fax broadcaster should be held strictly liable for the TCPA violations regardless of the level of control over the fax broadcaster. This position is inequitable and it is the reason Akin Gump makes the request for clarification contained in its Petition.

Some commenters suggest that the clarification Akin Gump seeks is unnecessary because the FCC already dealt with how liability should be assigned when fax broadcasters have a “high level of involvement” in the transmission of fax advertisements. The Commission should disregard these comments. The “highly involved” liability standard does not address the scenario described in the Akin Gump Petition. Akin’s Petition is directed at instances in which an advertiser is denied control over a fax campaign because of a fax broadcaster’s fraud and deceit – this is not a shared liability scenario, this is a scenario in which the fax broadcaster is solely liable. The fax broadcaster has engaged in deception or fraud against the advertiser (or blatantly violates its contract with the advertiser), such that the advertiser has no opportunity to control the fax campaign or prevent TCPA violations from occurring. In Akin Gump’s view, this must have been one of the situations contemplated by the Commission in the *2006 Junk Fax Order*, and clarification by the Commission is needed. When the advertiser is stripped of control because of the fax broadcaster’s fraud and deceit, and the fax broadcaster commits TCPA violations, applying joint and several liability is unfair and inappropriate for the advertiser, who neither committed TCPA violations, nor had the ability to prevent them. In this instance, the offending faxes are sent “on behalf of” the fax broadcaster, and the fax broadcaster alone should be liable for any TCPA violations it causes.

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CG Docket No. 02-278
CG Docket No. 05-338

REPLY COMMENTS OF AKIN GUMP STRAUSS HAUER & FELD LLP

Akin Gump Strauss Hauer & Feld LLP (“Akin Gump” or “we”) hereby replies to comments filed in response to its Petition for Expedited Clarification in the above-captioned proceeding (“Petition”).¹

Most commenters agree with Akin Gump that the Commission should clarify when the liable “sender” of facsimile advertising is *not* the advertiser.² Most commenters also agree with Akin Gump that one of the “instances” in which the liable sender is not the advertiser is 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

¹ Petition of Akin Gump Strauss Hauer & Feld LLP, CG Docket Nos. 02-278, 05-338 (filed February 26, 2019) (the “Petition”).

² Comments of Vincent A. Lavieri, CG Docket Nos. 02-278, 05-338 (filed April 8, 2019) (“Lavieri Comments”); Comments of Amerifactors Financial Group, LLC, CG Docket Nos. 02-278, 05-338 (filed April 8, 2019) (“Amerifactors Comments”); Comments of Educational Testing Service (“ETS”), CG Docket Nos. 02-278, 05-338 (filed April 8, 2019) (“ETS Comments”); Comments of RingCentral, Inc., CG Docket Nos. 02-278, 05-338 (filed April 8, 2019) (“RingCentral Comments”); Comments of Edelman Combs Lattuner & Goodwin, LLC (“ECLG”), CG Docket Nos. 02-278, 05-338 (filed April 9, 2019) (“ECLG Comments”). ECLG supports a construction of the “sender” definition that is based on the agency principles applied in the 7th Circuit’s approach, which is consistent with Akin Gump’s proposal.

control the fax campaign or prevent TCPA violations.”³ In this situation, it is only equitable that the fax broadcaster, alone, is liable for any TCPA violations it commits.

Akin Gump makes a simple request of the Commission in its Petition – please explain and clarify what the Commission meant in the *2006 Junk Fax Order*,⁴ when it said that the party whose goods and services are advertised in an unsolicited fax *is not always* the liable sender:

We take this opportunity to 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, including failure to honor opt-out requests.⁵

Akin Gump asks the Commission to clarify or provide examples of the relevant “instances” in which the fax broadcaster, and not the advertiser, is the liable “sender” – instances in which the fax broadcaster has so broken the control of the advertiser over the fax campaign that it must be said that the fax advertisement was sent “on behalf of” the fax broadcaster.

In the view of Akin Gump and many commenters in this proceeding, the language from the *2006 Junk Fax Order* must mean, and we hope the Commission will clarify, that when control is broken because of a fax broadcaster’s fraud or deceit against an advertiser, and the advertiser cannot prevent TCPA violations because it is kept in the dark, the offending faxes are sent “on behalf of” the fax broadcaster, and the fax broadcaster alone is liable for any TCPA violations it causes.

³ Petition at 3.

⁴ *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*”).

⁵ *Id.* at ¶ 39 (emphasis added).

I. THE MAJORITY OF COMMENTERS SUPPORT THE COMMISSION CLARIFYING THOSE “INSTANCES” WHEN A FAX BROADCASTER IS THE SOLELY LIABLE SENDER OF JUNK FAXES.

As noted above, most commenters agree with Akin Gump that a clarification of the language from the *2006 Junk Fax Order* should be issued, and most commenters agree with Akin Gump’s proposed formulation of an instance in which the fax broadcaster, and not the advertiser, is solely liable.

A. Vincent A. Lavieri.

Vincent A. Lavieri, an attorney who has represented clients in over 30 TCPA class action cases, agrees that the clarification requested by Akin Gump is desperately needed.⁶ He notes that the current lack of clarity about the exception to liability articulated in the *2006 Junk Fax Order* has prolonged litigation at the expense of defendants.⁷

Lavieri cites as an example the case *Bridgeview Health Care Center v. Clark*,⁸ in which Mr. Lavieri represented the defendant, Mr. Clark. The case was prolonged as the district court – and later, the Seventh Circuit – engaged in multiple attempts to decipher the meaning of the exception from the *2006 Junk Fax Order* and assign liability. When focusing on the exception to sender liability in the *2006 Junk Fax Order*, the district 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

⁶ See Lavieri Comments at 2 (“I agree with Akin Gump that the Commission should clarify that a party whose goods and services are advertised is not liable as a ‘sender’ when its fax broadcaster ‘both commits TCPA violations and engages in deception or fraud against the advertiser... such that the advertiser cannot control the fax campaign or prevent TCPA violations.’”).

⁷ *Id.*

⁸ *Bridgeview Health Care Ctr. Ltd. v. Clark*, No. 09-c-5601, 2015 U.S. Dist. LEXIS 45710 *1 (N.D. Ill. April 8, 2015), *aff’d*, 816 F.3d 935 (7th Cir. 2016).

person whose goods or services are advertised in an unsolicited fax will not always be a ‘sender.’”⁹

The district court concluded that the phrase “on whose behalf,” taken together with the FCC’s exception to sender liability contained in the *2006 Junk Fax Order*, 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.¹⁰ The district court found that Mr. Clark did not direct the rogue fax broadcaster to send faxes beyond Terre Haute.¹¹ Quite the contrary, Mr. Clark had no reason to think or foresee that the fax broadcaster would do so.¹² In the district court’s view, the faxes sent beyond Terre Haute were not sent “on behalf of” Mr. Clark.¹³ Clark was plainly the victim of actions undertaken by the fax broadcaster, without his knowledge and contrary to his authorizations, and, as such, the district court concluded that Clark should not incur any liability based on unforeseeable rogue actions.

The district court in *Bridgeview* reached the right and equitable result, and was subsequently upheld by the Seventh Circuit, but not until after Mr. Clark was forced to endure an expensive trial and appeal. According to Lavieri, had the clarification requested by Akin Gump existed at the time the district court decided *Bridgeview*, the district court could have made a

⁹ *Id.* at *19-20.

¹⁰ *Id.* at *20-21. The Court specifically explained: “In this respect, *Sarris* is particularly instructive. There, the Eleventh Circuit identified two, nonexclusive, factors for the jury to weigh in determining a defendant’s liability: (1) the extent and nature of control the defendant had over the third-party engaged in marketing on his behalf; and (2) whether the defendant approved the final draft of the fax marketing plan. As a result, this Court concludes that an appropriate standard requires a totality-of-circumstances review, which incorporates the *Sarris* factors and other considerations including, but not limited to: the defendant’s degree of input and control over the content of the faxes, the actual content of the faxes, contractual or expressly stated limitations in the scope of control between the parties, the defendant’s approval of the final draft of the faxes and their recipients, and the defendant’s overall awareness of the circumstances.”

¹¹ *Id.* at *21-22.

¹² *Id.*

¹³ *Id.* at *21.

straightforward determination at summary judgment, saving Mr. Clark both the time and significant expense required to defend himself at trial and through multiple appeals.¹⁴ As Akin Gump noted in its Petition, the simple requirement to defend oneself in TCPA litigation is materially damaging on its own: “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. 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 defendant to settle the action.’”¹⁵

B. Amerifactors.

Amerifactors also supports Akin Gump’s request for the Commission to clarify the instances in which a fax broadcaster’s conduct may result in the fax broadcaster, rather than the advertiser, being solely liable for a TCPA junk fax violation: “Amerifactors supports the Petition’s main principle – in certain circumstances, the fax broadcaster’s conduct may result in sole liability for a TCPA junk fax violation – and the Commission should issue an Order granting this part of Akin Gump’s request.”¹⁶ Amerifactors agrees that when a fax broadcaster engages in fraud or misrepresentation, such that the advertiser effectively loses control over the ad campaign, the broadcaster – not the advertiser – should be liable: “The Commission should declare, consistent with Akin Gump’s request, that in cases where the fax broadcaster engages in fraud, misrepresents

¹⁴ Lavieri Comments at 5.

¹⁵ Petition at 4.

¹⁶ See Amerifactors Comments at 2.

the facts related to the legality of the fax service, or deceives the advertiser, the fax broadcaster will be deemed exclusively responsible for any resulting violations.”¹⁷

C. RingCentral.

Similar to Akin Gump’s analysis that fraud or deceit by a fax broadcaster may strip an advertiser of control over the fax, RingCentral advocates for the Commission to explain that the test for determining who is liable as a “sender” should focus on the persons or entities who actually exercise control over the fax in question and who choose its recipients, not simply on the party whose goods or services are being advertised.¹⁸ RingCentral asserts that this position is consistent with the clarification Akin Gump seeks in its Petition: when the acts of a fax broadcaster deny the advertiser control over the contents or recipients of the fax, the fax broadcaster, and not the advertiser, will be liable: “Akin Gump rightfully points out that the Commission’s definition of ‘sender’ should exclude advertisers when a fax broadcaster engages in conduct such that the advertiser does not control the content of the fax or its recipients.”¹⁹

D. Educational Testing Service & Edelman Combs Lattuner & Goodwin, LLC.

Educational Testing Service (“ETS”) also agrees with Akin Gump and, similar to Lavieri, ETS comments that the requested clarification is desperately needed: “The Commission’s guidance is needed now to put an end to “the kind of sprawling, harmful litigation encouraged by

¹⁷ *Id.* at 5-6. In the view of Amerifactors, this includes situations where a fax broadcaster makes misrepresentations to an advertiser about the legality of the fax campaign, or induces an advertiser to pursue an advertisement that the broadcaster recognizes may implicate the TCPA without informing the advertiser of the risk.

¹⁸ *See* RingCentral Comments at 9 (“RingCentral respectfully asks the Commission to clarify the meaning of ‘sender’ under the Junk Fax Rules of the TCPA such that its application is limited to entities that take affirmative actions to dispatch a fax or otherwise cause it to be sent, by, for example, composing the actual fax message and choosing its recipient(s).”).

¹⁹ *See Id.* at 7.

the prevailing confusion about who qualifies as ‘sender.’”²⁰ In the view of ETS, under the circumstances described in Akin Gump’s Petition, the fax broadcaster, and not the advertiser, should be the liable sender.²¹ ETS agrees that the Akin Gump interpretation of the language from the 2006 *Junk Fax Order* “makes sense of the TCPA’s text, fits with the Commission’s regulations, and places TCPA liability where it ought to rest – with the entity responsible for violating the law.”²²

ETS also supports the use of agency principles to determine sender liability,²³ which is consistent with how the Seventh Circuit and some other courts have carefully decided these cases.²⁴ Edelman Combs Latturmer & Goodwin, LLC (“ECLG”) agrees that agency principles could be applied to determine when the fax broadcaster is the solely liable sender, and that this approach would be consistent with the Seventh Circuit’s approach in these cases.²⁵

It’s clear from the supportive comments of Vincent Lavieri, Amerifactors, RingCentral, ETS and ECLG that there is real value in the Commission explaining what it meant in the 2006 *Junk Fax Order* and providing examples of instances in which the fax broadcaster, alone, is the solely liable “sender.” All supportive commenters agree that control is key and agree with Akin Gump’s example of an instance in which the fax broadcaster alone is liable for TCPA violations: where a fax broadcaster both commits TCPA violations and engages in deception or fraud against

²⁰ See ETS Comments at 7.

²¹ *Id.* at i.

²² ETS Comments at ii.

²³ *Id.* at 9.

²⁴ See, e.g., *Bridgeview*, 816 F.3d at 939 (“In applying the regulatory definition of a fax sender, we hold that agency rules are properly applied to determine whether an action is done ‘on behalf’ of a principal.”).

²⁵ See ECLG Comments at 2 (citing the Seventh Circuit’s application of agency principles to determine liability in *Bridgeview*).

the advertiser (or blatantly violates its contract with the advertiser) such that the advertiser cannot control the fax campaign or prevent TCPA violations, the fax broadcaster – and not the advertiser – is liable.

II. THE ONLY OPPOSITION TO AKIN GUMP’S REQUEST COMES FROM TWO PLAINTIFF’S FIRMS WHO SUGGEST THE INEQUITABLE RESULT THAT ADVERTISERS ALWAYS SHOULD BE LIABLE FOR JUNK FAX TCPA VIOLATIONS, EVEN IF THEY ARE VICTIMS OF FRAUD OR SABOTAGE.

Craig Moskowitz et al, a group of frequent TCPA plaintiffs represented by Bellin & Associates (“the Bellin group”), filed comments supporting the simultaneously-filed comments of Cin-Q Automobiles, Inc., a TCPA plaintiff represented by Anderson + Wanca. The Bellin group asserts that the Commission should simply confirm that any party whose goods or services are advertised in an unsolicited fax is the directly liable sender.²⁶ The problem with this position, of course, is that it reads out half the definition of “sender” under the junk fax rules, and supports sabotage liability for advertisers.²⁷ The FCC and most courts agree that determining “on whose behalf” a fax is sent is the most germane inquiry when identifying the liable sender.²⁸ To disregard the first half of the sender definition is to read out the *2006 Junk Fax Order*’s exception to sender liability and to impose strict liability on an advertiser, even when advertisements are sent either without the advertiser’s knowledge, or in a manner not approved by the advertiser. Imposing

²⁶ Comments of Craig Moskowitz et al, CG Docket Nos. 02-278, 05-338, at 1 (filed April 8, 2019).

²⁷ “Sender” is defined at 47 C.F.R. § 64.1200(f)(10) as “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.”

²⁸ Notably, prior to the *2006 Junk Fax Order*, the uncodified definition of “sender” placed ultimate liability for an unsolicited fax on the entity “on whose behalf” the fax was sent. This articulation of the “sender” of a fax made no reference to the entity “whose goods or services are advertised or promoted in the unsolicited advertisement.” *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Order, 10 FCC Rcd. 12391, 12407 para. 35 (1995) (“*1995 TCPA Order*”).

advertiser liability for such violations would be a form of “sabotage liability,” and patently unfair.²⁹

For its part, Cin-Q asserts that any party who engages with a fax broadcaster should be held strictly liable for the TCPA violations caused by that fax broadcaster, regardless of the advertiser’s level of control over the fax broadcaster.³⁰ In prior TCPA proceedings, Anderson + Wanca have gone so far as to assert that it is the *Commission’s* view that strict liability for unsolicited fax advertising attaches to the advertiser and not the fax broadcaster in fax advertising cases.³¹ The Commission has not created a new strict liability standard for advertisers in fax advertising cases, and the Anderson + Wanca position is at odds with the Commission’s rules and relevant Commission orders.

The views of Bellin & Associates and Anderson + Wanca are predictable, seeking to continue holding advertisers with deep pockets liable for TCPA violations. Their position is that

²⁹ For example, the Sixth Circuit Court of Appeals and others have indicated in more than one case that an entity “whose goods or services are advertised or promoted in the unsolicited advertisement” is strictly liable for any related TCPA violations, including cases where fax broadcasters have gone rogue, stripping the advertiser of control, and engaged in actions that were not authorized by the advertiser. *See Siding & Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886, 891-96 (6th Cir. 2016); *Imhoff Investment, L.L.C. v. Alfoccino, Inc.*, 792 F.3d 627, 634 (6th Cir. 2015) (“*Imhoff*”); *see also, e.g., JWD Automotive, Inc. v. DJM Advisory Group LLC*, 218 F. Supp. 3d 1355 (M.D. Fla. Nov. 21, 2016) (adopting the strict liability standard established in *Imhoff*); *Supply Pro Sorbents, LLC v. RingCentral, Inc.*, No. C 16-02113, 2016 U.S. Dist. LEXIS 140033 (N.D. Cal. Oct. 7, 2016) (generally following *Siding* to hold that fax advertisers are strictly liable under the FCC’s sender definition).

³⁰ *See* Comments of Cin-Q Automobiles Inc., CG Docket Nos. 02-278, 05-338, at 6 (filed April 8, 2019) (“Cin-Q Comments”) (arguing that “the person or entity whose goods or services are advertised is the ‘sender,’ even if it is misled by the fax broadcaster’s ‘representations about the legality’ of the faxing,” and that the ‘sender is ‘liable for violations.’”).

³¹ *See* Anderson + Wanca’s Comments on Petition for Declaratory Ruling of Insights Association and AAPOR, CG Docket No. 02-278, at 7 (filed June 22, 2018) (quoting *Sarris Letter Brief* at *2). In its comments, A+W quoted a passage from a letter brief submitted by the Commission’s Office of General Counsel in the *Sarris* case, asserting that it was the Commission’s view that strict liability for unsolicited fax advertising attaches to the advertiser and not the fax broadcaster in fax advertising cases. A+W offered the following quote: “direct liability for sending an unsolicited facsimile advertisement attaches to the entity (defined as the ‘sender’) whose goods or services are being promoted, and not generally to the entity that physically transmits the facsimile.” Taking this one quote from a letter brief out of context – a quote that is at odds with the FCC’s rule and orders – and suggesting that the Commission intended to create a new strict liability standard for advertisers in fax advertising cases, was misleading.

advertisers should be held liable even when a fax broadcaster goes rogue, even when control between the fax broadcaster and the advertiser is broken by the fraud and deceit of the fax broadcaster, even when the advertiser is kept so in the dark that it does not know about and cannot prevent TCPA violations. This position is inequitable and it is the reason Akin Gump makes the request for clarification contained in its Petition.³²

A. The Petition Does Not Ask The Commission To Decide the Facts of Any Particular Case, and the Commission Should Disregard the Comments of Cin-Q Regarding its Specific TCPA Case.

Cin-Q's comments attempt to litigate its case with the Tampa Bay Buccaneers before the FCC. There is no need for Akin Gump or the Commission to address Cin-Q's comments regarding its case in response to the Petition. The Petition does not ask the Commission to decide the facts in the Cin-Q case or any other case discussed in the Petition. Akin Gump discusses the Cin-Q case and a number of other cases to show the prevalence of junk fax cases that raise the issue of a fax broadcaster who, through fraud, misrepresentation, or blatant disregard of the instructions of its client, acts on its own and causes TCPA violations. If the Commission adopts the proposed clarification, it would be up to the courts to decide whether the facts of any particular case fit the clarification.

³² In the alternative, Cin-Q asserts that if the Commission decides to issue a ruling aimed at preventing third parties from sabotaging unknowing defendants, the Commission should adopt a "but-for" causation standard similar to the one used in tort law for determining liability. *Id.* at 7. Under this standard, a defendant would be liable if "the harm would not have occurred" in the absence of the defendant's conduct – in other words, "but for" the defendant desiring advertising of its goods and services, the harm would not have taken place. Cin-Q asserts that this standard would prevent sabotage liability, while allowing consumers to pursue parties that hire fax broadcasters. Akin Gump supports the Cin-Q notion that the Commission should prevent sabotage liability. Akin Gump also notes that in the scenario described in the Petition, "but-for" the fraud, deceit, misrepresentations and TCPA violations by the fax broadcaster, TCPA liability would not exist for the advertiser, and the fax broadcaster alone would be liable.

B. Contrary to Cin-Q’s Assertions, Akin Gump is looking for Fairness, not Immunization.

Anderson + Wanca asserts that Akin Gump’s proposal seeks to “immunize” junk faxers from liability. We assume they are concerned about efforts to immunize advertisers, not fax broadcasters. Akin Gump is not seeking to shield responsible parties from TCPA liability – to the contrary, Akin Gump is seeking to have liability assigned where it belongs: with the offending party. Akin Gump’s view is that even if there has been fraud and deception and the advertiser’s control over the fax campaign has been broken, the advertiser may at some point assume joint liability for broadcasts made *after* they are put on actual notice of, and recklessly disregard, obvious TCPA violations that are being made by their fax broadcaster, and subsequently fail to take reasonable measures to stop that behavior.

III. THE COMMISSION SHOULD DISREGARD THE COMMENTS SUGGESTING THAT THERE IS NO REAL CONTROVERSY OR UNCERTAINTY TO BE RESOLVED – THE “HIGHLY INVOLVED” BROADCASTER STANDARD IS INAPPLICABLE HERE.

Cin-Q asserts that the Petition does not raise any “controversy” or “uncertainty” for the Commission to resolve.³³ ECLG similarly argues that clarification of the *2006 Junk Fax Order* is not necessary because the FCC already dealt with the “rogue fax broadcaster” scenario when it provided that fax broadcasters are jointly and severally liable with advertisers when the fax broadcaster has a “high level of involvement” in the transmission of the fax advertisements.³⁴

³³ Cin-Q Comments at 6.

³⁴ See ECLG Comments at 2 (“A fax broadcaster that provides a source of fax numbers, makes representations about the legality of faxing to those numbers or advises a client about how to comply with the fax advertising rules, also demonstrates a high degree of involvement in the transmission of those facsimile advertisements,” and would be jointly and severally liable with the sender.)

The Commission should disregard these comments. The “highly involved” liability standard does not address the scenario described in the Akin Gump Petition. Akin’s Petition is directed at instances in which an advertiser is denied control over a fax campaign because of a fax broadcaster’s fraud and deceit – this is not a shared liability scenario, this is a scenario in which the fax broadcaster is solely liable. Moreover, the wide variety of standards applied by courts to determine “sender liability” in cases involving rogue fax broadcasters is clear evidence that there is uncertainty requiring clarification and guidance from the Commission.

The “highly involved” broadcaster liability standard applies in situations where an advertiser retains control over the fax campaign, but hires a third party broadcaster who becomes “highly involved.” In this scenario, the advertiser remains sufficiently involved in the campaign to qualify as the directly liable “sender,” but the fax broadcaster is held jointly and severally liable because of its “high level of involvement in, or actual notice of, the unlawful activity and [its failure] to take steps to prevent” such faxed ads from being sent.³⁵

Akin Gump’s Petition seeks clarification about instances in which a fax broadcaster is not just “highly involved,” but in complete control. The fax broadcaster has engaged in deception or fraud against the advertiser (or blatantly violates its contract with the advertiser), such that the advertiser has no opportunity to control the fax campaign or prevent TCPA violations from occurring.³⁶ Unlike the advertiser in the “highly involved” broadcaster scenario, the advertiser in this situation has been stripped of its ability to control the fax campaign or prevent TCPA violations as a result of the broadcaster’s deceit and fraud. In Akin Gump’s view, this should be one of the

³⁵ *Id.* at ¶ 40. This type of “highly involved” conduct includes “suppl[ying] the fax numbers used to transmit the advertisement... provid[ing] a source of fax numbers, mak[ing] representations about the legality of faxing to those numbers,” or providing advice “about how to comply with the fax advertising rules.”

³⁶ Petition at 3.

situations contemplated by the Commission in the *2006 Junk Fax Order*. When the advertiser is stripped of control because of the fax broadcaster's fraud and deceit, and the fax broadcaster commits TCPA violations, applying joint and several liability would be unfair and inappropriate for the advertiser, who neither committed TCPA violations, nor had the ability to prevent them.

IV. CONCLUSION.

The record supports the Commission clarifying what it meant in the *2006 Junk Fax Order* when it stated that the party whose goods and services are advertised in an unsolicited fax **is not always** the liable sender. Akin Gump and the majority of commenters urge the Commission to clarify that a party whose goods and services are advertised is not the liable sender when its 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 clarification would give courts the guidance needed to decide more cases at the summary judgment phase, reducing the pressure on innocent defendants to settle, and saving litigants the time and expense associated with excessively prolonged litigation.

Dated: April 23, 2019

Respectfully submitted,

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