

# Morgan Lewis

**Ronald W. Del Sesto, Jr.**

Partner  
+1.202.373.6023  
ronald.delsesto@morganlewis.com

July 6, 2016

## **VIA ECFS AND HAND DELIVERY**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Room TW-A325  
Washington, DC 20554

**Re: Petition for Expedited Declaratory Ruling  
CG Docket No. 02-278**

Dear Secretary Dortch:

On behalf of RingCentral, Inc., enclosed for filing is an original and four (4) copies of a Petition for Expedited Declaratory Ruling.

Please date-stamp the enclosed extra copy of this filing and return it in the envelope provided. Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,



Ronald W. Del Sesto, Jr.  
Counsel for RingCentral, Inc.

Enclosures

cc: Bruce Johnson (RingCentral)

**Morgan, Lewis & Bockius LLP**

1111 Pennsylvania Avenue, NW  
Washington, DC 20004  
United States

**T** +1.202.739.3000  
**F** +1.202.739.3001

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
RingCentral, Inc.	)	CG Docket No. 02-278
	)	
Petition for Expedited Declaratory Ruling	)	
	)	

**PETITION FOR EXPEDITED DECLARATORY RULING**

Bruce Johnson  
Vice President, Legal  
RingCentral, Inc.  
1400 Fashion Island Blvd  
San Mateo, CA 94404

Ronald W. Del Sesto, Jr.  
Joshua M. Bobeck  
Morgan Lewis & Bockius LLP  
2020 K ST NW  
Washington, DC 20006

Dated: July 6, 2016

## TABLE OF CONTENTS

Executive Summary .....	i
I. Background.....	2
A. RingCentral’s Fax Services.....	2
B. RingCentral Information On User-Selected Cover Sheets Is Incidental to the Overall User Fax Communication .....	4
C. RingCentral’s Terms of Service Advance the Goals of the TCPA.....	4
D. RingCentral Customers Can Choose Whether to Incorporate Information Pertaining to RingCentral into their Fax Communications.....	7
E. Unsolicited Fax Advertisement Liability Under the TCPA.....	8
F. Class Action Allegations Against RingCentral.....	9
II. The Commission Should Clarify That A Fax broadcaster Is Not A “Sender” Of Its Customers’ Communications Merely Because The fax broadcaster Is referenced On The Cover Sheet .....	12
A. The Commission’s Interpretation of “Sender” Has Always Required a Substantial Connection Between the Sender and the Fax .....	12
B. The <i>DISH Network Ruling</i> Throws a Curveball.....	16
C. Clarification of the Definition of “Sender” is Needed .....	19
III. The Commission Should Clarify Its Guidance Regarding <i>De Minimis</i> Advertisements .....	25
IV. The Commission Should Declare That <i>De Minimis</i> Advertisers Are Covered By The Sender’s Consent.....	29
V. Conclusion.....	34

## EXECUTIVE SUMMARY

RingCentral, Inc. (“RingCentral”) respectfully seeks an expedited declaratory ruling clarifying certain portions of its regulations promulgated under the Telephone Consumer Protection Act (“TCPA” or “Act”), namely: (1) that a fax broadcaster whose facilities or services that are used by a third party content generator is not itself the “sender” of a facsimile, for purposes of the TCPA’s prohibition against sending unsolicited advertisements by facsimile; (2) *de minimis* promotional phrases contained in otherwise bona fide informational, transactional or even another party’s unsolicited fax advertising communications do not constitute “unsolicited advertisements” in violation of the TCPA; and (3) in the alternative, in certain limited circumstances fax broadcaster “senders” can rely on third party “consent” for sending *de minimis* information along with a facsimile that is otherwise lawfully sent by the fax broadcaster’s customer to a third party recipient.

The issues raised in this petition are not theoretical or academic. RingCentral has recently been named as a defendant in a TCPA lawsuit in the Northern District of California in which the Plaintiff alleges that RingCentral violated the TCPA because a RingCentral customer used RingCentral’s service to transmit authorized fax messages that included a sender-selected fax cover sheet containing *de minimis* language in the footer of the cover sheet. As illustrated herein, RingCentral has taken significant steps to ensure that its services are used in manner consistent with the TCPA. Yet, enterprising plaintiffs have nonetheless seized upon an incidental bit of text (that constitutes only a tiny percentage of the cover page area), as the basis for a lawsuit alleging violations of the Commission’s rules against unsolicited fax advertising.

For the reasons set forth herein, the Commission should clarify that a fax broadcaster is not the “sender” of a facsimile if the fax broadcaster did not directly or indirectly choose the

content of that facsimile. Relatedly, the Commission should clarify that it did not intend to expand the definition of “sender” in its *2006 TCPA Order* such that parties whose goods or services appear in an unsolicited fax advertisement are strictly liable under the TCPA even if the only relationship between the parties is: (1) customer and fax broadcaster; and (2) the fax broadcaster did not formally or informally engage the customer to perform marketing activities on its behalf. The Commission should also clarify that whether a fax qualifies as a *de minimis* advertising message depends on whether the *de minimis* message exceeds a certain, specific and quantifiable threshold, and declare that all such *de minimis* advertising messages are not “unsolicited advertising” when present on informational, transactional or even another party’s unsolicited advertising fax. Finally, if the Commission is unwilling to clarify either of these points, then the Commission should clarify that in circumstances where the fax broadcaster and customer have no marketing relationship whatsoever such that the customer makes all material decisions about a fax communication, including the content of a fax, whether, when and to whom to send a fax and when the only information pertaining to the fax broadcaster is *de minimis*, parties that qualify as “senders” under the Commission’s rules can nonetheless rely on intermediaries obtaining the requisite consent from the recipient of the faxed communication. Such clarification would be consistent with Commission precedent in analogous TCPA-related decisions.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
RingCentral, Inc.	)	CG Docket No. 02-278
	)	
Petition for Expedited Declaratory Ruling	)	
	)	

**PETITION FOR EXPEDITED DECLARATORY RULING**

RingCentral, Inc. (“RingCentral”), through its undersigned counsel, and pursuant to Section 1.2 of the Commission’s rules, respectfully requests that the Commission issue a declaratory ruling clarifying certain portions of its regulations promulgated under the Telephone Consumer Protection Act (“TCPA” or “Act”).<sup>1</sup>

Specifically, RingCentral requests that the Commission clarify that a fax broadcaster whose facilities or services that are used by a third party content generator is not itself the “sender” of a facsimile, for purposes of the TCPA’s prohibition against sending unsolicited advertisements by facsimile. Additionally, RingCentral requests that the Commission declare that *de minimis* promotional phrases contained in otherwise bona fide informational or transactional facsimile communications do not constitute “unsolicited advertisements” in violation of the TCPA. Indeed, the presence of *de minimis* advertising by a fax broadcaster (measured by a percentage threshold to be set by the Commission) should not invite liability even if the primary fax message is unsolicited advertising sent by a third party. Finally, RingCentral requests, as an

---

<sup>1</sup> See 47 C.F.R. § 64.1200(f)(10); 47 U.S.C. § 227(a)(5).

alternative grounds for relief, that the Commission clarify that in limited circumstances fax broadcaster “senders” can rely on third party “consent”— at least for sending *de minimis* information along with a facsimile that is otherwise lawfully authored and sent by the fax broadcaster’s customer to a third party recipient.

## **I. BACKGROUND**

### **A. RingCentral’s Fax Services**

RingCentral is a leading provider of software-as-a-service, or SaaS, solutions for businesses of all sizes. The company offers cloud-based services allowing it to provide flexible and cost-effective services that support distributed workforces, mobile employees and the proliferation of “bring-your-own” communications devices. Through leveraging the cloud and the SaaS business model, RingCentral is able to offer a powerful suite of unified communications services catering to the modern worker armed with smart phones, tablets and IP-enabled private branch exchange services. By providing these capabilities in a single platform, RingCentral also substantially reduces the time to implement and total cost of ownership for its customers.

Internet-based fax services are one of many communications services RingCentral offers. A RingCentral customer wishing to send a fax must have a paid RingCentral account. The account allows the customer to engage in a variety of types of fax communications over several platforms, such as via the RingCentral website, through a desktop computer application, through a mobile application, through an email, *etc.*

For example, to send a fax using the RingCentral website, customers must first log into RingCentral’s website to access their account. Then they must follow a link called “Messages.” From there, they must select “Fax Out.” They then may add a cover page where they have a variety of template options or select no cover page, fill out the recipient’s details and contact information if they have elected to use a cover sheet, insert a note for the cover page if they are

using one, attach a document to be faxed, include a cover sheet as an attachment if they choose, and press “send.” After completing this process, RingCentral routes the fax for the customer to the recipient’s telephone number or other address for delivery. RingCentral does not control whether to send a fax in the first instance, the content of the information sent, nor does it choose the recipient of the fax. The company simply enables users to send faxes where users have complete control over the content of those faxes, determined whether to send, and selected the recipients with no RingCentral input or direction whatsoever in any stage. Indeed, the entirety of the relationship between the company and users is that of service provider (where RingCentral provides many services beyond fax functionality but includes the provision of fax broadcasting services) and customer.

On certain platforms, such as through a desktop application, users can elect not to use a cover sheet, or to upload their own cover sheet, or select a user-created cover sheet later in their workflow, or elect to use one of the templates RingCentral makes available. Customers can also set a schedule for the transmission of the fax (right away, or at a specified time in the future), and even send a fax by email, using a “global setting” that they establish in their account to govern the sending of faxes via email (*i.e.*, whether to include a cover page, etc.). RingCentral’s fax service is integrated with other online platforms such as Box, Dropbox and Google Drive. RingCentral also provides inbound fax delivery services, which integrate email and text notifications to the customer when a new fax is received. RingCentral’s fax platform is designed to be flexible for its customers and thus provides customers a number of means to customize, or to remove altogether, cover sheets from the faxes that they send. Thus, in *no* case is RingCentral choosing *any* of the content for their customers.

**B. RingCentral Information On User-Selected Cover Sheets Is Incidental to the Overall User Fax Communication**

As a convenience to its customers, RingCentral offers template cover sheets that users may elect to use when sending faxes. To be clear, customers are not required to use these template cover sheets, or to use any cover sheet at all, and customers must take affirmative steps in order to add one of these template cover sheets to an outbound fax. The template cover sheets offered by RingCentral include, in approximately 1/8 inch tall font in the footer, RingCentral's logo, web address, and six words: "Send and receive faxes with RingCentral." This footer only appears on the optional cover sheet that users must affirmatively elect to use and not any other pages of a multi-page fax. The information pertaining to RingCentral occupies approximately 1/88th of the length of the page, only 0.836% of the entire cover page area. As incidental as this footer text is on the cover sheet itself, a multipage fax dramatically decreases the overall percentage of space that this text takes up in the entire fax communication, making such text even more incidental to the overall scope of the communication.<sup>2</sup>

**C. RingCentral's Terms of Service Advance the Goals of the TCPA**

RingCentral's Terms of Service,<sup>3</sup> to which all of its customers must agree, contain a number of provisions designed to ensure that its customers use the service responsibly, and in a manner that is consistent with the goals of the TCPA and the Junk Fax Prevention Act of 2005. For example, in Section 6.B RingCentral's Terms of Service require customers to "represent and

---

<sup>2</sup> For example, as explained in greater detail in Section I.F., *infra*, RingCentral is the target of a lawsuit where the plaintiff complains that information pertaining to RingCentral appearing only in the cover's sheet footer of a four-page fax sent by a RingCentral customer violates the TCPA where the footer comprises 0.167% of the entirety of the customer-sent fax.

<sup>3</sup> See generally RingCentral, Terms of Service (rev. Feb. 2016), available at: <http://www.ringcentral.com/legal/eulatos.html> ("RingCentral Terms of Service").

warrant that all use and usage of [RingCentral services] will at all times *comply with all applicable Laws, including but not limited to the rules, policies and regulation of the Federal Communications Commission (“FCC”), and all Laws relating to Do-Not-Call provisions; unsolicited marketing; telemarketing; [and] faxing; ...*”<sup>4</sup>

Section 6.C of the Terms of Service notifies RingCentral customers that “[c]ertain communication practices – including without limitation, the placing of unsolicited calls; the placing of commercial messages; the sending of unsolicited facsimile, internet facsimile, SMS, or other messages; and the use of certain automated telephone equipment to place certain calls” are regulated in the United States by the TCPA, the Junk Fax Prevention Act of 2005, and under a number of similar state, municipal or local laws, regulations, codes, ordinances and rules.<sup>5</sup> That Section goes on to say that the customer represents and warrants the following:

- You [the customer] *are the creator of the content of, and are solely responsible for determining the destination(s) and recipient(s) of, all outbound communications made using RingCentral’s services;*
- All content, communications, files, information, data, and other content provided for transmission through RingCentral’s services will be provided solely for lawful purposes, *and in no event shall any customer communication or any content thereof be in violation of the TCPA, Junk Fax Prevention Act, or any other Law; and*

---

<sup>4</sup> See RingCentral, Terms of Service, at 6.B. (emphasis added).

<sup>5</sup> See RingCentral, Terms of Service, at 6.C. (emphasis added).

- *No unsolicited advertisements, commercial messages, solicitations, marketing or promotional materials, or commercial messages or content will be transmitted or distributed in the form of facsimiles or internet facsimiles through the services.*<sup>6</sup>

That section also provides that the Customer agrees to indemnify and hold harmless RingCentral, and any third-party provider(s) from any and all third party claims, losses, damages, fines, or penalties arising out of alleged violation of the TCPA or Junk Fax Prevention Act or any similar regulation or legislation; or otherwise related to any voicemail, text, and/or fax spam, solicitations, or commercial messages that the customer may send and/or receive using RingCentral's Services.<sup>7</sup>

Finally, Section 6.F provides that the customer may not use RingCentral's services in any of the following ways, among others:

- “to intentionally send or transmit unsolicited or “junk” or “spam” advertisements, communications, or messages (commercial or otherwise) without consent, including without limitation through email, voicemail, SMS, facsimile, or internet facsimile;”
- “to intentionally engage in blasting or broadcasting bulk communications, advertisements, or messages (e.g., sending hundreds of messages simultaneously), including without limitation through email, voicemail, SMS, facsimile, or internet facsimile;”
- “to perform auto-dialing or ‘predictive’ dialing (i.e., non-manual dialing or using a software program or other means to continuously dial or place out-bound calls) in violation of applicable Law;” or

---

<sup>6</sup> RingCentral, Terms of Service, at 6.C (emphasis added).

<sup>7</sup> RingCentral, Terms of Service, at 6.C.

- “to transmit any communication that would violate any applicable Law, including but not limited to the Telephone Consumer Protection Act, the Junk Fax Prevention Act of 2005, the rules governing the DoNotCall Registry, Canadian Unsolicited Telecommunications Rules.”<sup>8</sup>

In summary, Ring Central’s Terms of Service prohibits customers from using the service in a way that violates the TCPA or the Junk Fax Act, notifies customers about the existence of those statutes, and makes clear that the customer is solely responsible for the contents, destination and sending of all fax messages.

**D. RingCentral Customers Can Choose Whether to Incorporate Information Pertaining to RingCentral into their Fax Communications**

RingCentral’s customers are responsible to ensure compliance with the TCPA under its Terms of Service. RingCentral provides its customers with significant flexibility in choosing how to use the service (including, but not limited to, the use of their own customized cover sheet, or the use of no cover sheet at all). In order for a template cover sheet to become part of an outbound fax, a customer must affirmatively decide to incorporate that template cover sheet (including the incidental RingCentral information) into the customer’s fax communications. In other words, the cover sheet is chosen by and part of the customer’s communication. The customer is the author and sender of the fax communication, not RingCentral.

---

<sup>8</sup> RingCentral Terms of Service, Section 6.F.

### **E. Unsolicited Fax Advertisement Liability Under the TCPA**

The TCPA is a source of considerable confusion for courts and businesses alike. Chief Justice Roberts described the Act as the “strangest statute I’ve ever seen.”<sup>9</sup> Likewise, Justice Kagan reported that all nine Justices found the statute “odd.”<sup>10</sup> Aside from the textual ambiguities, the statute is now more than twenty-five years old and the communications services that dominated the industry at the time of passage bear little resemblance to those predominantly used today. Further, the potential for plaintiffs’ attorneys to threaten businesses with class action lawsuits that have uncapped liability has led to a vast proliferation of nuisance suits where the actual harm to plaintiffs is, in many cases, remote at best.

Given the statutory ambiguity and the availability of statutory damages, litigation under the TCPA have grown dramatically. Claims filed under this law have skyrocketed 940% between 2010 and 2015 representing a high water mark of 3,710 new suits filed.<sup>11</sup> There is no reason to believe that the growth in the number of lawsuits filed under this statute will slow, although additional guidance and clarification from the Commission may slow the rate of growth by reducing the statute’s ambiguity without sacrifice of its underlying policy goals.

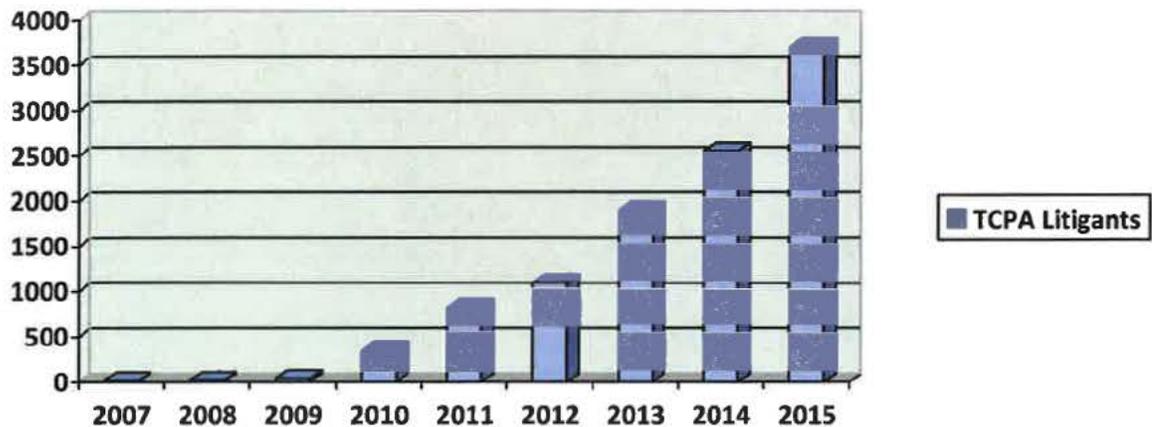
#### **Chart 1: TCPA Litigants by Year**

---

<sup>9</sup> Transcript of Oral Argument at 51, *Mints v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012) (No. 10-1195).

<sup>10</sup> Transcript of Oral Argument at 51, 55, *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012) (No. 10-1195).

<sup>11</sup> WebRecon LLC, *Out Like a Lion... Debt Collection Litigation & CFPB Complaint Statistics, Dec. 2015 & Year in Review* (Jan 18, 2016), available at: <http://webrecon.com/out-like-a-lion-debt-collection-litigation-cfpb-complaint-statistics-dec-2015-year-in-review/>. See also *U.S. Chamber of Commerce, Institute for Legal Reform, Analysis: TCPA Litigation Skyrockets Since 2007; Almost Doubles Since 2013* (Feb. 5, 2015), available at: <http://bit.ly/28XRE5j>



Source: WebRecon, LLC

#### F. Class Action Allegations Against RingCentral

RingCentral is now the target of one such suit in the Northern District of California.<sup>12</sup> The Plaintiff alleges that RingCentral has violated the TCPA because RingCentral’s customer used its service to transmit *authorized* fax messages which, on the sender-selected cover sheet, contained incidental, *de minimis* language identifying RingCentral as the underlying provider of fax services.

The Plaintiff in this particular case received a four-page fax from a RingCentral customer, identified on the cover page as Aplomb Training, who used one of RingCentral’s prepackaged cover sheet templates. The RingCentral logo, the RingCentral web address and the six-word slogan appeared only on the footer of the fax cover page. This forms the basis of the potential class action lawsuit against RingCentral. The Plaintiff does not allege that he did not wish to

<sup>12</sup> Class Action Complaint for Damages, *Supply Pro Sorbents, LLC v. RingCentral Inc.*, Case No. 16-cv-2113 (N.D. Cal. filed Apr. 21, 2016).

receive the fax from RingCentral's customer; only that the cover sheet violated the TCPA due to the footer.<sup>13</sup>

RingCentral's customers are free to use their own cover sheet, or no cover sheet at all. RingCentral provides template cover sheets, which include this identifying language, as a convenience to its customers. Should a customer choose to use one of the template fax cover sheets that RingCentral makes available, the footer on which the lawsuit is based will appear only on the customer-selected cover page.

A redacted copy of the cover sheet received by the Plaintiff follows:

Graphic 1

---

<sup>13</sup> See Class Action Complaint for Damages, *Supply Pro Sorbents, LLC v. RingCentral Inc.*, Case No. 16-cv-2113 (N.D. Cal. filed Apr. 21, 2016).

From: [REDACTED]
To: [REDACTED]
Fax: [REDACTED]
Page 1 of 4 04/13/2016 1:15 PM

# FAX

<b>Date:</b>	04/13/2016
<b>Pages including cover sheet:</b>	4

<b>To:</b>	[REDACTED]
<b>Phone</b>	[REDACTED]
<b>Fax Number</b>	[REDACTED]

<b>From:</b>	[REDACTED]
<b>Phone</b>	[REDACTED]
<b>Fax Number</b>	[REDACTED]

**NOTE:**

INTERNATIONAL BUSINESS DEVELOPMENT & EXPORTS COUNSELING SEMINAR

On Wednesday, April 27th, 2016, at The North Houston Hilton Hotel

Good day,

We invite you to attend our SEMINAR to find out about the "Top Emerging Global Markets" that are best suited for your exports.

Billions of US Dollars are allocated towards the development of sectors such as:

- HEALTHCARE & MEDICAL SUPPLIES
- INFORMATION TECHNOLOGY (IT)
- EDUCATION
- FURNITURE AND HOME FURNISHING ACCESSORIES

With An Enormous Consumer Market As Well.

You will get a head-start after this seminar and save a lot of valuable time and resources trying to learn the International Trade and understand its barriers. Hope to see you there.

FOR REGISTRATION AND PAYMENT, PLEASE VISIT [REDACTED] & TO GET OUT, PLEASE CIRCLE THIS LINE AND FAX ONLY THE COVER PAGE BACK TO US & THANK YOU VERY MUCH

Send and receive faxes with RingCentral, [www.ringcentral.com](http://www.ringcentral.com) **RingCentral**

As can be seen in Graphic 1, the content identifying RingCentral appears only on the last line of the cover sheet, and consists primarily of a logo and web address. The cover sheet included a considerable amount of text from RingCentral's customer, and was followed by three more

pages of customer content. The RingCentral information constituted only 1/352 of the length of the full fax communication. The information pertaining to RingCentral occupies approximately 1/88th of the length of the page, only 0.836% of the entire cover page area on the fax cover sheet that is the subject of the lawsuit.

**II. THE COMMISSION SHOULD CLARIFY THAT A FAX BROADCASTER IS NOT A “SENDER” OF ITS CUSTOMERS’ COMMUNICATIONS MERELY BECAUSE THE FAX BROADCASTER IS REFERENCED ON THE COVER SHEET**

As detailed herein, there is a pressing need for the Commission to clarify the meaning of the term “sender” due to inconsistent interpretation of the Commission’s rules by different appellate and federal district courts. Some courts<sup>14</sup> have wrongly concluded that the Commission’s 2006 *TCPA Order* drastically expanded the definition of “sender” of a facsimile, such that parties whose goods or service appear in an unsolicited advertising fax are liable for violating the TCPA under a strict liability standard even if that party had nothing to do with its sending. Given the absurd results that would follow from such an interpretation and the tremendous potential liability at stake, the Commission must correct this misinterpretation of its rules.

**A. The Commission’s Interpretation of “Sender” Has Always Required a Substantial Connection Between the Sender and the Fax**

The TCPA prohibits the use of “any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.”<sup>15</sup> The Commission has defined the “sender” of a prohibited fax 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

---

<sup>14</sup> See *infra* Section III.C.

<sup>15</sup> 47 U.S.C. § 227(b)(1)(C).

unsolicited advertisement.”<sup>16</sup> The Commission previously clarified that common carriers and fax broadcasters are not liable under the TCPA for the transmission of a prohibited fax message.<sup>17</sup> Pointing to the legislative history of the TCPA, the Commission found that Congress intended to attach liability only to those parties that are either initiating the telephone call or sending the fax message and that the prohibitions on sending unsolicited faxes do not apply to the “common carrier or other entity that transmits the call or message and that is not the originator or controller of the content of the call or message.”<sup>18</sup> Accordingly, the Commission made clear that liability for unsolicited faxes rest with parties responsible for the content of the fax and potentially a fax broadcaster with a high degree of involvement in the facsimile advertising campaign.<sup>19</sup>

The Commission codified its definition of “sender” that it had adopted in prior TCPA Orders in the *2006 TCPA Order* defining “sender” for purposes of the fax advertising rules as “the person or entity *on whose behalf* the advertisement is sent.”<sup>20</sup> The *2006 TCPA Order* further provides that “[i]n most instances, this will be the entity whose product or service is advertised

---

<sup>16</sup> 47 C.F.R. § 64.1200(f)(10) (emphasis added).

<sup>17</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Red 12391, 12407-08 (1995) (“*1995 TCPA Order*”) (“[E]ntity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with this rule.”); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8780 (1992) (“*1992 TCPA Order*”) (“In the absence of a ‘high degree of involvement or actual notice of illegal use and failure to take steps to prevent such transmissions,’ common carriers will not be held liable for the transmission of a prohibited facsimile message.”).

<sup>18</sup> *1995 TCPA Order* at 12407 n.90 (1995) (citing to Senate Rep. No. 178, 102d Cong., 1st Sess. 9 (1991)).

<sup>19</sup> *1995 TCPA Order* at 12407-8.

<sup>20</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 21 FCC Red 3787, 3808 (2006) (“*2006 TCPA Order*”)(emphasis added). See also *infra* Section II.B.

or promoted in the message.”<sup>21</sup> The qualifying clause “[i]n most instances” necessarily means that there are some circumstances in which the party whose goods or services appear in an unsolicited fax advertisement would not be liable under the TCPA. If the Commission intended to impose strict liability on the party whose products or services were advertised in an unsolicited fax advertisement, the Commission would either have written “in all instances” or omitted this clause entirely. Additionally, the reference to an “entity whose product or service is advertised or promoted in the message” was a means to determine “on whose behalf” a message was sent. It was not meant to be an independent basis of liability – much less an inflexible strict-liability rule.<sup>22</sup> Instead, it was presumed through reference to “on whose behalf” that a party had a significant level of involvement deciding whether to send a fax in the first instance, to whom it should be distributed, and/or choosing the content of the fax. A contrary interpretation of the Commission’s formulation of liability for unsolicited fax advertisements would render the reference to “on whose behalf” meaningless.

Further support for this understanding of the Commission’s reference to “sender” is found in the context of *2006 TCPA Order*. The Commission expounded upon the definition of “sender” in that decision to provide clarity as to which party was responsible for ensuring the honoring of opt-out requests that were made to a “third party agent or fax broadcaster” and not the “underlying business on whose behalf the fax is transmitted.”<sup>23</sup> The Commission clarified that “the business on whose behalf the fax is transmitted [] is responsible for complying with the

---

<sup>21</sup> *2006 TCPA Order* at 3808.

<sup>22</sup> *2006 TCPA Order* at 3808 (“We take this opportunity to emphasize that under the [FCC’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.”).

<sup>23</sup> *2006 TCPA Order* at 3807.

opt-out notice requirement and for honoring opt-out requests.”<sup>24</sup> The Commission clearly was not establishing a new test of overall liability for unsolicited facsimile advertisements; instead, it was clarifying that as between a fax broadcaster or other third party that transmitted faxes and the party *on whose behalf* such faxes were sent, it was the party *on whose behalf* such faxes were sent that bore responsibility for honoring the opt-out request. Accordingly, the Commission was clarifying liability in a specific factual circumstance where the “on whose behalf” standard had already been met.

The Commission allowed that, in certain instances, fax broadcasters could be liable for sending unsolicited faxes only if it is demonstrated that a fax broadcaster has “a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile advertisements.”<sup>25</sup> Its analysis highlighted that facts such as whether the fax broadcaster supplied the fax numbers to which advertisements were sent, made representations about the legality of sending faxes, or advised clients on how to comply with the unsolicited faxing rules, would weigh against the fax broadcaster.<sup>26</sup> Passive enabling of fax services does not subject fax broadcaster to liability which is the reason the Commission adopted the “on whose behalf” standard for determining liability. Nothing in this analysis, however, remotely suggested that liability would attach to a fax broadcaster based merely upon the customer’s choice to use a cover page containing the name, logo, and six-word slogan of the fax broadcaster. The *2006 TCPA Order* did not change the standard for assessing a party’s liability when sending unsolicit-

---

<sup>24</sup> *2006 TCPA Order* at 3807.

<sup>25</sup> *2006 TCPA Order* at 3808.

<sup>26</sup> *See 2006 TCPA Order* at 3808.

ed faxes but merely codified the existing Commission's rules whereby "the originator or controller of the content of the call or message[]" remained liable for prohibited faxes.<sup>27</sup>

### **B. The *DISH Network Ruling* Throws a Curveball**

Following the *2006 TCPA Order*, the FCC considered the liability of parties that initiate telemarketing calls, as opposed to unsolicited advertising faxes, in its *DISH Network Ruling*.<sup>28</sup> Among other findings, the Commission determined that sellers may be held vicariously liable under federal common law principles of agency for certain violation of the TCPA.<sup>29</sup> In reaching this conclusion, the Commission interpreted Section 227(c)(5) of the TCPA that allows a person that received more than one call within a 12-month period "by or on behalf of" the same entity in violation of the TCPA's do-not-call provisions to bring an action in state court.<sup>30</sup>

Courts began to apply the Commission's findings in the *DISH Network Ruling*, which concerned telemarketing calls, to cases involving alleged unsolicited advertising faxes. One such

---

<sup>27</sup> *1995 TCPA Order*, 10 FCC Rcd at 12407 n.90 (1995) (citing to Senate Rep. No. 178, 102d Cong., 1st Sess. 9 (1991)). See also *Letter from Laurence N. Bourne et al.*, Counsel for FCC, to John Ley, 11th Cir. Clerk of Court, 2014 WL 3734105 at \* 4 (July 17, 2014) (*Palm Beach Golf Center-Boca, Inc. v. Sarris*, Appeal No. 13-14013) (explaining that the codification of the rules in the *2006 TCPA Order* "is consistent with the Commission's pre-existing uncodified interpretation that the 'entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements.'" (citations omitted) ("Letter Brief"); *infra* Section III.B.

<sup>28</sup> *Joint Petition Filed by Dish Network, LLC, et al. for a Declaratory Ruling Concerning the Telephone Consumer Protection Act*, 28 FCC Rcd 6574 (2013) ("*DISH Network Ruling*").

<sup>29</sup> See *DISH Network Ruling*, 28 FCC Rcd at 6582-93.

<sup>30</sup> 47 U.S.C. § 227(c)(5) (emphasis added). See also *DISH Network Ruling*, 28 FCC Rcd 6574, 6578 (providing that one petitioner seeks a FCC declaration that a seller is liable under the TCPA where "calls that are sent by third parties 'on behalf of' or 'for the benefit of' the seller."); Public Notice, DA 11-594, at 4 (rel. April 4, 2011) (underlying Public Notice for the *DISH Network Ruling* where the FCC sought comment on whether federal common law agency principles should apply due to the reference in the statute to "made 'on behalf of' a seller).

case was *Palm Beach Golf Center-Boca, Inc. v. Sarris*.<sup>31</sup> Reasoning that the definitions of “seller” (*i.e.*, the party that “initiates” a telemarketing call) and “sender” (*i.e.*, a party that sends fax communications) are “substantially similar as used in regulations for the purposes of vicarious liability,” the District Court applied the *DISH Network Ruling* to the facts of the case.<sup>32</sup> A number of other District Courts have similarly applied the Commission’s *DISH Network Ruling* to cases alleging the receipt of unsolicited faxes.<sup>33</sup>

On appeal, the Eleventh Circuit requested that the Commission provide its position with respect to “whether the TCPA and its accompanying regulations allow a plaintiff to recover damages from a defendant who sent no facsimile to the plaintiff, but whose independent contractor did.”<sup>34</sup> In a letter brief response, the Commission explained that the *Dish Network Ruling* “did not address or alter the treatment of facsimile transmissions under the TCPA or the Com-

---

<sup>31</sup> 981 F. Supp. 2d 1239 (S.D. Fla. 2013) rev’d and remanded by *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris*, D.D.S., PA, 11th Cir. (Fla.), (Mar. 9, 2015).

<sup>32</sup> See *id.* at 1248 n.13. In fact, the District Court in *Palm Beach Golf Center-Boca, Inc.* was relying on an opinion from a Northern District Illinois District Court that also applied the *DISH Network Ruling* to a case alleging receipt of unsolicited advertising faxes. See *id.* (citing *Savanna Group, Inc. v. Trynex, Inc.*, 2013 WL 4734004, at \*5 (N.D.Ill. Sept. 3, 2013)).

<sup>33</sup> See, e.g., *Avio, Inc. v. Alfocchino, Inc.*, 18 F. Supp. 3d 882, 894 (E.D. Mich. 2014) (rejecting arguments that there is a material difference in the TCPA with respect to reference to “send” versus “initiate”); *Imhoff Inv., LLC v. SamMichaels, Inc.* 2014 WL 172234 (E.D. Mich 2014), at \*6 (“Even though the FCC’s declaratory ruling addressed the definition of seller within the telemarketing context, not sender within the faxing context, the definitions are similar and the ruling has been applied to senders as well.”); *Savanna Group, Inc. v. Trynex, Inc.*, No. 10 C 7995, 2013 WL 4734004 (N.D.Ill. Sept. 3, 2013), at \*5 (applying the analysis in the *DISH Network Ruling* to a case alleging violation of the unsolicited advertisement fax rules due to the similar definition of “seller” and “sender” in the TCPA).

<sup>34</sup> See *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris*, D.D.S., PA, 781 F.3d 1245 (11th Cir. 2015), Letter from Amy C. Nerenberg, Chief Deputy Clerk for the 11th Cir. Court of Appeals, to Richard Welch, FCC-Office of General Counsel, at 1 (July 7, 2014) (*Palm Beach Golf Center-Boca, Inc. v. Sarris*, Appeal No. 13-14013).

mission's implementing regulations."<sup>35</sup> The Commission advised the Court that "the recipient of an unsolicited facsimile advertisement may recover damages from a defendant that does not itself transmit the offending facsimile, if the defendant has hired an independent contractor to transmit facsimiles advertising the defendant's goods or services."<sup>36</sup> And the Commission maintained that such liability in the context of unsolicited faxes "does not depend upon the application of federal common law vicarious liability principles."<sup>37</sup> The Commission further clarified that while it had codified the definition of "sender" in the *2006 TCPA Order*, that 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 facsimiles."<sup>38</sup> Or as the Eleventh Circuit phrased it, "[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."<sup>39</sup> Thus, the Commission's letter brief confirmed both the inapplicability of the *DISH Network Ruling* analysis to cases involving unsolicited advertisement faxes and that the *2006 TCPA Order* did not alter the Commission's interpretation of "sender" when determining liability for the receipt of unsolicited advertisement faxes.

---

<sup>35</sup> *Letter Brief*, 2014 WL 3734105 at \* 1.

<sup>36</sup> *Letter Brief*, 2014 WL 3734105 at \* 1.

<sup>37</sup> *Letter Brief*, 2014 WL 3734105 at \* 1.

<sup>38</sup> *Letter from Laurence N. Bourne et al.*, Counsel for FCC, to John Ley, 11th Cir. Clerk of Court, 2014 WL 3734105 at \* 4 (July 17, 2014) (citing *1995 TCPA Order*, 10 FCC Rcd at 12407) (emphasis added).

<sup>39</sup> *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., PA*, 781 F.3d 1245, 1257 (11th Cir. 2015).

### C. Clarification of the Definition of “Sender” is Needed

Despite the *Letter Brief*, confusion as to who is liable when a plaintiff alleges receipt of an unsolicited fax advertisement is pervasive throughout the industry and the judiciary. Following the Eleventh Circuit reversal and remand in *Palm Beach Golf Center-Boca, Inc.*, other courts have adopted conflicting interpretations of the *Letter Brief*. In *Siding & Insulation Co. v. Alco Vending, Inc.*,<sup>40</sup> the Sixth Circuit found that the Commission changed its interpretation of the meaning of the term “sender” in the *2006 TCPA Order* such that “liability after the promulgation of the 2006 definition would extend to both those entities ‘on whose behalf the advertisement [was] sent’ and those whose goods or services [were] advertised or promoted in the unsolicited advertisement.”<sup>41</sup> According to the Sixth Circuit, the *2006 TCPA Order* broadened the definition of the term “sender” applicable to unsolicited advertising faxes, as compared with the pre-2006 definition despite the fact that the *Letter Brief* expressly states precisely the opposite.<sup>42</sup> Indeed, the Sixth Circuit reached this conclusion despite the fact that the *Letter Brief* explicitly explained that the Commission had intended the 2006 codification of the definition of “sender” to be consistent with its pre-existing uncodified interpretation. Undeterred by the Commission’s interpretation of the *2006 TCPA Order*, the Sixth Circuit dismissed the *Letter Brief*’s explanation as “not consistent with [the FCC’s] own regulations.”<sup>43</sup> Thus, the Sixth Circuit has adopted an interpretation of the *2006 TCPA Order* in direct contradiction with the Commission’s. That court wrongly maintains that the Commission adopted a strict liability standard such that a party could be found liable if its goods or services are merely described in an unsolicited advertisement fax,

---

<sup>40</sup> 2016 WL 2620507 (6th Cir. May 9, 2016).

<sup>41</sup> *Siding*, at \*10 (6th Cir. 2016).

<sup>42</sup> *Siding*, at \*6-8 (6th Cir. 2016).

<sup>43</sup> *Siding*, at \*11-12.

regardless of whether that party had anything to do with it; *i.e.*, there is no longer an “on whose behalf” standard.”<sup>44</sup>

The perverse results of the Sixth Circuit’s interpretation of the term “sender” are quickly apparent. It would hold parties liable for “advertisements” that they not only did not authorize, but knew nothing about. It even invites malicious conduct – an anonymous sender could transmit thousands of faxes bearing a fake advertisement for a victim’s goods or services, and the *victim would be liable* as the “sender” under this misinterpretation of the TCPA. Prior to the Sixth Circuit’s interpretation in *Siding & Insulation Co.*, a district court, in *CIN-Q Automobiles, Inc. v. Buccaneers Limited Partnership*, observed that interpreting the term “sender” as imposing strict liability on parties who are referenced in unsolicited advertisement faxes “leads to absurd results which cannot possibly follow from a permissible construction of the TCPA or from an agency’s reasonable interpretation of its regulations.”<sup>45</sup> The court continued,

To conclude that an individual or entity is per se a ‘sender’ under the TCPA merely because their ‘goods or services’ appear as advertised in the faxes at issue . . . would give rise to, what the parties have labeled, sabotage liability. By way of illustration, it would allow a rabid Tampa Bay Buccaneers fan—with a rhino helmet, red face paint, and an undying devotion to the organization—to trigger *per se* liability for the organization under the TCPA by gratuitously, and without directive from or notice to the organization, promoting season ticket sales via fax. The same could be true of a random individual in Boston, mind brewing with *scienter*, who works to implicate the New York Yankees by advertising their season tickets.<sup>46</sup>

---

<sup>44</sup> *Siding*, at \*13 (“Based on the above analysis, the strict liability standard as set out in the FCC’s 2006 regulation does not apply to Alco’s conduct”).

<sup>45</sup> See *CIN-Q Automobiles, Inc. et al v. Buccaneers Limited Partnership*, 2014 WL 7224943 at \*6 (M.D. Fla. 2014). Note that this case was decided prior to *Siding & Insulation Co. v. Alco Vending, Inc.*

<sup>46</sup> *Id.*, 2014 WL 7224943 at \*6.

Beyond the obvious absurdity of defining “sender” in a manner that would expose parties to “sabotage liability,” there remains considerable misinterpretation of the *Letter Brief*. In *Arkin v. Innocutis Holdings, LLC*,<sup>47</sup> the court, citing to *Siding & Insulation Co.*, found that the defendant was a “sender” under the TCPA<sup>48</sup> solely due to the fact that its “goods are advertised or promoted in the [f]ax[]”<sup>49</sup> without reference to the Commission’s “on whose behalf” standard and in direct contradiction to the *Letter Brief* where the Commission explained that the 2006 TCPA Order simply codified the Commission’s preexisting interpretation of the term “sender.”<sup>50</sup> Numerous other courts similarly grappled with how to interpret the term “sender” and wrongly adopted the view that the Commission expanded the meaning of the term in its 2006 TCPA Order.<sup>51</sup>

---

<sup>47</sup> 2016 WL 3042483 (M.D. Fla 2016).

<sup>48</sup> See 2016 WL 3042483, at \* 5 (asserting wrongly that the definition of “sender” was expanded in the 2006 TCPA Order to include both an “on-whose behalf” and a “strict” liability standard).

<sup>49</sup> *Arkin v. Innocutis Holdings, LLC*, 2016 WL 3042483, at \* 5.

<sup>50</sup> *Letter from Laurence N. Bourne et al.*, Counsel for FCC, to John Ley, 11th Cir. Clerk of Court, 2014 WL 3734105 at \* 4 (explaining that the 2006 TCPA Order’s codification of the term “sender” was “consistent with the [FCC’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 facsimiles.’”).

<sup>51</sup> See, e.g. *City Select Auto Sales, Inc. v. BMW Bank of North America Inc. et al.*, 2015 WL 5769951 (D. NJ 2015) (“[T]he FCC regulation defining a ‘sender’ appears to prescribe [two theories of liability] . . . The first . . . ‘applies to ‘person or entity’ on ‘whose behalf’ a third party transmits an unsolicited advertisement.’ The other [applies] to the person or entity ‘whose goods or services are advertised in the unsolicited advertisement.’”); *Sturdy v. Medtrak Educ. Services LLC*, 2014 WL 2727200, at \*2 (C.D. Ill June 16, 2014) (“Defendants are subject to liability under the TCPA if the unsolicited fax advertisement was sent on their behalf or if the fax advertised or promoted their goods or services.”); *Addison Automatics, Inc.*, 2013 WL 3771423, at \*4 (N.D. Ill July 16, 2013) (“Since [defendants’] goods or services are advertised in the fax at issue, they are ‘senders’ under the FCC’s interpretation of this section of the TCPA.”).

In addition to leading to absurd results, such an interpretation does violence to the text of the statute. The TCPA is unambiguous that a person cannot be exposed to liability based *only* on the fact that its goods or services appear in a fax. As written in the statute, it is unlawful for a person “to use any telephone facsimile machine . . . to send, to a telephone facsimile machine, an unsolicited advertisement.”<sup>52</sup> The text of the statute makes clear a person must have done something, *e.g.*, used or directed the use of a fax machine, to “send” an unsolicited advertisement.<sup>53</sup> In addition to misconstruing the *Letter Brief*, courts and plaintiffs suggesting that the Commission changed the definition of “sender” in the *2006 TCPA Order* to include parties that have taking no actions are asserting an interpretation of the Commission’s rules that would violate the TCPA’s statutory text, which, of course, the Commission cannot do when directed to promulgate regulations based on statutory text.<sup>54</sup>

As detailed above, the Commission cannot interpret the TCPA in a manner that violates the statutory text, nor did it as the *Letter Brief* makes clear. But as further evidence that the definition of “sender” in the *2006 TCPA Order* was merely codification of the Commission’s prior interpretation of that term, that Order was *not* the result of a rulemaking where the Commission sought comment on whether the term “sender” should be interpreted such that parties who had no involvement whatsoever in an unsolicited advertisement fax could still be found

---

<sup>52</sup> 47 U.S.C. § 227(b)(1)(C).

<sup>53</sup> See, *e.g.*, *Bridgeview Health Care Center v. Clark*, 2015 WL 1598115, at \*7 (N.D. Ill. Apr. 8, 2015) (“Congress sought to penalize persons who *advertise* their goods via junk faxes. But the very notion of advertising one’s goods entails that one must do something to advertise them. A rule of strict liability, however, would go much further and penalize people for simply having goods that are ‘advertised’ in a fax (perhaps unwillingly, by third parties), rather than penalize only those who take steps to advertise their goods unfairly by shifting the cost of advertising to the recipient.”) (emphasis in original).

<sup>54</sup> See, *e.g.*, *U.S. v. New England Coal & Coke Co.*, 318 F.2d 138, 143 (1st Cir. 1963) (“[T]he power to issue regulations is not the power to change the law . . .”).

liable solely on the basis that there goods or services were advertised in such a fax. If, as the Sixth Circuit wrongly concluded, the Commission had intended to make a substantive change in the definition of “sender” in a manner that departed from its prior interpretation of the term, the Commission could only have made such a change through a notice and comment rulemaking proceeding.<sup>55</sup> Accordingly, there is simply no basis on which to find that the *2006 TCPA Order* did anything more than codify the Commission’s prior interpretation of the term “sender,” as the Commission explained in the *Letter Brief*.

Although the Commission’s intent seems clear enough, the conflicting court decisions over the meaning of “sender” and ensuing litigation have created widespread uncertainty regarding the interpretation of the Commission’s rule, and a pressing need for the Commission to resolve this uncertainty by a declaratory ruling. 47 C.F.R. § 1.2. Conflicting judicial rulings create unnecessary risk and exposure to potential liability for fax services such as RingCentral’s. Therefore, RingCentral requests that the Commission clarify that a person is not the “sender” of a facsimile if they did not directly or indirectly choose the content of that facsimile. This declaration would be consistent with the *Letter Brief*, in which the Commission expressed the view that a person could be liable as the “sender” of a facsimile transmitted by its independent contractor. It would also be consistent with the “on behalf of” language in 47 C.F.R. § 64.1200(f)(10). Moreover, such a clarification is consistent with the *2006 TCPA Order* where the Commission reiterated that a fax broadcaster would only be liable for an unsolicited fax if the fax broadcaster “demonstrates a high degree of involvement in” the transmitting of unsolicited fax advertise-

---

<sup>55</sup> See, e.g., *DISH Network Ruling*, 28 FCC Rcd at 6586 (noting that in order to expand liability under the TCPA, the Commission would have to conduct a notice and comment rulemaking). But as pointed out in the preceding paragraph, even had the FCC conducted a notice and comment proceeding on such an interpretation of the term “sender,” which it did not, such an interpretation would fail as a matter of law as it would violate the terms of the statutory text.

ments.<sup>56</sup> Specifically, RingCentral did not and does not supply a “source of fax numbers” to be called, did not and does not “make representations about the legality of faxing to those numbers,” and did not and does not “advise clients about how to comply with the fax advertising rules[.]”<sup>57</sup> Thus, there is no basis on which to find that RingCentral demonstrates a “high degree of involvement in the transmission of those facsimile advertisements[.]” when its only involvement is: (1) to enable its customers to transmit facsimiles authored by customers with or without cover sheets; and (2) to provide cover sheet templates which a customer can affirmatively decide to use as a starting point for crafting an outbound fax message.<sup>58</sup> Further, the Commission should clarify that the phrase “whose goods or services are advertised or promoted in” an unsolicited facsimile applies only to a person who directly or indirectly initiated that advertising or promotion. Although the Commission undoubtedly should caution that the terms “directly or indirectly choose the content” and “directly or indirectly initiate” should be interpreted broadly to prevent evasion, it should firmly declare that “sender” liability cannot attach to a person who did not initiate, author or know about the content of a facsimile.

In this case, since RingCentral’s customer, not RingCentral, decided on the content of its facsimile transmission, including the choice of cover sheet; RingCentral did not directly or indirectly initiate the fax, select its content, or request the customer to send any facsimiles on RingCentral’s behalf; and RingCentral did not control, author, nor approve the content of the

---

<sup>56</sup> 2006 TCPA Order at 3808. See also, *Rules and Regulation Implementing the Telephone Consumer Protection Act*, 18 FCC Rcd 14014 (2003) (establishing when fax broadcasters are liable for third party facsimiles).

<sup>57</sup> *Id.* RingCentral clearly does not provide legal advice regarding compliance with relevant law as illustrated by the company’s Terms of Service expressly providing that the customer is solely responsible for such compliance. See *supra* Section I.C; RingCentral Terms of Service, at 6.C.

<sup>58</sup> See *infra* Section III.

customer's transmission. Accordingly, RingCentral cannot be liable as the "sender" of an unauthorized facsimile.

### III. THE COMMISSION SHOULD CLARIFY ITS GUIDANCE REGARDING *DE MINIMIS* ADVERTISEMENTS

One of the goals of the TCPA, as amended by the Junk Fax Protection Act, is to "prevent the shifting of advertising costs to recipients of unsolicited fax advertisements."<sup>59</sup> Cognizant of this underlying purpose, in the *2006 TCPA Order*, the Commission decided that a "*de minimis* amount of advertising should not convert a communication into an 'unsolicited advertisement.'"<sup>60</sup> It explained that "a company logo or business slogan found on an account statement" was insufficient to transform an informational message into an advertising message.<sup>61</sup> Similarly, it found that an "incidental advertisement contained in a newsletter does not convert the entire communication into an advertisement."<sup>62</sup>

The Commission elaborated that in assessing whether an advertisement is "incidental" it will first examine the nature of the primary message to determine if it is a *bona fide* informational communication. The factors involved in determining whether the communication was primarily informational include whether the information is issued on a regular schedule, whether the text varies from publication to publication and whether the information is directed to regular recipients.<sup>63</sup> The Commission provided that it would "also consider the amount of space devoted to

---

<sup>59</sup> *Phillips Randolph Enterprises, LLC v. Adler-Weiner*, 526 F. Supp. 2d 851, 852 (N.D. Ill. 2014), citing H.R.Rep. No. 317, at 10, 102d Cong., 1st Sess. 25 (1991).

<sup>60</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 21 FCC Rcd 3787, 3814 ¶ 51 (2006).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* ¶ 53

<sup>63</sup> *Id.* ¶ 53, n.187.

advertising versus the amount of space used” for other purposes and “whether the advertising is on behalf of the sender of the communication,... or whether the advertising space is sold to transmitted on behalf of entities other than the sender.”<sup>64</sup>

Several courts have had the opportunity to apply this principle and establish some limits on how much advertising qualifies under the *de minimis* exception. In *N.B. Industries v. Wells Fargo & Co.*,<sup>65</sup> the district court found that the four page faxes at issue were not an “unsolicited advertisement.” Each of the faxes at issue included information about applying for a business leadership award.<sup>66</sup> But the faxes also included five references to a business conference, contained six company logos, and invited applicants to visit the websites of entities sponsoring the award.<sup>67</sup> The Court found that the announcements regarding the availability of a business leadership award “were not rendered advertisements merely by the inclusion of logos and website addresses.”<sup>68</sup>

Other courts have addressed how much advertising content it takes to convert an otherwise purely informational message into an “unsolicited advertisement” that is prohibited under the TCPA. In *Holmes v. Back Doctors, Ltd.*,<sup>69</sup> the court found that medical information disseminated by defendants via fax to personal injury lawyers was primarily informational, despite the fact that approximately 1/7th of the material contained advertising. Several other courts have likewise found that the appearance of logos, websites or contact information fail to transform an

---

<sup>64</sup> *Id.*

<sup>65</sup> 2010 WL 4939970, (N.D. Cal. 2010), *aff’d*, 465 F. Appx. 640 (9th Cir. 2102).

<sup>66</sup> *Id.* at \*1-2.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at \*4.

<sup>69</sup> 2009 WL 3425961, *recon denied*, 695 F. Supp. 2d 843 (S.D. Ill 2010).

otherwise appropriate fax communication into an unsolicited advertisement.<sup>70</sup> Courts have established that the “sizing and spacing” of the commercial message plays a significant role in determining whether there is merely “an incidental connection between the informational messages contained in the faxes and the purported commercial material.”<sup>71</sup>

The present dispute appears to present a gap in the rules and decisions by courts applying the statute and the Commission’s rules. While some courts have applied the *de minimis* and incidental exceptions, the Commission should take the opportunity to establish a national standard that would provide guidance to the industry for assessing how much advertising is allowable on a message that is otherwise a permitted informational or transactional message without becoming an unsolicited advertisement barred by the TCPA. Plainly the single line of text, with the company logo, website and the line “send and receive faxes” on RingCentral’s cover sheet would, at best from the plaintiff’s perspective, fall on the *de minimis* and incidental side of whatever line the Commission draws.

Even if the message at issue in Plaintiff’s complaint may be construed as unsolicited advertising on behalf of Aplomb Corporate Training, this should not change the outcome, although Plaintiff’s complaint does not indicate Plaintiff lacked an existing business relationship with Aplomb.<sup>72</sup> The Commission should clarify that the presence of an incidental or *de minimis*

---

<sup>70</sup> See *Stern v. Bluestone*, 12 N.Y.3d 873, 875–76, (2009) (contact information was incidental and did not convert informational message to advertising). *Physicians Healthsource, Inc. v. Janssen Pharmaceuticals, Inc.*, 2013 WL 486207 \* 6 (D. N.J. 2013) (“marketing logos appear only at the bottom margin in small print and away from the name” of the drug that was subject of the informational message.).

<sup>71</sup> *Physicians Healthsource, Inc.*, 2013 WL 486207 \* 6.

<sup>72</sup> See Class Action Complaint for Damages, *Supply Pro Sorbents, LLC v. RingCentral Inc.*, Case No. 16-cv-2113 (N.D. Cal. filed Apr. 21, 2016).

reference to a third person in an advertising fax by the principal sender of the fax does not make that third person into a “sender” or co-sender under the TCPA.

The RingCentral footer constituted only 1/352 of the length of the full fax communication. Additionally, the footer with RingCentral’s information occupies approximately 1/88th of the length of the page, only 0.836% of the entire cover page area. Imposing liability on RingCentral in this situation would serve no purpose under the TCPA. The presence of RingCentral’s footer does not add any meaningful burden to the recipient, who would have still received the fax even if RingCentral’s information was not present in the footer. Nor did the presence of RingCentral’s footer contribute in any meaningful way to the amount of toner, paper, telecommunications usage or other costs incurred in receiving the fax. To the extent there is any burden on the recipient of the fax message here, RingCentral’s contribution to that burden was miniscule to the extent that it can even be viewed as RingCentral’s contribution which it cannot.<sup>73</sup>

Because *de minimis* advertisements on the fax add little to the burden and costs of receiving the fax and their presence has no influence on whether the fax would have been sent, it would be reasonable for the Commission to draw a bright line using a percentage of the lines in the length of the cover page as a proxy for determining when an advertising message qualifies as *de minimis*. The Commission should draw a bright line that advertising, contained only in the footer, that consumes no more than **5%**, of the lines of the cover sheet of a fax is *de minimis* and incidental to the overall content of the facsimile so that it does not create an unsolicited advertisement in violation of the TCPA, for all fax messages including those that are informational,

---

<sup>73</sup> See *supra* Section I.C, I.D.

transactional as well as those that contain separate and impermissible unsolicited advertisement.<sup>74</sup>

#### **IV. THE COMMISSION SHOULD DECLARE THAT *DE MINIMIS* ADVERTISERS ARE COVERED BY THE SENDER'S CONSENT**

For the reasons detailed in this Petition, RingCentral maintains that the Commission must clarify that the company is not the “sender” of a facsimile and that the *de minimis* text appearing exclusively in the footer of a customer-selected cover page does not constitute “unsolicited advertising.” But should the Commission determine that it does not want to issue the much-needed guidance to the judiciary and industry, an alternative basis for relief could be clarification as to when a fax broadcaster can rely on consent obtained by its customer to send a facsimile. In limited circumstances, the Commission could clarify that fax broadcasters can rely on their customers consent – referred to as third party “consent” – for sending *de minimis* information along with a facsimile that is otherwise lawfully authored and sent by a the fax broadcaster’s customer to a third party recipient. The standard for determining “consent” in the case of faxes is analogous to that in the telemarketing calls context, if not more flexible. In the telemarketing calls context, “prior express written consent” is required under the Commission’s rules.<sup>75</sup> But, in the case of fax communications, there are two means of determining when an “unsolicited advertisement” fax is permitted: 1) in the context of an “established business relationship,” coupled with “voluntary communication of the recipient’s number by the recipient directly to the

---

<sup>74</sup> Note that if the FCC adopts a bright line text based on this metric, a percentage as low as 1.2% of the cover page would provide RingCentral with relief as the footer containing the company’s information comprised 1/88th of the cover page.

<sup>75</sup> See 47 C.F.R. § 64.1200(a)(1)-(3).

sender, within the context of such established business relationship;”<sup>76</sup> and/or 2) “prior express invitation or permission,” which renders the communication to not be “unsolicited.”<sup>77</sup>

In neither the telephone nor the fax solicitation context do the Commission’s rules consider what constitutes “consent” or “invitation or permission.” In the *2012 TCPA Order*, the Commission recognized the tension between its interpretation of the kind of consent that is required for non-telemarketing calls and “unnecessarily restrict[ing] consumer access to information communicated through purely informational calls.”<sup>78</sup> That holds as true for fax transmissions as it does for other forms of messaging under the TCPA. The Commission should not impede non-advertising fax messages, and the services that allow consumers to send such messages through a strained interpretation of the “consent” requirements. Analogous to text messages, if the “sender” of the fax is determined to be the provider of facilities and services that enables customers to transmit faxes (*i.e.*, RingCentral) — a position with which RingCentral disagrees — then obtaining consent from the recipient of each facsimile message that RingCentral’s customers want to make will simply be impossible, even when the recipient of a message would like to receive the fax.

Without a clear interpretation on this issue, class action plaintiffs may argue that any *de minimis* and inconsequential language on a fax cover sheet, or elsewhere in an otherwise non-advertisement facsimile, is enough to constitute an “unsolicited advertisement.” This would result in the potential loss or discontinuation of Internet fax services, and chill the communications between parties that otherwise want to receive such fax messages. Allowing fax broadcast-

---

<sup>76</sup> See 47 C.F.R. § 64.1200(a)(4).

<sup>77</sup> See 47 C.F.R. § 64.1200(4)(15).

<sup>78</sup> *Rules and Regulations of the Telephone Consumer Protection Act*, 27 FCC Rcd 1830, 1838 (2012).

ers to rely on the consent that their customers have from the recipient (or other exemption from the rules that may apply to the customer) would help prevent such a scenario, and ensure that the “sender” of the fax (i.e., the author of the content) remain liable for the contents that are transmitted.

Given the ambiguity in the *2006 TCPA Order*, coupled with the likelihood of litigation over this issue, RingCentral respectfully requests that the Commission make explicit that, in any circumstance in which a fax broadcaster is treated as the “sender” of a facsimile message that contains *de minimis* advertising content, that provider may rely on the consent held or obtained by the fax broadcaster’s customer, including any “prior express invitation or permission” or “prior business relationship” exception that may apply. As explained above, RingCentral provides a service that enables its customers to send and receive faxes over the Internet. RingCentral’s customer (the author of the fax), represents that it has permission to send the fax to the recipient, and RingCentral’s terms of service prohibit sending unsolicited advertising through its Internet fax service.<sup>79</sup> The terms of service also specifically provide that the RingCentral customer is the creator of the content, and solely responsible for determining the destination(s) and recipient(s) of all outbound communications.<sup>80</sup> If RingCentral is deemed to be the “sender” of a fax in the circumstances noted above, then it should likewise be able to rely on the exceptions that would apply to its customer (*i.e.*, that either the fax recipient has given its consent to receive the fax, or that the prior business relationship exception applies, or both).

---

<sup>79</sup> See RingCentral, Terms of Service, at Section 6.C. See also *supra* Sections I.C, I.D.

<sup>80</sup> See RingCentral, Terms of Service, at Section 6.C. See also *supra* Sections I.C, I.D.

In the *GroupMe Declaratory Ruling*,<sup>81</sup> the Commission addressed the issue of “third party consent” under the TCPA. RingCentral respectfully submits that the issue of third party consent (or other exception) is analogous to the problem faced by GroupMe, in which case the Commission determined that intermediary consent was consistent with the TCPA.<sup>82</sup>

In the *GroupMe Declaratory Ruling*, the Commission found that, as a threshold matter, the TCPA is ambiguous as to how providers can obtain a consumer’s consent.<sup>83</sup> While the TCPA requires a caller (or in the case of faxes, a sender) to have such consent, both the text of the TCPA and its legislative history are silent on the method for obtaining consent, and by whom consent must be obtained. As such, the Commission concluded that the TCPA does not prohibit a caller, such as GroupMe, from obtaining the consumer’s prior express consent through an intermediary, such as the organizer of a group using GroupMe’s service.<sup>84</sup> It is natural for the Commission to extend that principle here and similarly find that the TCPA does not prohibit a fax sender (such as RingCentral), from obtaining the recipient’s consent through an intermediary, namely RingCentral’s customer who is the author of the substantive fax message. In summary, in the *GroupMe Declaratory Ruling* the Commission found that a consumer’s prior express consent may be obtained through and conveyed by an intermediary.<sup>85</sup> In that case the intermediary was

---

<sup>81</sup> See *GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 29 FCC Rcd 3442 (2014) (“*GroupMe Declaratory Ruling*”).

<sup>82</sup> *Id.* at ¶7.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at ¶ 6.

the organizer of a text messaging group.<sup>86</sup> In this case, the intermediary is the party transmitting the facsimile message. The third-party consent framework should be available to both.

The Commission should further conclude that allowing consent to be obtained and conveyed via intermediaries (or other exemptions, such as the prior business exemption) in the context of fax messages facilitates normal, expected, and desired business communications in a manner that preserves the intended protections of the TCPA. Because fax transmitters already have an established association with the fax recipient and are required by RingCentral's terms of service to not use the service to send unsolicited advertisements, commercial messages, solicitations, marketing or promotional materials,<sup>87</sup> the TCPA's goals of preventing unsolicited fax advertisements and avoiding costs associated with those messages, as well as of protecting consumer privacy, are not negatively impacted.<sup>88</sup>

---

<sup>86</sup> *Id.* at ¶ 7.

<sup>87</sup> *See* RingCentral Terms of Service, at 6.C..

<sup>88</sup> *See, e.g.*, H.R. Rep. 102-317 1st Sess., 102nd Cong. (1991).

## V. CONCLUSION

For the foregoing reasons, RingCentral requests that the Commission issue a ruling addressing the following issues. First, the Commission should clarify that the term “sender” under 47 C.F.R. Section 64.1200(f)(10) cannot mean a party whose goods or services appear in an unsolicited advertisement fax. The Commission should instead clarify that a person is not the “sender” of a facsimile if they did not directly or indirectly choose the content of that facsimile; rather, the “on whose behalf” standard requires a high level of direction by the party whose goods or services are advertised in such a fax. Relatedly, the Commission must clarify that it did not intend to expand the definition of “sender” in its *2006 TCPA Order* such that parties whose good or services appear in an unsolicited fax advertisement are strictly liable under the TCPA even if the only relationship between the parties is: (1) customer and fax broadcaster; and (2) the fax broadcaster did not formally or informally engage the customer to engage in marketing activities on its behalf. Second, the Commission should clarify that whether a fax qualifies as a *de minimis* advertising message depends on whether the *de minimis* message exceeds a threshold percentage of 5% the overall length of a cover page attendant to a fax and declare that all such *de minimis* advertising messages are not unsolicited advertising when present on informational, transactional or even another party’s unsolicited advertising fax. If the Commission is unwilling to clarify either the meaning of the term “sender” or “unsolicited advertisement,” – which for all the reasons detailed herein RingCentral believes the Commission must do – then the Commission should grant RingCentral’s alternative grounds for relief. Specifically, under circumstances where the fax broadcaster and customer have no marketing relationship whatsoever such that the customer makes all salient decisions about a fax communication, including the content of a fax, whether, when and to whom to send a fax and when the only information pertaining to the fax broadcaster is *de minimis* (such, as here, exclusively appearing in the footer of the cover page),

parties that qualify as “senders” under the Commission’s rules can rely on intermediaries obtaining the requisite consent from the recipient of the faxed communication.

Respectfully submitted,

RingCentral, Inc.

By: Ronald W. Del Sesto, Jr.

Bruce Johnson  
Vice President, Legal  
RingCentral, Inc.  
1400 Fashion Island Blvd  
San Mateo, CA 94404

Ronald W. Del Sesto, Jr.  
Joshua M. Bobeck  
Morgan Lewis & Bockius LLP  
2020 K ST NW  
Washington, DC 20006

Dated: July 6, 2016