

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

_____	)	
In the Matter of	)	
	)	
RingCentral, Inc.	)	CG Docket No. 02-278
	)	
Petition for Expedited Declaratory Ruling	)	
	)	
Comment by Supply Pro Sorbents, LLC	)	
_____	)	

**COMMENT BY SUPPLY PRO SORBENTS, LLC.**

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## EXECUTIVE SUMMARY

RingCentral, Inc. (“RingCentral”) is a telecommunication service provider offering a full-service bundle that includes fax broadcasting services. RingCentral provides its customers with form fax cover sheets that include an ad on the bottom that states, ““Send and receive faxes with RingCentral, [www. ringcentral.com](http://www.ringcentral.com) ***RINGCentral®***.” RingCentral has filed its petition seeking an exception to the Telephone Consumer Protection Act’s (“TCPA), 47 U.S.C. § 227, comprehensive ban on unsolicited fax advertisements to allow it to insert its ad on all of its customers’ fax cover sheets. RingCentral’s Petition should be denied because its ads provide no benefit to its customers or the recipients of their faxes and allowing such ads will open the flood gates to comprehensive and ubiquitous advertising within client communications by telecommunications providers.

RingCentral advances three arguments in support of its request for an exception, but none are persuasive. First, RingCentral argues it should not be deemed a “sender” of its ads. RingCentral’s argument fails because RingCentral controlled the content of its ad and designed it to promote its business. Whether RingCentral is viewed as the “highly involved” fax broadcaster of its ad, or that ad was sent on its “behalf,” or because that ad promoted its business, it qualifies as a “sender” as that term has been defined by the Commission since the beginning of the TCPA.

RingCentral also argues its ad should be exempt because it was only incidental to a bona fide transactional or informational communication. While the

Commission has established exceptions for fax ads that are incidental to bona fide informational and transactional communications, these exception cannot apply to RingCentral. The transactional exception covers faxers who have provided goods or services to the recipient of their fax, and the exception is limited to communications concerning that transaction. Thus, a pizza parlor can send a fax confirming an order for delivery that incidentally includes promotional statements. RingCentral indiscriminately includes its ad on every cover sheet its customers might use. RingCentral is not communicating with any of its customer's recipients about any transaction between RingCentral and the recipient, so the transactional exception cannot apply.

Similarly, the informational exception applies to faxers such as trade organizations and similar groups who send periodic newsletters, industry news articles, legislative updates, or employee benefit information to regular recipients. Once again, RingCentral's ad is appended to every fax cover it provides regardless of the context of the fax or to whom it is sent, so it is not incidental to a bona fide information communication as defined by the Commission.

Finally, RingCentral argues the even if it is a "sender" of its ads, the Commission should find that it has "third-party" permission to send its ads because its 23 page terms of service include a provision that customers should not violate the TCPA. This argument fails because even fax ads sent with permission must include an opt-out notice and RingCentral's forms did not.

RingCentral's legal arguments are without merit and its Petition should be denied for this reason. Moreover, RingCentral's request to allow fax broadcasters to routinely insert ads into their customer's faxes will cause a massive and useless proliferation of unsolicited fax advertising. Absent a compelling reason, and RingCentral provides none, the Commission should deny RingCentral's Petition and keep the floodgates closed.

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**I. INTRODUCTION.**

Petitioner RingCentral, Inc. (“RingCentral”) has requested that the Commission grant it an exemption from the prohibition on advertising by fax set forth in the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227(b)(1)(C).

RingCentral includes an advertising footer on the fax cover sheet forms it encourages its subscribers to use when using its fax broadcasting service. The ad reads, “Send and receive faxes with RingCentral, [www.ringcentral.com](http://www.ringcentral.com) ***RINGCentral®***.” The ad serves no conceivable purpose other than to promote RingCentral’s business by soliciting recipients of faxes from RingCentral customers to purchase RingCentral’s telecommunications services, nor does RingCentral identify any other purpose.

The core reason for the TCPA’s ban on fax advertising is to prevent advertisers from “tak[ing] advantage of th[e] basic design” of “facsimile machines” to “shift some of the costs of advertising from the sender to the recipient.” H.R. Rep.

No. 102-317, p. 10 (1991). That is exactly what RingCentral’s ad does. It is imposed without the recipient’s permission. While it might be chosen by the sender as a cost of using RingCentral’s forms, it is not chosen by the recipient and simply shifts some costs to the recipient to benefit RingCentral.

The Commission should deny RingCentral’s request because it is contrary to the plain language and purpose of the TCPA, and there is no compelling reason to allow fax broadcasters to include advertisements for their services in the faxes they send for their customers.

## **II. THE PARTIES.**

### **A. RingCentral**

#### **1. RingCentral automatically includes its ads in the fax cover forms it provides for its fax customers.**

RingCentral describes itself as a provider of “communications services” for “businesses of all sizes.” Pet., p. 2. One of the services RingCentral provides is fax broadcasting. *Id.* RingCentral’s services can be used from “the RingCentral website, through a desktop computer application, through a mobile application, through email, etc.” *Id.* As part of this service, RingCentral provides cover page forms that automatically include a footer advertising RingCentral’s services to the recipient. *Id.* at 4. RingCentral states that customers using its desktop application, but not most other applications, can choose not to use one of its cover forms; but it obviously provides the cover forms to encourage their use, and apparently they must be used in many applications. *Id.* at 3. RingCentral does not allow customers to alter the forms or remove the advertising footer when using them. *Id.* at 4.

**2. RingCentral's terms of service are irrelevant to its petition or the content it mandates for its fax covers.**

RingCentral argues its “terms of service advance the goals of the TCPA” by mandating that its customers follow the TCPA. Pet., p. 4. RingCentral’s terms of service consist of 23 pages of fine-print boilerplate text.<sup>1</sup> Burying admonitions to comply with the TCPA within a 23-page “Terms of Service” that no customer will actually read is irrelevant because RingCentral’s customers are not responsible for RingCentral’s ad. For example, RingCentral quotes its terms of service as stating, “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,” but that is exactly what RingCentral’s footer ads are. RingCentral is obviously not suggesting that its customers should read its terms of service and then decline to use its fax covers because they include “commercial messages or content.” *Id.* at 6. RingCentral’s terms of service are irrelevant to its Petition which concerns only the specific advertising content that RingCentral, itself, has chosen to include to promote its business, and not the content that its customers choose to include.

**3. RingCentral, not its customers, controls the content of its fax cover sheet ads.**

RingCentral argues its first page, footer ad is “incidental” to the rest of the fax, but RingCentral does not explain why it requires the footers in all of its cover forms if they are unimportant or incidental to RingCentral’s business. *Id.* at 4.

RingCentral similarly argues that its customers determine the content of all faxes,

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<sup>1</sup> See <https://www.reingcentral.com/legal/eulatos.html>.

but this is false because RingCentral provides and controls the content of its cover sheet footer ads. *Id.* at 3, 7. RingCentral goes so far as to claim that because its customers “must affirmatively decide to incorporate that template cover sheet (including the incidental RingCentral information) into the customer’s fax communications,” the customer becomes the “author” of RingCentral’s ad sent through RingCentral’s system. *Id.* at 7. First, RingCentral admits that it offers no fax covers without its automatic ad, and that it also prohibits customers from using the covers without including its ads. Second, RingCentral admits that the covers are not optional from some applications. *Id.* at 3. RingCentral’s customers do not become the authors of ads written by RingCentral where RingCentral conditions their use of its forms on inclusion of its ad. RingCentral’s argument to the contrary might be viable if RingCentral allowed its customers to delete its ads, but it admits it does not.

### **B. Supply Pro.**

Commenter Supply Pro Sorbents, LLC (“Supply Pro”) is a Texas LLC operating in Houston. *Supply Pro Sorbents, LLC v. RingCentral, Inc.*, No. 16-cv-2113, ECF 1, ¶ 10 (N.D. Cal. Apr. 21, 2016). Supply Pro received an unsolicited fax ad on April 13, 2016 from a customer of RingCentral. *Id.* at ¶¶ 14-20. Supply Pro filed suit against RingCentral for inserting its ad on the cover sheet used by its customer. *Id.* RingCentral asserts Supply Pro has not alleged the fax as a whole was an unsolicited advertisement, but this is false (and also irrelevant). *Compare* Pet. at 9-10 *with Supply Pro*, ECF 1, ¶ 17.

### C. The TCPA and fax advertisement liability.

As RingCentral notes, the TCPA is 25 years old. Pub. L. No. 102-243, 105 Stat. 2395 (codified as 47 U.S.C. § 227). Sending an “unsolicited advertisement” to a telephone facsimile machine has always been a violation of the Act. 47 U.S.C. § 227(b)(1)(C). “Unsolicited advertisement” is defined to include “any material advertising the commercial availability or quality of any property, goods or services which is transmitted to any person without that person’s prior express invitation or permission.” *Id.* at (a)(5).

The TCPA’s express purpose was to protect “privacy rights.” H.R. Rep. No. 102-317, pp. 5-6 (1991). The final House Report explained the purpose as follows:

The purpose of the bill (H.R. 1304) is to protect residential telephone subscriber privacy rights by restricting certain commercial solicitation and advertising uses of the telephone and related telecommunications equipment. ... [I]t restricts use of facsimile machines, computers or other electronic devices to send unsolicited advertisements.

H.R. Rep. No. 102-317, pp. 5-6 (1991). Congress was specifically concerned with protecting businesses. *Telemarketing Practices: Hearing on H.R. No. 628, H.R. No. 2131, and H.R. No. 2184 before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 101st Cong. 1st Sess., pp. 54-55 (1989) (“[B]usiness owners [were] virtually unanimous in their view that they [did] not want their fax lines tied up by advertisers trying to send messages.”) “Extensive research ... revealed no case of a company (other than those advertising via fax) which oppose[d] legislation restricting advertising via fax.” *Id.* at 54 n.35.

From its inception, the TCPA has provided that “a person or entity” may bring “an action based on a violation ... to recover for actual monetary loss from

such violation, or to receive \$500 in damages for each such violation, whichever is greater.” 47 U.S.C. § 227 (b) (3) (B). The TCPA does not allow recovery of costs or attorney fees. *Id.* (b) (3) (B). It does not allow for recovery of statutory damages in addition to actual damages, only permitting recovery of “whichever is greater.” *Id.* And in many states, legal entities and corporations such as Supply Pro cannot bring any claim without hiring a lawyer. *See, e.g., Downtown Disposal Servs., Inc. v. The City of Chicago*, 2012 IL 112040, ¶¶ 17, 22. This is true in federal courts as well. *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201-02 (1993) (citing *Osborn v. President of Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 829 (1824)).

In the 25 years since it was first enacted, the TCPA’s prohibition on unsolicited fax advertisements and enforcement by private class actions for \$500 in statutory damages per fax has never been amended by Congress and has been enforced by courts at all levels. *See, e.g., Imhoff Investment, L.L.C. v. Alfoccino, Inc.*, 792 F.3d 627, 633-634 (6th Cir. 2015); *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 (11th Cir. 2015); *American Copper & Brass, Inc. v. Lake City Indus. Products, Inc.*, 757 F.3d 540, 544 (6th Cir. 2014); *Chapman v. Wagener Equities, Inc.*, 747 F.3d 489, 492 (7th Cir. 2014); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682 (7th Cir. 2013).

These are not “nuisance suits” as RingCentral describes them, but private enforcement of the law as written. Pet., p. 8. To the extent they have proliferated, it is because companies like RingCentral have refused to take care to avoid violating the

TCPA. Consumer complaints about TCPA violations have been and continue to be the most frequent complaints received by the Commission.

<https://www.fcc.gov/general/quarterly-reports-consumer-inquiries-and-complaints> (site last visited August 24, 2016).

In addition, RingCentral misleadingly cites statistics to show the proliferation of lawsuits. Pet., p. 8 n.11. (citing <https://webrecon.com/out-like-a-lion-debt-collection-litigation-cfpb-complaint-statistics-dec-2015-year-in-review/>). That data reflects only federal court cases. <http://webrecon.com/some-notes-about-our-statistics/>. In *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 753 (2012), the defendant succeeded in arguing that TCPA claims can be forced into federal court. Thus, the increase in federal court TCPA claims since 2012 cited by RingCentral is as much a product of *Mims* as any increase in TCPA claims.

Finally, as long as the violations persist, the litigation should persist to deter and hopefully reduce it. Widespread violation of the TCPA is no reason to stop enforcing it or to prevent continued private enforcement like the lawsuits that prompted RingCentral's current petition.

**III. FAX BROADCASTERS WHO ADVERTISE THEIR OWN BUSINESSES IN THEIR CUSTOMERS' FAXES ARE "SENDERS" AS DEFINED BY 47 C.F.R. § 64.1200(f)(10).**

RingCentral argues there is a "pressing need for the Commission to clarify the meaning of the term 'sender' due to inconsistent interpretations of the Commission's rules by different appellate and federal district courts." Pet., p. 12.

RingCentral cites cases<sup>2</sup> it claims have concluded that the Commission changed the law by promulgating a codified definition of who is the “sender” of a fax advertisement for purposes of TCPA liability. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 FR 25967-01 (FCC 2006); 47 C.F.R. 64.1200(f)(10) (“*Sender Regulation*”). RingCentral argues it was not a change, the cited cases are wrong, and the Commission should use its petition to declare them wrong. Pet., pp. 12-25. RingCentral’s argument is both procedurally wrong, because its petition for declaratory relief is an untimely and improper vehicle for the relief it seeks, and substantively wrong because RingCentral is a “sender” of its fax ad regardless of whether the 2006 regulation changed the law.

**A. There is “no controversy to terminate or uncertainty to remove,” so RingCentral’s Petition should be dismissed.**

RingCentral petitions for declaratory relief under 47 C.F.R. § 1.2, which provides, “The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.” RingCentral argues 47 C.F.R. § 64.1200(f)(10), needs to be clarified.” Pet., p. 1. The *Sender Regulation* defines the “sender” who is liable for faxes sent in violation of the TCPA as, “the

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<sup>2</sup> *Siding & Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886, 894 (6th Cir. 2016); *Arkin v. Innocutis Holdings, LLC*, No. 8:16-CV-0321-T-27TBM, 2016 WL 3042483, at \*5 (M.D. Fla. May 26, 2016); *City Select Auto Sales, Inc. v. BMW Bank of N. Am. Inc.*, No. CV 13-4595 (NLH/JS), 2015 WL 5769951, at \*10 (D.N.J. Sept. 29, 2015); *Sturdy v. Medtrak Educ. Servs. LLC*, No. 13-CV-3350, 2014 WL 2727200, at \*2 (C.D. Ill. June 16, 2014); *Addison Automatics, Inc. v. RTC Grp., Inc.*, No. 12 C 9869, 2013 WL 3771423, at \*4 (N.D. Ill. July 16, 2013).

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.”

RingCentral does not argue that the Sender Regulation is ambiguous or difficult to understand, nor have the cases it cites so found. *See, e.g., Siding*, 822 F.3d at 894. Instead, RingCentral argues that, despite the lack of any ambiguity on the face of the Sender Regulation, courts should strictly limit its meaning to the views expressed by the Commission before it was promulgated. In other words, RingCentral seeks a declaration that the Commission’s codification of a “sender” definition in the Sender Regulation was superfluous.

The folly of RingCentral’s argument is illustrated by examining *Siding*. *Siding* considered the inverse of RingCentral’s argument. The plaintiff sought to hold the defendant advertiser liable for a fax sent before the Sender Regulation was promulgated. Like RingCentral, the plaintiff argued that the Commission had stated the *Sender Regulation* was “consistent” with prior Commission statements so it could not be a change in the law. *Letter from Laurence M. Bourne et al. to John Ley 11th Cir. Ct. Clerk*, 2015 WL 3734105 (FCC July 17, 2014) (“*Letter Brief*”) (filed in *Palm Beach*, No. 13-14013). The plaintiff argued that because the *Sender Regulation* did not change the law, its reference to the “sender” as “the person or entity ... whose goods or services are advertised or promoted” should apply to faxes sent before its effective date in 2006. *Siding*, 822 F.3d at 894. Likewise, RingCentral now argues that because there was no change, the language the *Siding* plaintiff cited means nothing, but the

legal argument is the same – the *Letter Brief's* reference to the consistency of the law before and after the 2006 regulation prohibits it from being interpreted as a change. As *Siding* explained, this is wrong because the consistency “could have been a reference to the fact that both the *1995 Order* and the 2006 definition include the ‘on whose behalf’ language, without expressing an opinion on the 2006 definition’s new language imposing liability on entities whose goods or services are advertised in a fax.” *Siding*, 822 F.3d at 894. Significantly, no court has disagreed with *Siding* and it is not, as the plaintiff in *Siding* argued or RingCentral now argues, in conflict with the *Letter Brief* or any case law.

RingCentral’s Petition does not seek to “terminat[e] a controversy or remov[e] uncertainty.” 47 C.F.R. § 1.2. Instead, RingCentral seeks to have the Commission overrule court decisions that have applied the plain language of 47 C.F.R. §64.1200(f)(10) without apparent difficulty and in a consistent fashion. The Commission should find that RingCentral’s Petition is not appropriate for declaratory relief and dismiss it. *See, e.g., In the Matter of Junk Fax Prevention Act of 2005*, 27 F.C.C. Rcd. 4912, 4912 (2012) (dismissing petition to declare opt-out notice regulation inapplicable to unsolicited fax advertisements contrary to the plain language of the regulation).

**B. To the extent RingCentral argues the regulation is inconsistent with the TCPA, its Petition is untimely and improper.**

A party that wishes to challenge the Commission’s authority to promulgate a regulation must do so by filing a petition for reconsideration within 30 days of the public notice of the action. 47 U.S.C. § 405(a); 47 C.F.R. § 1.429(d). The *Sender*

*Regulation* at issue here was published in the Federal Register on May 3, 2006. 71 FR 25967-01. RingCentral’s petition is plainly untimely to the extent it attacks the Commission’s authority to promulgate the *Sender Regulation*. 47 U.S.C. § 405(a); 47 C.F.R. § 1.429(d).

In an effort to obfuscate its untimeliness, RingCentral couches its attack on the Commission’s authority as only an attack on courts interpreting the *Sender Regulation* as a change in the law. Pet., pp. 22-23. RingCentral then claims the *Letter Brief* did not advocate the *Sender Regulation* was a change, so the Commission has not “interpret[ed] the TCPA in a manner that violates the statutory text.” *Id.* at 22. But this renders RingCentral’s argument irrelevant to its petition. Assuming, *arguendo*, that the Commission finds *Siding’s* view of the *Sender Regulation* correct, RingCentral’s argument that the *Sender Regulation* was beyond the authority of the Commission to promulgate because it was inconsistent with the TCPA is an untimely collateral attack. Conversely, if the Commission simply disagrees with *Siding’s* view of the meaning of the *Sender Regulation* itself, this has nothing to do with the Commission’s authority. RingCentral’s arguments regarding the Commission’s authority and any potential inconsistency between the text of the *Sender Regulation* and the TCPA are either irrelevant to its petition or an untimely and procedurally improper collateral attack on a 10-year-old regulation.<sup>3</sup>

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<sup>3</sup> RingCentral also suggests in passing that the *Sender Regulation* was enacted without proper notice and comment. Pet., p. 23 n.5. RingCentral cites *In the Matter of the Joint Petition Filed by Dish Network, LLC, the United States of Am., & the*

**C. RingCentral is a “Sender” under both the Sender Regulation and the prior statements by the Commission.**

RingCentral does not dispute that it created its fax footer ad and required that customers who used its fax cover forms would necessarily include this ad in their faxes. Pet., p. 3. RingCentral now argues that the “Commission’s interpretation of ‘Sender’ has always required a substantial connection between the Sender and the fax.” Pet., p. 12. While this may well be true, there can be no doubt there is such a connection here because the content of the faxes at issue in the Petition is content RingCentral created and imposed on the faxes at issue.

RingCentral draws distinctions between sender liability under the TCPA for three situations. First, broadcasters and common carriers; second, persons “on whose behalf” an advertising fax is sent; and finally persons whose “goods or services are advertised or promoted” in the fax. RingCentral then argues that the Commission should eliminate the final “advertiser” category to avoid “absurd results.” Pet., p. 22. The problem with RingCentral’s Petition is that it qualifies as a “sender” under all three of these categories, so it is particularly ill suited to raise its central point and its Petition should be denied regardless.

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*States of California, Illinois, N. Carolina, & Ohio for Declaratory Ruling Concerning the Tel. Consumer Prot. Act (TCPA) Rules*, 28 F.C.C. Rcd. 6574, 6586 (2013). First, RingCentral is wrong as the *Sender Regulation* was the product of notice, comment and subsequent rulemaking. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 Junk Fax Prevention Act of 2005*, 21 F.C.C. Rcd. 3787, 3806-3807 (2006); 71 FR 25967-01. Second, *Dish*, like the present case, was a declaratory action. The *Sender Regulation*, in contrast, was a codified regulation. *Dish’s* reference to the limits of the Commission’s power in the context of a declaratory action, therefore, is inapplicable to the validity of the *Sender Regulation* because it was not the product of such a proceeding.

1. **RingCentral is a sender, because it is a highly involved broadcaster.**

RingCentral cites Commission statements that support the idea that “common carriers and fax broadcasters” are generally not liable for faxes customers send using their services. Pet., pp. 13, 23-24 (citing *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 Junk Fax Prevention Act of 2005*, 21 F.C.C. Rcd. 3787, 3808 (2006) (“*2006 TCPA Order*”); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 F.C.C. Rcd. 12391 (1995) (“*1995 TCPA Order*”); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752 (1992) (“*1992 TCPA Order*”). As RingCentral concedes, however, the exception for broadcasters applies only so long as the broadcaster did not have a “high degree of involvement or actual notice of illegal use.” *Id.* at 13 n.17 (citing *1995 TCPA Order* at 12407 n.90).

The issue raised by RingCentral’s Petition is whether its ad is a violation of the TCPA, and RingCentral not only had a high degree of involvement in creating and including its ad in all of the faxes at issue in its Petition, but it was the sole actor responsible for doing so. In addition, as RingCentral concedes, the broadcaster exception only applies where the broadcaster is “not responsible for the content of the fax,” but RingCentral was responsible for the content at issue in its Petition. Pet., p. 13 (citing *1995 TCPA Order* at 12407-08). RingCentral protests that it did not provide “legal advice” to its customers, but by including its footer ads it was implying they were legal. Pet., p. 24 n.57 (citing *2006 TCPA Order* at 3808).

RingCentral cites its terms and conditions requiring customer compliance with the

TCPA, but it is nonsensical to think that RingCentral provided illegal fax covers relying on its customers never to use them with RingCentral’s service. Because RingCentral must concede that it was highly involved in and responsible for the ads it slipped into the faxes of its customers, it is a “sender” of those ads because it was a “highly involved” broadcaster under the *1995 TCPA Order*.

**2. RingCentral is a sender because it inserted its footer ad on its own behalf.**

The heart of RingCentral’s argument is that the “sender” liable for a fax under the TCPA can only be a person “on whose behalf” the advertisement was sent regardless of whose goods or services were advertised in it. Pet., p. 14 (citing *2006 TCPA Order* at 3807). RingCentral argues “on behalf of” means the entity who is “the originator controller of the content of the call or message.” Pet., p. 13 (citing *1995 TCPA Order* at 12407 n.90). By this definition, however, the ad that is at issue in the Petition was sent on RingCentral’s “behalf” because RingCentral originated and controlled that content. RingCentral similarly seeks to have the Commission “clarify that a person is not the ‘sender’ of a facsimile if they do not directly or indirectly choose the content of that facsimile,” but RingCentral chose the content of the footer ads at issue. Pet., p. 23. Finally, RingCentral argues “on behalf of” liability should not extend to a person “who did not initiate, author or know about the content of the facsimile,” but RingCentral knew the precise content of its footer ads. Pet., p. 24.

RingCentral’s own formulations of “on behalf of” liability reach the conduct that it puts at issue in its Petition. Even if the Commission were to accept

RingCentral's legal arguments, the undisputed facts make clear it is the person "on whose behalf" the footer ads were sent and, therefore, is liable as a sender under the TCPA.

**3. RingCentral is a sender because its services were advertised or promoted by its faxes.**

RingCentral argues the Commission should ignore the plain language of the Sender Regulation and hold RingCentral is not strictly liable for its footer ads that promote its services. Pet., pp. 19-21, 24. As explained above, RingCentral is liable as a "sender" even if liability does not attach simply because its services were promoted. Consequently, this declaratory action by RingCentral is not the appropriate forum for the consideration of the issue. But even if this were not the case, and the Commission does reach the issue, it should uphold its *Sender Regulation* and confirm that courts such as *Siding* have correctly applied it.

First, the *Sender Regulation* is clear and unambiguous. It states the sender is "the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement." 47 C.F.R. § 64.1200(f)(10). If liability were limited to "on behalf" of, there would have been no reason to promulgate the regulation and no reason to include the phrase, "or whose goods or services are advertised or promoted in the unsolicited advertisement." RingCentral's view excises half of the *Sender Regulation*.

Second, the only reason RingCentral provides for why the *Sender Regulation* should be re-written to excise the second half is specious and inapplicable to its

Petition. RingCentral argues that strict advertiser liability will lead to absurd results and gives “sabotage liability” as an example. Pet., p. 20 (citing *Cin-Q Auto., Inc. v. Buccaneers Ltd. P’ship*, No. 8:13-CV-01592-AEP, 2014 WL 7224943, at \*6 (M.D. Fla. Dec. 17, 2014)).

“Sabotage liability” is the notion that if the advertiser is held strictly liable its enemies could intentionally send unsolicited faxes advertising his business to expose him to liability and ruin it. *Id.* As a threshold matter, RingCentral’s Petition does not raise a proper challenge to “sabotage liability” because RingCentral was not the victim of any such conduct. RingCentral included its footer ads to promote its business, and it was not the victim of a saboteur.

More importantly, nothing compels the Commission or any court to interpret the Sender Regulation’s reference to the entity “whose goods or services are advertised or promoted in the unsolicited advertisement” to enable “sabotage liability.” The phrase can be reasonably construed to cover only actual entities advertising their own goods and services of their own volition without being extended to the absurd and extremely unlikely saboteur scenario.

RingCentral’s argument depends on a strict and false dichotomy between “on behalf of” and “advertiser” liability. Pet., p. 14. For example, RingCentral asserts that “on whose behalf” liability would be rendered “meaningless” if the reference to advertisers in the *Sender Regulation* were an independent basis for liability. *Id.* But this simply does not follow. A fax ad could be sent on behalf of someone whose goods or services were not advertised such as a “highly involved” broadcaster or an agent

for the advertiser as in *Palm Beach*. Similarly, an advertiser may not necessarily meet the “on behalf of” test while falling far short of the saboteur scenario where he approves the ad and intends it to be sent, but the broadcaster sends it to the wrong targets. *See, e.g., Siding*, 822 F.3d at 888.

RingCentral is an example of an entity that should be liable as a “sender” simply because the faxes at issue advertised its business even if it would not have been liable under an “on behalf of” standard. RingCentral intentionally chose systematically to foist its advertisements on the recipients of its customers’ faxes, and it should not be able to avoid liability by arguing the Sender Regulation that was promulgated 10 years ago does not mean what it says.

#### IV. RINGCENTRAL’S FOOTER AD SHOULD NOT BE EXEMPT FROM THE TCPA AS *DE MINIMIS*.

The TCPA defines “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods, or services.” 47 U.S.C. § 227(a)(5). RingCentral’s inclusion of the statement, “Send and Receive faxes with RingCentral, [www.ringcentral.com](http://www.ringcentral.com) **RingCentral**,” fits this definition because it not only identifies RingCentral, but it also describes its services and invites recipients to purchase those services by directing them where to go to purchase them.

In 2006 the Commission issued a clarification on the meaning of “advertisement” as used in the context of faxes. *Sender Regulation*, 71 FR 25967-01, 25972-73. The Commission recognized that certain “transactional communications” and “informational messages” might not be ads. *Id.* at 25972-25973. Transactional communications were described as, “messages whose purpose is to facilitate,

complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender.” *Id.* at 25972. “Informational messages” were described as, “industry newsletters, legislative updates, or employee benefit information.” *Id.* at 25973. The Commission stated, “In determining whether the advertisement is a bona fide ‘informational communication,’ the Commission will consider whether the communication is issued on a regular schedule; whether the text of the communication changes from issue to issue; and whether the communication is directed to specific regular recipients, i.e., to paid subscribers or to recipients who have initiated membership in the organization that sends the communication.” *Id.*

RingCentral’s inclusion of its footer ad in all of the fax cover sheets it makes available to its customers does not fit within the transactional or informational exceptions as described by the Commission. This is because RingCentral includes its ad regardless of who is sending the fax, what it contains, and to whom it is sent. In both exceptions, the content that allows the addition of incidental advertising is content provided by the advertiser itself. Thus the party that takes the time to inform its subscribers or members with periodicals or newsletters may incidentally advertise in them. Similarly, the provider of goods or services may interact with its customer about those same goods or services with faxes that incidentally promote its business. Here, in contrast, RingCentral is promoting itself to all of the recipients of its customers’ faxes regardless of what they are communicating in their faxes or to whom they are communicating. RingCentral’s ad is not incidental to its

own bona fide communications with the fax recipients as both the transactional and informational communications exceptions require.

RingCentral cites two cases applying the *Sender Regulation*, 71 FR 25967-01, 25972-73, to bona fide informational communications but neither supports its argument here. Pet., pp. 26-27 (citing *N.B. Industr. v. Wells Fargo & Co.*, No. C 10-03203 LB, 2010 WL 4939970 (N.D. Cal. Nov. 30, 2010), *aff'd*, 465 Fed. Appx. 640 (9th Cir. 2012); *Holmes v. Back Doctors, Ltd.*, No. CIV.NO.09-540-GPM, 2009 WL 3425961, at \*4 (S.D. Ill. Oct. 21, 2009), *vacated in part*, 695 F. Supp. 2d 843 (S.D. Ill. 2010) *P&S Printing LLC v. Tubelite, Inc.*, No. 3:14-cv-1441 (VAB), 2015 WL 4425793 (D. Conn. July 17, 2015)).

In *N.B. Industries* the court considered a fax inviting recipients to apply for an Asian Business Leadership Award that was sponsored by two non-profit organizations and Wells Fargo. *Id.* at \*1. The fax consisted of four pages mostly devoted to the details of the application for the award. In addition, on several pages there were some penny-sized logos for Wells Fargo and the non-profits and one quarter sized logo. *Id.* at \*1-\*2. The last page included the statement “visit [uspacc.com](http://uspacc.com) or [wellsfargo.com/biz/asian](http://wellsfargo.com/biz/asian).” *Id.* at \*11. The court noted the fax did not say anything about the commercial availability or quality of any of Wells Fargo’s or USPAACC’s property, goods or services.” *Id.* at \*11.

In *Holmes* the court found “the faxes contain bona fide medical information of interest to personal injury lawyers, that [the defendant chiropractor] issues its faxes on a regular schedule, that is, bi-monthly, that the text of the faxes changes from

issue to issue, and that the faxes are directed to specific regular recipients, specifically, personal injury law firms that have been logged as being willing to receive faxes from Back Doctors.” The court concluded that devoting 1/7 of these newsletters to contact information did not convert them to “advertisements” as defined by the *Sender Regulation*. *Holmes v. Back Doctors, Ltd.*, No. CIV.NO.09-540-GPM, 2009 WL 3425961, at \*4 (S.D. Ill. Oct. 21, 2009), *vacated in part*, 695 F. Supp. 2d 843 (S.D. Ill. 2010).

The present case is different than *N.B. Industries* because RingCentral’s ad described “the commercial availability” of its business by stating, “” Send and receive faxes with RingCentral.” It is also different than the fax in *Holmes* because RingCentral did not intend it for “specific regular recipients ... logged as willing to receive faxes from” RingCentral. RingCentral’s aim was to find new customers by affixing its ad to all faxes sent by indiscriminately attaching its footer ad to the faxes of its customers.

RingCentral protests that its footer ad imposes little burden on the recipients but this is beside the point. Pet., p. 28. Arguably, many illegal unsolicited fax ads impose little, if any, burden on the recipient. *See, e.g., Palm Beach*, 781 F.3d at 1250 (“[T]he specific injury targeted by the TCPA is the sending of the fax and resulting occupation of the recipient's telephone line and fax machine, not that the fax was actually printed or read.”)

The danger is not the individual injury, but the potential for unsolicited fax advertising to pass the costs of the advertising on to the recipients with no cost to

the advertiser. In the case of a general telecommunications services provider like RingCentral, the predictable result will be massive proliferation as provider ads become universally affixed to all of their customer's fax cover sheets and perhaps more. Nothing in the text of the TCPA's definition of "advertisement" or the current exceptions for ads that are incidental to bona fide "transactional" or "informational" fax communications supports the result RingCentral seeks. Moreover, RingCentral has failed to put forth any benefit its footer ads might have for its customer or their recipients. The Commission should not accept RingCentral's invitation to open the door for routine unsolicited fax advertising, even if it is limited to a single line of text on the first page of all faxes because it would be contrary to the fundamental purpose of the TCPA and has no salutary purpose.

**V. THE COMMISSION SHOULD NOT RECOGNIZE THIRD-PARTY CONSENT FOR FAX BROADCASTERS.**

RingCentral argues that if it is a "sender," the Commission should approve its practice of adding ads to its fax cover footers on a theory of third-party consent. *Pet.*, pp. 29-33. RingCentral's argument fails for three obvious reasons. First, even if RingCentral had consent, third-party or direct, it still cannot send a fax ad without including a compliant "opt-out notice." 47 C.F.R. 64.1200(a)(3)(iv); *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013). RingCentral did not include an opt-out notice so permission would not make its fax ads legal even if it had permission. *Id.*

Next, RingCentral does not know if its customers have permission to fax advertising content in the first place. RingCentral points to its Terms of Service requiring its customers to have permission, but the TCPA requires "express

invitation or permission” for fax advertisements. 47 U.S.C. § 227(b)(4). Even if RingCentral’s customers were contractually required to obtain permission, they may not have done so, and RingCentral has no way to know whether they did.

In addition, assuming all of RingCentral customers’ recipients have consented to receive faxes, they cannot be deemed to have consented to receive an ad, let alone a RingCentral ad. RingCentral argues that its third-party consent theory is necessary to avoid “restrict[ing] consumer access to information communicated through purely informational calls.” Pet., p. 30 (citing *Rules and Regulations of the Telephone Consumer Protection Act*, 27 FCC Rcd 1830, 1838 (2012)). RingCentral’s argument is baseless because its footer ad is not necessary to enable its customers to fax their information to their recipients. The only information chilled by declining RingCentral’s third-party consent theory is RingCentral’s ability to foist its ads on its customers’ recipients. Barring RingCentral’s ads will not “chill the communications between parties that otherwise want to receive [RingCentral’s *customers*] fax messages.” *Id.*

RingCentral cites the *GroupMe Declaratory Ruling*<sup>4</sup> for the idea that third-party consent should be recognized for its fax ads. RingCentral’s reliance is misplaced because *GroupMe* did not concern advertising or faxes. *GroupMe* found:

We clarify that text-based social networks may send administrative texts confirming consumers’ interest in joining such groups without violating the TCPA because, when consumers give express consent to participate in the group, they are the types of expected and desired

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<sup>4</sup> *Matter of GroupMe, Inc./Skype Commc'ns S.A.R.l Petition for Expedited Declaratory Ruling Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 F.C.C. Rcd. 3442, 3446 (2014)

communications TCPA was not designed to prohibit, even when that consent is conveyed to the text-based social network by an intermediary. To ensure that the TCPA's consumer protection goals are not circumvented, we emphasize that social networks that rely on third-party representations regarding consent remain liable for TCPA violations when a consumer's consent was not obtained.

*Id.* at ¶ 1.

Unlike RingCentral's petition, GroupMe's did not seek permission to append GroupMe ads to every text message sent by the members of the social networks created by its customers. *GroupMe* does not support RingCentral's argument and should not now be so construed.

RingCentral also suggests that it should have third-party consent because its customers' relationship with their recipients is an "established business relationship." Pet., pp. 29, 33. Even if this were true, however, RingCentral's argument would fail because its faxes do not include the "opt-out notice" which is expressly required on advertising faxes sent pursuant to an established business relationship. 47 C.F.R. 64.1200(a)(3)(iii).

RingCentral's third party consent argument is meritless and should be rejected by the Commission.

## **VI. CONCLUSION.**

For the foregoing reasons, the Commission should dismiss RingCentral's petition because it is an untimely collateral attack on the 2006 *Sender Regulation*. If the Commission does not dismiss RingCentral's Petition, it should deny it because it is without merit and there is no reason to create a special exception to the TCPA

to allow fax broadcasters to systematically append their ads to all of their customers' faxes.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned attorney states that on August 30, 2016 he caused to be served a true and correct copy of the foregoing, *Comment by Supply Pro Sorbents*, on the party listed below by electronic mail and by depositing the same in the U.S. mail at 134 N. La Salle St., Chicago IL 60602 with proper postage prepaid and addressed as follows:

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