BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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

REPLY COMMENTS OF AKIN GUMP STRAUSS HAUER & FELD LLP

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Akin Gump Strauss Hauer & Feld LLP ("Akin Gump") hereby replies to comments filed in response to the Petition for Expedited Declaratory Ruling (the "Petition") of RingCentral, Inc. ("RingCentral" or "Petitioner"). Akin Gump is a law firm that represents clients on Telephone Consumer Protection Act of 1991 ("TCPA") matters. Akin Gump submits these comments because a ruling on the Petition could have implications beyond the instant case. In the Petition, RingCentral requests that the Commission clarify its definition of the "sender" of a fax advertisement.[1] Under the Commission's junk fax rules[2] 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."[3]

Among other things, 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

[1] RingCentral, Inc., Petition for Expedited Declaratory Ruling, CG Dkt No. 02-278 (filed July 6, 2016) ("Petition").
[2] 47 C.F.R. § 64.1200(a)(4).
[3] 47 C.F.R. § 64.1200(f)(10).

facsimile.[4] Although, Akin Gump agrees with RingCentral and other commenters[5] that clarification regarding the FCC's facsimile "sender" definition is urgently needed in order to curtail nuisance lawsuits against innocent parties,[6] and to address conflicting interpretations of sender liability among the courts,[7] the Commission should reject, as too narrow, RingCentral's proposed interpretation of the definition of "sender."

RingCentral's petition seeks to place sender liability with the person who directly or indirectly chose the content of the subject advertisement. As discussed below, such a narrow interpretation has no support in FCC precedent and would contradict court decisions that find that "control over content" is merely one factor to consider in determining whether a person or entity is the "sender" of an unsolicited fax advertisement.

As discussed below, in these reply comments, Akin Gump urges the Commission to: (1) clarify, as RingCentral suggests, that the definition of "sender" does not impose strict liability on a party solely because its goods or services are advertised or promoted in an unsolicited fax. Such an approach could allow for "sabotage liability" against innocent advertisers, and would disregard an analysis of the party "on whose behalf" the facsimile is sent; and (2) reject RingCentral's proposal that sender liability should simply lie with the party that directly or indirectly chose the content of an unsolicited facsimile. The analysis of the identity of the "sender" must be much more complete than RingCentral suggests, and many courts around the country seem to agree.

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[4] Petition at 23.

[5] *E.g.*, Voice on the Net Coalition, VON Coalition Comments in Support of RingCentral Petition, CG Dkt. No. 02-278, at 2 (filed Aug. 29, 2016) ("VON Comments").

[6] *See* Petition at 8.

[7] *See* Petition at 19-25; VON Comments at 2.

I. CLARIFICATION REGARDING THE DEFINITION OF "SENDER" IS NEEDED, INCLUDING CONFIRMATION THAT STRICT LIABILITY IS NOT IMPOSED ON AN ENTITY SIMPLY BECAUSE ITS GOODS AND SERVICES ARE ADVERTISED IN AN UNSOLICITED FAX.

The RingCentral Petition correctly explains that when the Commission codified its definition of "sender" in 2006, it made clear that "the person or entity on whose behalf the advertisement is sent" is the sender.[8] In the 2006 *Junk Fax Order,* the FCC defined a "sender" as "the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement."[9] As discussed in the Petition, the reference in the definition 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.[10] It was not meant to justify an independent basis of liability - much less impose an inflexible strict liability rule.

The Commission also made clear in the 2006 *Junk Fax Order* that there are situations in which the "sender" will be a party <u>other than</u> the entity whose goods or services are advertised. In particular, the FCC stated:

> We take this opportunity to emphasize that under the Commission's interpretation of the facsimile advertising rules, the sender is the person or entity on whose behalf the advertisement is sent. *In most instances, this will be the entity whose product or service is advertised or promoted in the message*. As discussed above, the sender is liable for violations of the facsimile advertising rules, including failure to honor opt-out requests.[11]

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[8] Petition at 13 (*citing Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 21 FCC Rcd 3787, 3808 (para. 39) (2006) ("*Junk Fax Order*")).

[9] *Id. codified at* 47 CFR § 64.1200(f)(10).

[10] Petition at 14.

[11] *Junk Fax Order*, 21 FCC Rcd at 3808 (para. 39) (2006) (emphasis added). As explained in the FCC's *Letter Brief*, the codification in 2006 is consistent with the Commission's pre-existing uncodified interpretation that "the

Courts around the country have been exploring the meaning of this exception and the circumstances under which an entity whose products or services are advertised is not the sender.[12] Some courts have concluded that when a fax broadcaster takes actions that are not authorized by the advertiser, such as actions that are out of compliance with the contract with the advertiser, the advertiser is not liable as the "sender" of those faxes because such faxes could not be seen as sent "on behalf of" the advertiser.

Petitioner also is correct that since the FCC's issuance of its *Letter Brief* to the Eleventh Circuit Court of Appeals in *Palm Beach Golf Center-Boca, Inc. v. Sarris*,[13] courts around the country have been interpreting the *Letter Brief* in divergent ways, causing confusion and inconsistent results regarding sender liability in the Sixth Circuit, Seventh Circuit and Eleventh Circuit. Some courts, principally in the Sixth Circuit, focus on the second half of the definition of sender, finding that the entity whose goods or services are promoted in a fax advertisement is the "sender" and is strictly liable for any violations of the TCPA.[14] Other courts, in the Seventh Circuit and the Eleventh Circuit, have rejected strict liability as "absurd," examining the FCC's exception from the 2006 *Junk Fax Order,* and developing an expanded "totality of the

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entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements." *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) ("*Letter Brief*") (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd 12391, 12407 (para. 35) (1995)).

[12] *See, e.g., Bridgeview Health Ctr. v. Clark*, No. 09-c-5601, 2015 U.S. Dist. LEXIS 45710 *21-22 (N.D. Ill. April 8, 2015) *aff'd* 2016 WL 1085233, Nos. 14-3728, 15-1793 (7th Cir. 2016); *Avio, Inc. v. Alfoccino, Inc.*, 18 F. Supp. 3d 882, *895 (2014) (*reversed and remanded by Imhoff Investment, L.L.C. v. Alfoccino, Inc.*, 792 F.3d 627 (6th Cir. 2015)); *CIN-Q Automobiles, Inc. v. Buccaneers Limited Partnership*, No. 8:13-CV-1592, 2014 WL 7224943 *6 (M.D. Fla. Dec. 17, 2014).

[13] *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris*, 781 F.3d 1245 (11th Cir. 2015).

[14] *See, e.g., Imhoff Investment, L.L.C. v. Alfoccino, Inc.*, 792 F.3d 627, 634 (6th Cir. 2015).

circumstances" test for determining sender liability under the TCPA.[15] Akin Gump agrees with Petitioner that clarification from the Commission regarding the TCPA definition of sender for unsolicited fax advertisements is needed, and Akin Gump urges the Commission to adopt a totality test that takes into consideration all relevant factors.

For example, the Sixth Circuit has, on more than one occasion, wrongly held that the Commission adopted a strict liability standard that supports sender liability simply because a party's goods or services are advertised in an unsolicited fax.[16] As Petitioner rightly suggests, "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."[17]

In the Eleventh Circuit, the district court in *CIN-Q Automobiles, Inc. v. Buccaneers Limited Partnership*, observed that interpreting the term "sender" as imposing strict liability on parties whose goods and services are advertised "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."[18]

> To conclude that an individual or entity is *per se* '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

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[15] *See CIN-Q Automobiles, Inc. v. Buccaneers Limited Partnership*, No. 8:13-CV-1592, 2014 WL 7224943 *6 (M.D. Fla. Dec. 17, 2014) ("*Cin-Q*"); *Bridgeview Health Ctr. v. Clark*, No. 09-c-5601, 2015 U.S. Dist. LEXIS 45710 (N.D. Ill. April 8, 2015) *aff'd* 2016 WL 1085233, Nos. 14-3728, 15-1793 (7th Cir. 2016).

[16] *Siding and Insulation, Co. v. Alco Vending, Inc.* Case No. 15-3551, 2016 U.S. App. LEXIS 8506 at * 16-17 (6th Cir. May 9, 2016) ("*Alco Vending*"); *Imhoff Investment, L.L.C. v. Alfoccino, Inc.*, 792 F.3d 627, 634 (6th Cir. 2015).

[17] Petition at 20.

[18] *Cin-Q*, 2014 WL 7224943 at *6.

> 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.[19]

Similarly, in the Seventh Circuit, the United States District Court for the Northern District of Illinois in *Bridgeview Health Care Center v. Clark* determined that an analysis of sender liability requires understanding the meaning of the exception to the definition of "sender" articulated in the 2006 *Junk Fax Order*: "*in some instances*, an entity whose product or service is advertised will not be deemed a "sender" and would therefore not be liable."[20] The *Bridgeview* court noted that "[t]he FCC itself does not appear to endorse a rule of strict liability because, as explained in the 2006 [*Junk Fax Order*], a person whose goods or services are advertised in an unsolicited fax will not always be a 'sender.'"[21] Looking to *Sarris*, the *Bridgeview* court concluded that the phrase "on whose behalf" requires consideration of the relevant factors surrounding a defendant's role in providing direction to a third party. In so doing, it settled on a totality of the circumstances test focused on determining the advertiser's level of control over the fax broadcaster and the fax advertisements to determine whether the advertised party could be considered the "sender," or whether the exception should apply because the fax broadcaster was the source of the offending conduct.[22]

In view of the conflicting interpretations of the definition of "sender" in the courts, a conflict that may have been caused, in part, by the FCC's *Letter Brief* in the *Sarris* case, the Commission should, as RingCentral suggests, clarify that an entity is not the "sender" and is not

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[19] *Id.*

[20] No. 09-c-5601, 2015 U.S. Dist. LEXIS 45710, *7 (N.D. Ill. April 8, 2015) *aff'd* 2016 WL 1085233, Nos. 14-3728, 15-1793 (7th Cir. 2016). (emphasis in original).

[21] *Id*. at *19-20.

[22] *Id*. at *20-21.

strictly liable, simply because its goods and services are advertised. The analysis must be much more complete, as expressed by many courts around the country.

II. THE FCC SHOULD NOT ADOPT "CHOICE OVER CONTENT" AS THE CONTROLLING FACTOR IN DETERMINING SENDER LIABILITY FOR AN UNSOLICITED FAX.

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 interpretation would promote "choice over content" as the controlling factor in determining the "sender" of a junk fax. However, RingCentral provides no justification, in FCC precedent or otherwise, for why this factor should be determinative. In the standards that are developing in the courts, control over content is one factor, among many, to consider in determining whether a party is the sender of a facsimile advertisement.[23]

For example, in *Bridgeview*, the court looked to the Eleventh Circuit decision in *Sarris*, which identified two, nonexclusive, factors in determining a defendant's liability: (1) the extent and nature of control the defendant had over the third-party engaged in marketing on his behalf; and (2) whether the defendant approved the final draft of the fax marketing plan. According to the *Bridgeview* court:

> an appropriate standard [for determining the 'sender' of a fax] requires a totality-of-circumstances review, which incorporates the Sarris factors and other considerations including, but not limited to: the defendant's degree of input and control over the content of the faxes, the actual content of the faxes, contractual or expressly stated limitations in the scope of control between the parties, the

[23] *E.g.*, *Cin-Q*, 2014 WL 7224943 at *7; *Alco Vending* 2016 U.S. App. LEXIS 8506 at *32 (interpreting the FCC's pre-2006 uncodified sender definition); *Bridgeview*, 2015 U.S. Dist. LEXIS 45710 at *20-21.

> defendant's approval of the final draft of the faxes and their recipients, and the defendant's overall awareness of the circumstances.[24]

Similarly, in *Cin-Q Automobiles, Inc. v. Buccaneers Limited Partnership*, the court listed the factors to be considered as, including but not limited to:

> the degree of input and control over the content of the fax(es), the actual content of the fax(es), contractual or expressly stated limitations and scope of control between the parties, privity of the parties involved, approval of the final draft of the fax(es) and its transmission(s), method and structure of payment, overall awareness of the circumstances (including access to and control over facsimile lists and transmission information), and the existence of measures taken to ensure compliance and/or to cure non-compliance with the TCPA.[25]

Totality of the circumstances tests such as the foregoing are not perfect, even for innocent parties, as they often lead to cases unnecessarily proceeding past the summary judgment stage, but RingCentral provides no justification why a more fulsome investigation of relevant factors should be ignored in determining "sender" liability, and replaced by a test that focuses solely on one factor -- choice over content.

In addition, placing an undue emphasis on "choice over content" could and would lead to wrong and unjust results. For example, in *Bridgeview*, the court evaluated a lawsuit brought against a defendant seeking to advertise his business within Terre Haute. [26] The advertiser contracted a fax broadcaster to send facsimiles designed by the advertiser to go to 100 individuals within Terre Haute. But the fax broadcaster sent the approved faxes to almost 5,000 individuals within and outside of Terre Haute.[27] After applying a totality of circumstances test that looked at both control over content and the relationship between the advertiser and the fax

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[24] *Bridgeview*, 2015 U.S. Dist. LEXIS 45710 at *20-21 (citing *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris*, 781 F.3d 1245, 1288 (11th Cir. 2015)).

[25] *Cin-Q*, 2014 WL 7224943 at *7.

[26] *Bridgeview*, 2015 U.S. Dist. LEXIS 45710 at *1-2.

[27] *Id.* at *2-3.

broadcaster,[28] the *Bridgeview* court found that the defendant did not direct the fax broadcaster to send faxes beyond Terre Haute and he had no reason to think or foresee the fax broadcaster would do so in violation of the contract between the parties. The court concluded that the faxes that were sent beyond Terre Haute were not sent "on behalf of" the defendant.[29] Had the court focused merely on which party controlled the content of the faxes, the defendant may have been found liable for the thousands of faxes that it had not instructed the fax broadcaster to send simply because the defendant, and not the fax broadcaster, was solely responsible for choosing the content of these faxes. Such a result would have been unjust as the fax broadcaster failed to follow the express instructions and agreement with the advertiser and was, therefore, the "source of the offending behavior" with regard to those faxes sent outside Terre Haute. There is no reason that the FCC should upset the finding of this case, or future cases like it, by adopting the interpretation proposed by RingCentral.

III. CONCLUSION.

For all the foregoing reasons, the Commission should clarify as RingCentral suggests that its junk fax regulations do not impose strict liability on entities simply because their goods and services are advertised in unsolicited faxes. The Commission should, however, reject RingCentral's proposal that an entity can only be considered a "sender" if it chooses the content

[28] *Id*. at *20-21.

[29] *Id*. at * 21.

of a facsimile. In both instances, a more meaningful analysis of the facts, perhaps taking into considering the "totality of the circumstances," is justified.

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Respectfully submitted,

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