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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REDEFINING PROGRESS, a California
Non-Profit Corporation, on behalf of itself
and all others similarly situated, and on behalf
of the general public,

Plaintiff.

vs

FAX.COM, INC.; KEVIN KATZ; COX
BUSINESS SERVICES, L.L.C.;
AMERICAN BENEFIT MORTGAGE, INC.;
and DOES 1 through 10,000.

Defendants.

Case No.: C 02-4057 MJJ

**COX BUSINESS SERVICES' REPLY
MEMORANDUM IN SUPPORT OF ITS
MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION,
FOR FAILURE TO STATE A CLAIM
AND BASED ON PRIMARY
JURISDICTION OF FEDERAL
COMMUNICATIONS COMMISSION**

Date: February 11, 2003
Time: 9:30 a.m.
Judge: Hon. Martin J. Jenkins

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RICHARD B. HIXING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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1 Cox California Telecom, L.L.C., doing business as Cox Business Services (“Cox”),
2 respectfully submits this reply memorandum in support of its motion to dismiss.

3 INTRODUCTION

4 Plaintiff’s struggle to shoehorn its purported class action into federal district court, and to
5 show sufficient factual allegations against Cox, must fail. Leaving aside plaintiffs rhetoric about
6 the merits of its case, this motion is about whether plaintiff can bring in federal court a private
7 claim that Congress specifically intended for state courts, and whether plaintiff can sue a common
8 carrier for the content of third-party transmissions over its network. The answer to both questions
9 is no. And even if there were any basis for such a claim in this Court, dismissal or a stay would be
10 proper to allow the FCC to address the novel issues raised here regarding potential common carrier
11 liability under the TCPA, 47 U.S.C. § 227. The FCC is currently considering these issues in a
12 pending rulemaking that is proceeding apace.

13 ARGUMENT

14 1. Congress’ Specific Jurisdictional Provision in the **TCPA** Controls Over the
15 More General **and Earlier** Language in Section **207**.

16 Plaintiff cannot circumvent clear congressional intent to vest exclusive jurisdiction over
17 private TCPA claims in state courts by including a novel and peripheral claim against the common
18 carrier who provides service to the alleged TCPA violators. This truly would be the tail wagging
19 the dog. This case is premised on allegations that Fax.com and its advertising customers illegally
20 “broadcast fax” unsolicited advertisements. Under plaintiffs reasoning, all future TCPA claimants
21 could circumvent the TCPA’s jurisdictional provision and sue in federal court, merely by naming
22 the telephone service provider as a defendant. This would be directly contrary to the plain
23 language of the statute, congressional intent, and a plethora of judicial decisions unequivocally
24 holding that state courts have exclusive jurisdiction to hear private TCPA claims.

25 The dispute on jurisdiction is rather narrow. The parties agree that subject matter
26 jurisdiction is lacking unless Section 207 supplies it. It is also agreed that jurisdiction under
27 Section **207** requires a claim to arise under another provision of the Communications Act, here,
28 allegedly, the TCPA. The parties also agree that Congress specifically intended that private TCPA

1 claims would be brought in state court (if allowed under state law); that the TCPA includes a
2 specific jurisdictional provision; and that the TCPA was enacted later than Section 207.

3 Nonetheless, plaintiff argues that Section 207 can supply jurisdiction here because it is a
4 “specific” jurisdictional statute that can be reconciled with congressional intent under the TCPA.
5 This is wrong as a matter of law and logic. Section 207 is a general, not specific, jurisdictional
6 statute, and, more importantly, the TCPA is far more specific than Section 207. Congressional
7 intent is clear, as the Ninth Circuit has found, and invoking jurisdiction under Section 207 to bring
8 a private TCPA claim in federal court is irreconcilable with that intent

9 At the outset, plaintiff is wrong that Section 207 is a “specific” federal question
10 jurisdictional statute. Unlike statutes creating exclusive federal court jurisdiction over certain types
11 of claims implicating subjects in which Congress finds a particular federal interest -- e.g., admiralty
12 (28 U.S.C. § 1333), bankruptcy (28 U.S.C. § 1334), or patents (28 U.S.C. § 1338) -- Section 207
13 confers concurrent (not exclusive) jurisdiction over claims arising under *other* statutory provisions
14 against common carriers. 47 U.S.C. § 207. It merely provides authority to bring such claims *either*
15 at the FCC *or* in federal district court, but not both. Like Section 1331, it requires the violation of
16 another statute before federal jurisdiction can be invoked.

17 Indeed, plaintiffs own list of “general” jurisdictional statutes demonstrates the point.
18 Plaintiff says only five statutes have been held to be general jurisdictional statutes -- 28 U.S.C. §§
19 1331, 1337, 1343, 1346(a)(2) and 1361. (Opp’n at 4-5.)’ But Section 207 is far less specific than
20

21 ¹ Neither case plaintiff cites supports its statement that there are only five “general”
22 jurisdictional statutes. In Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480, 495 (1983),
23 the Supreme Court held that Congress had not exceeded the scope of Article III in granting federal
24 courts jurisdiction over certain actions under the Foreign Sovereign Immunities Act (“FSIA”). Id.
25 at 492. The Court did not distinguish between general and specific jurisdictional statutes, holding
26 only that the “arising under” language of Article III is broader than federal question jurisdiction
27 under Section 1331 and permitted Congress to enact the FSIA and grant jurisdiction to district
28 courts over such cases. Id. In Simmons v. Arkansas Power & Light Co., 655 F.2d 131, 133-34
(1981), the Eighth Circuit held that the district court lacked jurisdiction over claims that the
operator of a nuclear reactor had failed to establish adequate emergency plans. Although plaintiffs
cited several general jurisdictional statutes -- such as 28 U.S.C. §§ 1331, 1337, 1343, 1346(a)(2)
and 1361 -- the Court merely listed them as *examples* and held that those (and other general
statutes) had been supplanted by a statute providing exclusive jurisdiction in the Nuclear

1 Section 1337, which grants jurisdiction specifically over claims arising under federal statutes
2 “regulating commerce or protecting trade and commerce against restraints and monopolies”
3 28 U.S.C. § 1337. Section 1343 also is more specific than Section 207, granting jurisdiction
4 specifically over claims involving civil rights and the right to vote. 28 U.S.C. § 1343. Section
5 1346(a)(2), like Section 207, grants jurisdiction over a specific type of defendant, and applies when
6 a civil action is brought against the United States. 28 U.S.C. § 1346(a)(2). And Section 1361
7 grants district courts jurisdiction over specific claims *and* defendants, namely mandamus actions to
8 compel United States officers, employees or agencies to perform a duty owed a plaintiff. 28 U.S.C.
9 § 1361. Thus, the general jurisdictional statutes plaintiff cites demonstrate that Section 207, too,
10 must be considered general.²

11 More importantly, plaintiffs analysis of “general” and “specific” jurisdictional statutes is
12 too narrow. The issue is not merely whether Section 207 is general or specific, but whether it was
13 the intent of Congress to grant jurisdiction over the claim at issue. If two statutes conflict as
14 applied to a claim, the analysis is comparative. An analysis of one without the other provides no
15 sense of the relative specificity of the provisions and sheds little light on congressional intent. In
16 such a comparison, the fact that one provision is more specific indicates that Congress intended the
17 more specific (and later) provision to govern.³ Indeed, plaintiff mistakenly attempts to limit the

18
19 Regulatory Commission over such claims. *Id.* at 133. Indeed, this decision entirely supports the
20 conclusion that Congress intended the TCPA to supplant other, earlier statutes to the extent they
might otherwise be applied to confer federal question jurisdiction over private TCPA claims.

21 ² Plaintiff references California Practice Guide Section 2.68, which discusses Section 1331
22 as authorizing “general” federal question jurisdiction, and lists examples of “specific”
23 jurisdictional statutes. Schwarzer et al., California Practice Guide: Federal Civil Procedure Before
24 Trial § 2:68 (Rutter Group 2002). However, the California Practice Guide illustrates Cox’s point
25 by demonstrating the subjective nature of distinguishing among general and specific jurisdictional
provisions. In its list of “examples of ‘specific’ federal question statutes,” it includes 28 U.S.C. §§
1337 and 1346(a), which plaintiff claims are “general” jurisdictional provisions based on Verlinden
and Simmons.

26 ³ See United Artists Theatre Circuit, Inc. v. FCC, 147 F. Supp. 2d 965 (D. Ariz. 2000) (more
27 specific TCPA provision showed congressional intent); Carpenter v. Dep’t of Transportation, 13
28 F.3d 313 (9th Cir. 1994) (more specific Hobbs Act provision indicated congressional intent versus
Rehabilitation Act). Plaintiffs attempt to distinguish Carpenter is entirely unconvincing. (Opp’n
at 5 n.4.) The holding was based on an analysis of congressional intent in enacting one

1 reasoning of United Artists to situations where federal jurisdiction over a TCPA claim is based
2 solely on 28 U.S.C. § 1331. In fact, the Court’s reasoning was much broader:

3 [D]etermining whether federal jurisdiction exists over private TCPA actions does
4 not require reference to the background assumptions about the scope of the federal
5 question statute, but is plainly discernable in the express Congressional allocation of
6 jurisdiction.

7 147 F. Supp. 2d at 975. The Court explained that, “by virtue of a specific assignment of
8 jurisdiction to state courts, Congress negates district court jurisdiction under § 1331.” Id. at 972
9 (quoting ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 519 (3d Cir. 1998) (emphasis added)).
10 The Court concluded by rejecting supplemental jurisdiction over the TCPA claim, stating that
11 “Congress’s efforts to vest exclusive jurisdiction in other courts over certain causes of action may
12 not be derailed by resort to general jurisdictional statutes.” Id. at 976 (citing various federal
13 appellate cases in support)

14 The same principles apply here. Even a cursory comparison of Section 207 and the TCPA
15 reveals that the TCPA is far more specific, applying to all private TCPA claims, in contrast to
16 Section 207, which generally applies to claims against a type of defendant, just like the general
17 provisions in Sections 1346(a)(2) and 1361. Indeed, Congress enacted the TCPA and its
18 jurisdictional language as part of the Communications Act, many years after Section 207 was
19 already a part of the same Act, indicating an awareness and intent to assign all private TCPA
20 claims to state court (if permitted under state law), notwithstanding Section 207.

21 Plaintiffs reference to Kinder v. Citibank, No. 99-2500, 2000 U.S. Dist. LEXIS 13853
22 (S.D. Cal. Sept. 13, 2000) does not undermine this conclusion. In Kinder, the court acknowledged
23 the holding in Murphey v. Lanier, 204 F.3d 911 (9th Cir. 2000), that Section 1331 does not permit
24 private TCPA claims in federal court. Id. at *9. In dicta, the court noted that Murphey did not
25 suggest that the TCPA precludes district courts from hearing private claims where there is an

26 jurisdictional statute (the Hobbs Act) which covered certain claims that otherwise would be
27 governed under another jurisdictional statute (the Rehabilitation Act). The same analysis applies
28 here, simply to different statutes. Plaintiffs half-hearted distinction -- based solely on the fact that
two different statutes were involved in Carpenter -- fails utterly to address the applicable reasoning
and holding.

1 “independent basis” for federal jurisdiction such as “diversity of citizenship or supplemental
2 jurisdiction.” Id. at *9-10. But plaintiff does not and cannot rely on these grounds to justify his
3 Section 207 claim, which, in fact, *is based on an alleged violation of the TCPA.*⁴ Certainly,
4 Section 207 does not provide a basis for jurisdiction “independent” of the TCPA here, where
5 plaintiff relies exclusively on the TCPA to supply the alleged violation on which Section 207
6 jurisdiction is based. Section 207 is far more akin to Section 1331 in this context than it is to
7 Sections 1332 or 1367,⁵ and Kinder held that Section 1331 could not be used as a basis for federal
8 jurisdiction over private TCPA claims.⁶

9 Finally, plaintiff argues that the TPCA and Section 207 can be “reconciled,” because
10 jurisdiction under Section 207 depends upon a defendant’s status as a common carrier and not the
11 nature of the underlying violation of the Communications Act. (Opp’n at 7-8.) This is plainly
12 wrong. Section 207 grants federal court jurisdiction over private claims for violations of the
13 Communications Act, but Section 227(c)(5) within the TCPA expressly and specifically carves out
14 private TCPA claims and assigns them exclusively to state courts. 47 U.S.C. § 227(c)(5). This is
15 an irreconcilable conflict. The TCPA does not exempt private claims against common carriers as

16 _____
17 ⁴ Ironically, plaintiff attempts to use the TCPA to create Section 207 federal question
18 jurisdiction, and then brings a separate TCPA non-federal-court claim invoking supplemental
19 jurisdiction based on the alleged Section 207 claim.

20 ⁵ Indeed, diversity and supplemental jurisdiction presume no federal question underlying the
21 claim, yet they permit state claims in federal court based on entirely different, non-federal question
22 principles. Here, there are **two** different federal question statutes, one of which indicates that
23 Congress did not intend to create federal question jurisdiction over private claims in federal court.

24 ⁶ Plaintiff also argues it would be incongruous to allow state courts to decide TCPA cases
25 involving common carriers, because they are regulated “exclusively” by the federal courts and
26 FCC. (Opp’n at 6-7 n.5.) It is simply not true that common carriers are regulated exclusively by
27 the federal courts and FCC; they are subject to regulation by state regulatory commissions and state
28 courts as well. In any event, the cases plaintiff cites stand only for the proposition that federal
29 courts have subject matter jurisdiction over claims against common carriers that “arise under”
30 federal common law under 28 U.S.C. § 1331. See MCI Telecoms Corp. v. Teleconcepts, Inc., 71
31 F.3d 1086 (3d Cir. 1995); Ivy Broad. Co. v. AT&T, 391 F.2d 486 (2d Cir. 1968). But the Ninth
32 Circuit and other federal circuits have expressly rejected the applicability of Section 1331 to
33 provide subject matter jurisdiction over TCPA claims. See, e.g., Murphey v. Lanier, 204 F.3d 911
34 (9th Cir. 2000). Congress has determined that TCPA claims should be handled differently from
35 claims arising under other federal statutes.

1 permitted in federal court, and nothing in the statute or legislative history suggests such a result.
2 Indeed, Senator Hollings, sponsor of the TCPA, stated the intent that the TCPA would “allow
3 consumers to bring an action in State court against any entity that violates the bill,” and “that States
4 [would] make it as easy as possible for consumers to bring such actions, preferably in small claims
5 court.” 137 Cong. Rec. S16204-01 (daily ed. Nov. 7, 1991).

t **II. The Court Should Decline to Exercise Supplemental Jurisdiction Over the
8 Remaining Claims.**

9 The absence of original jurisdiction over plaintiffs claim against Cox prevents the exercise
10 of supplemental jurisdiction over the pendant claims. Randolph v. Budget Rent-A-Car, 97 F.3d
11 319, 329 (9th Cir. 1996). But even if plaintiffs claim against Cox under Sections 206 and 207
12 were to remain, supplemental jurisdiction would be inappropriate.

13 First, even under Section 206 and 207, the alleged violation plaintiff must prove is of the
14 TCPA, again demonstrating that this is a private TCPA case, which Congress intended for state
15 courts. **As** noted above, the sum and substance of the claims here is the alleged violation of the
16 TCPA, which plainly predominates over the sole “federal” claim against Cox. In addition, plaintiff
17 is wrong that its state claims do not predominate because damages available under Sections 206
18 and 207 are the same as those available under the TCPA. Under the TCPA, a person may recover
19 “actual monetary loss” or \$500 in statutory damages for each violation. 47 U.S.C. § 227(b)(3). A
20 person suing under Sections 206 and 207, however, may recover only *actual* damages and **is** barred
21 from recovery of presumed damages. See, e.g., Conboy v. AT&T Corn., 241 F.3d 242, 249-50 (2d
22 Cir. 2001) (plaintiff failed to allege recoverable damages under Sections **206** and 207, in part
23 because they do not permit recovery of “presumed damages” or damages that approximate the

24
25 ⁷ Accordingly, plaintiffs authority on this point is inapposite. See, e.g., Law Offices of
26 Curtis v. Trinko, L.L.P., 305 F.3d 89, 93 (2d Cir. 2002) (involving underlying alleged violations of
27 Sections 202(a) and 251, which do not contain jurisdictional limitations that conflict with Sections
28 206 and 207), pet. for cert. filed, 71 U.S.L.W. (U.S. Nov. 1, 2002)(No. 02-682); RCA Global
Communications, Inc. v. Western Union Tel. Co., 521 F. Supp. 998, 1000(S.D.N.Y. 1981)
(involving underlying alleged violations of Sections 203, 222(c)(2) and 222(e), which do not
contain jurisdictional limitations that conflict with Sections 206 and 207).

1 harm suffered to compensate **for** harms that may be difficult to establish and measure).’ Therefore,
2 plaintiff cannot recover statutory damages against Cox under the only federal claim, and the
3 remedies under the TCPA substantially predominate over the federal remedies, demonstrating that
4 the Court should not exercise supplemental jurisdiction. See 28 U.S.C. § 1367(c)(2).

5 Second, plaintiffs TCPA claim raises novel and complex issues of state law. Plaintiff
6 suggests that the relevant issue is whether the TCPA is an opt-in or an opt-out statute, which
7 plaintiff says is neither novel nor a matter of state law. (See Opp’n at 10.) But the premise is
B incorrect. The relevant question is not whether the TCPA is an opt-in or an opt-out statute, but
9 whether California has chosen to opt in or opt out. California, through its enactment of Cal. Bus.
10 & Prof. Code § 17538.4, chose to opt out of the federal TCPA and enact its own legislative scheme
11 to address unsolicited facsimile advertisements. In fact, California specifically chose to bar actions
12 against common carriers for transmission of unsolicited facsimile advertisements. See Cal. Bus. &
13 Prof. Code § 17538.4(f) (excluding transmissions by “telecommunications utilities” from the
14 definition of “fax” or “cause to be faxed”). Plaintiff’s opposition fails to even mention the bar to
15 its claim in Cal. Bus. & Prof. Code § 17538.4.⁹

16 _____
17 ⁸ Sections 206 and 207 were expressly modeled on the enforcement provisions (formerly
18 sections 7 and 8) of the Interstate Commerce Act (“ICA”), see id. at 250, which do not allow
19 recovery of presumed damages. See, e.g., Overbrook Farmers Union Coop. Ass’n v. Missouri Pac.
20 R.R. Co., 21 F.3d 360,364 (10th Cir. 1994) (punitive damages unavailable for willful refusal to
21 provide rail service, noting Supreme Court decisions limiting carrier liability to “actual damages”);
22 Ajajem Lumber Corp. v. Penn Cent. Transp. Co., 487 F.2d 179, 183 (2d Cir. 1973) (remanded to
23 determine damages because recovery under ICA is limited to damages “actually suffered”).

24 ⁹ In any event, it is unclear whether a state must affirmatively opt in and authorize
25 jurisdiction over private TCPA claims or whether it must affirmatively opt out. Many of plaintiffs
26 cases merely establish that Congress left it up to the states to decide whether to exercise such
27 jurisdiction. For example, in Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507 (5th Cir.
28 1997), the Court states that Congress “creat[ed] a private right of action in state courts,” but that
Congress “allowed states, in effect, to enforce regulation of interstate telemarketing activity.” Id. at
513. The Court discussed Senator Hollings’ comments that venue within the state was
constitutionally a matter for the states to decide: “The statute’s text evidences Senator Hollings’s
hopes **as** it provides for the right of action in state court, but gives states discretion over its
administration.” Id.; see Compoli v. AVT Corp., 116 F. Supp. 2d 926, 928 (N.D. Ohio 2000)
 (“Congress’s permissive authorization in a statute of a state cause of action cannot create
jurisdiction in unstated courts of limited jurisdiction.”) Plaintiff **also** misstates the import of the
federal decisions it quotes, most **of** which discuss whether the TCPA denies **an** effective remedy by

1 This is also the import of the Court's decision in Kaufman & Vans, Inc. v. ACS Systems,
2 Inc., Case Nos. BC 240588, BC 240573 (Los Angeles County Superior Court, filed Dec. 19, 2001),
3 contrary to Plaintiffs position. (See Opp'n at 10.) In Kaufman, the court held that California does
4 not authorize private actions in state court under the TCPA because California opted out of the
5 federal TCPA through its enactment of Section 17538.4 of the Business & Professions Code. The
6 court in Kaufman reached its decision notwithstanding contrary federal authority (which it
7 acknowledged) and found that Section 17538.4 and the Ninth Circuit's decision in Murphey, 204
a F.3d at 914, dictated its holding. The Kaufman decision therefore is based on legislative
9 provisions specific to California, which distinguishes it from the federal cases plaintiff cites.

10 **111. Plaintiff Has Failed to Allege Facts Sufficient to Establish Carrier Liability**
11 **Under Sections 206,207 or the TCPA.**

12 Plaintiff's TCPA claims against Cox must fail because the facts alleged are insufficient as a
13 matter of law. Plaintiff's conclusory allegations that simply mirror the FCC's language about
14 potential carrier liability are legally insufficient to satisfy plaintiffs obligation to *allege facts* that
15 would, if true, establish liability. "[C]onclusory allegations of law and unwarranted inferences are
16 insufficient to defeat a motion to dismiss." Ove v. Gwinn, 264 F.3d 817, 821 (9th Cir. 2001)
17 (affirming dismissal of claims in part because the facts alleged failed to demonstrate that
18 defendants' conduct "directly and proximately caused the alleged injury"). "[C]ourts do not accept
19 as true legal conclusions cast in the form of factual allegations if such conclusions cannot be
20 reasonably drawn from the facts alleged." Damascus v. Office of the Attorney General, Case No.
C95-20073RMW(EAI), 1995 WL 261414, at *3 (N.D. Cal. May 2, 1995).

21 Plaintiff does not address, and does not appear to dispute, the overwhelming body of law
22 holding that common carriers cannot be held liable merely for transmitting the content of others,
23 *i.e.*, for serving as common carriers. Instead, plaintiff argues that Cox does more than provide a
24 common carrier service by providing a "custom-tailored infrastructure" to suit Fax.com's business

25
26
27 allowing the states to decide whether they will permit private TCPA claims and hold that states
28 "may refuse to exercise the jurisdiction authorized by the statute." See, *e.g.*, Foxhall Realty Law
Offices, Inc. v. Telecomms. Premium Services, Ltd., 156 F.3d 432,438 (2d Cir. 1998).

1 needs. (Opp'n at 13.) This argument fails, however, because the provision of a network and
2 service tailored to a customer's needs constitutes no more than the provision of normal common
3 carrier service as a matter of law." Indeed, plaintiff alleges that Cox "custom tailored" its network
4 to meet Fax.com's needs by providing enough capacity to accommodate a large amount of
5 telecommunications transmissions and ensuring responsive customer service. (Compl. ¶¶ 35-38.)
6 Such "custom tailoring" demonstrates only that Cox was providing a large volume of common
7 carrier services to Fax.com, and it simply cannot support a claim that a common carrier is violating
8 *the* TCPA, regardless of whether the carrier knows what business its customer is in.

9 In contrast, plaintiff alleges no facts whatsoever that would fall within *any* of the factors the
10 FCC actually considers to determine whether a fax broadcaster (or carrier) had a "high degree of
11 involvement" in the transmission of unsolicited fax advertisements -- *i.e.*, whether it determined
12 content or destination of the transmissions of others, whether it developed lists of fax numbers, or
13 whether it advised customers on the content of advertisements. NAL ¶ 14 (Ex. B, Cox Mem. in
14 Supp. Mot. Dism.)¹¹ Plaintiff asserts only that Cox provided a custom-tailored infrastructure
15 knowing that Fax.com planned to broadcast three million faxes per day. (Opp'n at 13-14.)
16 Contrary to plaintiff's argument, mere knowledge of a high degree of use of a common carrier's
17 facilities, even for the transmission of facsimiles, does not adequately allege that a carrier is aware
18 of illegal conduct. **As** shown in Cox's initial brief, not all broadcast faxing is illegal, and a
19 common carrier has neither the duty to investigate nor the right to terminate the use of its common
20

21 ¹⁰ See e.g., MCI Telecomms. Corn. v. FCC, 917 F.2d 30, 33, 38 (D.C. Cir. 1990) (negotiation
22 of specific services, service amounts and rates between carriers and customers does not jeopardize
23 "common carrier" status or violate the Communications Act if a carrier makes **such** services **and**
24 rates available *to* other customers seeking like service); Akron, Canton & Youngstown R.R. v.
25 ICC, 611 F.2d 1162, 1166-67 (6th Cir. 1979) (individualized contractual terms and responsibilities
26 to customers do not vitiate common carrier status); see also Independent Data Communications
27 Mfrs. Ass'n & AT&T Co.'s Petitions for Declaratory Ruling, Memorandum Opinion and Order, 10
28 F.C.C.R. 13717 (1995) (negotiation of custom service arrangements for packet-switched services
to meet users' particular needs does not demonstrate that AT&T is not acting as a common carrier)

21 The language "high degree of involvement" requires proof of control, not merely providing
22 supplies or services. See Trinity Broad of Fla., Inc., Decision, 14 F.C.C.R. 13570, 13593-94
23 (1999), vac'd on other grounds, Trinity Broad of Fla., Inc. v. FCC, 211 F.3d 618 (D.C. Cir. 2000).

1 carrier facilities based on speculation or mere allegations. (Mot. at 15, 17.) Were the law
2 otherwise, common carriers would be required to investigate the purposes for which their facilities
3 were being used and to draw assumptions about the lawfulness of transmissions based on the level
4 of service and the types of transmissions. Common carriers would become transmission police,
5 contradicting the established principle and settled policy that common carriers must remain
6 conduits with no authority, duty or right to screen or censor content.

7 Plaintiff also does not address its failure to allege that Cox somehow “used” a fax machine
8 to “send” a facsimile, as the plain language of the statute requires. 47 U.S.C. § 227(b)(1)(C).
9 Plaintiff fails to address the legislative history demonstrating congressional intent that the TCPA
10 fax prohibition “not apply to the common carrier or other entity that transmits the call or message
11 and that is not the originator or controller of the content of the call or message.” S. Rep. No. 102-
12 178, at 9 (1991). Instead, plaintiff attacks and tries to water down the FCC’s high threshold for
13 potential common carrier liability under the TCPA. These efforts should be rejected.

14 First, plaintiff attempts to obfuscate the FCC orders and case law establishing that “actual
15 notice of illegal conduct” requires a prior adjudication of illegal conduct and a basis to know that it
16 will continue in the future.¹² Rather than attempt to show how its complaint has met this legal
17 standard, plaintiff attacks the standard itself by attempting to limit Sable to its facts and to limit the
18 FCC Obscenity Order to multipoint distribution service (“MDS”) common carriers. This is
19 baseless. In establishing the very high threshold for potential liability based on “actual notice of
20 illegal conduct,” the FCC purposefully decided to adopt the standard from Sable in both the FCC
21 Obscenity Order and the FCC TCPA Order without limiting it to certain facts or types of carriers.¹³

22
23 ¹² See Enforcement of Prohibitions Against the Use of Common Carriers for the Transmitter
24 of Obscene Materials, Memorandum Opinion, Declaratory Ruling and Order, 2 F.C.C.R. 2819,
25 2820 (1987) (“FCC Obscenity Order”) (discussing and quoting Sable Communications of Ca., Inc.
26 v. Pac. Tel. & Tel. Co., Nos. 84-469, 84-549, 1984 U.S. Dist. LEXIS 19524 (C.D. Cal. Feb. 13,
1984)); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,
Report and Order, 7 F.C.C.R. 8752 (1992) (“FCC TCPA Order”) (adopting high threshold for
common carrier liability based on standard adopted in FCC Obscenity Order).

27 ¹³ Even the FCC Obscenity Order is not limited to MDS carriers. To the contrary, it describes
28 the “legal obligations of common carriers,” FCC Obscenity Order, 2 F.C.C.R. at 2819 (emphasis
added), and proceeds to cite FCC precedent involving common carrier-licensed satellite facilities

1 Any argument that the FCC should reconsider that decision and instead adopt a more limited
2 standard (e.g., because Sable allegedly is distinguishable) should be addressed to the FCC in its
3 pending rulemaking.¹⁴

4 And second, plaintiff erroneously claims that the FCC's Orders state that no prior
5 adjudication of illegal conduct is required for telephone common carriers. The FCC Obscenity
6 Order makes no such statement; to the contrary, it takes the standard of liability for telephone
7 common carriers -- "common carriers will not generally be liable for illegal transmissions unless it
8 can be shown that they knowingly were involved in transmitting the unlawful material" -- and
9 clarifies that "knowing involvement" means actual notice of an adjudication of obscenity. Id. at
10 2820 (emphasis added).¹⁵ Nor does the FCC TCPA Order state that no prior adjudication of illegal
11 conduct is required for telephone common carriers; again, it cites the FCC Obscenity Order and
12 sets forth the standard of liability for common carriers. FCC TCPA Order, 7 F.C.C.R. at 8780.¹⁶

13
14 and telephone common carriers as the basis for the standard of liability created. Id. at 2819-20.
15 The Order also explicitly refers to MDS licensees "operating as a common carrier." Id. at 2820.

16 ¹⁴ In any event, plaintiffs attempt to distinguish Sable falls short. In Sable, the court's
17 limitation of carrier liability to situations where a carrier had "actual notice" that a program had
18 been adjudicated obscene was not dependent solely upon the terms of the tariff. The court also
19 relied on Supreme Court precedent setting forth procedural safeguards to avoid censorship of
20 constitutionally protected speech that would amount to an unlawful prior restraint. See Freedman
21 v. Maryland, 380 U.S. 51 (1965). In Freedman, the Court held that any restraint on speech
22 imposed prior to a final adjudication on the merits must be limited to preservation of the status quo
23 "compatible with sound judicial resolution," and a "prompt final judicial decision" must be
24 assured. Id. at 58-59. The Court noted that these requirements forbid censorship of speech not yet
25 determined to be obscene, notwithstanding a prior determination after a full adversary hearing that
26 similar matter is obscene. The court in Sable, therefore, contrary to plaintiffs characterization,
27 determined that "actual notice of illegal conduct" requires a prior adjudication of unlawful conduct
28 in reliance on Supreme Court authority and not merely as a result of the terms of the tariff.

29 ¹⁵ Plaintiff also misconstrues the FCC's statement that the standard of liability applies "to the
30 extent an MDS common carrier confines itself to operation under section 21.903(b)(1) of the
31 Commission's rules." FCC Obscenity Order, 2 F.C.C.R. at 2820. This refers to the requirement
32 that an MDS common carrier must be acting in conformity with FCC rules and the applicable tariff
33 for the higher standard to apply, as long as "the carrier is not substantially involved in the
34 production of, the writing of, or the influencing of the content of any information to be transmitted
35 over its facilities."

36 ¹⁶ Plaintiff also mischaracterizes the FCC Obscenity Order to argue that Cox is under no legal
37 duty to await a formal adjudication of Fax.com's violations of the TCPA before terminating

1 Plaintiff also fails to distinguish the legal authority Cox cites to show that it has no basis or
2 duty to terminate common carrier services to customers absent a statutory requirement, court order
3 or legal adjudication of illegal conduct. In attempting to distinguish Sprint Corp. v. Evans, 818 F.
4 Supp. 1447, 1457 (M.D. Ala. 1993), which involved a telephone common carrier, plaintiff merely
5 notes that different law applies to MDS and telephone common carriers. (Opp'n at 18.) This is a
6 distinction without a difference in this context, and, in any event, plaintiff neglects to mention that
7 the FCC Obscenity Order adopts its standard of liability for MDS carriers in reliance on the
8 standards of liability for telephone common carriers. Second, plaintiff asserts that in Sprint there
9 was no indication that Sprint offered a "customized" service to its customers, ¶ while plaintiff
10 claims that Cox "customized" its service to Fax.com by providing enough network capacity to
11 accommodate transmission of millions of faxes nationwide. (Compl. ¶¶ 35-37.) In Sprint,
12 however, the court noted the carrier handled "over seven million 800-number calls during a normal
13 business day" and that the "800 service plan . . . differs from regular telephone service." 818 F.
14 Supp. at 1449-50.¹⁷ Accordingly, there is no meaningful distinction between this case and Sprint.

15 Similarly, plaintiffs attempt to distinguish People v. Brophy, 120 P.2d 946,956 (Cal. Ct.
16 App. 1942) is specious. Plaintiff claims that there was no indication that the common carrier in
17 Brophy offered anything more than standard service to paying customers. (Opp'n. at 18.)
18 Plaintiff's allegations that Cox offered "customized" service relies on the number of T1 and private
19 lines that Cox provides, which is indistinguishable from the facts in Brophy, where the phone
20 company furnished telephone connection and service consisting of "ten No. 51 order tables, one

21
22 Fax.com's common carrier service and may terminate such service at any time. (Opp'n at 15.) In
23 describing the FCC Obscenity Order as stating that telephone common carriers are permitted to
24 deny use of their facilities for an illegal purpose, plaintiff omits key language stating that such
25 carriers may do so when they have "historically imposed provisions to this effect in their tariff
26 filings." 2 F.C.C.R. at 2820. Thus, the FCC's discussion of a common carrier's ability to deny
27 service depends upon the provisions in their governing tariffs, which are not alleged here.

28 ¹⁷ Plaintiff also again mischaracterizes the FCC Obscenity Order as stating that telephone
common carriers are free to terminate services based upon notice of alleged illegal use, failing to
mention that this is pursuant to a tariff. (Opp'n at 18 n.14.) The FCC Obscenity Order also refers
to carriers' denial of use of their facilities "for an illegal purpose" (2 F.C.C.R. at 2820). not an
allegedly illegal purpose, as represented by plaintiff.

1 hundred trunk lines and four business trunk lines.” 120 P.2d at 949. Plaintiff also claims that
2 Brophy did not address cases where the carrier had a “high degree of involvement or actual notice,”
3 but this is not so. Brophy expressly notes that the phone company was not “accused in the
4 injunction suit of managing, operating or participating in any gambling place or enterprise
5 maintained for the acceptance of wagers.” Id. at 956.¹⁸

6 Here, while there are *allegations* that Fax.com has violated the TCPA, there has been no
7 adjudication or court order determining that Fax.com’s conduct is illegal. Indeed, two courts have
8 recently held that the TCPA violates the First Amendment, and one has stayed the FCC’s
9 proceeding against Fax.com on its Notice of Apparent Liability issued on August 7, 2002.¹⁹ No
10 hearing on the NAL has been held, and Fax.com has not been required to answer the claims.
11 Indeed, the NAL does not suggest that Cox is even “apparently” involved in improper activity and,
12 naturally, does not purport to put Cox on notice of illegal conduct. It would be illogical and legally
13 unwarranted to require the common carrier to take it upon itself to pre-judge the facts and law,
14 presume illegal conduct and unilaterally terminate Fax.com’s service.

15
16 ¹⁸ Plaintiff also claims it has established “good cause” to allow discontinuation of services
17 under Goldin v. Public Utilities Comm’n, 23 Cal.3d 638 (1979). This is meritless. In Goldin, the
18 California Supreme Court examined the constitutionality of Rule 31, which provides that service
19 shall be refused or disconnected upon a finding of “probable cause” to believe the use made (or to
20 be made) is prohibited by law, or that the service is being used as an instrumentality to violate or
21 assist violation of the law. Each service contract in California is deemed to contain Rule 31, which
22 was enacted after the California Supreme Court held in Sokol v. Public Utilities Comm’n, 65
23 Cal.2d 247 (1966) that a pre-existing rule allowing utilities to summarily discontinue service
24 without authorization and provision for prompt subscriber challenge was unconstitutional. In
25 Goldin, the telephone company had terminated service after being served with a “Finding of
26 Probable Cause” issued by a judge who had reviewed an “extensive affidavit and other materials.”
27 Id. at 647-48. The Court noted that telephone service is an entitlement protected by Due Process,
28 which typically requires notice and a hearing prior to termination. The Court concluded that the
“Notice of Probable Cause” sufficed because a judicial officer had made a finding of probable
cause that the facilities had been used in the commission or facilitation of illegal acts, and because
the acts presented “significant dangers to public health, *safety*, or welfare.” Id. at 664.

¹⁹ See Missouri ex rel. Nixon v. American Blast Fax, Inc., 196 F. Supp. 2d 920 (E.D. Mo.
2002) (subsequently enjoining NAL, pending appeal, and ordering FCC to “cease and desist” from
proceeding against Fax.com or its customers) (Writ of Mandamus attached hereto as Ex. B). See
also Rudgayzer & Gratt v. Enine, Inc., 749 N.Y.S.2d 855 (N.Y. Civ. Ct. 2002) (holding that TCPA
violates the First Amendment).

1 **IV. The Court Should Dismiss or Stay Based on the FCC's Primary Jurisdiction.**
2 Plaintiffs argument against deferral based on the primary jurisdiction of the FCC is
3 misguided. Plaintiff contends that dismissal or stay is inappropriate because the FCC has no
4 authority to adjudicate private TCPA claims. But this is neither the purpose of the deferral nor
5 Cox's argument. Cox does not expect the FCC to adjudicate the plaintiffs claims. The basis for
6 deferral is (1) the pendency of the FCC's rulemaking *specifically on the TCPA*, which includes the
7 issue of common carrier liability, and (2) the authority and responsibility Congress vested in the
8 FCC as the expert agency over telecommunications common carrier and TCPA-related issues. To
9 the extent the Court finds jurisdiction over this case, and declines to dismiss the common carrier
10 claims, the results of the FCC's rulemaking are highly likely to assist the Court in determining the
11 circumstances, if any, under which a common carrier could potentially be liable under the TCPA
12 for the transmission of the facsimiles of others. As Cox set forth in its initial brief, the FCC has
13 identified several issues under the TCPA that it plans to address through this rulemaking, including
14 issues of common carrier liability that have a direct bearing on this litigation.²⁰ In fact, Cox's
15 ultimate parent corporation has raised in the FCC rulemaking the very issue of potential common
16 carrier liability that plaintiff raises in this case. See Comments of Cox Enterprises, Inc., at 12-19
17 (Attached hereto as **Ex. A.**)

18 Plaintiff also asserts that the FCC does not provide a viable forum because the proposed
19 rulemaking might be stayed as a result of Judge Limbaugh's issuance of an injunction ordering the
20 FCC to stay all proceedings under the NAL against Fax.com. This is incorrect. Judge Limbaugh's
21 injunction applies only to proceedings against Fax.com and its customers. See American Blast
22 Fax, Inc., Writ of Mandamus (Sept. 20, 2002) (Attached hereto as **Ex. B.**). The Notice of Proposed
23

24 _____
25 ²⁰ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,
26 Notice of Proposed Rulemaking, FCC 02-250, CG Docket No. 02-278 (Sept. 18, 2002) available at
27 <http://www.fcc.gov/headlines.html> (for example, FCC plans to **clarify** the "established business
28 relationship" exemption **and** "what constitutes prior express invitation or permission for purposes
of sending an unsolicited fax," address whether the general prohibition on unsolicited fax
advertising applies to Fax.com and similarly situated entities, and determine whether the FCC
should specify by rule the activities under the "high degree of involvement/actual notice" standard
that could trigger liability for common carriers under the TCPA).

1 Rulemaking is proceeding without delay. Indeed, comments from interested parties were due and
2 filed on December 9, 2002, and reply comments are due January 31, 2003. See Public Notice
3 (Attached hereto as Ex. C).

4 Finally, plaintiffs additional concern that the rulemaking is "little more than a gleam in a
5 regulator's eye," is unfounded. Indeed, the original FCC TCPA Order was released on September
6 17, 1992, only five months after the FCC adopted the underlying Notice of Proposed Rulemaking
7 (see Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, 7 F.C.C.R.
8 2736 (1992)). There is no basis for plaintiffs claim that the rulemaking proceeding "may be many
9 years from fruition." If this argument were valid, no matters could be deferred under primary
10 jurisdiction as it can never be predicted accurately how quickly an agency will act. Barring
11 extraordinary circumstances and evidence of unreasonable agency delay, courts reject attempts to
12 evade the primary jurisdiction of agencies based on the length of time necessary to complete a
13 rulemaking or other agency proceeding.²¹ For the same reason, dismissal without prejudice would
14 be appropriate, as there is no basis to believe there will be an unreasonable delay here.

15 CONCLUSION

16 WHEREFORE, Cox respectfully requests that the Court dismiss the claims against Cox
17 California Telecom, I. L.C.

18 Respectfully submitted,

19 

20 David E. Mills
21 Dow, Lohnes & Albertson, PLLC

22 -and-

23 Richard R. Patch
24 Coblentz, Patch, Duffy & Bass, LLP

25 December 24, 2002

26 Attorneys for Defendant Cox Business Services

27 ²¹ See, e.g., Total Telecomms. Servs., Inc. v. AT&T, 99 F.3d 448 (D.D.C. 1996) (deferring
28 case to FCC based on primary jurisdiction when duration of agency proceeding would last one year
to fifteen months, especially considering the litigation had been ongoing for only several months).

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FILED

MAR 03 2003

**RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REDEFINING PROGRESS, et al.,

No. C 02-4057 MJJ

Plaintiffs,

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS**

v

FAX.COM, INC, et al.,

Defendants.

INTRODUCTION

Before the Court are two motions to dismiss (“motions”) a class action complaint filed by Redefining Progress (“Plaintiff”). The first motion, brought by Cox Business Services, LLC (“Cox”) seeks to dismiss for lack of subject-matter jurisdiction, failure to state a claim, and primary jurisdiction of the Federal Communications Commission (“FCC”). The second, brought by Kevin Katz (“Katz”) and American Benefit Mortgage, Inc. (“ABM”), seeks to dismiss solely based on lack of subject-matter jurisdiction. These motions require the Court to determine if federal jurisdiction exists under Section 207 of the Communications Act (“Section 207”), 47 U.S.C. § 207, where the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, is used as the basis for such jurisdiction. Having considered the briefing in this matter and listened to argument from the parties, the Court **GRANTS** Defendants’ motions based on lack of subject-matter jurisdiction.

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FACTUAL BACKGROUND

Plaintiff alleges that Fax.com, Inc. (“Fax.com”) is the largest fax broadcaster in the United States. Class Action Complaint (“Complaint”) ¶ 10. Defendant Katz is Fax.com’s cofounder and president. Complaint ¶ 11. Plaintiff alleges that Defendant ABM is one of Fax.com’s customers, for whom Fax.com broadcasts unsolicited advertisements to individuals and businesses such as Plaintiff listed on Fax.com’s fax number database. Complaint ¶ 40.

Plaintiff alleges that Defendants Fax.com, Katz, ABM, and Does 1 through 10,000 (collectively, “Fax.com Defendants”) have violated and continue to violate the TCPA by fax broadcasting millions of unsolicited advertisements every day, Complaint ¶¶ 1, 20. Plaintiff alleges that Defendant Cox, a common carrier under the Communications Act, has both actual notice of and a high degree of involvement in the Fax.com Defendants’ fax-spamming operation, and has caused or permitted these TCPA violations, rendering it liable under the TCPA and the Communications Act. *See* Complaint ¶¶ 12, 35-38, 75-79.

On August 22, 2002, Plaintiff filed a class action complaint against the Fax.com Defendants and Cox asserting the following claims: (1) violations of the TCPA (against all Defendants); (2) violations of Section 206 of the Communications Act (“Section 206”), 47 U.S.C. § 206 (against Cox only); (3) violations of California’s Unfair Competition Law, Business & Professions Code § 17200, *et seq.* (against all Defendants); (4) unjust enrichment (against Fax.com, Katz, and Cox); (5) violations of the Uniform Fraudulent Transfer Act, California Civil Code § 3439, *et seq.* (against Fax.com and Katz). *See* Complaint ¶¶ 66-96.

The Court will now consider motions to dismiss brought by Ccx as well as Katz and ABM

LEGAL STANDARD

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, “a district court must dismiss an action if it lacks jurisdiction over the subject matter of the suit.” *Friends of Frederick Seig Grove #94 v. Sonoma County Water Agency*, 124 F.Supp.2d 1161, 1164 (N.D. Cal. 2000).

ANALYSIS

Plaintiff asserts federal causes of action based on the TCPA and Section 206,¹ neither of which provide an independent basis for federal jurisdiction. *See Murphey v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000) (“state courts have exclusive jurisdiction over a cause of action created by...the [TCPA]”) (quotations and citations omitted); *AT&T Communications of Cal., Inc. v. Pacific Bell*, 60 F.Supp.2d 997, 1000 (N.D. Cal. 1999) (“there is no independent **right** of action provided by Section 206 itself”). Therefore, in order for this Court to have jurisdiction over any of Plaintiff’s claims, there must be a basis for federal jurisdiction. The question here is whether Section 207 of the Communications Act (“Section 207”) provides such a basis.²

A. General v. Specific Jurisdiction

The parties initially dispute whether Section 207 reflects a grant of “general” or “specific” jurisdiction. Defendant Cox argues that Section 207 is a general jurisdiction statute akin to 42 U.S.C. § 1331 because they both “require[] the violation of another statute before federal jurisdiction can be invoked.” *See* Cox Reply to Plaintiffs Opposition (“Reply”) at 2:15-16.³ The Court disagrees.

There are two key distinctions between 1331 and Section 207. First, unlike 1331, Section 207 makes reference to, and is part of, a larger federal statute, the Communications Act. Moreover, while 1331 requires a violation of *another* federal statute in order to be invoked, Section 207 is

¹ Section 206 provides: “In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney’s fee, to be fixed by the court in every case of recovery, which attorney’s fee shall be taxed and collected as part of the costs in the case.”

² Section 207 provides: “Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier **may** be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction: but such person shall not have the right to pursue both such remedies.” 42 U.S.C. § 207.

³ Under this theory, Plaintiff’s additional claims would have to be dismissed for lack of subject-matter jurisdiction. *See United Artists Theater Circuit, Inc. v. FCC*, 147 F.Supp.2d 965, 972 (D. Ariz. 2000) (“[i]n the absence of an express jurisdictional grant to the federal courts in the statute, federal jurisdiction over private TCPA actions cannot alternatively be obtained under the general federal question jurisdiction statute”); see also *Murphey*, 204 F.3d at 915.

1 predicated upon a violation of the Communications Acts. *See* 42 U.S.C. § 207 (“[a]ny person
2 claiming to be damaged by any common carrier *subject to the provisions of this chapter* may...”) (emphasis added). In short, Section 207 is simply the jurisdictional provision of the
3 Communications Act, which, taken as a whole, reflects a grant of specific jurisdiction. However, the
4 distinction between general and specific jurisdiction is not determinative here.
5

6 **B. Private Right of Action**

7 As previously stated, the TCPA does not create a private right of action in federal court.
8 *Murphey*, 204 F.3d at 915. Neither does Section 207; in order to state a claim under Section 207, a
9 plaintiff must establish that another provision of the Communications Act has been violated. *See*
10 *Frenkel v. Western Union Telegraph Company*, 327 F.Supp. 954, 958 (9th Cir. 1971).⁴ Plaintiff
11 contends that a violation of the TCPA by a common carrier satisfies this requirement. In other
12 words, Plaintiff argues that the TCPA, a provision of the Communications Act which clearly vests
13 jurisdiction with state courts, is sufficient to invoke Section 207, the federal jurisdictional provision
14 of the same Act. This theory does not withstand the traditional canons of statutory interpretation, nor
15 does this represent sound logic.

16 When reviewing a statute, the Court first looks to the statutory language itself. If the
17 language is clear, there is no need to look any further to determine the meaning of the statute. *Hellon*
18 *& Associates, Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992). “Second, to the
19 extent that statutes can be harmonized, they should be, but in case of an irreconcilable inconsistency
20 between them the later and more specific statute usually controls the earlier and more general one
21 [citations].” *Id.* Finally, it is presumed that new laws are passed with knowledge of previous
22 legislation. *Id.*

23 Here, the two statutory provisions clearly conflict with regard to jurisdiction: Section 207
24 places jurisdiction solely in the federal arena, while the TCPA places jurisdiction exclusively with
25

26 Section 206 cannot provide the requisite violation to state a claim under Section 207.
Frenkel, 327 F.Supp. at 958.

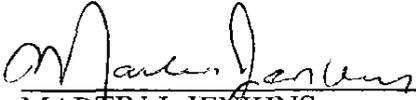
state courts. However, Plaintiff contends that the two provisions can be reconciled because “Section 207 does not depend on the nature of the underlying [Communications Act] violation to determine whether a federal court has jurisdiction.” Opp. at 8:2-4. This fact, however, does not address the inherent conflict between the two provisions.⁵ Therefore, the rules of statutory interpretation require that the later and more specific statute, is controlling. There can no question that the TCPA was enacted long after the Communications Act.⁶ Moreover, TCPA’s grant of jurisdiction is more specific than Section 207. *See Carpenter v. Department of Transportation*, 13 F.3d 313, 316 (9th Cir. 1994) (“[s]pecific grants of exclusive jurisdiction to the courts of appeals override general grants of jurisdiction to the district courts”). In other words, with the enactment of the TCPA, Congress carved out a specific exception to Section 207, the general jurisdictional provision of Communications Act. Thus, as a matter of statutory interpretation, the Court finds that the TCPA controls.⁷

CONCLUSION

For the reasons stated above, Defendants’ motions to dismiss are **GRANTED** based on lack of subject-matter jurisdiction.’

IT IS SO ORDERED.

Dated: March 3, 2003


MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

⁵ Moreover, **if** the Court were to employ Plaintiffs rationale, any claim under the TCPA, which named the common carrier as a defendant, could be heard in federal court. Plaintiff offers no evidence that Congress intended such a result when it, without exception, provided exclusive state court jurisdiction over TCPA claims.

⁶ There is almost a sixty-year gap between the enactment of the Communications Act (1934) and the TCPA (1991).

⁷ Although the Court need not reach the final rule of statutory interpretation--the presumption that new laws are passed with knowledge of previous laws--in this case it is likely that Congress was aware of Section 207 when it passed the TCPA. *See Murphey*, 204 F.3d at 915 (describing the TCPA’s grant of exclusive state court jurisdiction as “unusual”).

⁸ Based on this decision, the Court need not consider *Cox*’s additional grounds from dismissal.

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ALAMEDA**

David

Plaintiff

vs.

Fax.Com, Inc

Defendant

<p>FILED ALAMEDA COUNTY</p> <p>MAR 18 2003</p> <p>CLERK OF THE SUPERIOR COURT</p> <p>By <u>RB</u> Deputy</p>
<p>case number</p> <p style="text-align: center;">2002063723</p>

ORDER re: CASE MANAGEMENT

& TRAL SETTING ORDER WITH NOTICE OF TRIAL

& ORDER TO SHOW CAUSE

THE COURT HAS ORDERED THE FOLLOWING:

- At the conclusion of a judicially supervised Case Management Conference.
- After review of the case, including timely filed Case Management Statements, without a conference.

Compliance with the paragraphs (1) through (16) below is required if such paragraph is marked with an "X" in the space provided.

FURTHER CASE MANAGEMENT CONFERENCE

- 1. A further Case Management Conference is scheduled for 7/8/03 at 9 AM in Dept. 114.
- 2. The Case Management Conference currently scheduled for _____ is **VACATED** and advanced continued to _____ at _____ in Dept. _____.
- 3. Updated Case Management Statements in compliance with CRC 212 and Alameda County Local Rules, Chapter 4, on Judicial Council Form CM-I 10, must be filed no **later** than _____. If the foregoing date is a court holiday or a weekend, the time is extended to the next business day.
- 4. All unserved parties must be served with summons/complaint/cross-complaint, a copy of this order, and proof of service filed with the court.

5. Parties must timely file:

a. any demurrers, or similar motions challenging the pleadings,

b. Other: *STAY OF PROCEEDINGS CONTINUED BY STIPULATION OF PARTIES*

so that adjudication of motions shall occur before

Updated Case Management Statements are due. *6 CONTAIN F.C.C & FED CT STATUS -*

Mandatory Settlement Conference Statements are due.

6. The following discovery must be completed before updated Case Management Statements are due:

Medical examination(s) of parties and deposition of doctor

All non-expert depositions

All interrogatory and/or document production discovery

Disclosure of identities of experts and expert witness depositions (without prejudice to additional disclosures pursuant to CCP § 2034 prior to trial).

ALTERNATIVE DISPUTE RESOLUTION (ADR)

7 The case is referred to Judicial Arbitration Private ADR, said process to be completed

by

before the updated CMC Statements are due and the results thereof to be included in said Statements, except to the extent precluded by Evidence Code §§ 1115-1128 or by a confidentiality agreement.

All counsel and self-represented parties who are proceeding to mediation or other form of ADR requiring the selection of a neutral shall advise the Case Management Judge in writing no later than _____ of the identity of the neutral selected. If the parties have failed to do so notify the court, counsel and self-represented parties shall appear in Dept. _____ on _____ at _____

MANDATORY SETTLEMENT CONFERENCE

8. A Mandatory Settlement Conference pursuant to CRC 222 is set for _____ in Dept. _____ ai _____. Trial counsel, the parties, claims representatives and all other persons with full authority to settle the case must personally attend unless the Court has, before the Conference, authorized telephonic participation upon written application with notice to all other parties and good cause shown. A Settlement Conference Statement complying with CRC 222 (c) must be filed with the court no later than _____ and served on all other parties. If the foregoing date is a court holiday or a weekend, the time is extended to the next business day.

TRIAL SETTING ORDERS

9. The Court makes the following trial setting orders:

Trial date: at 8:45 AM in Dept.
Estimated length of trial: court days

The parties are ordered to comply with the Pretrial Orders set forth in Appendix A

Trial by jury is waived by all parties, the action shall proceed as a court trial,

Jury is demanded by Plaintiff(s) Defendant(s)

Cross-defendant(s)

(Specify if less than all parties to a side)

Jury is waived by Plaintiff(s) Defendant(s)

Cross-defendant(s)

(Specify if less than all parties to a side)

Jury is reserved by Plaintiff(s) Defendant(s)

Cross-defendant(s)

(Specify if less than all parties to a side) .

10. The Trial Date currently scheduled for is VACATED.

The case is rescheduled for trial on at 8:45AM in Dept.

Statutory discovery dates remain in force as a result of the original Trial Setting Order.

This order constitutes a new Trial Setting Order. Discovery is re-opened and governed by the appropriate statutory provisions.

NOTICES

11. Counsel for Plaintiff(s) Defendant(s) must forthwith serve a copy of this order on all counsel of record and self-represented parties, and file proof of service.

12. Clerk is directed to serve endorsed-filed copies of this order, with proof of service, to counsel and to self-represented parties of record by mail fax.

SANCTIONS

13. Sanctions: Proof having been made to the satisfaction of the court that _____ has failed to sanctions are ordered as follows:

a. Monetary sanctions in the sum of _____ are ordered and are

- 1. payable to the clerk of the court within _____ calendar days.
- 2. stayed pending further order of the court.
- 3. stayed until the **next** Case Management Conference.

b. Other sanctions:

c. A copy of this order will be forwarded to the State Bar of California

14. Other orders and/or comments:

17 a. _____ and attorney are ordered to appear at the Case Management Conference scheduled in Paragraph 1 above. Failure to do so may result in the claim(s) being dismissed or the answer(s) being stricken.

b.

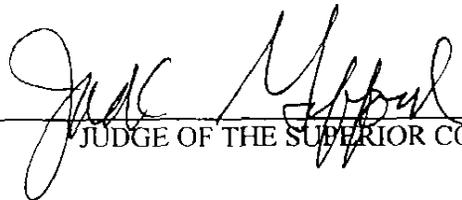
15. Any delay in the trial, caused by non-compliance with any order contained herein, shall be the subject of sanctions pursuant to CCP 177.

REASSIGNMENT

16. Good cause having been shown pursuant to Local Rule 4.3 (2), the above-entitled action is reassigned to

- Plan 1 Plan 2 Plan 3 Plan 4
- Exempt Other:

DATED: March 18, 2003



JUDGE OF THE SUPERIOR COURT

SHORT TITLE:

David VS Fax.Com, Inc

CASE NUMBER

2002063723

Coblentz, Patch, Duffy & Bass, LLP
Attn: Greer, Julia D.
222 Kearney Street, 7th Floor
San Francisco, CA 94108-4510

Law Offices of Charles Carbone
Attn: Carbone, Charles
896 1/2 Steiner Street
San Francisco, CA 94117-1618

Cozen and O'Connor
Attn: Mitchell, Cynthia L.
425 California Street
Suite 1800
San Francisco, CA 94104-___

Superior Court of California, County of Alameda
Wiley W. Manuel Courthouse

David
Plaintiff/Petitioner(s)
Fax.Com, Inc.
Defendant/Respondent(s) (Abbreviated Title)

No. 2002063723

Minutes

Department 114

Honorable Jack Gifford, Judge

Cause called for Case Management Conference on March 18, 2003

Plaintiff Daniel David represented by Carbone, Charles
Defendant American Benefit Mortgage, Inc. represented by James Casello via conference call
Defendant Cox Business Services, LLC represented by Grcer, Julia D.
Defendant Fax.Com, Inc. represented by James Casello via conference call.
Defendant Kevin Katz represented by James Casello via conference call.

Further case management conference is scheduled. Stay of proceeding continued by stipulation of parties.
Updated case management statements to contain F.C.C. and Fed Ct. status

Case continued to 09:00 AM on 07/08/2003 in Department 114, Case Management Conf Continuance,
Wiley W. Manuel Courthouse, 661 Washington Street, Oakland.

Court order notices will be mailed

Minutes of 03/18/2003
Entered on 03/19/2003

Executive Officer / Clerk of the Superior Court

By  Deputy Clerk

Minutes

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PROOF OF SERVICE

The undersigned hereby declares:

I am over the age of 18 years and not a party to or interested in the within entitled cause. I am an employee of Coblentz, Patch, Duffy & Bass, LLP and my business address is 222 Kearny Street, 7th Floor, San Francisco, CA 94108. On the date stated below, I served a true copy of:

NOTICE OF ENTRY OF ORDER RE: CASE MANAGEMENT CONFERENCE

(X) By mail, by placing said document(s) in an envelope addressed as shown below. I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service, to wit, that correspondence will be deposited with the United States Postal Service this same day in the ordinary course of business. I sealed said envelope and placed it for collection and mailing on the date stated below to the addressee stated below, following ordinary business practices.

Charles Carbone
LAW OFFICES OF CHARLES CARBONE
896 1/2 Steiner Street
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Telephone: (415) 885-4810
Facsimile: (415) 614-0971
Attorney for Plaintiff Daniel David

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Attorneys for Defendant Fax. Corn

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800
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Facsimile: (202) 776-2222
*Attorneys for Defendant Cox Business
Services. LLC*

I declare under penalty of perjury, under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on March 24, 2003.


Rachael M. Garcia

COBLENTZ, PATCH, DUFFY & BASS, LLP
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