

No. 18-

IN THE
Supreme Court of the United States

SUPPLY PRO SORBENTS, LLC, INDIVIDUALLY
AND AS THE REPRESENTATIVE OF A CLASS OF
SIMILARLY-SITUATED PERSONS,

Petitioner,

v.

RINGCENTRAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit err by following FCC commentary to hold that an “‘incidental [fax] advertisement’ ‘does not convert the entire communication into an advertisement,’ considering ‘the amount of space devoted to advertising versus the amount of space used for information,’ when the Telephone Consumer Protection Act and the FCC’s own codified regulation define a fax advertisement as “*any* material advertising the commercial availability or quality of any property, goods, or services?”

The Seventh Circuit previously declined to follow the FCC’s commentary, rendering a decision that conflicts with the Ninth Circuit’s decision in this case. *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 687 (7th Cir. 2013).

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Court's Rule 29.6, undersigned counsel states that Petitioner, Supply Pro Sorbents, LLC, has no parent corporation and that no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Supply Pro Sorbents, LLC (“Plaintiff”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit below is reported at *Supply Pro Sorbents, LLC v. RingCentral, Inc.*, 743 Fed. Appx. 124 (Mem) (9th Cir. Nov. 20, 2018). App., *infra*, 1a-3a. The opinion of the district court granting Defendant’s motion to dismiss is reported at *Supply Pro Sorbents, LLC v. RingCentral, Inc.*, No. 16-CV-02113-JSW, 2017 WL 4685705 (N.D. Cal. July 17, 2017). App., *infra*, 4a-13a.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 2018. App., 1a. Fourteen days later, Plaintiff filed a timely Petition for Rehearing or for Rehearing en Banc on December 14, 2018. Fed. R. App. P. 35(c), 40(a)(1). The court of appeals denied Plaintiff’s petition on January 28, 2019. App., *infra*, 15a.

This petition is timely because it is being filed within 90 days of the Ninth Circuit’s denial of Plaintiff’s petition for rehearing or for rehearing en banc. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.5. This Court has jurisdiction to hear this petition under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

I. The Telephone Consumer Protection Act ("TCPA") 28 U.S.C. § 227

Restrictions on use of telephone equipment

(a) Definitions

As used in this section--

(5) The term "unsolicited advertisement" means 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, in writing or otherwise.

II. The Codified FCC Regulation Implementing the TCPA 47 C.F.R. § 64.1200(f)(15)

The term unsolicited advertisement means 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, in writing or otherwise.

INTRODUCTION

This case concerns the question of whether Federal Communications Commission (“FCC”) commentary can be applied to change the plain and unambiguous meaning of the TCPA’s definition of a fax advertisement *and* the FCC’s own codified regulation adopting the same definition. The Ninth Circuit held that it could, but in *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 687-688 (7th Cir. 2013), the Seventh Circuit did the opposite.

The TCPA defines a fax advertisement as “any material advertising the commercial availability or quality of any property, goods, or services.” 28 U.S.C. § 227(a)(5). When discussing a minor amendment to the very same language in a codified regulation, the FCC also discussed its enforcement priorities. 47 C.F.R. § 64.1200(f)(1), (15); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 and Junk Fax Preventions Act of 2005*, 71 Fed. Reg. 25,967-01, 25972-25973 (May 3, 2006) (“*2006 Rules and Regulations*”). In particular, the FCC stated that on a “case-by-case basis,” it might not enforce the TCPA if a “bona fide ‘informational communication’” contained an “incidental” advertisement. *Ibid.*

In the present case, the Ninth Circuit applied this FCC commentary to find that “incidental” advertisements contained in other communications are not “advertisements” in derogation of the TCPA’s

and the codified regulation’s plain language covering “any material,” whether incidental or not. App, *infra*, 2a-3a. In contrast, *Turza* correctly viewed the FCC’s commentary accompanying amendment of its codified regulation as “a species of untethered legislative history” that could not change the plain meaning of the unambiguous text of the TCPA or the codified regulation. 728 F.3d at 688.

The issue of how to apply the FCC’s discussion in the *2006 Rules and Regulations* to the TCPA’s definition of fax advertisements has vexed the courts. See, e.g., *Matthew N. Fulton, D.D.S., P.C. v. Enclarity, Inc.*, 907 F.3d 948 (6th Cir. Nov. 2, 2018), *petition for cert. filed*, (U.S. Mar. 27, 2019) (No. 18-1258); *Carlton & Harris Chiropractic, Inc. v. PDR Network*, 883 F.3d 459 (4th Cir. 2018), *cert. granted in part, sub. nom. PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, No. 17-1705, 2018 WL 3127423 (U.S. Nov. 13, 2018); *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 847 F.3d 92, 96 (2d Cir. 2017); *Turza*, 728 F.3d 682.

The legal question presented here is slightly different. The issue here is not a question of the deference to apply to FCC commentary, but whether there is any ambiguity in the plain language of the TCPA’s or the FCC’s codified regulation’s definition of “advertisement” that would allow the FCC’s commentary to apply in the first place. Significantly, regardless of how this Court rules in *PDR Network*

concerning the Hobbs Act's¹ limits on district court jurisdiction to consider the validity of an FCC regulation, the Court's ruling will not resolve this case where the FCC has adopted a codified regulation that is identical to the TCPA. The same inconsistency that exists between the FCC's statements in the *2006 Rules and Regulations* and the TCPA's definition of "advertisement" can also be found between the FCC's statements and its codified regulation defining "advertisement." Thus, the issue here is whether, by commentary published in the federal register, the FCC can re-write not only an unambiguous federal statute but also an unambiguous codified FCC regulation.

The Court should grant this petition to make clear that the FCC cannot slip commentary with an elusive meaning in the midst of a dense text in the federal register and thereby re-write the plain language of a federal statute and the FCC's own codified regulation.

I. STATEMENT OF THE CASE

A. Statement of Facts

The TCPA prohibits the sending of unsolicited advertisements by facsimile. 47 U.S.C. § 227(b)(1)(C). Defendant operates a cloud-based business communications service. First Amended Complaint, p. 2, *Supply Pro Sorbents, LLC v. RingCentral, Inc.*, No. 4:16-cv-02113-JSW (N.D. Cal. Oct. 26, 2016), ECF

¹ 28 U.S.C. § 2342(1).

No. 49. As part of that service, Defendant provides its customers with a system through which Defendant sends and receives their faxes. *Ibid.* Defendant provides form fax cover sheets for use on outgoing faxes. *Ibid.* at 2, 6-7, Ex. B, pp. 1-13. All of Defendant's form cover sheets automatically include an advertisement for Defendant's services: "Send and receive faxes with RingCentral, www.ringcentral.com **RingCentral**." *Ibid.* Most users are unaware of Defendant's practice of sending its own advertisement with the users' facsimiles, but, in any event, users cannot delete or alter Defendant's advertisement before transmission. *Ibid.*

On or about April 13, 2016, Plaintiff received an unsolicited advertisement by facsimile. *Ibid.* at 6, Ex. A. Defendant sent that fax through its faxing system on behalf of one of its customers. *Ibid.* Plaintiff did not expressly invite or permit anyone to send Defendant's advertisement by facsimile. *Ibid.* at 6. In addition, the fax did not contain any opt-out notice regarding how to prevent receipt of Defendant's fax advertising in the future. *Ibid.*

B. Procedural History

Plaintiff commenced this action on April 21, 2016. Defendant filed a motion to dismiss under Rules 12(b)(6) and 12(b)(1). Defendant simultaneously filed a motion to dismiss or for a stay under the doctrine of primary jurisdiction citing a petition Defendant had filed with the FCC.

Plaintiff responded to Defendant's primary jurisdiction motion on July 22, 2016, and to Defendant's Rule 12 motion on August 19, 2016. Defendant submitted replies on August 5, 2016, and September 19. Without hearing, the district court granted Defendant's Rule 12 motion solely on the basis of a lack of Article III standing, but gave Plaintiff leave to file an amended complaint. App. *infra*, 16a-23a. The district court did not reach Defendant's Rule 12(b)(6) argument or Defendant's motion to stay or dismiss based on primary jurisdiction. App., *infra*, 34a.

Plaintiff filed its First Amended Complaint on October 27, 2016. First Amended Complaint, p. 1, *Supply Pro Sorbents, LLC v. RingCentral, Inc.*, No. 4:16-cv-02113-JSW (N.D. Cal. Oct. 26, 2016), ECF No. 49. Defendant once again moved to dismiss under Rules 12(b)(6) and 12(b)(1) and filed a separate motion to dismiss or stay under the doctrine of primary jurisdiction. Plaintiff responded to both motions on December 12, 2016. Defendant replied on December 27, 2016.

Without hearing, the district court granted Defendant's Rule 12(b)(1) and 12(b)(6) motion to dismiss and denied Defendant's motion under the doctrine of primary jurisdiction as moot. App., *infra*, 5a-19a.

Plaintiff appealed to the Ninth Circuit, which

affirmed. App., *infra*, 1a-4a. Plaintiff petitioned for rehearing or rehearing en banc, but that was denied. App., *infra*, 21a-22a. This petition followed.

II. REASONS FOR GRANTING THE PETITION

A. The Importance of the Question Presented.

Plaintiff petitions for a writ of certiorari because the Ninth Circuit's decision in this case is contrary to the prior published decision of the Seventh Circuit in *Turza*, 728 F.3d 682, on the important issue of when a court can apply the FCC's commentary in derogation of the plain meaning of the TCPA and the FCC's own codified regulation. S. Ct. R. 10(a).

The Ninth Circuit relied on a statement by the FCC to find that an "incidental" advertisement is not an "advertisement" under the TCPA. App. *infra*, 2a-3a. In contrast, *Turza* held that very same statement "must be ignored" because it was contrary to the unambiguous definition of an "advertisement" in the TCPA, and the FCC's own codified regulation. 728 F.3d at 688; 47 U.S.C. § 227 (a) (5); 47 C.F.R. § 64.1200 (f)(1), (15).

The TCPA defines a fax "advertisement" as "*any* material advertising the commercial availability or quality of *any* property, goods, or services." 47 U.S.C. § 227 (a) (5) (emphasis added). The FCC's codified regulation repeats this same language. 47 C.F.R. § 64.1200 (f)(1), (15). In the regulatory history issued with amendment of the codified regulation, the FCC

discussed “Informational Messages.” *2006 Rules and Regulations*, 71 Fed. Reg. 25,967-01, 25973. The FCC’s discussion suggests that, depending on circumstances, the FCC might not enforce the TCPA where a “bona fide informational communication” contained an “incidental” advertisement. *Ibid.*

The Ninth Circuit and *Turza* conflict on whether this FCC discussion can change the TCPA’s unambiguous definition of “advertisement” to include “any material.” *Turza* held the plain language of the TCPA is unambiguous, so there could be no exception for “incidental” advertisements. 728 F.3d at 688. In contrast, the Ninth Circuit ignored the TCPA’s language and relied entirely on the FCC’s enforcement discussion to find an “incidental advertisement” exception in Defendant’s favor.

The question of what is an “advertisement” under the TCPA’s junk fax prohibition, and the weight owed FCC statements on the issue, has generated substantial litigation and is the subject of numerous recent decisions with disparate results. *See, e.g., Fulton*, 907 F.3d 948; *PDR Network*, No. 17-1705; *Physicians Healthsource*, 847 F.3d at 96; *Turza*, 728 F.3d 682. Thus, it is a question on an “important matter” where the circuit courts of appeal have disagreed, so there is a need for this Court to provide a uniform national standard.

B. The Ninth Circuit Should Be Reversed.

1. The Ninth Circuit’s Decision Elevates the FCC’s Discussion of Its Enforcement Priorities over the Plain Language of the TCPA.

The issue in this case is whether the FCC’s discussion of its enforcement priorities can change the plain meaning of the text of the TCPA and the FCC’s own codified regulation. The TCPA defines a fax “advertisement” as “*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.” 47 U.S.C. § 227 (a) (5). The FCC promulgated an official codified regulation that uses this same language. 47 CFR § 64.1200 (f) (1), (15). In promulgating an amendment to the codified regulation, the FCC also discussed how it might enforce the TCPA. *2006 Rules and Regulations*, 71 Fed. Reg. 2597-01, 25972-25973. Specifically, the FCC discussed the idea that on a “case-by-case basis,” depending on circumstances, it might not enforce the TCPA where a “bona fide ‘informational communication’” included an “incidental” advertisement. *Ibid.*

Ignoring both the TCPA’s statutory definition and the FCC’s codified regulatory definition of “advertisement,” the Ninth Circuit relied on the FCC’s discussion of its enforcement priorities to hold

Defendant's fax cover page was not an advertisement because the one line of advertising content was merely an "incidental advertisement" that did not "convert the entire communication into an advertisement." App., *infra*, 2a-3a, *citing 2006 Rules and Regulations*, 71 Fed. Reg. 2597-01, 25972-25973. Considering the same FCC discussion on the same issue of advertising content that is "incidental" to "bona fide informational communications," the Seventh Circuit in *Turza* held, "[The FCC's discussion] seems to be a species of untethered legislative history – and the Supreme Court has told us that, although legislative history may assist in understanding an ambiguous text, a freestanding declaration untied to an adopted text must be ignored." 728 F.3d at 688 (citing *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988); *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993)).

The *Turza* defendant was an attorney who faxed a "Daily Plan It" newsletter containing business advice to CPAs. *Turza*, 728 F.3d at 683. The "Daily Plan It" mostly contained information and advice but, like Defendant's insertion here, it also displayed the defendant's contact information at the bottom. *Ibid.* at 686. The *Turza* defendant argued that because his professional contact information occupied only 25% of the "Daily Plan It," that advertising content was "merely incidental" to the informational content, and so the fax was not an advertisement as defined by the TCPA. *Ibid.* at 687.

The Seventh Circuit flatly rejected this argument:

But the statute does not ask whether a notice of availability is incidental to something else. If Macy’s faxes potential customers a page from the New York Times that is devoted 75% to news about international relations and 25% to an ad for goods on sale at Macy’s, it has sent an advertisement. That 75% of the page is *not* an ad does not detract from the fact that the fax contains an advertisement.

Ibid. (emphasis added). The *Turza* court went on to examine the FCC discussion at length, and concluded it had no bearing on the meaning of “advertisement” as defined by the statute and the FCC’s regulation:

This passage is mysterious. It does not elaborate on the meaning of the word “advertisement” in the statute or regulation. Instead it discusses the meaning of “informational communication,” a phrase that does not appear in either [TCPA] § 227 or the regulation. It seems to be a species of untethered legislative history—and the Supreme Court has told us that, although legislative history may assist in understanding an ambiguous text, a

freestanding declaration untied to an adopted text must be ignored. *See, e.g., Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988); *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

Perhaps this passage is best understood as a declaration of the Commission's enforcement plans. Section 227 authorizes private litigation, however; recipients need not depend on the FCC.

Turza, 728 F.3d at 688. *Turza* thus held that where the TCPA and the FCC's regulations thereunder are unambiguous, there is no basis to look to statements by the FCC to understand their meaning. The statutory and regulatory plain meanings govern, and there is no justification for inquiry into the regulatory history. In addition, as *Turza* noted, the nature of the FCC's discussion indicates it was intended as an expression of the FCC's own enforcement intentions, not as a modification of otherwise-plain statutory or regulatory meaning, or as a limitation upon the TCPA's private civil remedy. The Ninth Circuit erred by elevating regulatory history over the TCPA's plain statutory and regulatory definitions of "advertisement." A writ of certiorari should be granted and the Ninth Circuit should be reversed.

2. The FCC's discussion does not support the Ninth Circuit's decision.

Turza was correct to reject the FCC's "mysterious" discussion in light of the unambiguous language used in the statute's and the codified regulation's uniform definitions of "advertisement." But even if this "mysterious" passage is considered, it does not support the Ninth Circuit.

The Ninth Circuit construed the FCC's discussion to mean that any advertisement that is "incidental" to the primary, non-advertising content of a fax is not actionable under the TCPA. App., *infra*, 2a-3a (citing *2006 Rules and Regulations*, 71 Fed. Reg. 25967-01, *25,973). But, at most, the FCC's discussion, read in its entirety, indicates that an advertisement by the sender that is incidental to a "bona fide 'informational communication'" may not be actionable on a "case-by-case basis." 71 Fed. Reg. 25967-01, *25,973.² As

² The FCC's discussion in this regard is contained under a section heading titled "Offers of Free Goods and Services and Informational Messages." *2006 Rules and Regulations*, 71 Fed. Reg. 25967-01, *25,972-3. In dismissing Plaintiff's Complaint, the district court also relied on a separate section titled, "Transactional Communications." App., *infra*, 9a-10a (citing 71 Fed. Reg. 25967-01, *25,972-3). While the Ninth Circuit did not mention that section, the district court's reliance on it was erroneous. The FCC's "Transactional Communications" discussion indicates that "messages whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously entered into with the sender are not advertisements for purposes of the TCPA's facsimile advertising rules," and that "a reference to a commercial entity does not by

examples of such “informational communications,” the FCC’s discussion lists, “[I]ndustry news articles, legislative updates, or employee benefit information.” *2006 Rules and Regulations*, 71 Fed. Reg. 25967-01, 25973. None of these examples is comparable to what Defendant does. Defendant appends its advertising insert to every fax cover sheet used by its customers who send faxes using Defendant’s service. Unlike the FCC’s above-referenced examples, Defendant’s advertisements are not incidental to any other “informational communication” that Defendant is transmitting to fax recipients. To the contrary, Defendant’s advertising content is the only communication that Defendant sent to Plaintiff. The

itself make a message a commercial message. For example, a company logo or business slogan found on an account statement would not convert the communication to an advertisement.” *2006 Rules and Regulations*, 71 Fed. Reg. 25967-01, *25,972. But the district court cited this language for the sweeping proposition that a reference to a commercial entity does not make a fax an ad. App., *infra*, 9a-11a. This construction of the language ignores the limited “transactional” context that the FCC was addressing. Read in context, the FCC was simply explaining that merely including one’s logo or slogan within a “transactional” communication does not make it an advertisement. Here, in contrast, even assuming some of Defendant’s customers may have used its service to transmit their own “transactional” communications, Defendant’s mandatory inclusion of an ad for Defendant’s services, does not fit the FCC’s identified “transactional” exception. Defendant’s ad was not part of a “transactional communication” between Defendant and Plaintiff, so the FCC’s discussion of when a corporate logo can be included within a “transactional communication” is irrelevant.

remainder of the communication was from Defendant's customer, not from Defendant. Thus, even if the FCC's discussion could override the plain-language definitions of "advertisement" in the TCPA and the FCC's regulation thereunder, the FCC's discussion still would not support the Ninth Circuit's decision in this case.

3. Plaintiff Has Standing.

Although the Ninth Circuit did not reach the issue, the district court erroneously held that Plaintiff lacked Article III standing. App., *infra*, 12a-17a. Because the district court's ruling in this regard was wrong, it presents no obstacle to granting Plaintiff's petition.

The district court identified the "three 'irreducible' elements of Article III standing" as: "(1) 'the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical'; (2) the injury must be 'fairly traceable to the challenged action of the defendant;' and (3) a favorable decision will be 'likely' to redress injury." App., *infra*, 12a. (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The district court found that Plaintiff satisfied all of these elements except a "particularized" injury.

The district court held Plaintiff had shown a “concrete” injury because receipt of a fax sent in violation of the TCPA necessarily occupies the fax recipient’s telephone line illegally. App., *infra*, 9a. (citing *Imhoff Investment, LLC v. Alfocchino, Inc.*, 792 F.3d 627, 633 (6th Cir. 2015); *Turza*, 728 F.3d at 684; H.R. Rep. No. 102-317, p. 10 (1991)).³ In other words, Defendant’s fax ad injured Plaintiff because Plaintiff received it.

The district court also held Plaintiff’s concrete injury was “fairly traceable to Defendant,” because the FCC has defined the “sender” of a fax to include “the person or entity ... whose goods or services are advertised or promoted in the unsolicited advertisement,” and the faxes plainly advertised Defendant’s services. App., *infra*, 16a-17a (quoting 47 C.F.R. § 64.1200 (f) (10)).

Nevertheless, the district court applied the common law doctrine of *de minimis non curat lex* to find Plaintiff’s injury was not “particularized.” App., *infra*, 14a-16a. The district’s application of the *de*

³ All three circuits to have considered the issue have held that simply receiving a fax advertisement in violation of the TCPA causes a concrete injury sufficient for Article III standing even if the plaintiff never saw the fax. *Imhoff*, 792 F.3d at 633-634; *Palm Beach Golf Center-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) (“[N]o monetary loss need be shown to entitle a junk-fax recipient to statutory damages”).

minimis doctrine to the “particularity” element of standing makes no sense. An injury is “particularized” if it “affect[s] the plaintiff in a personal and individual way.” *Spokeo, Inc v. Robins*, 136 S. Ct. 1540, 1548 (2016). Where a defendant violates a plaintiff’s personal statutory rights and those rights are “individualized rather than collective,” the plaintiff has suffered a “particularized” injury. *Ibid*. “Particularity” is distinct from “concreteness” and has nothing to do whether an injury “exists” or is “real and not abstract.” *Ibid*.

Here, there can be no doubt that Defendant’s advertisement “affect[ed] the plaintiff in a personal and individual way” because Plaintiff personally received Defendant’s fax. *Ibid*. It is also beyond dispute that Plaintiff’s statutory right under the TCPA to be free of fax advertisements was “individualized rather than collective.” As the district court noted, the *de minimis* doctrine concerns the magnitude of the harm, whether it is a mere “trifle,” not whether it was directed at a particular individual. App., *infra*, 15a. Thus, the *de minimis* doctrine has no logical application to the “particularity” element of standing and could apply, if at all, only to Article III’s “concreteness” element.

Notably, Defendant did not argue below that the *de minimis* doctrine applied to the “particularity” element of standing. Rather, Defendant argued it applied to the “concreteness” element. But the district court held Plaintiff had alleged a “concrete” injury

because, as explained above, the case law overwhelmingly holds that the illegal occupation of a telephone line in violation of the TCPA is a “concrete” injury even without any quantifiable damage.

The district court cited several cases, but none supports its novel application of the *de minimis* doctrine to the particularity requirement for standing. App., *infra*, 15a, citing *Skaff v. Meridien N. Am. Beverley Hills, LLC*, 506 F.3d 832, 839-40 (9th Cir. 2007); *Caldwell v. Caldwell*, 545 F.3d 1126, 1134 (9th Cir. 2008); *In re Google, Inc. v. Privacy Policy Litig.*, No. 12-cv-01382, 2013 WL 6248499, at *7 (N.D. Cal. Dec. 3, 2013); *Hernandez v. Path, Inc.*, No. 12-cv-01515, 2012 WL 5194120, at *20 (N.D. Cal. Oct. 9, 2012); *Smith v. Aitima Medical Equip., Inc.*, No. 5:16-cv-00339, 2016 WL 4618780, *6 (C.D. Cal. July 29, 2016). None of these cases discussed the particularity requirement for standing.

Further, none of these cases involved fax advertisements in the TCPA context, and none addressed the large body of on-point case law in the TCPA context. For example, in *Sarris, supra*, the Eleventh Circuit held the plaintiff had standing to sue for a junk fax that he never saw. 781 F.3d at 1252. In *Imhoff*, the Sixth Circuit reached the same conclusion. 792 F.3d at 633-634. And in *Chapman*, the Seventh Circuit stated, “[N]o monetary loss need be shown to entitle a junk-fax recipient to statutory damages.” 747 F.3d at 492.

Citing *Google, supra*, which found standing, the district court below noted that “systematic *rather than episodic*” unauthorized conduct “is sufficient to establish more than a *de minimis* injury,” App., *infra*, 15a, but Defendant’s conduct in this case is quintessentially systematic. The problem addressed by the TCPA is the potential for proliferation of junk faxes, but the damage an individual suffers from any given junk fax will almost always be miniscule. There is no discernible basis to distinguish the district court’s *de minimis* analysis from the unanimous holdings of the circuit courts that merely being sent a fax advertisement in violation of the TCPA establishes Article III standing. The district court’s “particularity” rationale was unsound, and its judgment on this point should not prevent granting Plaintiff’s petition.

C. Conclusion.

The Ninth Circuit’s decision conflicts with the Seventh Circuit’s decision in *Turza* on the important issue of whether the FCC’s discussion of advertisements “incidental” to “informational messages” alters the otherwise plain and unambiguous definitions of “advertisement” set forth in the TCPA and the FCC’s own codified regulation. The Court should grant this petition to consider this issue.

Respectfully submitted,
/s/ Phillip A. Bock

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APPENDIX

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**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT, FILED NOVEMBER 20, 2018**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16528

D.C. No. 4:16-cv-02113-JSW

SUPPLY PRO SORBENTS, LLC,

Plaintiff-Appellant,

v.

RINGCENTRAL, INC.,

Defendant-Appellee.

MEMORANDUM*

Submitted November 16, 2018**
San Francisco, California
November 20, 2018, Filed

Appeal from the United States District Court for the
Northern District of California
Jeffrey S. White, District Judge, Presiding.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appendix A

Before: HAWKINS, GRABER, and THACKER, *** Circuit Judges.

Defendant RingCentral, Inc. (“RingCentral”) operates an online service that allows its customers to send faxes using a cover sheet that includes a one-line statement, “Send and receive faxes with RingCentral, www.ringcentral.com RingCentral®” (the “Identifier”). Plaintiff Supply Pro Sorbents, LLC (“Sorbents”) claims that this practice violates the Telephone Consumer Protection Act of 1991 (“TCPA”), 47 U.S.C. § 227, and constitutes common law conversion. The district court granted RingCentral’s motion to dismiss. Sorbents timely appeals. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

The district court determined that Sorbents’ injury, if any, did not confer Article III standing because it was *de minimis*. On appeal, Sorbents argues that receiving any unsolicited advertisement by fax is sufficient to establish standing under the TCPA without any additional showing. But, even if Sorbents had standing, its statutory claims fail because the Identifier is not an “unsolicited advertisement.” *See* 47 U.S.C. § 227(a)(5), (b)(1)(C). The Federal Communications Commission (“FCC”) administers the TCPA, *see* 47 U.S.C. § 227(b)(2); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009), so its interpretation of the TCPA is due at least *Skidmore* deference. *See Skidmore v. Swift &*

*** The Honorable Stephanie Dawn Thacker, United States Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.

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Co., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1994). The FCC’s *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* and *Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25,967-01 (May 3, 2006), offer a reasonable interpretation of the statute. Following the FCC’s guidance, we find that the one-line Identifier is an “incidental advertisement” that “does not convert the entire communication into an advertisement,” considering “the amount of space devoted to advertising versus the amount of space used for information.” *See id.* at 25,973.

Sorbents’ conversion claim also fails. RingCentral neither intentionally nor actually controlled Sorbents’ fax machine because RingCentral’s customers, rather than RingCentral itself, chose to send the fax containing the Identifier. *See* Restatement (Second) of Torts § 222A (“Conversion is an intentional exercise of dominion or control over a chattel . . .”). Moreover, the damages claimed by Sorbents—the resources used to print the Identifier—are too minimal to support a claim for conversion under the doctrine of *de minimis non curat lex*. *See id.* § 222 cmt. a (“There may, however, be minor and unimportant disposessions . . . which do not . . . amount to conversion.”).¹

1. In their submissions to the district court and on appeal, the parties agree that either the law of Texas, where Sorbents is domiciled, or of California, where RingCentral is domiciled, governs Sorbents’ conversion claims. The district court applied California law. We express no view on this issue, except to note that Sorbents’ claim would fail under the law of either state. In both states, a defendant commits conversion by intentionally controlling a plaintiff’s property,

*Appendix A***AFFIRMED.**

see Ananda Church of Self-Realization v. Mass. Bay Ins. Co., 95 Cal. App. 4th 1273, 116 Cal. Rptr. 2d 370, 376 (Ct. App. 2002); *Robinson v. Nat'l Autotech, Inc.*, 117 S.W.3d 37, 40 (Tex. App. 2003), and both states recognize the doctrine of *de minimis non curat lex*, *see Kullman v. Greenebaum*, 92 Cal. 403, 28 P. 674, 674-75 (Cal. 1891); *Thompson v. Mannix*, 814 S.W.2d 811, 812 (Tex. App. 1991).

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**APPENDIX B — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, FILED JULY 17, 2017**

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

Case No. 16-cv-02113-JSW

SUPPLY PRO SORBENTS, LLC,

Plaintiff,

v.

RINGCENTRAL, INC.,

Defendant.

July 17, 2017, Decided;

July 17, 2017, Filed

**ORDER GRANTING MOTION TO DISMISS
FIRST AMENDED COMPLAINT AND
DENYING AS MOOT MOTION TO STAY**

Now before the Court are the motion to dismiss the first amended complaint and the motion to stay this action pursuant to the doctrine of primary jurisdiction both filed by Defendant RingCentral, Inc. (“Defendant”). Having carefully reviewed the parties’ papers and considered their arguments and the relevant legal authority, and good cause appearing, the Court HEREBY GRANTS Defendant’s motion to dismiss the first amended complaint

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without leave to amend and DENIES Defendant's motion to stay this action as moot.

BACKGROUND

Supply Pro Sorbents, LLC ("Plaintiff") brings this putative class action to challenge Defendant's alleged practice of adding an unsolicited advertisement in the form of a one-line identifier on the bottom of the cover page of documents sent by facsimile. (First Amended Complaint ("FAC") ¶ 1.) Defendant operates a cloud-based business communications service that offers a system by which Defendant sends and receives its users' faxes. (*Id.* at ¶ 2.)

On or about April 13, 2016, Plaintiff received a fax ("Subject Fax") that included a cover sheet with an identifier containing Defendant's logo and one line of text that stated "Send and receive faxes with RingCentral, *www.ringcentral.com*." (*Id.* at ¶¶ 18, 20, Ex. A.) While Plaintiff admits that Defendant has created several coversheets that its users have the option to attach to outgoing faxes sent via Defendant's service, Plaintiff alleges that each coversheet contains the same one-line identifier that cannot be modified or removed. (*Id.* at ¶¶ 24-26.) Plaintiff claims that this one-line identifier constitutes an unsolicited advertisement and violates the Telephone Consumer Protection Act, 47 U.S.C. Section 227 (the "TCPA"), which prohibits a person from sending any advertisement by facsimile without the recipient's prior express invitation or permission. (*Id.* at ¶¶ 5, 18, 21.) Additionally, Plaintiff alleges Defendant improperly converted putative class members' fax machines, toner,

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and paper as well as Plaintiff's employees' time to its own use. (*Id.* at ¶ 64.)

On July 6, 2016, Defendant filed a Petition for Expedited Declaratory Ruling with the Federal Communications Commission ("FCC") seeking clarification of the term "sender" under 47 C.F.R. Section 64.1200(f)(10) and to clarify the precise scope of "non-advertisement communications with incidental or *de minimis* advertising information." (*See* Motion to Stay, Ex. A.) The Court later granted Defendant's motion to dismiss both causes of action in the initial complaint with leave to amend and denied as moot Defendant's motion to stay. Plaintiff subsequently filed an amended complaint.

Defendant now moves to dismiss the TCPA claim in the first amended complaint based on lack of Article III standing and the conversion claim based on failure to state a claim upon which relief can be granted. In a separate motion, Defendant moves to dismiss or to stay this action pursuant to the doctrine of primary jurisdiction pending the determination of the petition before the FCC.

The Court shall address other specific facts in the remainder of its order.

ANALYSIS**A. Legal Standards on a Motion to Dismiss.**

The Court evaluates a motion to dismiss for lack of Article III standing pursuant to Federal Rule of Civil

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Procedure 12(b)(1). *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121 (9th Cir. 2010). A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may be “facial or factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Here, Defendant raises a facial challenge to Plaintiff’s standing. Therefore, the Court “must accept as true all material allegations in the complaint, and must construe the complaint in the nonmovant’s favor.” *Chandler*, 598 F.3d at 1121; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (“[O]n a motion to dismiss, [courts] presume that general allegations embrace those specific facts that are necessary to support the claim.”) (internal citations and quotations omitted).

A motion to dismiss for failure to state a claim upon which relief can be granted is proper under Federal Rule of Civil Procedure 12(b)(6) and should be granted if the complaint fails to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Under this standard, the Court must accept all material allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party. *Friedman v. AARP, Inc.*, 855 F.3d 1047, 1051 (9th Cir. 2017). “However, the [C]ourt is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

*Appendix B***B. Unsolicited Advertisement.**

The Court first addresses the dispositive issue of whether the identifier on the bottom of the Subject Fax transforms the fax into a prohibited, unsolicited advertisement under the TCPA. *See* 47 U.S.C. § 227(b)(1)(C) (making it unlawful “to send, to a telephone facsimile machine, an unsolicited advertisement”). An unsolicited advertisement is “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, in writing or otherwise.” 47 U.S.C. § 227(a)(5). While the plain meaning of “unsolicited advertisement” in the statute is unambiguous, the Court may still “consider and rely on” the FCC’s *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005* (the “FCC Rules and Regulations”), which “do provide some guidance as to how to apply the statutory definition.” *N.B. Industries v. Wells Fargo & Co.*, No. C 10-03203, 2010 U.S. Dist. LEXIS 126432, 2010 WL 4939970, at *5 (N.D. Cal. Nov. 30, 2010); *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944) (“[A]gency interpretations and guidelines, even when not controlling, constitute a body of experience and informed judgment to which courts and litigants may resort for guidance.”).

The FCC Rules and Regulations state that “a reference to a commercial entity does not by itself make a message a commercial message.” *FCC Rules and Regulations*, 71 Fed. Reg. 25967-01, *25,973 (May 3, 2006);

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see also N.B. Industries, 2010 U.S. Dist. LEXIS 126432, 2010 WL 4939970, at *7 (“[A]n incidental advertisement in an otherwise informational message does not convert the entire communication into an advertisement.”) (internal citations and quotations omitted); *see also P&S Printing LLC v. Tubelite, Inc.*, No. 3:14-cv-1441, 2015 U.S. Dist. LEXIS 93060, 2015 WL 4425793, at *4 (D. Conn. 2015) (“The FCC has also recognized that documents with only an incidental amount of advertising are not advertisements under the TCPA.”). The most relevant factor that the FCC considers to determine whether an advertisement is incidental is “the amount of space devoted to advertising versus the amount of space used for information or transactional messages.” *FCC Rules and Regulations*, 71 Fed. Reg. at *25,973 (internal citations and quotations omitted). In the Regulations, the FCC provides an example of a company logo or business slogan on an account statement as incidental advertising, and the Regulations explain that those identifiers “would not convert the communication into an advertisement, so long as the primary purpose of the communication . . . is to relay account information to the fax recipient.” *Id.*

Here, the one-line identifier at the bottom of a four-page fax does not extend the Subject Fax beyond the boundaries of a mere incidental advertisement. While there is little case law that defines what percentage of incidental advertising is sufficient to transform a largely permissible fax into a prohibited communication, the identifier here proves to be smaller than most advertising deemed incidental. *See N.B. Industries, Inc. v. Wells*

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Fargo & Co., 465 Fed. App'x 640, 642-43 (9th Cir. 2012) (holding that multiple logos and slogans as well as contact information “constituted such a small portion of the faxes as to be incidental” advertising); *see also Holmes v. Back Doctors, Ltd.*, 695 F. Supp. 2d 843, 851 (S.D. Ill. 2010) (holding that advertising that took up “about one-seventh of each of the two faxes sent” was incidental); *cf. Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 686 (7th Cir. 2013) (holding that an advertisement constituting twenty-five percent of a one-page fax was not considered to be incidental).

Plaintiff claims that *N.B. Industries, Inc.* is distinguishable because the district court there found the business logos and slogans did not promote the commercial availability or quality of the defendants’ property, goods, or services. However, the Ninth Circuit disagreed on appeal and held that “[t]he logos, slogans, and contact information . . . could reasonably be construed as advertising the commercial availability” of defendants’ goods and services because the identifiers sufficiently suggested a specific service related to the main content of the fax. *N.B. Industries*, 465 Fed. App'x at 643 (“[A] recipient of the faxes could reasonably infer from the references to Wells Fargo’s Asian Business Services program that Wells Fargo sells services to Asian businesses.”).

Although the one-line identifier does promote Defendant’s services and thus constitutes an advertisement, this Court finds that the de minimis size of the identifier

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does not transform the Subject Fax into an unsolicited fax.¹ Plaintiff has not alleged facts to support its allegation that the Subject Fax constitutes an unsolicited advertisement, and Plaintiff cannot allege a set of facts that would support this allegation and remain consistent with the allegations in the first amended complaint. Accordingly, the Court GRANTS Defendant's motion to dismiss the first claim for relief for violation of the TCPA without leave to amend pursuant to Federal Rule of Procedure 12(b)(6).

C. Article III Standing.

Alternatively, even if the identifier here were construed as adequate to transform the Subject Fax into an unsolicited advertisement, Defendant argues that Plaintiff has insufficiently alleged a particularized injury caused by Defendant's conduct. The Constitution requires a plaintiff to prove that it has standing to sue in order to invoke a federal court's jurisdiction. *See Lujan*, 504 U.S. at 560-61. There are three "irreducible" elements of Article III standing: (1) "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;" (2) the injury must be "fairly traceable to the challenged action of the defendant;" and (3) a favorable decision will be "likely" to redress the injury. *Id.* A plaintiff's failure to satisfy these

1. The Court's finding that the identifier does not rise to the level of an unsolicited advertisement moots Plaintiff's allegation that Defendant failed to include a proper opt-out notice, because the notice requirement only applies to unsolicited advertisements. (*See* FAC ¶ 22.)

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constitutional requirements requires a court to dismiss the complaint for lack of jurisdiction. *See Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 475-76, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982).

1. Injury.

Defendant contends that Plaintiff has failed to allege an injury in fact. “To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent.” *Id.* (internal citations and quotations omitted). “[T]hrough the TCPA, Congress intended to remedy a number of problems associated with junk faxes, including the cost of paper and ink, the difficulty of the recipient’s telephone line being tied up, and the stress on switchboard systems,” as well as loss of employee time. *Imhoff Investment, LLC v. Alfocino, Inc.*, 792 F.3d 627, 633 (6th Cir. 2015); *see also Ira Holtzman*, 728 F.3d at 684 (noting that “the value of the time necessary to realize that the inbox has been cluttered by junk” is a protected interest under the TCPA); *see also* H.R. Rep. No. 102-317, at 10 (1991) (proliferation of fax machines shifts costs of telemarketing advertising from the sender to the recipient and makes recipient’s fax machines unavailable for legitimate business messages while processing and printing the junk fax).

Here, the Court finds that Plaintiff sufficiently alleges that it has suffered concrete and actual harm. Plaintiff claims loss of use of its fax machine for the increased

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amount of time necessary to transmit the identifier on the Subject Fax, ink toner, and its employees' time spent assessing the identifier, as well as unwanted wear and tear on its fax machine.²(See FAC ¶ 11.) Although Defendant challenges the concreteness of these alleged injuries, case law supports that the claimed injuries satisfy that constitutional requirement. See *U.S. v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987) (“[A]bsent a strong reason to do so, we will not create a direct conflict with other circuits.”); see also *Imhoff Investment*, 792 F.3d at 631 (holding that the cost of paper and ink, tying up the recipient’s telephone line, and the stress on the switchboard systems are injuries that confer Article III standing); see also *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris*, 781 F.3d 1245, 1250 (11th Cir. 2015) (holding that Article III standing may be based on the occupation of a fax recipient’s phone line and fax machine); see also *Ira Holtzman*, 728 F.3d at 684 (holding that the value of a fax recipient’s time is a protected interest under the TCPA and is sufficient to confer standing).

However, the Court finds that the doctrine of *de minimis non curat lex* contradicts Plaintiff’s contention that the harm is sufficiently particularized. “The ancient

2. Plaintiff additionally alleges an invasion of privacy interest. (See FAC ¶ 11.) Yet, while the TCPA seeks to protect privacy interests, “[p]rivacy is personal to individuals and does not encompass any corporate interest.” *Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.*, 306 F.3d 806, 814 (9th Cir. 2002). Therefore, the Court finds this allegation insufficient to satisfy the Article III standing requirement that an injury be particularized.

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maxims of *de minimis non curat lex* and *lex non curat de minimis* teach that the law cares not about trifles.” *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 839-40 (9th Cir. 2007). Further, “systemic rather than episodic” unauthorized conduct “is sufficient to establish more than a *de minimis* injury.” *In re Google, Inc. Privacy Policy Litig.*, No. 12-cv-01382, 2013 U.S. Dist. LEXIS 171124, 2013 WL 6248499, at *7 (N.D. Cal. Dec. 3, 2013) (emphasis added). The injuries that Plaintiff alleges here from the one-line identifier on an episodic fax are of such a small degree as to constitute mere trifles. *Cf. Caldwell v. Caldwell*, 545 F.3d 1126, 1134 (9th Cir. 2008) (“[T]he alleged offense from the content of one page out of 840 that one need not read or tarry over is fleeting at best . . . [and] is too *de minimis* to satisfy the standing doctrine’s core aim of improving judicial decision-making by ensuring that there is a specific controversy before the court and that there is an advocate with sufficient personal concern to effectively litigate the matter.”) (internal citations and quotations omitted); *cf. Hernandez v. Path, Inc.*, No. 12-cv-01515, 2012 U.S. Dist. LEXIS 151035, 2012 WL 5194120, at *2 (N.D. Cal. 2012) (“The specific harm caused by diminished resources of which Plaintiff complains is *de minimis*: depletion of two to three seconds of battery capacity.”) (internal quotations omitted); *see also Quinshawnda Smith v. Aitima Medical Equipment, Inc.*, No. 16-cv-00339, 2016 U.S. Dist. LEXIS 113671, 2016 WL 4618780, at *6 (C.D. Cal. 2016) (“[A]ny drainage of battery from a single call is surely minimal.”); *cf. Olmos v. Bank of America*, No. 15-cv-2786, 2016 U.S. Dist. LEXIS 72329, 2016 WL 3092194, at *4 (S.D. Cal. 2016) (“[D]iminished mobile device resources, such as storage, battery life and

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bandwidth were insufficient allegations of injury to confer standing because the loss was *de minimis*.”). Accordingly, Plaintiff has not established Article III standing because the alleged injury is not sufficiently particularized.

2. Traceability.

Defendant contends that it does not qualify as a “sender” of the Subject Fax and that the alleged injury is therefore not fairly traceable to Defendant. The definition of “sender” is codified 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.*” 47 C.F.R. § 64.1200(f)(10) (emphasis added).

The Court finds that the one-line identifier promotes Defendant’s services, placing Defendant directly within the code’s definition of “sender.” Defendant argues that neither Congress nor the FCC intended to impose liability on an entity whose goods or services are advertised in a fax. While the doctrine of *de minimis non curat lex* may lend some support for Defendant’s argument, the contention is directly contradicted by the specific definition of “sender” provided in the code. *See* 47 C.F.R. § 64.1200(f)(10); *see also Mohamad v. Palestinian Authority*, 566 U.S. 449, 132 S. Ct. 1702, 1709, 182 L. Ed. 2d 720 (2012) (stating that Congress can legislatively override common law principles). Accordingly, Defendant qualifies as a sender of the Subject Fax if it is construed as an unsolicited advertisement, regardless of the participation of the third party user in the transaction.

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The Court finds that the alleged injuries are fairly traceable to Defendant's conduct. Regardless, Plaintiff insufficiently alleges an injury in fact and the Court thus lacks jurisdiction. Without subject-matter jurisdiction, the case must be dismissed pursuant to Federal Rule of Procedure 12(b)(1). On this basis, the Court GRANTS Defendant's motion to dismiss the first cause of action.

D. Conversion.

While Plaintiff alleges that Defendant converted its property through the transmission of the Subject Fax, the allegations do not indicate that Defendant had the opportunity to exercise control over Plaintiff's property. "Conversion is the intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." *Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.*, 95 Cal. App. 4th 1273, 1281, 116 Cal. Rptr. 2d 370 (2002) (citing Rest. 2d Torts, § 222A) (internal quotations omitted).

The Court finds that Plaintiff does not sufficiently allege that Defendant intentionally exercised dominion or control over Plaintiff's fax machine or that Defendant so seriously interfered with the right of Plaintiff to control its fax machine. Plaintiff admits that users of Defendant's service "have the option of attaching" Defendant's coversheets containing the one-line identifier, which negates a claim that Defendant intended to exercise control over or even could have exercised control

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over Plaintiff's fax machine. (*See* FAC ¶ 25.) Further, while Plaintiff correctly notes that property need not have monetary value to be converted, Plaintiff fails to recognize that "there may . . . be minor and unimportant dispossessions . . . which do not seriously interfere with the other's right of control, and so do not amount to a conversion." Restatement (Second) of Torts § 222; *see also Palm Beach Golf*, 781 F.3d at 1259 (holding that de minimis value of property does not negate a claim of conversion). Here, the Court finds that the alleged dispossession of Plaintiff's tangible and intangible property was so minor that it would not have seriously interfered with Plaintiff's right to control its property.

With the addition to its finding that the intrusion was not serious enough to amount to a conversion, the Court finds Plaintiff's allegations of an intentional and serious interference with its right to control its property to be facially implausible because Defendant's users—rather than Defendant—determined whether to use the optional cover sheet. Accordingly, the Court GRANTS Defendant's motion to dismiss the second claim for relief for conversion without leave to amend pursuant to Federal Rule of Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's motion to dismiss without leave to amend. The dismissal of the amended complaint moots Defendant's motion to stay, which the Court accordingly DENIES. A

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separate judgment shall issue and the Clerk shall close the file.

IT IS SO ORDERED.

Dated: July 17, 2017

/s/ Jeffrey S. White
JEFFREY S. WHITE
United States District Judge

**APPENDIX C — JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, FILED JULY 17, 2017**

UNITED STATES COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 16-cv-02113-JSW

SUPPLY PRO SORBENTS, LLC,

Plaintiff,

v.

RINGCENTRAL, INC.,

Defendant.

JUDGMENT

Pursuant to the Court's Order issued this date, dismissing this case with prejudice, the Court HEREBY ENTERS JUDGMENT.

IT IS SO ORDERED AND ADJUDGED.

Dated: July 17, 2017

/s/ _____
JEFFREY S. WHITE
United States District Judge

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**APPENDIX D — ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT DENYING PETITION FOR
RE-HEARING, FILED JANUARY 28, 2019**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16528

D.C. No. 4:16-cv-02113-JSW
Northern District of California, Oakland

SUPPLY PRO SORBENTS, LLC,

Plaintiff-Appellant,

v.

RINGCENTRAL, INC.,

Defendant-Appellee.

ORDER

Before: HAWKINS, GRABER, and THACKER,*
Circuit Judges.

The panel has voted to deny Appellant's petition for rehearing.

* The Honorable Stephanie Dawn Thacker, United States Circuit Judge for the U.S. Court of Appeals for the Fourth Circuit, sitting by designation.

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Judge Graber has voted to deny the petition for rehearing *en banc*, and Judges Hawkins and Thacker so recommend. The full court has been advised of the petition for rehearing *en banc* and no judge of the court has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

Appellant's petition for rehearing and petition for rehearing *en banc* are DENIED.

**APPENDIX E — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA GRANTING MOTION
TO DISMISS WITH LEAVE TO AMEND AND
DENYING AS MOOT MOTION TO STAY,
FILED OCTOBER 7, 2016**

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

No. C 16-02113 JSW

SUPPLY PRO SORBENTS, LLC,

Plaintiff,

v.

RINGCENTRAL, INC.,

Defendant.

**ORDER GRANTING MOTION TO DISMISS WITH
LEAVE TO AMEND AND DENYING AS MOOT
MOTION TO STAY**

October 7, 2016, Decided;
October 7, 2016, Filed

Now before the Court are the motion to dismiss and the motion to dismiss or to stay this action pursuant to the doctrine of primary jurisdiction filed by Defendant RingCentral, Inc. (“Defendant”). Having carefully reviewed the parties’ papers and considered their arguments and the relevant legal authority, and good cause

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appearing, the Court HEREBY GRANTS Defendant's motion to dismiss the complaint with leave to amend and DENIES the motion to dismiss or to stay this action as moot without prejudice to refile.

BACKGROUND

Supply Pro Sorbents, LLC ("Plaintiff") brings this action on behalf of itself and purportedly on behalf all others similarly situated, challenging Defendant's practice of adding unsolicited advertising information to the single line identifier on the bottom of the cover page of documents sent by facsimile. (Complaint ¶ 1.) Defendant operates a cloud-based business communications service. (*Id.* at ¶ 2.) As a part of that service, Defendant provides its users with a system to send and receive faxes and provides form fax cover sheets for the users' selection. (*Id.* at ¶¶ 2, 21.)

On or about April 13, 2016, Plaintiff received a fax ("Subject Fax") which included a cover sheet with an identifier that contains Defendant's logo and a single line of text which states "Send and receive faxes with RingCentral, www.ringcentral.com." (*Id.* at ¶¶ 14, 16; Ex. A.) Although Defendant provides several cover sheets for its users' selection, Plaintiff alleges each of them includes the same unsolicited one-line identifier at the bottom. Plaintiff claims that the unsolicited message constitutes advertising in violation of the Telephone Consumer Protection Act, 47 U.S.C. Section 227 (the "TCPA") which prohibits a person from sending any advertisement by facsimile without the recipient's prior express invitation or permission. (*Id.* at ¶ 3, 37-53.) Plaintiff also alleges a second cause of action for conversion, claiming that by

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sending unsolicited faxes to Plaintiff and other class members, Defendant improperly and unlawfully converted their fax machines, toner and paper, and Plaintiff's employee time to its own use. (*Id.* at ¶ 56.)

Defendant moves to dismiss the TCPA claim based on lack of standing and the conversion claim based on failure to state a claim upon which relief can be granted. In a separate motion, Defendant moves to dismiss or to stay this action pursuant to the doctrine of primary jurisdiction. Defendant has filed a Petition for Expedited Declaratory Ruling with the Federal Communications Commission ("FCC") seeking clarification of the term "sender" under 47 C.F.R. Section 64.1200(f)(10) and to clarify the precise scope of "non-advertisement communications with incidental or *de minimis* advertising information." (*See* Motion to Stay, Ex. A.)

The Court shall address other specific facts in the remainder of its order.

ANALYSIS**A. Legal Standards on a Motion to Dismiss.**

The Court evaluates the motion to dismiss for lack of Article III standing pursuant to Rule 12(b)(1). *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may be "facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Here, Defendant raises a facial challenge to Plaintiff's standing. Therefore,

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the Court “must accept as true all material allegations in the complaint, and must construe the complaint in” Plaintiff’s favor. *Chandler v. State Farm Mut. Auto Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (“At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion dismiss, [courts] presume that general allegations embrace those specific facts that are necessary to support the claim.”) (internal cite and quotations omitted).

“The jurisdictional question of standing precedes, and does not require, analysis of the merits.” *Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1189 n.10 (9th Cir. 2008). Thus, the fact that a plaintiff may allege facts that, at the pleading stage, satisfy the requirements for Article III standing does not mean these same facts would be sufficient to state a claim. *See Doe v. Chao*, 540 U.S. 614, 624-25, 124 S. Ct. 1204, 157 L. Ed. 2d 1122 (2004); *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 712 n.5 (N.D. Cal. 2011) (quoting *Doe*, 540 U.S. at 624-25).

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. A motion to dismiss should not be granted unless it appears beyond a doubt that a plaintiff can show no set of facts supporting his or her claim. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). Thus, dismissal is proper “only if it is clear that no relief could be granted under any set of

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facts that could be proved consistent with the allegations.” *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984). The complaint is construed in the light most favorable to the non-moving party and all material allegations in the complaint are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). The court, however, is not required to accept legal conclusions cast in the form of factual allegations, if those conclusions cannot reasonably be drawn from the facts alleged. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)).

B. Article III Standing.

The Court lacks jurisdiction to hear cases that do not present a justiciable case or controversy. Indeed, no principle is more fundamental to the role of the judiciary than the “constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Raines v. Byrd*, 521 U.S. 811, 818, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997). A party seeking to invoke the federal court’s jurisdiction bears the burden of demonstrating that he has standing to sue. *See Lujan*, 504 U.S. at 561. To satisfy the constitutional requirements to establish standing, a plaintiff must demonstrate: (1) that he has “suffered an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical;” (2) that the injury was caused by, or is “fairly . . . trace[able] to the challenged action of the defendant;” and (3) that it is “likely, as opposed to merely speculative, that the

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injury will be redressed by a favorable decision.” *Id.* at 560-61 (citations omitted). If the plaintiff fails to satisfy the constitutional requirements to establish standing, the Court lacks jurisdiction to hear the case and must dismiss the complaint. *See Valley Forge Christian Col. v. Americans United for Separation of Church and State*, 454 U.S. 464, 475-76, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). The plaintiff bears the burden of establishing these elements. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990); *see also San Diego County Gun Rights Comm v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). Where, as here, a case is at the pleading stage, the plaintiff must “clearly . . . allege facts demonstrating” each element. *Warth v. Seldin*, 422 U.S. 490, 518, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

Here, Defendant challenges the claims that Plaintiff has suffered an injury-in-fact as is required to demonstrate standing to sue. Defendant also alleges that Plaintiff cannot demonstrate that any alleged injury was fairly traceable to Defendant’s conduct and not the result of some independent action from a third party. The Court shall address each argument in turn.

1. Injury.

The TCPA prohibits the use of “any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement.” 47 U.S.C. § 227(a)(1)(C). The Act provides a private right of action, permitting plaintiffs to seek (1) to enjoin a violation of the Act; (2) to recover for actual monetary loss from such

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a violation or to receive \$500, whichever is greater; or (3) both (1) and (2). 47 U.S.C. § 227(b)(3). However, in order to have standing to allege a violation of this provision of the TCPA, a plaintiff must allege more than a mere statutory violation. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016) (“Article III standing requires a concrete injury even in the context of a statutory violation”). For this reason, Plaintiff may not “allege a bare procedural violation, divorced from any real harm, and satisfy the injury-in-fact requirement of Article III.” *Id.* (citing *Summers v. Earth Island Institute*, 555 U.S. 488, 496, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009) (“[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing.”)).

Here, the Court finds that Plaintiff has failed to meet the constitutional requirements to establish standing to sue. Plaintiff has not demonstrated that it has actually suffered an injury-in-fact which is concrete and imminent, and not conjectural or hypothetical. In order to establish an injury-in-fact, “the injury plaintiff alleges must be unique to that plaintiff, one in which he has a ‘personal stake’ in the outcome of a litigation seeking to remedy that harm.” *Schmier v. United States Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 821 (9th Cir. 2002). Plaintiff has failed to articulate any unique and concrete injury — beyond merely alleging a statutory violation — that was caused by the incidental transmission of an identifier at the bottom of a four-page facsimile.

In its complaint, Plaintiff alleges that “[u]nsolicited faxes damage their recipients. A junk fax recipient loses the

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use of its fax machine, paper, and ink toner. An unsolicited fax wastes the recipient's valuable time that would have been spent on something else. A junk fax interrupts the recipient's privacy. Unsolicited faxes tie up telephone lines, prevent fax machines from receiving authorized faxes, prevent their use for authorized outgoing faxes, cause undue wear and tear on the recipient's fax machines, and require additional labor to attempt to discern the source and purpose of the unsolicited message." (Complaint at ¶¶ 7, 52.) Although these facts may generally be true of unsolicited fax advertisements, it is not clear how Plaintiff alleges it specifically suffered these particular harms from the single line identifier on the optional cover sheet of a solicited four-page fax it received. In addition, in its opposition to the motion to dismiss, Plaintiff merely identifies its injury as the alleged statutory infraction. That is insufficient for the purpose of alleging Article III standing. Accordingly, without Plaintiff establishing standing to sue, the Court must GRANT the motion to dismiss. Although it is not clear how Plaintiff could identify sufficient injury-in-fact to rise to the level of constitutional standing, the Court GRANTS Plaintiff leave to amend to allege facts in support of a specific and cognizable injury-in-fact it alleges to have suffered.

2. Traceability.

The second contested element to establish standing to sue is the injury must have been caused by or is fairly traceable to the challenged action of the defendant. *See Lujan*, 504 U.S. at 560-61. Defendant contends that it does not serve as a "sender" of the Subject Fax and cannot

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therefore have caused the harm (or fall under the statutory provisions of the TCPA). The TCPA and the FCC's regulations implementing the Act provide that a person may not send an unsolicited advertisement. "In 2006, the FCC promulgated in the Code of Federal Regulations a definition describing who can be held liable as the 'sender' of a fax advertisement . . . The codified definition provides that '[t]he term sender . . . means the person or entity [1] on whose behalf a facsimile unsolicited advertisement is sent or [2] whose goods or services are advertised or promoted in the unsolicited advertisement.'" *Siding and Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886, 891 (6th Cir. 2016) (citing 47 C.F.R. § 64.1200(f)(10)).

Defendant operates a cloud-based business communications service. (Complaint at ¶ 2.) As part of that service, Defendant "provides form fax cover sheets to be used with outgoing faxes." (*Id.*) Defendant contends that the choice of fax cover sheet and the Subject Fax itself was sent on behalf of one of Defendant's users, not by Defendant directly. Defendant argues that Plaintiff was going to receive the Subject Fax regardless whether the cover sheet was one the user chose or created. (Motion at 5.) In this instance, the preoccupation with the Plaintiff's fax line was not caused by the disputed identifier, but rather by the third party's solicited message that Plaintiff would have received regardless of the one-line identifier. On these alleged facts, Defendant contends that the transmission of the fax was the "result of the independent action of some third party not before the court." (*Id.* at 6, citing *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 878 (N.D. Cal. 2009)).

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However, the Court finds that the definition of “sender” in the operative regulations permits the inclusion of Defendant and its services under the facts as currently alleged. The regulations provide that the term “sender” may include one “whose goods or services are advertised or promoted in the unsolicited advertisement.” 47 C.F.R. § 64.1200(f)(10). Because the Court finds that the identifier promotes Defendant’s services, the Court finds this allegation sufficient to permit Defendant to fall with the statutory definition of sender, regardless of the participation of the third party user in the transaction.¹

Because the Court finds that Plaintiff lacks standing to allege its claims under the FTCA for lack of allegations of suffering an actual injury-in-fact, the Court GRANTS Defendant’s motion to dismiss the first claim for relief with leave to amend.

1. The TCPA defines an “unsolicited advertisement” as “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, in writing or otherwise.” 47 U.S.C. § 227(a)(5). The question whether the small percentage of advertising on an otherwise solicited fax constitutes an unsolicited advertisement is also the subject of Defendant’s pending petition to the FCC. Should the find that Plaintiff has standing, the Court would then address the motion to stay in pursuant to the doctrine of primary jurisdiction. However, at this procedural posture, the Court finds the motion to stay moot and it is therefore DENIED with prejudice to refiling should Plaintiff allege sufficient facts to establish standing under the FTCA claim.

*Appendix E***C. Conversion Claim.**

Conversion is the “unauthorized and wrongful assumption and exercise of dominion and control over the personal property or another, to the exclusion of or inconsistent with the owner’s rights.” *Waisath v. Lack’s Stores, Inc.*, 474 S.W.2d 444, 447 (Tex. 1971). To state a claim for conversion under either Texas or California law, a plaintiff must allege: (1) plaintiff was entitled to possession of the property; (2) defendant unlawfully or without authorization assumed and exercised dominion over the property to the exclusion of, or inconsistent with, plaintiff’s rights; (3) plaintiff made a demand for the property; and (4) defendant refused to return it. *See, e.g., Wise v. SR Dallas, LCC*, 436 S.W.3d 402, 412 (Tex. App. 2014); *see also Burlesci v. Petersen*, 68 Cal. App. 4th 1062, 1066, 80 Cal. Rptr. 2d 704 (1998) (“The elements of a conversion claim are: (1) the plaintiff’s ownership or right to possession of the property; (2) the defendant’s conversion by a wrongful act or disposition of property rights; and (3) damages.”).

Plaintiff alleges that “[b]y sending unsolicited faxes to Plaintiff and the other Class members, [Defendant] improperly and unlawfully converted their fax machines, toner and paper to [Defendant’s] own use. [Defendant] also converted Plaintiff’s employees time to its own use.” (Complaint at ¶ 56.) Even if the Court accepts the minimal use of Plaintiff’s paper and toner and employee time used on the single-line identifier of the cover sheet of a four-page fax qualifies as unauthorized use of the Plaintiff’s property, such property never came into Defendant’s possession or was unlawfully held in such a way as to

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indicate that Defendant “assumed control, dominion or ownership of the property.” *Rossario’s Fine Jewelry, Inc. v. Paddock Publ’n., Inc.*, 443 F. Supp. 2d 976, 980 (N.D. Ill. 2006) (quoting *Cirrincione v. Johnson*, 184 Ill.2d 109, 114-15, 703 N.E.2d 67, 234 Ill. Dec. 455 (1998)). Also, as addressed by the Court in the first cause of action under the TCPA, it is unclear what damage Plaintiff alleges it suffered as a result of Defendant’s conduct. Accordingly, the Court GRANTS Defendant’s motion to dismiss the second cause of action for conversion with leave to amend.

CONCLUSION

Based on the foregoing reasons, the Court GRANTS Defendant’s motion to dismiss with leave to amend and DENIES Defendant’s motion to stay this action pursuant to the doctrine of primary jurisdiction without prejudice to refile.

The Court provides Plaintiff with leave to amend. Plaintiff shall file its amended complaint, if any, within twenty days of the date of this Order. If Plaintiff files an amended complaint in accordance with this Order, Defendant shall either file its response within twenty days of service of the amended complaint.

IT IS SO ORDERED.

Dated: October 7, 2016

/s/ Jeffrey S. White
JEFFREY S. WHITE
UNITED STATES DISTRICT
JUDGE