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United States District Court  
For the Northern District of California

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

SUPPLY PRO SORBENTS, LLC,  
Plaintiff,

No. C 16-02113 JSW

v.

RINGCENTRAL, INC.,  
Defendant.

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

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 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 refileing.

**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.)

1 On or about April 13, 2016, Plaintiff received a fax (“Subject Fax”) which included a cover  
2 sheet with an identifier that contains Defendant’s logo and a single line of text which states “Send  
3 and receive faxes with RingCentral, [www.ringcentral.com](http://www.ringcentral.com).” (*Id.* at ¶¶ 14, 16; Ex. A.) Although  
4 Defendant provides several cover sheets for its users’ selection, Plaintiff alleges each of them  
5 includes the same unsolicited one-line identifier at the bottom. Plaintiff claims that the unsolicited  
6 message constitutes advertising in violation of the Telephone Consumer Protection Act, 47 U.S.C.  
7 Section 227 (the “TCPA”) which prohibits a person from sending any advertisement by facsimile  
8 without the recipient’s prior express invitation or permission. (*Id.* at ¶ 3, 37-53.) Plaintiff also  
9 alleges a second cause of action for conversion, claiming that by sending unsolicited faxes to  
10 Plaintiff and other class members, Defendant improperly and unlawfully converted their fax  
11 machines, toner and paper, and Plaintiff’s employee time to its own use. (*Id.* at ¶ 56.)

12 Defendant moves to dismiss the TCPA claim based on lack of standing and the conversion  
13 claim based on failure to state a claim upon which relief can be granted. In a separate motion,  
14 Defendant moves to dismiss or to stay this action pursuant to the doctrine of primary jurisdiction.  
15 Defendant has filed a Petition for Expedited Declaratory Ruling with the Federal Communications  
16 Commission (“FCC”) seeking clarification of the term “sender” under 47 C.F.R. Section  
17 64.1200(f)(10) and to clarify the precise scope of “non-advertisement communications with  
18 incidental or *de minimus* advertising information.” (*See* Motion to Stay, Ex. A.)

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

20 **ANALYSIS**

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

22 The Court evaluates the motion to dismiss for lack of Article III standing pursuant to Rule  
23 12(b)(1). *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A motion to dismiss for lack of  
24 subject matter jurisdiction under Rule 12(b)(1) may be “facial or factual.” *Safe Air for Everyone v.*  
25 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Here, Defendant raises a facial challenge to Plaintiff’s  
26 standing. Therefore, the Court “must accept as true all material allegations in the complaint, and  
27 must construe the complaint in” Plaintiff’s favor. *Chandler v. State Farm Mut. Auto Ins. Co.*, 598  
28 F.3d 1115, 1121-22 (9th Cir. 2010); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561

1 (1992) (“At the pleading stage, general factual allegations of injury resulting from the defendant’s  
2 conduct may suffice, for on a motion dismiss, [courts] presume that general allegations embrace  
3 those specific facts that are necessary to support the claim.”) (internal cite and quotations omitted).

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

10 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the  
11 pleadings fail to state a claim upon which relief can be granted. A motion to dismiss should not be  
12 granted unless it appears beyond a doubt that a plaintiff can show no set of facts supporting his or  
13 her claim. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Thus, dismissal is proper “only if it is  
14 clear that no relief could be granted under any set of facts that could be proved consistent with the  
15 allegations.” *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984). The complaint is construed in  
16 the light most favorable to the non-moving party and all material allegations in the complaint are  
17 taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). The court, however, is not  
18 required to accept legal conclusions cast in the form of factual allegations, if those conclusions  
19 cannot reasonably be drawn from the facts alleged. *Clegg v. Cult Awareness Network*, 18 F.3d 752,  
20 754-55 (9th Cir. 1994) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

21 **B. Article III Standing.**

22 The Court lacks jurisdiction to hear cases that do not present a justiciable case or  
23 controversy. Indeed, no principle is more fundamental to the role of the judiciary than the  
24 “constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Raines v.*  
25 *Byrd*, 521 U.S. 811, 818 (1997). A party seeking to invoke the federal court’s jurisdiction bears the  
26 burden of demonstrating that he has standing to sue. *See Lujan*, 504 U.S. at 561. To satisfy the  
27 constitutional requirements to establish standing, a plaintiff must demonstrate: (1) that he has  
28 “suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and

1 particularized, . . . and (b) actual or imminent, not conjectural or hypothetical;” (2) that the injury  
2 was caused by, or is “fairly . . . trace[able] to the challenged action of the defendant;” and (3) that it  
3 is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable  
4 decision.” *Id.* at 560-61 (citations omitted). If the plaintiff fails to satisfy the constitutional  
5 requirements to establish standing, the Court lacks jurisdiction to hear the case and must dismiss the  
6 complaint. *See Valley Forge Christian Col. v. Americans United for Separation of Church and*  
7 *State*, 454 U.S. 464, 475-76 (1982). The plaintiff bears the burden of establishing these elements.  
8 *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990); *see also San Diego County Gun Rights Comm v.*  
9 *Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). Where, as here, a case is at the pleading stage, the  
10 plaintiff must “clearly . . . allege facts demonstrating” each element. *Warth v. Seldin*, 422 U.S. 490,  
11 518 (1975).

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

16 **1. Injury.**

17 The TCPA prohibits the use of “any telephone facsimile machine, computer, or other device  
18 to send, to a telephone facsimile machine, an unsolicited advertisement.” 47 U.S.C. § 227(a)(1)(C).  
19 The Act provides a private right of action, permitting plaintiffs to seek (1) to enjoin a violation of the  
20 Act; (2) to recover for actual monetary loss from such a violation or to receive \$500, whichever is  
21 greater; or (3) both (1) and (2). 47 U.S.C. § 227(b)(3). However, in order to have standing to allege  
22 a violation of this provision of the TCPA, a plaintiff must allege more than a mere statutory  
23 violation. *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1549 (2016) (“Article III standing requires a  
24 concrete injury even in the context of a statutory violation”). For this reason, Plaintiff may not  
25 “allege a bare procedural violation, divorced from any real harm, and satisfy the injury-in-fact  
26 requirement of Article III.” *Id.* (citing *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009)  
27 (“[D]eprivation of a procedural right without some concrete interest that is affected by the  
28 deprivation . . . is insufficient to create Article III standing.”)).

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

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

## 24 2. Traceability.

25 The second contested element to establish standing to sue is the injury must have been  
26 caused by or is fairly traceable to the challenged action of the defendant. *See Lujan* , 504 U.S. at  
27 560-61. Defendant contends that it does not serve as a “sender” of the Subject Fax and cannot  
28 therefore have caused the harm (or fall under the statutory provisions of the TCPA). The TCPA and

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

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

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

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26  
27 <sup>1</sup> The TCPA defines an “unsolicited advertisement” as “any material advertising the  
28 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

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

4 **C.     Conversion Claim.**

5           Conversion is the “unauthorized and wrongful assumption and exercise of dominion and  
6 control over the personal property or another, to the exclusion of or inconsistent with the owner’s  
7 rights.” *Waisath v. Lack’s Stores, Inc.*, 474 S.W.2d 444, 447 (Tex. 1971). To state a claim for  
8 conversion under either Texas or California law, a plaintiff must allege: (1) plaintiff was entitled to  
9 possession of the property; (2) defendant unlawfully or without authorization assumed and exercised  
10 dominion over the property to the exclusion of, or inconsistent with, plaintiff’s rights; (3) plaintiff  
11 made a demand for the property; and (4) defendant refused to return it. *See, e.g., Wise v. SR Dallas,*  
12 *LCC*, 436 S.W.3d 402, 412 (Tex. App. 2014); *see also Burlesci v. Petersen*, 68 Cal. App. 4th 1062,  
13 1066 (1998) (“The elements of a conversion claim are: (1) the plaintiff’s ownership or right to  
14 possession of the property; (2) the defendant’s conversion by a wrongful act or disposition of  
15 property rights; and (3) damages.”).

16           Plaintiff alleges that “[b]y sending unsolicited faxes to Plaintiff and the other Class members,  
17 [Defendant] improperly and unlawfully converted their fax machines, toner and paper to  
18 [Defendant’s] own use. [Defendant] also converted Plaintiff’s employees time to its own use.”  
19 (Complaint at ¶ 56.) Even if the Court accepts the minimal use of Plaintiff’s paper and toner and  
20 employee time used on the single-line identifier of the cover sheet of a four-page fax qualifies as  
21 unauthorized use of the Plaintiff’s property, such property never came into Defendant’s possession  
22 or was unlawfully held in such a way as to indicate that Defendant “assumed control, dominion or  
23 ownership of the property.” *Rossario’s Fine Jewelry, Inc. v. Paddock Publications, Inc.*, 443, F.  
24 Supp. 2d 976, 980 (N.D. Ill. 2006) (quoting *Cirrincone v. Johnson*, 184 Ill.2d 109, 114-15 (1998)).  
25 Also, as addressed by the Court in the first cause of action under the TCPA, it is unclear what

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27 constitutes an unsolicited advertisement is also the subject of Defendant’s pending petition to the FCC.  
28 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 refile should Plaintiff allege sufficient facts  
to establish standing under the FTCA claim.

1 damage Plaintiff alleges it suffered as a result of Defendant's conduct. Accordingly, the Court  
2 GRANTS Defendant's motion to dismiss the second cause of action for conversion with leave to  
3 amend.

4 **CONCLUSION**

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

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

12 **IT IS SO ORDERED.**

13 Dated: October 7, 2016

  
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JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE