

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

In the Matter of:)
) CG Docket No. 02-278
Petition of Kohll's Pharmacy & Homecare Inc.'s)
for Declaratory Ruling and Waiver)
)

**KOHL'S PHARMACY & HOMECARE INC.'S REPLY IN SUPPORT OF PETITION
FOR DECLARATORY RULING AND WAIVER**

Pursuant to 47 C.F.R. § 1.2, Petitioner Kohll's Pharmacy & Homecare, Inc. ("Kohll's") respectfully submits this Reply in support of its petition for a declaratory ruling and waiver.

I. INTRODUCTION

Kohll's Pharmacy & Homecare, Inc. ("Kohll's") is a defendant in a class action lawsuit brought pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") by plaintiff Ballard Nursing Center, Inc. ("Ballard"). Ballard sued Kohll's for sending it a single facsimile promoting the availability of corporate flu vaccines. The facsimile was also sent to 4,141 other businesses in the Midwest. Both parties have zealously litigated this case because there is a lot of money at stake. If Ballard prevails in its action in Circuit Court of Cook County, Ballard and its counsel will command a verdict of \$2,071,000, or \$6,213,000 if treble damages are awarded. Accordingly, Kohll's cannot be faulted for defending this case at every opportunity and Kohll's petition is not a "delay tactic" as Ballard claims in its Comment in opposition to Kohll's petition. See Ballard's Comment, p. 1. Nor is Kohll's petition "frivolous [or] abusive." *Id.* Finally, Kohll's petition is not a "bad-faith attempt to forum-shop." *Id.* Rather, Kohll's petition represents a good-faith attempt to protect Kohll's from ruinous liability. In summary, Kohll's Petition seeks to have the same rights afforded to other healthcare providers where the

Federal Communication Commission ("FCC") allows healthcare providers communicate with persons via text and voice messages. Notably, the FCC has the ability and expertise to interpret the TCPA and its own regulations to afford Kohll's the relief it properly seeks. Simply stated, the FCC can and should conclude that certain facsimile transmissions should have the healthcare related exceptions as voice and text based communications.

II. ARGUMENT

As an initial matter, Kohll's will correct a few misstatements from Ballard's. First, Ballard's Comment incorrectly stated that the subject facsimile did not contain an "opt out notice". See Ballard's Comment at p. 3. Ballard's contention is false because the facsimile contains opt out language. See page 5 of this Reply.

Second, Kohll's Petition is not forum shopping. See Ballard's Comment at p. 3. Aggrieved parties have an absolute right to petition the FCC to seek relief. Further, there is nothing impermissible about the relief that Kohll's is seeking. To recap, Kohll's is asking the FCC to declare that the subject facsimile is not an advertisement as defined by the TCPA. Kohll's is also asking to have the FCC apply certain healthcare related exceptions apply equally to both cellular and facsimile based communications.

A. There Has Been No Judicial Finding that the Subject Facsimile is an Advertisement.

There is no merit to Ballard's argument that the trial court (or any other court) has held that the facsimile is an advertising facsimile subject to the TCPA. See Ballard's Comment at p. 3. There are several flaws with Ballard's argument. First, Ballard argues that "[a]t no point in the litigation has Kohll's disputed the fact that the fax is an advertisement." *Id.* This argument misses the mark completely because it ignores the fact that it is Ballard's burden of proof to show that the facsimile is an advertisement. "A party . . . who bears the burden of proof on a particular

issue may not rest on its pleadings but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact for trial." *McMillian v. Svetanoff*, 878 F.2d 186, 188 (7th Cir.1989) (citation omitted). Here, Ballard failed to submit any arguments to the trial court, the appellate court or the Illinois Supreme Court on the issue of whether the subject facsimile constitutes an advertisement. Rather, the only issues that were fully briefed were whether the elements of a class action were satisfied and whether an unaccepted offer to Ballard mooted out its case. Ballard's own motion for class certification fails to argue that the facsimile was an advertisement. See Exhibit C to Ballard's Comments.

Second, Ballard's argument fails to point to any citations in any holding which supports its apparent claim that the trial court, appellate court and Illinois Supreme Court all "*recognized* that the fax at issue is an advertisement." See Ballard's Comment at p. 3 (emphasis supplied). If any of these courts *held* or in Ballard's words "recognized" that the subject facsimile constitutes an advertisement it would have been simple for Ballard to cite to the particular page of the opinion(s). Ballard did not point to any citation(s) because no court has ruled that the subject facsimile constitutes an advertisement.

Third, here is no merit to Ballard's attempt to counter the testimony of the Kohll's employee who was instrumental in sending the facsimiles. See Ballard's Comment at p. 4. The employee in question, Laurie Dondelinger, testified that the facsimile was intended to "promote wellness." See Petition at p. 3, citing page 13 of Dondelinger's deposition. Ballard's argument that "an employee's legal conclusion as to the characterization of the fax is hardly relevant" is flawed because the stated intention of the person in charge of creating and transmitting the facsimile is highly relevant. Notably, Ballard has offered no competing evidence through its own testimony or that of an expert which demonstrates that the subject facsimile is in fact an

advertisement. See *Practice Management Support Services Inc. v. Appeal Solutions, Inc.*, 2010 WL 748170, *3 (N.D. Ill. March 1, 2010) (awarding summary judgment where TCPA plaintiff failed to refute evidence that it had voluntarily provided its facsimile number, "plaintiff did not submit any contradictory evidence. Therefore, defendants' assertion that Zulaski voluntarily provided the fax number and remaining statements of material fact are deemed admitted as a matter of law."). Again, Ballard "may not rest on its pleadings but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact for trial." *McMillian*, 878 F.2d at 188.

Because no court has ever ruled that the facsimile is an advertisement, it is proper for the FCC, with its vast expertise, to declare whether the facsimile is an advertisement under the TCPA. And despite Ballard having the burden of proof, it has cited to no cases in support of its sweeping statement that "[t]he fax was clearly sent to promote the commercial enterprise of Kohll's and is not merely an informational message as Kohll's suggests." See Ballard's Comment at p. 4. Thus, to the extent Ballard's Comment attempted to distinguish two of the cases cited by Kohll's Petition, Ballard has failed to carry *its burden of proof* through any citation to a case involving a similar type of facsimile.¹

B. The HIPAA Exception Should Apply to Healthcare Related Facsimiles.

Ballard's Comment overstates its position by arguing that "the [healthcare] exception has never been intended to apply to facsimiles messages." Ballard's Comment at p. 8. This

¹ Ballard "doth protest too much, methinks." *Hamlet*, Act III. Ballard is worried about the fact that it failed to get any judicial determination that the subject facsimile is an advertisement because it spends the majority of its Comment in attempting to distinguish the cases cited by Kohll's. See Ballard's Comment, pp 5-8. To the extent Ballard's Comment includes a citation to *Physicians Healthsource, Inc. v. Janssen Pharmaceuticals*, 2013 WL 486207 (D. N.J. Feb. 6, 2013) and the cases cited within the *Physicians Healthsource* opinion (Comment p. 7), Ballard's Comment is largely devoid of any substantive analysis.

sweeping statement is meaningless because Ballard's argument fails to point to any statutory or case law authority which prohibits this cellular based "healthcare message" exceptions from applying equally to facsimile based communications. This is a matter of first impression.

As Ballard must acknowledge, the FCC has created broad-based exceptions to healthcare messages transmitted via voice and cellular/text messages. Ballard's Comment at pp. 8-9, discussing the FCC's July 10, 2015 Declaratory Ruling and Order. Ballard's main argument appears to be that the FCC's exceptions for voice and text messages are limited in nature, with certain content based limitations (no calls or texts without the provision of the cellular number by the patient, the disclosure of the healthcare provider at the beginning of the message, no telemarketing, concise messages and only one message per day or no more than three per week). Ballard's Comment at p. 9 (citing to paragraph 147 of *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, FCC 15-72, CG Docket No. 02-278 (July 10, 2015)). As discussed on the following page, the facsimile (reproduced below) meets almost all of these limitations.

Corporate Flu Shots

**Only \$16-\$20 per
vaccination**

Did you know....

10 employees sick from the flu costs you \$877.10

Each flu infection results in 3-5 missed work days and up to 2 weeks of low work productivity

How much is the flu REALLY costing your company?

Protect your assets! Vaccinate your employees.

Call for a free quote today

(877) 408-1990

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Providing corporate vaccinations for over 15 years

A division of Kohll's Pharmacy & Homecare...trusted since 1948

Removal From List Request

If you have received this information in error or if you are requesting that transmissions cease in the future, please notify the sender to be removed as the recipient of future transmissions. Notify the sender by sending a return transmission to (402) 896-7655, by calling (866) 500-7800, extension 154, or by sending an email to akurland@kohlls.com.

Ballard properly concedes that Kohll's is a healthcare provider. Ballard's Comment at p. 10. Although Ballard did not provide its facsimile number to Kohll's, this fact has a diminished impact because a business' facsimile machine is not the equivalent of a person's cellular number which is generally carried by people (or at their side) during their waking hours. Further, businesses generally advertise their facsimile number (unlike cell phone users), thus diminishing the need to obtain consent to send informational facsimiles to businesses. For example, the FCC

has found that "prerecorded health care-related calls when subject to HIPAA, do not tread heavily upon the consumer privacy interests because these calls are placed by the consumer's health care provider to the consumer and concern the consumer's health." 2012 FCC Report & Order, 12-21, ¶ 63 (Feb. 15, 2012).

Ballard's argument also fails because it ignores the fact that the FCC has declared that calls offering flu shots do not require a recipient's written consent. See 47 C.F.R. § 64.1200(a)(2); see also 2012 FCC Report & Order, at p. 48; 2012 Telephone Consumer Protection Act, Final Rule, 77 Fed.Reg. 43233, ¶ 46 (June 11, 2012). Ballard's Comment also fails to address the fact that Kohll's Petition discussed the HIPAA Rule, 45 C.F.R. 160.103, which defines "health care" as "[s]ale or dispensing of a drug, device, equipment, or other item in accordance with a prescription." 45 C.F.R. § 160.103. Ballard does not argue that *flu vaccinations clearly fall within this definition*. Therefore, the FCC should conclude that health care related facsimiles such as the availability of flu vaccinations should be exempted from the TCPA.

Ballard's Comment also ignores the fact that further support for Kohll's petition comes from the fact that the FCC follows the FTC's approach of exempting HIPAA health care messages from the Telemarketing Sales Rule. *Telephone Consumer Protection Act of 1991*, 77 FR 34233-01, ¶ 40 (June 11, 2012). In particular, the FCC specifically mentioned immunization reminders and calls offering vaccinations would fall within the HIPAA exemption. *Id.* at ¶46. Notably, the FCC has observed that "prescription refills and immunization reminders" and observing that "these communications promote health and streamline health care administration." *Id.* See also 2012 FCC Report & Order, ¶ 63 & n. 192.

As to the FCC's second limiting clause, Kohll's facsimile complies with the "name and contact information" requirement because its contact information was clearly identified on the facsimile. Further, as to the FCC's third limiting clause, the Kohll's facsimile is an informational facsimile promoting the utility of and availability of flu vaccines notwithstanding the inclusion of pricing data at the top of the document. The majority of the facsimile provides information regarding lost productivity, missed work. See above facsimile. As to the FCC's fourth limiting clause, the facsimile is concise as it includes large font and the message is simply stated. As to the FCC's fifth limiting clause, it is undisputed that each recipient received only one facsimile. And again, the facsimile was sent corporate human resources managers for large sized Midwestern corporations. It was not sent out indiscriminately.

In summary, the facsimile is far less abusive than a text or voice message to one's cellular phone, and for the above reasons, the FCC should apply a healthcare exception to healthcare related facsimiles. Finally, contrary to Ballard's argument that the recipients "plainly incurred costs in receiving the unwanted fax from Kohll's," Ballard is the only entity in the record who even complained that the facsimile in question was "unwanted." And as for cost, the minimal cost of viewing and possibly printing a computer based facsimile were nominal.

C. Kohll's Other Assertions Are Both Relevant and Persuasive.

Ballard's final comment in opposition to Kohll's Petition argues that several of Kohll's supporting statements are "irrelevant." Ballard's Comment at p. 10-11. The fact that Ballard has filed dozens of TCPA suits supports Kohll's argument that Ballard is a professional class action plaintiff. While this fact would not cause a trial court to find Ballard to be an inadequate class representative, this fact should make it apparent to the FCC that Ballard (and its counsel) have an incentive to ask the FCC to deny the relief sought by Kohll's. Ballard and its counsel have a

huge stake in this Petition because both stand to gain a share of a potential verdict of \$2,071,000, or \$6,213,000 if treble damages are awarded.

Further, it is absolutely relevant for the FCC to consider how a potential multi-million dollar verdict may impact Kohll's. Further, even if insurance may cover a portion of a judgment, it won't cover a judgment of close to \$6 million dollars.

D. Kohll's Constitutional Arguments Are Valid

Ballard's Comment notes that "nearly all courts that analyzed the constitutionality of this provision found it constitutional." Ballard's Comment at p. 11. While this generalized comment is accurate, it fails to knowledge that no other litigation has involved this particular issue – whether the FCC's 2015 healthcare related exceptions for voice and text messages to cellular phones are unconstitutional if they do not equally apply to facsimile transmissions. Ballard's reference to some *unidentified* Eighth Circuit Court of Appeals' decision is irrelevant. Ballard's Comment at pp. 11-12. It does not help Ballard's argument that it neglected to provide a name or citation to the Eighth Circuit's opinion, but the un-named case clearly does not apply because it is limited to the fact scenario that it apparently addressed: whether it was constitutional to restrict unsolicited commercial facsimiles while not restricting non-commercial facsimiles. That is not the argument behind the relief sought by Kohll's. Rather, Kohll's argues that it would violate the First Amendment to apply the above discussed healthcare exceptions to calls and messages to cellular phones while similarly prohibiting a less invasive form of healthcare communication via facsimile.

Ballard's final argument, that "the FCC denied petitions seeking to repeal the Solicited Fax Rule entirely" is misplaced. Ballard's Comment at p. 12. First, Ballard has not identified any so called "Solicited Fax Rule", and Kohll's is not attacking any such rule. Second, Kohll's is

not basing its argument on any "opt out notice" requirements as Ballard appears to suggest. *Id.* Accordingly, there is no "well settled law in this area" as Ballard argues. *Id.* at p. 13. Therefore, the FCC should examine whether the *absence* of a healthcare related exception for facsimiles is proper where certain exception exist for voice and text messages to cellular phones.

III. CONCLUSION

Wherefore, pursuant to 47 C.F.R. § 1.2(a), the Commission should "issue a declaratory ruling terminating a controversy" between Ballard and Kohll's by declaring that Kohll's facsimile to Ballard was not an advertisement under the TCPA. See also, 5 U.S.C. § 554(e). Alternatively, the Commission should declare that Kohll's facsimile to Ballard is a healthcare related facsimile and thus exempt from liability. Alternatively, the Commission should declare that Kohll's is entitled to a waiver. The issuance of any of the above forms of relieve would terminate a "controversy" between the parties and remove any "uncertainty" regarding potential liability.

Respectfully submitted,

/s/ James C. Vlahakis

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CERTIFICATE OF SERVICE

The undersigned certifies that on June 6, 2016, a copy of Petitioner Kohl's Pharmacy & Homecare, Inc.'s Petition for Declaratory Rulings and/or for Waiver was served upon counsel of record at the following address via First Class Mail and email service.

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The undersigned also certifies that on June 6, 2016, he filed, by mail and internet Petitioner Kohl's Pharmacy & Homecare, Inc.'s Petition for Declaratory Rulings and/or Waiver with the Federal Communications Commission, Office of the Secretary, 445 12th Street, SW, Washington, D.C. 20554

/s/ James C. Vlahakis

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