

July 30, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, D.C. 20036

Re: Petition of Staples, Inc. and Quick Link Information Services, LLC
for Expedited Declaratory Ruling and for a Cease and Desist Order,
CG Docket No. 02-278

Dear Ms. Dortch:

On May 3, 2004, Staples, Inc. ("Staples") and Quick Link Information Services, LLC ("Quick Link") (Staples and Quick Link collectively, the "Petitioners") filed a Petition for Expedited Declaratory Ruling and for a Cease and Desist Order (the "Petition") seeking relief in connection with disputes arising out of a lawsuit filed by Mattison R. Verdery, C.P.A., P.C. ("Verdery") against the Petitioners in the Superior Court of Richmond County, Georgia (the "State Court"). Verdery's State Court lawsuit alleges violations by Staples and Quick Link of the Telephone Consumer Protection Act, codified at Section 227 of the Communications Act of 1934, as amended, 47 U.S.C. § 227 (1991) (the "TCPA"). Staples and Quick Link hereby supplement their Petition in order to update the record regarding the State Court proceeding, and also respond to the Brief of Respondent in Opposition to their Petition, filed by Verdery on May 10, 2004 (the "Opposition").

On May 17, 2004, the State Court held a hearing on Staples' and Quick Link's Motion for Reconsideration of the State Court's March 24, 2004 denial of Petitioners' Motion for Summary Judgment (the "Hearing"). Included herein are excerpts from the transcript of the Hearing.

On July 16, 2004, the State Court denied the Motion for Reconsideration and a separate Application for Stay of Proceedings, filed April 21, 2004. On July 19, 2004, the office of the presiding judge in the State Court action informed counsel for Staples and Quick Link that the State Court will not be granting a certificate of immediate review in the case. Petitioners'

previous requests to the State Court for a certificate of immediate review also were denied. On July 22, 2004, Staples and Quick Link filed in the State Court an Emergency Petition for Writ of Prohibition and for Writs of Mandamus.¹

The consequences of these recent events will substantially harm Staples and Quick Link. The Petitioners are being denied an opportunity to appeal fundamental issues of law that affect whether and how the case will proceed, leaving them with little effective means of legal redress. Instead, Petitioners will be able to seek meaningful review only after a trial and a ruinous judgment. Based on a possible award of between \$500 and \$1,500 in statutory damages for each facsimile advertisement sent by Staples to its existing customers nationwide during the four years preceding the filing of the State Court lawsuit, the damages sought by Verdery are estimated to be between \$2.2 and \$6.7 *billion*.

Petitioners now also will be compelled to undergo burdensome and costly class-action litigation, including discovery involving the confidential records of Staples' customers nationwide. Verdery's counsel has noticed depositions and the production of class discovery documents for August 10, 2004. These discovery obligations have now accrued and Staples is required to expend substantial resources collecting and producing a large volume of documents concerning its facsimile advertising campaigns during the July 1999 – July 2003 time period. Information pertaining to hundreds of thousands of Staples' customers will unnecessarily be placed at issue.

For these reasons and as set forth in the Petition, Petitioners seek expedited relief. The requested rulings will provide much-needed clarification on issues of law in dispute between the Petitioners and Verdery, on which the State Court has not rendered a dispositive decision. Petitioners wish to make clear that they are not asking the Commission to compel the State Court to take or to refrain from taking any action. The requested rulings and cease and desist order, however, will compel Verdery to comply with applicable law. Petitioners have addressed and will continue to address other issues before the State Court that are not dealt with in the Petition.

¹ The Emergency Petition seeks, *inter alia*, a writ of prohibition forbidding Verdery from usurping the jurisdiction of the federal Courts of Appeals and the Commission, and ordering the State Court to abandon jurisdiction over Verdery's collateral attack on the validity of the Commission's rules and orders. No action has been taken on that Emergency Petition. The Petitioners will keep the Commission apprised of further relevant developments in the State Court proceeding.

**A DECLARATORY RULING BY THE COMMISSION ADDRESSING VERDERY'S
CHALLENGE TO THE VALIDITY OF FCC ORDERS WOULD NOT
INTERFERE WITH THE STATE COURT'S JURISDICTION**

The key issue under consideration is the distinction between a state court private right of action “based on a violation of”² the TCPA – which the TCPA and Georgia law permit – and a separate state court challenge to the Commission’s authority to promulgate the *TCPA Orders*³ – about which the TCPA is silent, but other federal law is crystal clear. This distinction lies at the heart of the controversy between Petitioners and Verdery that is the subject of the Petition.

Verdery’s Challenge to the TCPA Orders

As explained in the Petition, Verdery has asserted in the State Court that Commission Orders permitting businesses to send facsimiles to persons with whom they have an established business relationship⁴ constitute “an improper attempt by the FCC to reinsert an exemption into the TCPA’s ban on junk faxing that Congress specifically deleted”⁵ and are “directly contrary to the clear language and intent express[ed] by Congress.”⁶ According to Verdery, the Commission’s interpretations are “merely wayward FCC commentary.”⁷ Verdery is expressly asking the State Court to disregard the Commission’s *TCPA Orders*:

Because *the FCC lacked the authority to establish an exemption to junk fax liability, and because the established business relationship exemption ... is directly contrary to the clear language and intent*

² 47 U.S.C. § 227(b)(3).

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, *Report and Order*, 7 FCC Rcd 8752 (1992) (the “1992 TCPA Order”); *Memorandum Opinion and Order*, 10 FCC Rcd 12391 (1995) (the “1995 TCPA Order”); FCC 03-153 (July 3, 2003) (the “2003 TCPA Order”) (the 1992 TCPA Order, the 1995 TCPA Order, and the 2003 TCPA Order collectively, the “TCPA Orders”).

⁴ *1992 TCPA Order*, 7 FCC Rcd at 8779, ¶34 & n.87; *1995 TCPA Order*, 10 FCC Rcd at 12408, ¶37; *2003 TCPA Order*, at n.699.

⁵ See Petition at 15 (quoting Plaintiff’s Brief in Opposition to Defendant’s Motion for Summary Judgment and in Support of Plaintiff’s Cross-Motion for Summary Judgment (a copy of which is attached to the Petition as Exhibit 6) at 8.

⁶ Petition, Exhibit 6 at 13.

⁷ See Petition, Exhibit 6 at 13.

express[ed] by Congress, *this Court should find and declare* that no such exemption exists.⁸

Nowhere in the Opposition does Verdery deny the fact that its State Court suit challenges the validity of the *TCPA Orders*.

The Declaratory Ruling Request

The Communications Act requires any party seeking to challenge “any order” of the Commission to do so “as provided by and in the manner prescribed by chapter 158 of Title 28, United States Code.”⁹ In turn, Title 28 grants the federal Courts of Appeals “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of ... all final orders of the Federal Communications Commission made reviewable by” Section 402(a) of the Communications Act.¹⁰ “It is hard to think of clearer language confining the review of regulations to the Courts of Appeal.”¹¹ Consequently, the Petitioners have asked the Commission to rule that Verdery’s challenge to the validity of the Commission’s *TCPA Orders* appropriately lies in the federal Court of Appeals.¹²

State and federal courts have found these statutory requirements unambiguous. “[T]hese statutory restrictions on jurisdiction are sensible.... First, by requiring the FCC initially to pass on the validity of its own regulations, the agency may apply its expertise to the question at hand.... Second, it ‘ensure[s] review based on an administrative record made before the agency charged with implementation of the statute.’... Third, it assists in ‘uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress’ to enforce the statutory scheme governing the nation’s airwaves.”¹³

⁸ Petition at 14 and Exhibit 6 at 5 (emphasis added).

⁹ The Communications Act of 1934, as amended, 47 U.S.C. § 402(a).

¹⁰ Hobbs Act (also known as the Administrative Orders Review Act), 28 U.S.C. § 2342(1). See *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-97 (9th Cir. 1996) (the Communications Act and the Hobbs Act “vest the courts of appeals with exclusive jurisdiction to review the validity of FCC rulings”).

¹¹ *U.S. v. Any and All Radio Station Transmission Equipment*, 207 F.3d 458, 463 (8th Cir. 2000).

¹² Petition at 16-21.

¹³ *U.S. v. Dunifer*, 219 F.3d 1004, 1008 (9th Cir. 2000) (quoting *New York Telephone Co. v. New York Department of Labor*, 440 U.S. 519, 528 (1979), and citing *U.S. v. Any and All Radio Transmission Equipment*, 207 F.3d 458,

**A Private Right of Action Under the TCPA Does Not Include
the Right to Challenge the Validity of the TCPA Orders**

Verdery states that the TCPA “grants a private right of action for violations of the junk fax prohibition exclusively in state court.” This statement is accurate, but is not conclusive regarding the key question raised in the Petition.¹⁴ Petitioners are not asking the Commission to deprive the State Court of its lawful jurisdiction under Section 227(b)(3),¹⁵ because Section 227(b)(3) *does not* allow a private right of action challenging Commission decisions. Just as the TCPA does not confer upon state courts authority to adopt rules and orders implementing the TCPA,¹⁶ there can be no inference that the TCPA grants jurisdiction to state courts to determine the validity of the Commission’s implementing rules and orders, because Congress clearly granted that authority to the federal appellate courts. Courts consistently have held that parties may not evade federal appellate court jurisdiction by raising collateral challenges to the validity of Commission Orders.¹⁷

Verdery attempts to portray the Petition as a challenge to the state court’s exclusive jurisdiction over private rights of action under the TCPA, simply by citing a line of cases that

(Footnote continued from previous page)

463 (8th Cir. 2000)). See also *Dickinson v. Cosmos Broadcasting Co.*, 782 So. 2d 260 (Ala. 2000) (Alabama State Court held that it “cannot entertain a collateral challenge to the validity of” a Commission Order).

¹⁴ Opposition at 5-6.

¹⁵ The TCPA provides that:

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State – (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or (C) both such actions.

47 U.S.C. § 227(b)(3). Georgia courts have held that Georgia law does not expressly prohibit private TCPA actions for the transmission of unsolicited facsimile advertisements. *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga. App. 363, 537 S.E. 2d 468 (Ct. App. Ga. 2000).

¹⁶ Congress expressly granted that authority to the Commission. 47 U.S.C. § 227(b)(2).

¹⁷ See *FCC v. ITT World Communications*, 466 U.S. 463, 468-69 (1984) (exclusive jurisdiction of the Courts of Appeals over rulemaking by the Commission may not be evaded by seeking to enjoin a final order of the Commission in the district court); *U.S. v. Dunifer*, 219 F.3d at 1007 (“[t]o allow [the defendant-appellant] to contest the validity of the implementing regulations would create just such an evasion”); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-97 (9th Cir. 1996) (“Together, [Sections 402(a) and 2342] vest the courts of appeals with exclusive jurisdiction to review the validity of FCC rulings.”).

established that right.¹⁸ In all but one of those cases, the plaintiffs filed suit in federal district court and the defendants successfully sought dismissal on the grounds that the TCPA grants state courts exclusive jurisdiction.¹⁹ Thus, it now is well-settled that a plaintiff may not sue for a violation of the TCPA in federal district court. But no such issue is in dispute between Petitioners and Verdery. None of the cases cited by Verdery involved a challenge to the validity of the Commission's *TCPA Orders*. The right to sue in state court for violation of the TCPA does not include the right to bootstrap a challenge to the Commission's *TCPA Orders*.

Ultimately, because Verdery can find no authority to support its position that the State Court has jurisdiction to entertain a challenge to Commission orders,²⁰ it relies instead on contrived arguments intended to obscure the fact that no such authority exists. For example, Verdery finds it significant that "Petitioners cite no authority that confers upon the Commission either discretion or a statutory duty to interfere with state court proceedings where the court is vested with exclusive jurisdiction by federal law."²¹ But *the requested ruling would not interfere with the jurisdiction granted to the State Court* by the TCPA. The TCPA gives the State Court jurisdiction to hear "action[s] based on a violation of [Section 227(b)] or the regulations prescribed [by the Commission] under [Section 227(b)]."²² This language makes clear that the contours of a private right of action under the TCPA and a state court's jurisdiction over such an action are shaped by the Commission's rules and orders – and not the other way around.

¹⁸ See Opposition at 6-7 (citing *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Servs., Ltd.*, 156 F.3d 432, 438 (2nd Cir. 1998) ("*Foxhall*"); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 520 (3rd Cir. 1998) ("*ErieNet*"); *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146 (4th Cir. 1997) ("*International Science*"); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997) ("*Chair King*"); *Murphey v. Lanier*, 204 F.3d 911 (9th Cir. 2000) ("*Murphey*"); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289, *modified*, 140 F.3d 898 (11th Cir. 1998) ("*Nicholson*").

¹⁹ *Foxhall*, 156 F.3d at 434; *ErieNet*, 156 F.3d at 514; *International Science*, 106 F.3d at 1150-51; *Chair King*, 131 F.3d at 509; *Murphey*, 204 F.3d at 912. In the Eleventh Circuit decision, plaintiffs filed suit in state court, and defendants successfully removed the case to federal district court, which then granted defendants' motion to dismiss. The Eleventh Circuit vacated that judgment and directed the district court to dismiss the case for lack of subject matter jurisdiction. *Nicholson*, 136 F.3d at 1288.

²⁰ Verdery does not dispute that each of the Commission's *TCPA Orders* was reviewable under Section 402(a) of the Communications Act. Nor can there be any argument that the *TCPA Orders* are "final orders". Nonetheless, as discussed below, Verdery has contrived just such a dispute in the State Court proceeding.

²¹ Opposition at 11-12.

²² 47 U.S.C. § 227(b)(3).

Verdery also cites the “general rule followed by federal courts that a state court action filed first has priority.”²³ But it makes no difference *when* a plaintiff alleges in state court that a Commission order is not valid: that plaintiff *at all times* must comply with the Communications Act and Hobbs Act provisions governing where and when such claims may be made. Verdery is not exempt from this requirement just because the TCPA allows plaintiffs to pursue other claims in state court. Moreover, the *relevant* first-in-time events were the Commission’s rulemaking proceedings in Docket No. 92-90 and Docket No. 02-278, which clearly established that businesses may send facsimile advertisements to customers with whom they have an established business relationship.²⁴

The Requested Ruling Would Not Contravene Any State Court Action

In the Opposition, Verdery implies that the requested rulings would contravene an action the State Court already has taken.²⁵ Significantly, however, nowhere does Verdery claim that the rulings would be contrary to any actual decision by the State Court on the issues raised in the Petition. Instead, the Opposition consists of speculative and misleading statements that fail to distinguish between state court jurisdiction over claims permitted by the TCPA and federal appellate court jurisdiction over challenges to the *TCPA Orders*.

Verdery speculates that a declaratory ruling by the Commission would constitute “interven[tion]” in or “interfere[nce]” with the State Court lawsuit.²⁶ This claim is premised on Verdery’s misleading (and unsupported) explanation of the State Court proceedings, specifically, that “the existence and application of the ‘established business relationship’ or EBR defense ... ha[s] been raised and duly considered by the” State Court.²⁷ Verdery also claims that the State Court “weighed the Commission’s comments regarding an ‘established business relationship’ in light of the TCPA’s clear requirement of ‘express invitation or permission,’ and held that issues

²³ Opposition at 16.

²⁴ For example, the Commission’s 1992 *TCPA Order* and 1995 *TCPA Order* long predate Verdery’s July 2003 action, but Verdery asserts these Orders are not binding.

²⁵ See, e.g., Opposition at 8 (“The very issues the Petitioners now raise before the Commission ... have been raised and duly considered by the [State Court]”); Opposition at 5, 9 (the requested relief would “effectively overrule” the State Court).

²⁶ Opposition at 11.

²⁷ Opposition at 8.

of fact remain for jury determination.”²⁸ This implies that the State Court has rendered a decision expressly permitting Verdery’s challenge to the validity of the *TCPA Orders*. But the State Court has done no such thing: the “weighing” – to the extent the State Court may be said to have engaged in any analysis at all on the question – is not apparent on the face of any decision by the State Court.²⁹ At no point has the State Court specifically opined on the merits of Verdery’s challenge to the *TCPA Orders*.³⁰

Chevron Does Not Permit State Courts to Review Challenges to Agency Decisions

Verdery invokes the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (“*Chevron*”) to support its assertion that state courts may entertain challenges to the validity of Commission orders.³¹ Verdery’s interpretation of *Chevron* is misguided. *Chevron* involved a challenge to agency regulations, adopted in notice-and-comment rulemaking proceedings, which were appealed to the federal Court of Appeals pursuant to a statutory provision similar to Section 402 of the Communications Act.³² *Chevron* sets forth the standard of review that a federal appellate court must apply when reviewing such challenges.³³ The language Verdery relies on – “[t]he judiciary ... must reject administrative constructions which are contrary to clear congressional intent”³⁴ – may only be read in conjunction with the applicable statutory delegation of jurisdiction to the federal Courts of Appeals. Verdery is wrong to interpret *Chevron* as announcing a controlling rule of law that

²⁸ Opposition at 8-9. Of course, the Commission’s *TCPA Orders* are not mere “comments”.

²⁹ In denying summary judgment, the State Court simply found that issues of material fact remain. Petition, Exhibit 9.

³⁰ In its July 16 Order denying reconsideration of its prior order denying summary judgment, the State Court “reject[ed] Defendants’ contention that the Federal Communications Commission (FCC) has original jurisdiction over this case. It is well settled that the state courts have jurisdiction to hear and decide claims brought under the” *TCPA*. Order, Civil Action File No. 2003-RCCV-728, July 16, 2004, at 1-2 (attached hereto as Exhibit 1). The State Court’s reference to “well settled” state court jurisdiction can refer only to state court authority to hear claims brought pursuant to Section 227(b)(3) of the *TCPA*. Petitioners do not dispute that authority.

³¹ See *id.* at 8.

³² See *Chevron*, 467 U.S. at 841.

³³ *Id.* at 866.

³⁴ Opposition at 8 (quoting *Chevron*, 467 U.S. at 842-43).

henceforth *state* courts would be free to invalidate final orders issued by the Commission at the conclusion of notice-and-comment rulemaking proceedings. The relevant “judiciary,” as *Chevron* made clear, is the federal Court of Appeals.

A DECLARATORY RULING IS NECESSARY AND APPROPRIATE UNDER THE CIRCUMSTANCES

Verdery has argued that “neither the APA nor the Commission’s rules permit declaratory relief under the present circumstances” because it “is [not] possible here” to terminate a controversy or remove uncertainty.³⁵ This argument highlights Verdery’s disregard for the distinction between its right to bring a suit for a violation of the TCPA in state court under Section 227(b)(3) of the Communications Act, on the one hand, and Verdery’s obligation to challenge the validity of the Commission’s *TCPA Orders* in a federal Court of Appeals, on the other hand. Simply put, Verdery is using the State Court’s jurisdiction over the former to shield the latter from the only appropriate venue.³⁶

Verdery contends that a ruling by the Commission “would be merely advisory,” “[g]iven the [State] Court’s exclusive jurisdiction under the TCPA.”³⁷ There is no such “given” – the State Court does not have jurisdiction to address Verdery’s challenge to the validity of the *TCPA Orders*, which Verdery is bootstrapping with its TCPA claim.

Furthermore, Verdery misconstrues the authority it cites regarding advisory opinions and the Declaratory Judgment Act.³⁸ “[A] request for declaratory ruling is not restricted, as are proceedings of federal courts, to ‘cases and controversies’ within the meaning of Article III of the Constitution. . . . Indeed, Sections 4(i) and (j) of the Communications Act . . . bestow upon the Commission the broad power to issue orders consistent with the Act ‘as may be necessary in the execution of its functions.’ And Section 554(e) of the Administrative Procedure Act . . . provides that the Commission ‘may issue a declaratory order to terminate a controversy or remove

³⁵ Opposition at 12-13.

³⁶ See, e.g., Opposition at 13, where Verdery avers that “the intent of Section 554(e) of the APA and 47 C.F.R. § 1.2 clearly is not to permit a defendant in a civil case to remove the uncertainty and risk of litigation by circumventing a court’s jurisdiction to resolve claims pending before it.”

³⁷ Opposition at 14.

³⁸ Opposition at 15-16 & nn. 38-42.

uncertainty.”³⁹ The “case and controversy” standard and questions of “justiciability” at issue in the cases Verdery cites simply do not apply here.⁴⁰

Moreover, unlike the cases cited by Verdery,⁴¹ here there is “a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”⁴² Significantly, again unlike the Declaratory Judgment Act cases relied on by Verdery,⁴³ the Petitioners are not seeking a ruling on any question involving state law.

Verdery suggests that even if the Commission issues any ruling the Petitioners seek, Verdery nonetheless may continue to try to persuade the State Court and a jury that they may freely ignore that ruling.⁴⁴ This threat does not, however, diminish the Commission’s power to issue a declaratory ruling. A declaratory ruling need not terminate a controversy in its entirety, or “remove uncertainty about the outcome” of the State Court proceeding, as Verdery suggests.⁴⁵

³⁹ *Fox Television Stations Inc., Declaratory Ruling*, 8 FCC Rcd 5341, 5343 (1993), *aff’d*, *Metropolitan Council of NAACP Branches v. FCC*, 76 RR.2d 1604 (D.C. Cir. 1995) (“unlike the case or controversy requirement for a federal court, under 5 U.S.C. § 554(e) (1988), an agency may issue a declaratory order to terminate a controversy or remove uncertainty.”). *See also American Communications Services, Inc., et al., Petitions for Expedited Declaratory Ruling*, 14 FCC Rcd 21579, 21589 (1999) (Commission can and does adjudicate petitions for declaratory rulings without strict adherence to the federal court doctrines of ripeness and standing).

⁴⁰ Ignoring substantial and longstanding case law on the difference between an agency declaratory ruling and the “cases and controversies” requirement for Article III jurisdiction, Verdery misleadingly states that a “prohibition on advisory opinions and case or justiciability requirements apply with the same stringency in the administrative law context.” Opposition at n.38 (quoting *Miller v. FCC*, 66 F.3d 1140, 1146 (11th Cir. 1995)). In fact, the *Miller* Court stated that because “Article III requirements apply with the same stringency in the administrative law context” – in other words, an Article III Court must review a matter that originated with an agency under the same “case or controversy” standard as non-agency matters – “[f]ederal courts simply are not permitted to render advisory opinions.” *Miller*, 66 F.3d at 1146. The Court did not say that agencies are subject to Article III requirements.

⁴¹ *See id.* at 15 & n.39.

⁴² *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

⁴³ Opposition at n.41.

⁴⁴ *See* Opposition at 13-14.

⁴⁵ *Id.*

The Commission routinely issues declaratory rulings addressing discrete issues that are part of a court proceeding that will continue after such rulings.⁴⁶

Contrary to Verdery's contentions, there can be no real question that the requested rulings would terminate real, not hypothetical, controversy and would remove uncertainty. The Petitioners ask the Commission to resolve by declaratory ruling the following three disputes:

(1) **Right to Challenge the Validity of the TCPA Orders**

The parties disagree about whether, as a matter of law, Verdery may challenge the *TCPA Orders* in state court. This disagreement is apparent from the State Court pleadings⁴⁷ and the Petition and Opposition filed with the Commission, and also from Verdery's counsel's response to a question asked at the Hearing by the presiding judge:

The Court: What authority does the FCC have to interpret a statute that's plain on its face?⁴⁸

...

Mr. Revell [Counsel to Verdery]: [T]here are plenty of Georgia cases, that if an administrative agency's interpretation is contrary to the plain meaning of the statute, the Court is to disregard it. The Court is to disregard it, not go back to the agency and say, [']did you mean what you said[?'].... *The [State] Court decides whether the agency's interpretation is valid and rational and reasonable and contrary to the plain meaning of the statute.* That's what we've asked you to do. Here's the FCC pronouncement and interpretation. We think it conflicts with the TCPA. *We're asking the [State] Court to ignore that interpretation* and the case books are full of instances where the Court does that. And we don't have to have the FCC to say, change your mind or either did you mean what you said.... We don't have to stop because it's the [State] Court that

⁴⁶ See, e.g., *Fox Television Stations Inc. Declaratory Ruling*, 8 FCC Rcd 5341 (1993); *Victor Frankfurt*, 12 FCC Rcd 17631 (CSB 1997); *Mary Pat Hogan Merin*, 11 FCC Rcd 5360 (WTB 1996).

⁴⁷ See Petition, Exhibits 1, 3, 4, 5, 6, 7, 8.

⁴⁸ Transcript of Hearing ("Tr.") at 71 (included herewith as Exhibit 2).

decides whether that interpretation makes sense or not, and the books are full of opinions that say that.⁴⁹

Petitioners disagree that the Commission's *TCPA Orders* were contrary to the statute and disagree that Verdery may make such a claim in state court. A ruling by the Commission that the Communications Act requires Verdery to challenge the *TCPA Orders* only in federal appellate court is necessary and appropriate to resolve the question. It is well within the Commission's powers to interpret the Communications Act in this context.⁵⁰

(2) Effect of TCPA Rule Changes

In addition, there is fundamental disagreement and confusion about the effect of the Commission's recent revisions to the junk fax rule:

The Court: "Well, as [Verdery] said [the FCC has] since gone back and said, [']wait a minute. We didn't know what we were saying back then.['] [D]idn't they?"

Mr. Lefkow [Counsel to Staples and Quick Link]: "They did not say they were wrong.... What they said was, look, people have been complaining so we're going to change it...."⁵¹

...

Mr. Brownstein [Counsel to Verdery]: "[Y]ou asked counsel whether [the FCC was] wrong in [its] prior interpretation and he said they didn't, but they did say, [']we now reverse our prior conclusion[']. Now, that sort of sounds like [']we're wrong['] to me."⁵²

⁴⁹ *Id.* at 82-83 (emphasis added). At the Hearing, Verdery's counsel then cited *Chevron* (which, as discussed above, is not applicable), and discussed cases that involve the right to bring suit for violation of the TCPA in state court. *Id.* at 83. As discussed above, that right, founded in Section 227(b)(3) of the Communications Act, is not at issue in this declaratory ruling proceeding.

⁵⁰ 5 U.S.C. § 554(e), 47 U.S.C. § 4(i), (j); 47 C.F.R. § 1.2.

⁵¹ Exhibit 2, Tr. at 59, 60.

⁵² *Id.* at 69.

“[T]hat’s where we’re not subject to or bound by any FCC – we’re not governed by the FCC.”⁵³

...

“Now, the FCC has admitted they were wrong, they’ve admitted their interpretation was incorrect.”⁵⁴

This, too, involves an issue of law, and a ruling clarifying that the *1992 TCPA Order* and the *1995 TCPA Order* were in effect as of March 18, 2003 and were not retroactively nullified as a result of the 2003 amendment (which in any event has not become effective), is necessary and appropriate to resolve the question.

(3) Finality of the TCPA Orders

Verdery also has argued to the State Court that the *TCPA Orders* do not constitute “final orders” of the Commission. At the Hearing, Verdery claimed that the Commission had not issued a final order regarding the established business relationship defense to TCPA facsimile actions:

The Court: Is there a final order in this case from the FCC?

Mr. Brownstein: No, Your Honor. ... [W]e definitely dispute that.

...

We have an agency’s opinion that under some circumstances an established business relationship may be deemed to be consent. That was the opinion [the FCC] stated in 1992, they restated it again in 1995.... There’s no final order [of the FCC] to challenge here.⁵⁵

⁵³ *Id.* at 68.

⁵⁴ *Id.* at 43.

⁵⁵ Exhibit 2, Tr. at 52, 54.

Similarly, in its Opposition Verdery asserts that the *TCPA Orders* do not constitute final orders.⁵⁶ Clarification of this issue is necessary to resolve disagreement between Petitioners and Verdery, and to eliminate the State Court's confusion, about the finality of the *TCPA Orders*. Commission rules provide that any Commission action becomes final on the date of public notice as defined in Section 1.4(b) of the rules. 47 C.F.R. § 1.103(b). Section 1.4(b), in turn, provides that Federal Register publication governs the date of public notice with regard to documents in notice-and-comment rulemaking proceedings. The *1992 TCPA Order* and the *1995 TCPA Order* have long been final orders.⁵⁷

THE COMMISSION HAS AUTHORITY TO ISSUE A CEASE AND DESIST ORDER

The Petition asks the Commission to issue a cease and desist order, pursuant to Section 312 of the Communications Act, enjoining Verdery from further prosecution of its challenge to the validity of the *TCPA Orders*.⁵⁸ Verdery's opposition to this request, like its opposition to Petitioners' other requests, is premised on Verdery's failure to distinguish between its private right of action under the TCPA and its challenge to the validity of the *TCPA Orders*.⁵⁹ But that distinction may not be denied. Congress has authorized the Commission to issue a cease and desist order against any person who "has violated or failed to observe any of the provisions of this Act" or "has violated or failed to observe any rule or regulation of the Commission...." 47 U.S.C. §§ 312(b)(2), (3).⁶⁰ There is no exception for violation or failure to observe Sections 402 and 405 of the Communications Act, which require Verdery to seek relief in the federal Court of Appeals or before the Commission. Petitioners also note that the Anti-Injunction Act, 28 U.S.C. § 2283, discussed in cases relied on by Verdery, does not prohibit the requested relief. The Anti-Injunction Act applies to federal courts, not agencies.

⁵⁶ Opposition at 18.

⁵⁷ The *1995 TCPA Order*, for example, was published in the Federal Register on August 15, 1995.

⁵⁸ Petition at 24-25.

⁵⁹ See Opposition at 16 ("This request is an extraordinary and unprecedented attempt to prohibit a private party from pursuing a claim clearly authorized by federal law."). Of course, this statement simply illustrates the dispute: the Petitioners in fact are seeking to prohibit Verdery from pursuing a claim clearly **not** authorized by federal law (the challenge to the *TCPA Orders*), but are not seeking a ruling prohibiting Verdery from pursuing a claim that is permitted under the TCPA.

⁶⁰ See also Petition at 24-25.

* * * * *

Just as “[l]itigants may not evade [“the Court of Appeals’ exclusive jurisdiction for review of final FCC orders”] by requesting the District Court to enjoin action that is the outcome of the agency’s order,”⁶¹ or “simply by labeling the proceeding as one other than a proceeding for judicial review,”⁶² Verdery may not evade the same requirement by bootstrapping a challenge to the *TCPA Orders* with a claim for violation of the TCPA. On this question the Petitioners and Verdery “have a dispute that is real, well defined, and ripe for resolution.”⁶³

Since the filing of the Petition, the need for Commission action has become even clearer and more urgent. Because issuance of the requested ruling will “give useful guidance ... with a minimum of time, cost, and misunderstanding,”⁶⁴ not only to Petitioners, Verdery and the State Court, but to litigants and potential litigants nationwide, we urge the Commission to grant the Petition immediately.

Respectfully submitted,



E. Ashton Johnston

*Counsel for Staples, Inc. and
Quick Link Information Services, LLC*

Enclosures

⁶¹ *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984).

⁶² *Southwestern Bell Telephone v. Ark. Pub. Serv.*, 738 F.2d 901, 906 (9th Cir. 1984).

⁶³ *Comcast Cable Communications, Inc.*, 19 FCC Rcd 6, 10 (Pol. Div. 2004).

⁶⁴ *Id.*

cc: K. Dane Snowden, Chief, Consumer & Governmental Affairs Bureau
Genaro Fullano, Consumer & Governmental Affairs Bureau
Richard D. Smith, Chief, Consumer Policy Division, Consumer & Governmental Affairs Bureau
Christopher Killion, Office of General Counsel
Mattison R. Verdery, CPA, P.C.
Jay D. Brownstein, Esq.
Harry Revell, Esq.
Kevin Little, Esq.

EXHIBIT 1

IN THE SUPERIOR COURT OF RICHMOND COUNTY

STATE OF GEORGIA

MATTISON R. VERDERY, C.P.A, P.C.,)
individually and on behalf of all persons)
and entities similarly situated,)

Plaintiffs,)

v.)

STAPLES, INC. and QUICK LINK)
INFORMATION SERVICES, LLC,)

Defendants.)

Civil Action File No.
2003-RCCV-728

CLERK OF SUPERIOR COURT
AND JUVENILE COURT
FOR RECORD
RICHMOND COUNTY, GA.

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CLERK OF SUPERIOR, STATE
AND JUVENILE COURT
FOR RECORD

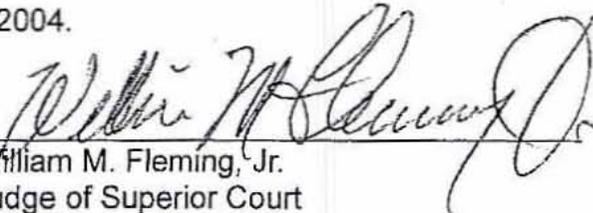
ORDER

Before the Court is Defendants' Motion for Reconsideration of the March 24 Order denying Summary Judgment and Defendants' separate Motion for Stay of Proceedings. The parties have submitted extensive Briefs addressing all issues presented in said motions, and the Court conducted hearings on May 17 and June 17. After consideration of the record, the Briefs, and the arguments of counsel, the Court concludes that summary judgment is inappropriate since there are genuine issues of material fact that must be resolved by a jury. Accordingly, Defendants' Motion for Reconsideration of the denial of summary judgment is hereby DENIED.

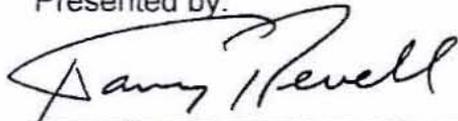
The Court rejects Defendants' contention that the Federal Communications Commission (FCC) has original jurisdiction over this case. It is well settled that the state courts have jurisdiction to hear and decide claims brought under the Telephone

Consumer Protection Act. As a result, Defendants' Motion for Stay of Proceedings is also hereby DENIED.

So Ordered this 16th day of July, 2004.


William M. Fleming, Jr.
Judge of Superior Court
Augusta Judicial Circuit

Presented by:


Harry D. Revell
State Bar No. 601331
Attorney for Plaintiff

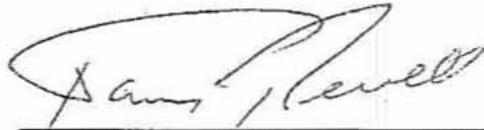
[Order Denying Motion for Reconsideration and Motion for Stay of Proceedings]

Certificate of Service

This is to certify that I have served the within and foregoing upon the following by
U. S. Mail prior to filing:

Mark D. Lefkow, Esq.
Nall & Miller, LLP
Suite 1500, North Tower
235 Peachtree Street, NE
Atlanta, Georgia 30303-1401

This 16th day of July, 2004.



HARRY D. REVELL

EXHIBIT 2

IN THE SUPERIOR COURT OF RICHMOND COUNTY

STATE OF GEORGIA

MATTISON R. VERDERY, C.P.A., P.C.,)
individually and on behalf of all)
persons and entities similarly)
situated,)

Plaintiffs,)

vs.)

STAPLES, INC. and QUICK LINK)
INFORMATION SERVICES, LLC,)

Defendants.)

Civil Action File No.
2003-RCCV-728

MOTION FOR RECONSIDERATION

Before the Honorable William M. Fleming, Jr.

Chief Judge of the Superior Court

In the Augusta-Richmond County Municipal Building

Courtroom 202, Augusta, Georgia

On May 17th, 2004, Commencing at 10:48 a.m.

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1 common to the class and would therefore bolster the
2 requirement that the common questions predominant over
3 individual issues. So in the *Hammond* case it says if the
4 EBR is a valid defense for faxes it's common and it should
5 bolster the reason that class action is appropriate.

6 Now, that's the state of the law in Georgia that to
7 the extent the EBR is an available defense for faxes and
8 Your Honor's aware and I'm not going to bore you with the
9 fact, but in the TCPA itself the Established Business
10 Relationship is written--only it's a the provision
11 prohibiting telephone, live or recorded telemarketing. It
12 is absolutely not included in the fax section of the TCPA.
13 And, in fact, we demonstrated to the Court earlier that in
14 the earlier version of the TCPA it was in both. That EBR
15 was in both the fax provision and the live telephone
16 provision and Congress took it out, said we're going to
17 remove it from the fax provision and leave it in the
18 telephone live or recorded solicitation provision. And we
19 presented that argument before which shows that that was
20 not Congress's intent.

21 Now, the FCC has admitted they were wrong, they've
22 admitted their interpretation was incorrect. They are,
23 quote, reversing themselves in the future rules. And the
24 future rule, as counsel said, will require a written
25 permission for a fax and I dare say that will be in a

1 set aside, to suspend, or determine the validity of all
2 final orders.

3 MR. BROWNSTEIN: That's right, Your Honor, and if--

4 THE COURT: Is there a final order in this case from
5 the FCC?

6 MR. BROWNSTEIN: No, Your Honor. As Mr. Revell said,
7 we definitely dispute that.

8 THE COURT: Well, that's what I thought y'all were
9 disputing all along.

10 MR. BROWNSTEIN: Well, there's two things in--

11 THE COURT: All right.

12 MR. BROWNSTEIN: --this 2342. The first one you just
13 hit on, which is do we even have a final order here; the
14 second thing is, are we seeking to enjoin, set aside,
15 suspend, or determine the validity of a so-called final
16 rule. I don't see that anywhere in our complaint. Mr.
17 Lefkow didn't point out anywhere in our complaint or
18 amended complaint where we're seeking to enjoin the FCC
19 from anything and Your Honor picked up on that. The fact
20 that in briefs on summary judgment we respond to the
21 defense by saying, well, the FCC didn't have authority to
22 do that and we asked you, the Court, to declare that they
23 didn't have the authority to do that, that's in response
24 to them raising that as a defense. We're not seeking any,
25 any, relief related to an FCC rule.

1 decision, a letter of admonition, nor an order levying the
2 penalty of forfeiture, a loss of operating authority, or a
3 refund to a candidate. Because it is axiomatic that
4 Congress has not delegated and could not delegate the
5 power to any agency to oust state courts and federal
6 district courts of subject matter jurisdiction, the FCC's
7 declaratory rulings amount to an agency opinion. That's
8 what we have here. We have an agency's opinion that under
9 some circumstances an established business relationship
10 may be deemed to be consent. That was the opinion they
11 stated in 1992, they restated it again in 1995, and that's
12 the premise for their defense. There's no final order to
13 challenge here. But, Your Honor, the TCPA couldn't be
14 more clear that private rights of action a person or
15 entity may if otherwise permitted by the laws or rules of
16 court of a state bring an appropriate court of that state
17 a private right of action for damages and that's exactly
18 what we have done.

19 It's illogical and it frankly just--it wouldn't make
20 any sense at all if we were allowed to follow our private
21 right of action under the TCPA but yet as Mr. Lefkow has
22 told the FCC be in violation of appellate rules of
23 procedure and FCC rules about how you go about challenging
24 an FCC opinion or an FCC order. We've done exactly what
25 Congress has allowed us to do. The cases that Mr. Lefkow

1 allowed to do and businesses can send faxes to their
2 existing customers. In 1995 they say: the Report and
3 Order makes clear that the existence of an established
4 business relationship establishes consent to receive
5 telephone facsimile advertisement transmissions. Again,
6 that is--they are right. It is a--actually what it's
7 called is Memorandum Opinion and Order. In 2003--let's
8 talk about what we're dealing with and, you know, I think
9 Your Honor will find we're talking about an elephant.
10 Okay. Regardless--I'm not trying to make it disappear.

11 THE COURT: Well, as they said they've since gone
12 back and said, wait a minute. We didn't know what we were
13 saying back then, didn't they?

14 MR. LEFKOW: They did not say we were wrong.

15 THE COURT: Well, that's--

16 MR. LEFKOW: --because--

17 THE COURT: Okay. Well, what did they say?

18 MR. LEFKOW: What they said was because people had
19 petitioned and indicated that--what the FCC does--one of
20 the things they do is they're a repository for petitions
21 and comments. And Your Honor can go to the FCC's website
22 and if somebody calls you and you don't like it you can
23 enter a little comment and that goes on their pending
24 proceeding. And that's exactly what--I mean we filed one
25 comment. We filed actually a notice of an ex-parte

1 proceeding because we talked to the FCC early on and they
2 could file comments, they could file petitions, but they
3 didn't do it. These proceedings were going on after they
4 filed this suit. They still didn't do anything about it
5 in the FCC, the place where they're supposed to go. The
6 second order that we're talking about--so we've got
7 actually two--there's a '92 Memorandum Opinion Order, but
8 this is the clearest one. Memorandum Opinion and Order.
9 This is order on reconsideration, 2003, where they
10 recognized, look, businesses need more time to deal with
11 this and to come into compliance with our new rule so what
12 we're going to do is we're going to extend it, we're going
13 to prospectively say the new rules is that you have to get
14 signed, written permission. They didn't say because we
15 are wrong. And if they can find someplace to show
16 you--they've got a big stack too--where they said, we were
17 wrong because they didn't say that. They absolutely did
18 not say that. What they said was, look, people have been
19 complaining so we're going to change it, and that's what
20 they do.

21 THE COURT: They say they didn't conflict with the
22 statute, don't they?

23 MR. LEFKOW: They did not--

24 THE COURT: They don't say that either?

25 MR. LEFKOW: --say it was in conflict with the

1 in the *City of Peoria*, Your Honor.

2 MR. REVELL: Here's the difference, Your Honor. I
3 believe, in all of those cases the party that was crossed
4 up with the FCC was a party either one, before the FCC or
5 bound by some pronouncement against them the--like a
6 tariff or whatever. We're not regulated by the FCC. Our
7 client is a certified public accountant. They're not--he
8 doesn't appear before the FCC or get filings before the
9 FCC or the FCC come down with a pronouncement that his
10 business is subject to it. And I think in all those cases
11 you had somebody challenging something the FCC was doing
12 to them personally by a regulation, by a pronouncement, by
13 assessment, or by an enforcement procedure and that's
14 where--and that's where we're not subject to or bound by
15 any FCC--we're not governed by the FCC. The fact that
16 they raise a defense that we say is a poor defense,
17 doesn't all of a sudden make us subject to and governed by
18 the FCC. And that's what your--you and the courts of
19 appeals are to decide the validity of that defense just
20 like the Texas Court of Appeals decided the validity of
21 that defense. The Georgia Court of Appeals has at least
22 looked at it and said if it is a defense it's common
23 to--and class certification is appropriate and failure to
24 certify a class was an abuse of discretion in the *Hammond*
25 case. And nobody--I've never heard of anybody--again, I

1 know personally of at least a hundred TCPA cases where
2 something the FCC has commented upon in the--over the
3 twelve years is in the opinions. Just like the *Hooters*
4 case, there are four or five different parts of that
5 opinion that the FCC spoke to a certain issue and the
6 plaintiffs one position about that FCC pronouncement, and
7 the defendant took a completely contrary position about
8 the validity and effect of that FCC pronouncement. Well,
9 not only did this Court nor the Georgia Court of Appeals,
10 nobody said well, now you got to stop and go up there and
11 let the FCC decide this and that's what they're--that's
12 just unprecedented.

13 Now, having said all that I want to make one comment
14 that the FCC did say in their--you asked counsel whether
15 they were wrong in their prior interpretation and he said
16 they didn't, but they did say, we now reverse our prior
17 conclusion. Now, that sort of sounds like we're wrong to
18 me. But if he's right, if counsel's right, and they filed
19 this petition on May the 3rd asking for, you know, stop
20 the wheels of justice while the FCC deals with this and
21 issue a cease and desist order against our client, if he's
22 right I guess they'll do it. But I don't think this Court
23 has to wait around to see when and if the FCC will address
24 this issue. And that's what we're opposed to, of sitting
25 on our hands and--because it's before the FCC. He put it

1 MR. REVELL: We just want to add one to the stack
2 which was the *Miller* case that Mr. Brownstein--

3 THE COURT: Okay. Is that the one from Texas?

4 MR. REVELL: Eleventh Circuit.

5 THE COURT: Is that the one--

6 MR. REVELL: That's the Eleventh Circuit case--

7 THE COURT: Oh, okay.

8 MR. REVELL: --about the FCC's authority.

9 MR. BROWNSTEIN: That's the only paper I'm going to
10 give you, Judge.

11 MR. LEFKOW: And remember the *Miller* case said, well,
12 this is not a case interpreting a statute, that kind of
13 thing, and this is. The FCC clearly was interpreting a
14 statute and you'll see it from the FCC orders, but the
15 supreme court rejected an argument like this, that Harry
16 made--Mr. Revell.

17 THE COURT: What authority does the FCC have to
18 interpret a statute that's plain on it's face?

19 MR. LEFKOW: That is a question of whether their
20 action was outside their authority, Your Honor. Even if
21 Your Honor doubts that they have that authority the
22 correct procedure is to dismiss or stay the case and let
23 them deal with it or--well--and they can be reversed. I
24 mean the court of appeals will reverse them if they're
25 wrong, and that's the proper procedure for it to go

1 and the Georgia books are full of opinions where an agency
2 opines about something. And as Mr. Brownstein cited the
3 supreme court case, and there are plenty of Georgia cases,
4 that if an administrative agency's interpretation is
5 contrary to the plain meaning of the statute, the Court is
6 to disregard it. The Court is to disregard it, not go
7 back to the agency and say, did you mean what you said, as
8 you say, or change your opinion or change your
9 interpretation. The Court decides whether the agency's
10 interpretation is valid and rational and reasonable and
11 contrary to the plain meaning of the statute. That's what
12 we've asked you to do. Here's the FCC's pronouncement and
13 interpretation. We think it conflicts with the TCPA.
14 We're asking the Court to ignore that interpretation and
15 the case books are full of instances where the Court does
16 that. The Court can abide by it. Can say, well, I defer
17 to that agency interpretation. They're doing it and they
18 make sense and I'll abide by that interpretation. It's
19 not contrary to the plain language of the statute. Or the
20 Court can say, the TCPA says this and the FCC says that
21 and it doesn't make any sense. And that's what we've
22 asked you to do. And we don't have to have the FCC to
23 say, change your mind or either did you mean what you
24 said, as you pointed out earlier. We don't have to stop
25 because it's the Court that decides whether that

1 interpretation makes sense or not, and the books are full
2 of opinions that say that. The Supreme Court *Chevron* case
3 being the--sort of the seminal case on that. But the
4 Georgia courts--again, I hate to keep coming back to the
5 *Hooters* case, but there the Georgia Court of Appeals said
6 the Public Service Commission has given an interpretation
7 about this private right of action. And we sort of--that
8 makes sense. We look at the TCPA, we look at the Public
9 Service Commission's interpretation, and we're going to
10 agree with the Public Service Commission and say there is
11 a private right of action under Georgia law. So that
12 happens in many, many cases and the litigants aren't
13 stopped and redirected to Washington or to Atlanta, as the
14 case may be, the Insurance Commissioner. We got another
15 case with you, the Insurance Commissioner's pronouncement.
16 Does that make sense and should--but it's the Court, Your
17 Honor, as the trial court that makes the determination
18 whether to embrace that interpretation or reject that
19 interpretation. That's all we've asked you to do. We
20 haven't asked you to order the FCC to quit saying it.
21 That's what he would contend. We're not asking you to
22 say, FCC, don't--don't say that anymore.

23 MR. LEFKOW: They're trying to enjoin action which is
24 the outcome of the agency order. That's *FCC v. ITT World*.
25 That's exactly what they're trying to do. It is a