

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	CG Docket No. 02-278
Petition for Waiver of)	
Kirby Lester, LLC)	CG Docket No. 05-338

**COMMENTS OF RHEA DRUGSTORE, INC.
ON PETITION FOR RETROACTIVE WAIVER**

On October 30, 2014, the Federal Communications Commission (the “Commission”) issued an order (the “Opt-Out Order”) reaffirming that 47 C.F.R. § 64.1200(a)(4)(iv) requires all fax advertisements—invited or not—to contain an adequate opt-out notice. Kirby Lester, LLC (“Kirby Lester”) did not adhere to the Order and continued to transmit fax advertisements without an opt-out notice. Now that Rhea Drugstore, Inc. (“Rhea Drug”) seeks to hold it accountable, Kirby Lester wants a retroactive waiver. This request is nothing more than an attempt to escape from liability in a private lawsuit. As the Opt-Out Order emphasizes, potential legal liability is not a valid ground for a waiver. Nothing in Kirby Lester’s petition indicates that it was actually confused about the Commission’s opt-out requirement or is, in fact, similarly situated to previous waiver recipients. To the contrary, it is unlike other recipients, as it violated not only the Commission’s regulations but also the Opt-Out Order itself. It is in the public interest to hold Kirby Lester accountable for these violations. Accordingly, Kirby Lester’s Petition for Retroactive Waiver should be denied.

BACKGROUND

On November 21, 2014, and again on December 17, 2014, Rhea Drug received a fax from Kirby Lester advertising the tax benefits of purchasing one of its pill-counting machines. Exact copies of the faxes Rhea Drug received are attached to these comments as Exhibit A. The faxes contain no opt-out language.

On January 23, 2015, Rhea Drug filed a class-action lawsuit in the Northern District of Illinois alleging that Kirby Lester violated the Telephone Consumer Protection Act (“TCPA”) and the Commission’s regulations. *See Rhea Drugstore, Inc. v. Kirby Lester, LLC*, No. 15-710 (N.D. Ill.). The complaint alleges that Kirby Lester sent Rhea Drug two unsolicited fax advertisements without an adequate opt-out notice. Because 47 C.F.R. § 64.1200(a)(4)(iv) requires an opt-out notice on all faxes, Rhea Drug also seeks to represent a class of persons to whom Kirby Lester sent noncompliant fax advertisements, regardless of whether the faxes were invited.

As of this writing, Kirby Lester has answered the complaint and has moved to stay the action until the Commission rules on its petition. The court’s ruling on the motion to stay is expected by May 19, 2015. In its petition, Kirby Lester protests that it only sends faxes to “customers who have *consented* to receive such communications.” Pet. at 2. However, that statement has yet to be tested in the litigation. As to Rhea Drug, at least, the statement is untrue, because Rhea Drug never asked to receive Kirby Lester’s faxes.

Shortly after Rhea Drug filed its complaint, Kirby Lester alerted Rhea Drug that the faxes it received did not accurately reflect the faxes Kirby Lester sent. The

following statement had been cut off: “To opt out from future faxing, call 877.547.2775 or fax to 847.984.3366.” The complete faxes, as Kirby Lester claims they were sent, are attached as Exhibit B. Kirby Lester takes the position “that the faxes at issue did, in fact, include opt out notices” and states that its only failure was to track verbatim the opt-out language provided in 47 C.F.R. § 64.1200(a)(4)(iii). Pet. at 3. However, even if Rhea Drug had received the complete faxes, the opt-out language would have fallen significantly short of the Commission’s requirements. Most noticeably, the faxes in no way inform the recipient that it is unlawful for Kirby Lester to refuse to timely comply with an opt-out request. *See* 47 U.S.C. §§ 227(b)(1)(C)(iii) & (b)(2)(D)(ii); 47 C.F.R. § 64.1200(a)(4)(iii)(B).

In its Opt-Out Order, the Commission granted specific petitioners retroactive waivers from the requirements of 47 C.F.R. § 64.1200(a)(4)(iv) and invited “similarly situated parties” to also seek waivers. *See* Opt-Out Order ¶30. On March 16, 2015, Kirby Lester filed a petition claiming it is a “similarly situated party” and requesting retroactive relief from its obligation to provide opt-out notices on invited faxes. On March 27, 2015, the Commission requested comments on Kirby Lester’s petition by April 10, 2015, which Rhea Drug now provides.

ARGUMENT

A. Kirby Lester is not similarly situated to previous waiver recipients.

In the Opt-Out Order, the Commission invited “similarly situated parties” to seek individual waivers such as those granted in the Order. At the same time, the

Commission emphasized the obligation of all senders to include adequate opt-out notices on invited faxes: “Having confirmed the Commission’s requirement to provide opt-out notices on fax ads sent with the recipient’s prior express permission, however, we expect all fax senders to be aware of and in compliance with this requirement.” Opt-Out Order ¶30. Kirby Lester’s transmission of noncompliant faxes *after* the Opt-Out Order undermines its claim to be similarly situated to previous waiver recipients. Kirby Lester should not be rewarded with a waiver for violating a clear Commission mandate.

Kirby Lester in no way explains how it is, in fact, similarly situated to companies that received a waiver in the Opt-Out Order. In the Order, the Commission found “two grounds that . . . led to confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient).” *Id.* ¶24. One was a contradictory footnote in the original order adopting 47 C.F.R. § 64.1200(a)(4)(iv). *See id.* The other was potentially deficient notice of the Commission’s intent to adopt 47 C.F.R. § 64.1200(a)(4)(iv). *See id.* ¶25. At no point in its petition does Kirby Lester claim the footnote actually caused it to become confused. Instead, it offers a perfunctory reference to the footnote. Pet. at 4. Moreover, Kirby Lester cannot possibly have been prejudiced by deficient notice of a rulemaking when the resulting rule had been on the books for more than eight years prior to its transmission of noncompliant faxes. Kirby Lester’s easy invocation of the rationales in the Opt-Out Order does not make it similarly situated to other waiver recipients.

Only once in its petition does Kirby Lester provide the *real* reason it failed to include an adequate opt-out notice on (what it claims to be) invited faxes: “Because Section 227(b) expressly applies to ‘unsolicited’ fax advertisements, Kirby Lester did not believe that any of its solicited facsimiles required opt-out notices.” Pet. at 3. In other words, Kirby Lester did not read beyond the TCPA itself—even though the TCPA permits private actions “based on a violation of this subsection *or the regulations prescribed under this subsection.*” 47 U.S.C. § 227(b)(3)(A) (emphasis supplied). One such regulation is 47 C.F.R. § 64.1200(a)(4)(iv): “A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.” That regulation could hardly be clearer about Kirby Lester’s obligations. Kirby Lester’s ignorance of the regulation does not entitle it to a waiver. As the Commission explained in the Opt-Out Order, “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.” Opt-Out Order ¶26.¹

Though its claim to be “similarly situated” is largely conclusory, Kirby Lester does invoke one (and only one) concrete ground for finding it is like other waiver recipients: it is a defendant in a class-action lawsuit. However, that ground cannot support a waiver. As the Opt-Out Order emphasized, “the risk of substantial liability in private rights of action” is not, by itself, “an inherently adequate ground for waiver.” *Id.* ¶28.

¹ It is possible that Kirby Lester consciously disregarded the Commission’s regulation because it thought it profitable to exclude opt-out notices from its faxes. That issue will be tested in the litigation. However, even the best-case scenario—ignorance of the law—does not justify a waiver.

B. There is no good cause for a waiver.

Regardless of whether Kirby Lester is similarly situated to other waiver recipients, its case for a waiver must be judged on an individual basis. *See id.* ¶30 n.102. The relevant inquiry is whether there is good cause for a waiver, which requires (1) that there be special circumstances warranting deviation from the rule and (2) that waiver would better serve the public interest than adherence to the rule. *See id.* ¶23.

Neither criterion is present here. As explained above, Kirby Lester was in no way confused about its obligations but, at best, simply failed to read the Commission's regulations. That is hardly a special circumstance warranting deviation from the rule. Furthermore, Kirby Lester's continued violations of the opt-out rule undermine any claim that a waiver is in the public interest. Kirby Lester should have known that *all* fax advertisements require opt-out language. The wording of 47 C.F.R. § 64.1200(a)(4)(iv) is perfectly clear, so it should have known this all along, to say nothing of what it should have known after October 30, 2014. Yet even after the Opt-Out Order left no question about the Commission's opt-out requirements, Kirby Lester continued to send noncompliant faxes. The public interest is better served by holding it accountable than by forgiving its violations.

CONCLUSION

All told, Kirby Lester's petition comes down to the assertion that it is entitled to a waiver because other parties got one. However, Kirby Lester is similarly situated to past waiver recipients in one respect only: it is a defendant in a lawsuit

for sending fax advertisements without opt-out notices. That is not the sort of similarity the Commission had in mind when it invited other fax senders to apply for waivers. Kirby Lester appears to have been in no way confused about its obligation to include opt-out notices on its faxes. At best, it was ignorant of the law, which is an insufficient ground for a waiver. Because Kirby Lester continued to send noncompliant faxes after the Opt-Out Order, the public interest favors accountability. There is no good cause for an individual waiver here. Accordingly, Rhea Drug respectfully requests that the Commission deny Kirby Lester's Petition for Retroactive Waiver.

Dated: April 9, 2015

RHEA DRUGSTORE, INC.

By: /s/ John C. Williams

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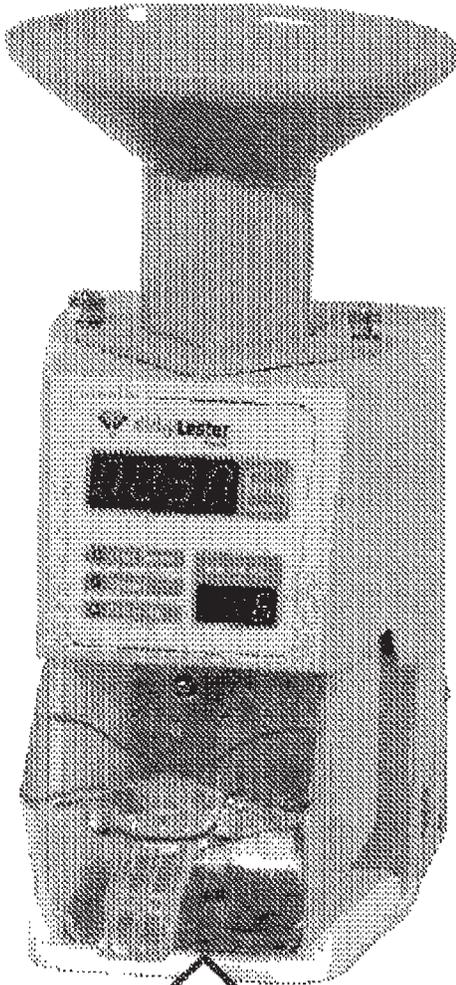
Its Attorneys

EXHIBIT A

Show this to your accountant

Your Last Chance for significant tax savings

Get a full 2014 tax break now before Sec. 179 expires



Tax break up to \$2,200 on the best-selling KL1 tablet counter

Has your accountant mentioned you could use a tax shelter? Don't miss this opportunity to save a substantial amount of money this year, not to mention improve your pharmacy's dispensing efficiency.

If you lease or purchase any Kirby Lester system by Dec. 31 and take advantage of the Section 179 deduction, your total savings can be significant. Not sure? Just ask your tax advisor or accountant.



You need to hurry! On Dec. 31, your full Section 179 tax incentive expires

Contact Kirby Lester at sales@kirbylester.com or 800.641.3961



KirbyLester
exactly.

Yes! Contact me about tax savings with Kirby Lester dispensing technology

Pharmacy _____

Your Name _____

Phone _____

E-Mail _____

Fax back to 847.984.3366

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Tax Benefits
In 2014

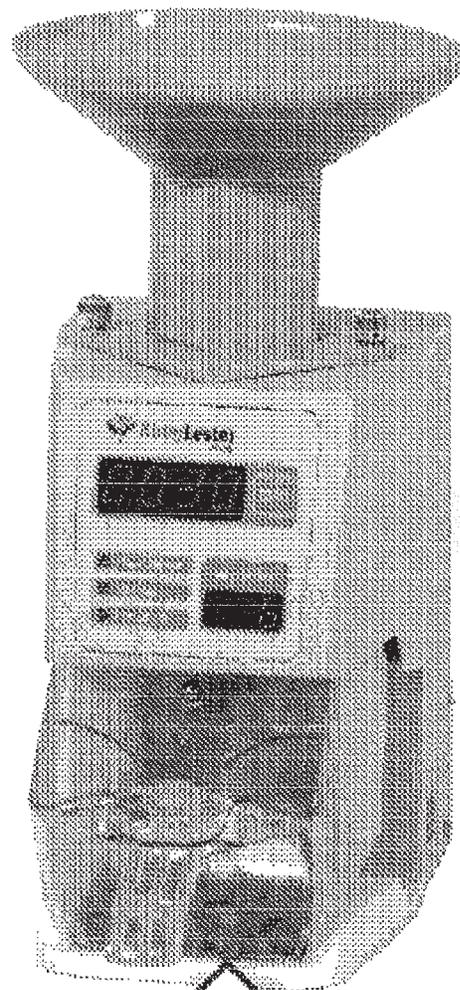
Attention: Pharmacy Owner and Accountant

You still have time for a 2014 tax deduction

Ask your accountant one question: "Would a deduction this year help my 2014 taxes?"

A Kirby Lester device makes the perfect tax write-off. Not very expensive. Installable this year. Significant tax advantages (a minimum of \$2,200). And immediately improve your workflow with dispensing.

The federal tax program is called Section 179. It's real tax relief, and Kirby Lester devices are fully qualified. Ask your accountant for more details.



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