Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	CG Docket No. 02-278
Petition of Smith & Nephew, Inc.	)	
for Retroactive Waiver of	)	CG Docket No. 05-338
47 C.F.R. § 64.1200(a)(4)(iv)	)	

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. Smith & Nephew, Inc. ("S&N") 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, S&N wants a retroactive waiver. S&N's pro forma petition merely parrots the rationales for waiver articulated in the Opt-Out Order. In no way does it show that S&N is entitled to a waiver as a similarly situated party. S&N is similarly situated to previous waiver recipients in two respects only: it sent faxes without legally required opt-out language, and it is now a defendant in a class-action lawsuit for doing so. As the Opt-Out Order emphasizes, potential legal liability is not a valid ground for a waiver. Moreover, unlike other waiver recipients, S&N continued to send noncompliant faxes even *after* the Commission emphasized that all faxes must contain adequate opt-out language. It is in the public interest to hold S&N

accountable for these violations. Accordingly, S&N's Petition for Retroactive Waiver should be denied.

BACKGROUND

On November 27, 2014, Rhea Drug received a fax from S&N advertising a product called "Acticoat Dressings." On December 3, 2014, Rhea Drug received a second fax from S&N advertising products called "Iodosorb" and "Iodoflex." Exact copies of the faxes Rhea Drug received are attached to these comments as Exhibit A. The faxes do not contain the opt-out language required by 47 U.S.C. § 227(b)(2)(D) and 47 C.F.R. § 64.1200(a)(4)(iii). Instead, the bottom of the faxes merely say, "Call 1-800-761-8493 to opt out of future communications."

On January 23, 2015, Rhea Drug filed a class-action lawsuit in the Western District of Tennessee alleging that S&N violated the TCPA and the Commission's regulations. *See Rhea Drugstore, Inc. v. Smith & Nephew, Inc.*, No. 15-2060 (W.D. Tenn.). The complaint alleges that S&N sent Rhea Drug 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 S&N sent noncompliant fax advertisements, regardless of whether the faxes were invited. As of this writing, S&N has moved to dismiss the complaint on a procedural ground, and the motion is pending.[1]

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

[1] S&N states in its petition that it "sometimes provides important information about its products via facsimile to customers who have requested or consented to receipt of such communication." Pet. at 2. However, it bears emphasizing that S&N sent Rhea Drug *unsolicited* faxes.

"similarly situated parties" to also seek waivers. *See* Opt-Out Order ¶30. On April 29, 2015, S&N 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 May 8, 2015, the Commission requested comments on S&N's petition by May 22, 2015, which Rhea Drug now provides.

ARGUMENT

A. S&N 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. S&N's transmission of noncompliant faxes *after* the Opt-Out Order undermines its claim to be similarly situated to previous waiver recipients.

S&N 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 S&N claim the footnote actually caused it to become confused. Instead, it offers a perfunctory reference to the footnote. Pet. at 4. Moreover, S&N 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. S&N's easy invocation of the rationales in the Opt-Out Order does not make it similarly situated to other waiver recipients.

Though its claim to be "similarly situated" is largely conclusory, S&N 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." Opt-Out Order ¶28.

B. There is no good cause for a waiver.

Regardless of whether S&N 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. S&N simply expects to get a waiver because other senders got one in the Opt-Out Order. Indeed, S&N does not even attempt to explain why special circumstances permit it to receive a waiver after sending faxes that violate the clear terms of the Opt-Out Order. At best, S&N was ignorant of its obligations (though even that point is at issue). However, ignorance is not a special circumstance that justifies 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. That rule is sound. Lawyers, doctors, and many other professions are expected to be aware of and adhere to regulations that govern their conduct. They don't get to claim ignorance when they violate those regulations. Senders of fax advertisements should be treated no differently.

Moreover, S&N provides no reason to believe that a waiver is in the public interest. Indeed, it is not. S&N 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, S&N continued to send noncompliant faxes. The public interest is better served by holding it accountable than by absolving it of responsibility.

CONCLUSION

All told, S&N's petition comes down to the assertion that it is entitled to a waiver because other parties got one. However, S&N is similarly situated to past

waiver recipients in two respects only: it sent faxes that violated the Commission's regulations, and it is a defendant in a lawsuit for sending those faxes. That is not the sort of similarity the Commission had in mind when it invited other fax senders to apply for waivers. S&N 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 S&N 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 S&N's Petition for Retroactive Waiver.

Dated: May 22, 2015

RHEA DRUGSTORE, INC.

By: /s/ John C. Williams

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EXHIBIT A

Demand more from your silver dressings

smith&nephew
ACTICOAT°
Silver-Coated
Antimicrobial Barrier

Bactericidal activity: Only ACTICOAT Dressings are proven bactericidal against 360+ pathogens, including 188 strains of MRSA (*in vitro*).[1-4]

Efficacy: In a comparative study, ACTICOAT Dressings showed a 60% resolution of the clinical signs of infection in 2 weeks.[5*]

Cost savings: ACTICOAT Dressings have been shown to require 33% fewer dressing changes compared with other brands.[6**]

Wound healing: ACTICOAT Dressings have been shown in a comparative cohort study with Biatain™ Ag, Comfeel™ Ag and Aquacel™ Ag to reduce wound healing time, healing 2X more wounds in 8 weeks.[6**]

For more information or to request a free sample† of ACTICOAT Dressings, call 1-800-761-8493 or email megan.cramer@smith-nephew.com.
Mention code: ACTICOAT-0614-F

Or fill out the form below and fax it to 1-800-761-8494.

Name: _____

Title: _____

Company: _____

Phone: _____

Email: _____

When is the best time to reach you? _____

References
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†Offer available only to participants who are not current purchasers of ACTICOAT. Qualified participants must not resell or otherwise seek reimbursement for their use of free samples. Free samples are limited to the first 100 qualified respondents.

*The International Consensus Panel determined a two week period can be used to assess the efficacy of silver dressings, as measured by wound improvement. **Comparative cohort study (n=75) in mixed chronic wounds.

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smith&nephew
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0.9% Cadexomer Iodine Gel
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Only IODOSORB and IODOFLEX prevent and disrupt mature biofilms *(in vitro)*.[1]

Bactericidal

Kills 103 isolates of MRSA and 101 strains of *P. aeruginosa (in vitro)*, with broad spectrum antimicrobial activity up to 72 hours *(in vitro)*.[4,3,7]

Rapid and effective deslougher

Cleanses wound bed to prepare for effective healing. Aids in autolytic debridement by absorbing excess slough and debris.[4,5,7]

Highly absorbent

Absorbs up to 6 times its own weight in wound exudate.[4,6,9]

For more information or to request a free sample† of IODOSORB or IODOFLEX, call 800-761-8493, ext. 3483 or email scott.siskin@smith-nephew.com.

Mention offer code: IODOSORB FAX 5-14

Or fill out the form below and fax it to 1-800-761-8494.

Name: _____

Title: _____

Company: _____

Phone: _____

Email: _____

When is the best time to reach you? _____

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†Offer available only to participants who are not current purchasers of IODOSORB or IODOFLEX. Qualified participants must not resell or otherwise seek reimbursement for their use of free samples. Free samples are limited to the first 100 qualified respondents.

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Call 1-800-761-8493 to opt out of future communications.