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

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| In the Matter of | ) | |
| | ) | |
| Junk Fax Prevention Act of 2005 | ) | CG Docket No. 05-338 |
| | ) | |
| Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 | ) | CG Docket No. 02-278 |
| | ) | |

**TCPA Plaintiffs' Comments on Petition for Retroactive Waiver filed by Endo Pharmaceuticals Inc.**

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## Executive Summary

The Commission's October 30, 2014 Order stated all future requests for "retroactive waivers" of 47 C.F.R. § 64.1200(a)(4)(iv) would be "adjudicated on a case-by-case basis" and the Commission did not "prejudge the outcome of future waiver requests in the order." The Commission should deny the Endo Pharmaceuticals petition for two reasons.

First, the Commission has no authority to "waive" violations of the regulations "prescribed under" the TCPA in a private right of action. Doing so would violate both the terms of the statute and the separation of powers because the courts have exclusive authority to determine whether "a violation" of the regulations has taken place, and Congress has determined that "each such violation" gives rise to $500 in statutory damages. The requested waiver would not merely affect a Commission rule divorced from the statute; a violation of the rule *is* a violation of the statute where a private right of action is concerned. The TCPA also does not expressly authorize the Commission to issue retroactive rules.

Second, Endo is not "similarly situated" to the petitioners covered by the Opt-Out Order. Endo claims it "did not understand" that opt-out notice was required on faxes sent with prior express invitation or permission, but it does not explain why it was uncertain or claim it was "confused" by footnote 154 in the Junk Fax Order or the 2005 public notice. Endo does not claim it was "confused" or even "uncertain," essentially admitting that it was simply ignorant of the law, which the Commission ruled is insufficient grounds for a waiver. Moreover, Endo has made no effort to show it faces "significant" potential liability in the underlying private TCPA litigation.

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Commenter Physicians Healthsource, Inc. is the plaintiff in private TCPA litigation against Petitioners Endo Pharmaceuticals Inc., Endo Pharmaceuticals Solutions Inc., Endo Pharmaceuticals Valera Inc., Endo Health Solutions Inc., Endo Pharma LLC and Endo Pharma Delaware Inc., and their similarly situated parent companies and subsidiaries (together "Endo").[1] Endo has filed a petition seeking a "retroactive waiver" of 47 C.F.R. § 64.1200(a)(4)(iv), the regulation requiring opt-out notice on fax advertisements sent with "prior express invitation or permission."[2]

The Commission issued an order on 24 similar petitions on October 30, 2014 ("Opt-Out Order").[3] That order rejected several challenges to the validity of the opt-out

[1] *Physicians Healthsource, Inc. v. Endo Pharmaceuticals Inc., et al.*, No. 14-cv-02289 (E.D. Pa.).

[2] *Petition of Boehringer Ingelheim Pharmaceuticals, Inc. and Boehringer Ingelheim Corporation for Waiver*, CG Docket Nos. 02-278, 05-338 (filed Feb. 25, 2015) (Boehringer Petition); *Petition of Esaote North America, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (filed Mar. 12, 2015) (Esaote Petition).

[3] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014).

regulation,[4] but granted retroactive "waivers" purporting to relieve the covered petitioners of liability from both Commission forfeiture actions and the private right of action in 47 U.S.C. § 227(b)(3).[5] The Consumer and Governmental Affairs Bureau sought comments on the Endo petition on May 29, 2015.[6]

**Procedural History**

On October 30, 2014, the Commission issued the Opt-Out Order, granting "retroactive waivers" intended to relieve the covered TCPA defendants of liability in private TCPA actions for violations of § 64.1200(a)(4)(iv) from its effective date, August 1, 2006, to October 30, 2014, as well as prospective waivers for any future violations through April 30, 2015.[7] The Commission invited "similarly situated" parties to petition for similar waivers by April 30, 2015, stating all future petitions would be "adjudicated on a case-by-case basis" and that the Commission did not "prejudge the outcome of future waiver requests in the order."[8]

Plaintiff's counsel filed comments on two post-order waiver petitions November 18, 2014,[9] five petitions December 12, 2104,[10] six petitions January 13, 2015,[11] one petition

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[4] *Id.* ¶¶ 19–20, 32 & n.70 (ruling that Commission issued regulation under its statutory authority to "implement" the TCPA by empowering consumers to "halt unwanted faxes" and regulation is enforceable through the TCPA's private right of action).

[5] *Id.* ¶¶ 22–31.

[6] *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning Commission's Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Mar. 27, 2015).

[7] Opt-Out Order ¶ 29.

[8] Opt-Out Order ¶ 30 & n.102.

[9] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Beck Simmons LLC's Comments on Francotyp-Postalia Petition (Nov. 18, 2014); *id.*, Physicians Healthsource, Inc.'s Comments on Allscripts Petition (Nov. 18, 2014).

February 13, 2015,[12] one petition March 13, 2015,[13] two petitions April 10, 2015,[14] and 31 petitions on May 22, 2015.[15] In each set of comments, Plaintiffs asked the Commission to clarify whether the standard for a waiver is that the petitioner was *actually* confused about whether opt-out notice was required when it sent its faxes[16] or whether the Commission created a *presumption* that petitioners are confused in the absence of evidence they were "simpl[y] ignorant" or knowingly violated the law.[17]

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[10] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, TCPA Plaintiffs' Comments on Petitions for Waiver of the Commission's Rule on Opt-Out Notices on Fax Advertisements Filed by Alma Lasers, ASD Specialty Healthcare, Den-Mat Holdings, and Stryker Corp. (Dec. 12, 2014).

[11] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, TCPA Plaintiffs' Comments on Petitions for Waiver of the Commission's Rule on Opt-Out Notices on Fax Advertisements Filed by EatStreet Inc., McKesson Corp., Philadelphia Consolidated Holding Corp., St. Luke's Center for Diagnostic Imaging, LLC, Sunwing Vacations, Inc., and ZocDoc, Inc. (Jan. 13, 2015).

[12] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Physicians Healthsource, Inc.'s Comments on A-S Medication Solutions LLC's Petition for Wavier of Section 64.1200(a)(4)(iv) of the Commission's Rules and/or Declaratory Relief (Feb. 13, 2015).

[13] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Christopher Lowe Hicklin, DC, PLC's Comments on National Pen's Petition for Retroactive Waiver (Mar. 13, 2015).

[14] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, TCPA Plaintiffs' Comments on Petitions for Retroactive Waivers filed by Boehringer Pharmaceuticals and Esaote North America (Apr. 10, 2015).

[15] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, TCPA Plaintiffs' Comments on Thirty-One Petitions for Retroactive Waiver Filed on or Before April 30, 2015 (May 22, 2015).

[16] Opt-Out Order ¶ 26 (stating waiver was justified because footnote 154 of the 2006 Junk Fax Order "led to confusion or misplaced confidence on the part of petitioners"); *id.* ¶ 32 (stating Commission granted waivers "to parties that have been confused by the footnote").

[17] *Id.* (stating combination of footnote 154 and lack of notice "presumptively establishes good cause for retroactive waiver," finding no evidence "that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement," and "emphasiz[ing]" that "simple ignorance" of the law "is not grounds for a waiver").

Plaintiffs' counsel noted they expected dozens of TCPA fax defendants to petition for waivers before April 30, 2015, and argued the Commission should expect waiver requests from defendants in non-fax TCPA litigation, as well. For example, on December 5, 2014, Wells Fargo cited the Opt-Out Order as authority for a retroactive waiver absolving TCPA defendants of liability for cellular-phone calls where the "called party" is not the "intended recipient."[18] Plaintiffs reiterate their request that the Commission clarify the standards it applied in the Opt-Out Order.

## Factual Background

On April 21, 2014, Plaintiff, a chiropractic practice in Cincinnati, Ohio, filed a TCPA action in the Eastern District of Pennsylvania alleging Endo sent it unsolicited fax advertisements on April 20, 2012, and October 5, 2012.[19] The first fax is a four-page advertisement for the "Lidoderm lidocaine patch," touting the product's "demonstrated effectiveness" for pain relief.[20] Fine print at the bottom of the fax states, "[i]f you have received this fax transmission in error or wish to be removed from our list, please call 1-888-681-5252, enter document number 700264 and follow the prompts."[21] The opt-out notice does not (1) state the consumer has a right to opt out, (2) state a sender's failure to comply within 30 days is unlawful, (3) state the consumer must follow the instructions on the fax to make an enforceable request, (4) state the consumer must identify the fax number to which

[18] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Expedited Declaratory Ruling of the Consumer Bankers Assoc.*, CG Docket No. 02-278, Reply Comments of Wells Fargo (Dec. 5, 2014) at 9 & n.35 (citing Opt-Out Order ¶ 26).

[19] *Physicians Healthsource, Inc. v. Endo Pharms. Inc.*, No. 14-cv-02289 (E.D. Pa.), Pl.'s Class Action Complaint (Doc. 1) ¶ 14.

[20] *Id.*, Ex. A.

[21] *Id.*

the request relates to make an enforceable request, or (5) state the consumer must not subsequently give the sender permission to send fax advertisements.

The second fax promotes an "educational program" regarding a medication called "Opana ER," a pain reliever.[22] The program was to be held at an upscale Cincinnati steakhouse on October 10, 2012, from 6:30 p.m. to 9:30 p.m.[23] The program aimed to teach participants to "[d]escribe the benefits and limitations of Opana ER to treat appropriate patients with moderate to severe chronic pain" and to "[r]eview the dosing flexibility of Opana ER when tailoring treatment for opioid-naïve and opioid-experienced patients."[24] The second fax contained no opt-out notice of any kind.[25]

The Complaint alleged Endo sent the same and similar fax advertisements to Plaintiff and "over forty" other persons and that class certification was appropriate.[26] The Complaint alleged the faxes were "unsolicited advertisements," giving rise to the minimum $500 in statutory damages per violation.[27] Further, the Complaint alleged that Endo is precluded from raising an affirmative defense based on a claim of established business relationship ("EBR") or "prior express invitation or permission" because the faxes do not contain the opt-out-notice required to maintain either defense.[28]

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* ¶ 22.

[27] *Id.*

[28] *Id.* ¶ 34.

On June 20, 2014, Endo moved the district court to stay the case pending the Commission's decision on three issues: "1. Whether 47 C.F.R. § 64.1200(a)(4)(iv) applies to solicited faxes; 2. Whether 47 C.F.R. § 64.1200(a)(4)(iv) was promulgated under 47 U.S.C § 227(b); and 3. Whether 47 C.F.R. § 64.1200(a)(4)(iii) is satisfied by substantial compliance.[29] The district court granted the stay on January 5, 2015.[30] When Plaintiff pointed out that the Commission decided the three issues identified by Endo in the October 30, 2014 Opt-Out Order, the district court ruled the stay would remain in place "for a limited period of time" until April 30, 2015, to allow Endo to file a petition, at which time the parties were to provide the court with a joint status report.[31]

On April 27, 2015, Endo filed its petition for retroactive waiver, asserting that "[a]lthough the faxes at issue in this case were solicited, plaintiff alleges Endo failed to provide adequate opt-out notices."[32] Endo does not explain how it supposedly obtained prior express invitation or permission from Plaintiff or the other class members.[33] Endo claims it "did not understand the opt-out requirement to apply to solicited faxes."[34] Endo does not explain why it "did not understand" the law.[35]

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[29] *Id.*, Def.'s Mot. Stay (Doc. 19) at 2.

[30] *Id.*, Order (Doc. 27).

[31] *Id.* (Doc. 30).

[32] Endo Pet. at 4.

[33] *Id.* at 1–8.

[34] *Id.* at 5.

[35] *Id.* at 1–8.

Endo does not claim it was "confused" about the opt-out notice requirements.[36] Endo does not claim it was aware of the existence of § 64.1200(a)(4)(iv) when it sent the faxes.[37] Endo does not claim it read footnote 154 of the 2006 Junk Fax Order or the 2005 public notice prior to sending the faxes.[38]

Endo argues it is "potentially subject to massive liability" in the underlying class action, but it does not state how many faxes it sent or attempt to estimate its potential liability.[39] Endo gives no indication of its financial resources or explain what a "massive" liability would be in comparison.[40] Endo states it "understand[s] the importance of compliance with the Commission's rules, including the Junk Fax Order as clarified by the Order, and will continue to implement procedures to ensure compliance."[41] Endo does not explain what procedures it has implemented to ensure compliance or what procedures it intends to implement in the future.[42]

On April 30, 2015, the parties filed their joint status report with the district court, with Endo arguing the court should continue the stay.[43] Plaintiff opposed any continued stay, arguing Endo has not provided any evidence of "prior express invitation or permission" or even explained how it claims to have obtained such permission.[44] Plaintiff

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 6.

[40] *Id.*

[41] *Id.* at 7–8.

[42] *Id.*

[43] *Physicians Healthsource v. Endo Pharms.*, Joint Status Report (Doc. 31) at 1–4.

[44] *Id.* at 5.

argued Endo "most likely purchased a list of fax numbers from a third party for marketing purposes, as in the vast majority of TCPA fax cases" and so § 64.1200(a)(4)(iv) will not even be at issue.[45] Plaintiff argued a stay would also be futile because, *even if* Endo carries its burden of proving express permission, and *even if* it obtains a "retroactive waiver" from the Commission, the waiver will have no effect in a private right of action under the TCPA, citing *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, --- F. Supp. 3d ---, 2014 WL 7109630, at *14 (W.D. Mich. Dec. 12, 2014) ("It would be a fundamental violation of the separation of powers for the administrative agency to 'waive' retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court."), and *Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC*, 2014 WL 7366255, at *5 (S.D. Fla. Dec. 24, 2014) (holding defendant's pending FCC waiver petition did not preclude class certification because "even if [defendant] could obtain a waiver and prove consent, that would still create another class-wide question: whether the FCC can grant a retroactive waiver that would apply in civil litigation between private parties").

The district court has not issued any rulings since the April 30, 2015 joint status report. No discovery has been conducted. Endo has never explained how it claims it obtained prior express invitation or permission from Plaintiff or the other class members.

[45] *Id.* at 5–6.

## Argument

### I. The Commission has no authority to "waive" violations of the regulations prescribed under the TCPA in a private right of action, and doing so would violate the separation of powers.

The TCPA creates a private right of action for any person to sue "in an appropriate court" for "a violation of this subsection or the regulations prescribed under this subsection,"[46] and directs the Commission to "prescribe regulations" to be enforced in those lawsuits.[47] The Commission reaffirmed in the Opt-Out Order that § 64.1200(a)(4)(iv) is one of the "regulations prescribed under" 47 U.S.C. § 227(b)(2).[48]

The "appropriate court" determines whether "a violation" of the statute or the regulations has taken place.[49] If the court finds a violation, the TCPA automatically awards a minimum $500 in damages for "each such violation" and allows the court "in its discretion" to increase the damages up to $1,500 per violation if it finds they were "willful[] or knowing[]."[50]

The TCPA does not authorize the Commission to "waive" its regulations in a private right of action.[51] It does not authorize the Commission to intervene in a private right of action.[52] It does not require a private plaintiff to notify the Commission it has filed a private

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[46] 47 U.S.C. § 227(b)(3).

[47] *Id.* § 227(b)(2).

[48] Opt-Out Order ¶¶ 19–20.

[49] *Id.* § 227(b)(3)(A)–(B).

[50] *Id.* § 227(b)(3).

[51] *Id.*

[52] *Id.*

lawsuit.[53] Nor does it limit a private plaintiff's right to sue to cases where the Commission declines to prosecute.[54] The Commission plays no role in determining whether "a violation" has taken place, whether a violation was "willful or knowing," whether statutory damages should be increased, or how much the damages should be increased. These duties belong to the "appropriate court" presiding over the lawsuit.[55]

The Communications Act does, however, grant the Commission authority to enforce the TCPA through administrative forfeiture actions.[56] Private citizens have no role in that process, such as determining whether a violator acted "willfully or repeatedly."[57] Thus, the TCPA and the Communications Act create a dual-enforcement scheme in which the Commission promulgates regulations that both the Commission and private litigants may enforce but where the Commission plays no role in the private litigation and private citizens play no role in agency enforcement.[58] This scheme is similar to several other statutes, including the Clean Air Act, which empowers the EPA to issue regulations imposing

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[53] *Id.*; *C.f.*, Clean Air Act, 42 U.S.C. § 7604(b) (requiring 60 days prior notice to the EPA to maintain a citizen suit).

[54] *C.f., e.g.*, 42 U.S.C.A. § 2000e-5(f)(1) (requiring employment-discrimination plaintiffs to obtain "right-to-sue" letter from Equal Employment Opportunity Commission).

[55] 47 U.S.C. § 227(b)(3).

[56] *Id.* § 503(b).

[57] *Id.*

[58] *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 688 (7th Cir. 2013) (holding TCPA "authorizes private litigation" and agency enforcement, so consumers "need not depend on the FCC").

emissions standards[59] that are enforceable both in private "citizen suits"[60] and in administrative actions.[61]

The D.C. Circuit Court of Appeals recently held the EPA could not issue a regulation creating an affirmative defense for "unavoidable" violations in private litigation under the Clean Air Act in *Nat. Res. Def. Council v. EPA*,[62] holding it is "the Judiciary" that "determines 'the scope'—*including the available remedies*" of "statutes establishing private rights of action"[63] and that, consistent with that principle, the Clean Air Act "vests authority over private suits in the *courts*, not EPA."[64] TCPA Plaintiffs discussed *NRDC* extensively in a letter to the Commission after it was issued April 18, 2014,[65] and in subsequent comments on waiver petitions.[66] The Opt-Out Order does not cite *NRDC*.

On December 12, 2014, the United States District Court for the Western District of Michigan became the first court in the country to rule on whether a Commission "waiver" from § 64.1200(a)(4)(iv) is enforceable in private TCPA litigation.[67] The district court held "[i]t would be a fundamental violation of the separation of powers for the administrative

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[59] 42 U.S.C. § 7412(d).

[60] 42 U.S.C. § 7604(a).

[61] 42 U.S.C. § 7413(d).

[62] 749 F.3d 1055, 1062 (D.C. Cir. 2014).

[63] *Id.* (quoting *City of Arlington v. FCC*, --- U.S. ---, 133 S. Ct. 1863, 1871 n.3 (2013); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)).

[64] *Id.*

[65] Letter of Brian J. Wanca, CG Docket No. 05-338 (May 19, 2014).

[66] *See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Nos. 02-278, 05-338, TCPA Pls.' Comments on Stericycle Pet. at 7 (July 11, 2014); *id.*, TCPA Pls.' Comments on Unique Vacations, Inc. Pet. at 6–8 (Sept. 12, 2014).

[67] *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, --- F. Supp. 3d ---, 2014 WL 7109630 (W.D. Mich. Dec. 12, 2014).

agency to 'waive' retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court."[68] The district court held that "nothing in the waiver—even assuming the FCC ultimately grants it—invalidates the regulation itself" and that "[t]he regulation remains in effect just as it was originally promulgated" for purposes of determining whether a defendant violated the "regulations prescribed under" the TCPA, as directed by § 227(b)(3).[69] The district court concluded, "the FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action; at most, the FCC can choose not to exercise its own enforcement power."[70]

The argument that the Commission is merely waiving "its own rules," rather than the statutory private right of action fails because "[i]nsofar as the statute's language is concerned, to violate a regulation that lawfully implements [the statute's] requirements *is* to violate the statute."[71] The Commission already ruled in the Opt-Out Order that the regulation lawfully implements the TCPA,[72] so a violation of the regulation *is* a violation of the statute.

The argument that a waiver of the opt-out regulation in a private right of action is permissible because "regulations can be applied retroactively" fails because "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in

[68] *Id.*, at *14.

[69] *Id.*

[70] *Id.*

[71] *Global Crossing Telecommc'ns, Inc. v. Metrophones Telecommc'ns, Inc.*, 550 U.S. 45, 54 (2007) (citing *MCI Telecommc'ns Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995) (holding Commission rule "has the force of law" and the Commission "may therefore treat a violation of the prescription as a *per se* violation of the requirement of the Communications Act that a common carrier maintain 'just and reasonable' rates")).

[72] Opt-Out Order ¶ 19–20.

express terms."[73] The TCPA does not expressly authorize the Commission to issue retroactive rules.[74] It authorizes it to "implement" the statute.[75] To "implement" is inherently prospective, meaning "to begin to do or use (something, such as a plan): to make (something) active or effective."[76]

## II. Endo is not "similarly situated" to the petitioners covered by the Opt-Out Order.

### A. Endo claims it "did not understand" that opt-out notice was required, but it does deny that its lack of understanding was due to simple ignorance of the law, and not due to the public notice or footnote 154.

If the standard for a waiver is that the petitioner was *actually* "confused" about whether opt-out notice was required on faxes sent with permission, Endo's petition must be denied. Endo claims it "did not understand" that opt-out notice was required on faxes sent with express permission,[77] but it does not claim its lack of understanding resulted from reading footnote 154 or the 2005 notice of rulemaking, the only sources of "confusion" identified in the Opt-Out Order.[78] Based on the record before the Commission, it is more likely that Endo was simply ignorant of the law, which the Opt-Out Order held was insufficient for a waiver.[79]

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[73] *Bowen*, 488 U.S. at 208.

[74] 47 U.S.C. § 227(b)(2); *Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 102 (N.D. Ill. 2013).

[75] § 227(b)(2).

[76] *See* http://www.merriam-webster.com/dictionary/implement.

[77] Endo Pet. at 5.

[78] *Id.*

[79] Opt-Out Order ¶ 26.

### B. Plaintiff has a due-process right to inquire into whether Endo had actual knowledge of the rules if that factor is dispositive of its private right of action.

If the standard for a waiver is that a petitioner is considered "presumptively" confused in the absence of evidence it "understood that [it] did, in fact, have to comply with the opt-out notice requirement,"[80] then Plaintiff has no evidence of actual knowledge at this time with which to rebut the presumption with respect to Endo. Only Endo has that information, and its petition is silent on the issue and discovery is stayed in the underlying litigation, so Plaintiff has no way to uncover that information. Plaintiff has a due-process right to investigate whether Endo had actual knowledge of the opt-out rules if that factor is dispositive of its private right of action under the TCPA, and the Commission should hold such "proceedings as it may deem necessary" for that purpose.[81]

### C. Endo has failed to establish its potential liability is "significant" in comparison to its financial resources.

The Opt-Out Order states the Commission granted waivers, in part, because the petitioners were "subject to significant damage awards under the TCPA's private right of action," ruling that "the risk of substantial liability," although not dispositive, was "a factor" in its decision.[82] Endo claims it is subject to "massive" liability in Plaintiff's case, but it does not state how many faxes it sent or estimate its potential liability.[83] Plaintiff's Complaint, which Endo has never answered, alleges Endo sent faxes to "over forty" persons.[84] On this

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[80] *Id.*

[81] 47 C.F.R. § 1.1.

[82] Opt-Out Order ¶¶ 27–28.

[83] Endo Pet. at 5.

[84] *Id.* ¶ 22.

record, in the absence of any evidence from Endo, the Commission should assume the amount at stake is $61,500 (41 faxes at $1,500 per fax).

Endo is a large, publicly traded pharmaceutical company with $408 million in cash and cash equivalents.[85] In comparison, a judgment for $61,500 would represent 0.015% of Endo's cash reserves. That is not a "massive" or even "significant" risk in relation to Endo's financial resources.

## Conclusion

The Commission should deny Endo's petition because the Commission has no authority to "waive" a regulation in a private right of action under the TCPA. Endo is also not "similarly situated" to the petitioners covered by the Opt-Out Order, since (1) it does not claim it was confused about whether opt-out notice was required, (2) it does not claim it ever read footnote 154 or the public notice, (3) it was most likely simply ignorant of the opt-out regulation, and (4) it does not face a risk of "significant" potential liability in relation to its financial resources.

Dated: June 12, 2015

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[85] *See* Endo International PLC, 2014 Form 10-K at 48, at http://www.sec.gov/Archives/edgar/data/1593034/000159303415000005/endp-12312014x10k.htm