

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

<i>In the Matter of</i>)	
)	CG Docket No. 02-278
Petition of Biolase, Inc.)	CG Docket No. 05-338
For Retroactive Waiver of)	
47 C.F.R. § 64.1200(a)(4)(iv))	

COMMENT OF CHARLES SHULRUFF, DDS
TO PETITION OF BIOLASE, INC

The petition for retroactive waiver filed by Biolase, Inc. should be denied.

Biolase, Inc. requests a retroactive waiver with respect to faxes sent with express prior invitation or permission but does not specifically claim that recipients of its advertisements, including members of the putative class action it currently faces consented to receiving its facsimiles. (Petition, pp. 1-2) Plaintiff’s complaint alleges that Biolase sent him unsolicited fax advertisements in December of 2013, that he did not consent to the advertisements and that the faxes do not contain an opt out notice in the form required by 47 U.S.C. § 227. (Appendix A)

Biolase fails to supply any basis for its assertions that the faxes it sent were “solicited” or that it obtained “prior express permission” from anyone, including plaintiff. The Petition is bereft of any facts or details to support the assertion that Biolase’s faxes were sent with prior express invitation or permission.

Moreover, the waiver contemplated by the FCC does not extend to faxes sent in the context of an established business relationship. Rather, because the Commission’s notice of intent to adopt Section 64.1200(a)(4)(iv) “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent *with prior express invitation or permission*

of the recipient,” such retroactive waivers should only be considered in those instances involving prior express invitation or permission where there is some evidence that the petitioner misunderstood and, as the FCC provided, **not** in instances involving established business relationships or “customers.”

The Commission has repeatedly held that the business claiming consent or an established business relationship has the burden of proof. “[A] sender should have the obligation to demonstrate that it complied with the rules, including that it had the recipient's prior express invitation or permission.” *In re: Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278; CG Docket No. 05-338, FCC Release 06-42, 21 FCC Rcd 3787, at 3812, 2006 FCC LEXIS 1713; 38 Comm. Reg. (P & F) 167 (April 6, 2006). The FCC has consistently adhered to this position. *Virtual Auto Loans*, EB-09-TC-230, 2009 FCC LEXIS 4342 (March 9, 2009); *New York Security and Private Patrol, Inc.*, EB-09-TC-231, 2009 FCC LEXIS 4343 (March 9, 2009).

Courts have also followed this rule and placed the burden of proof on the sender of the communication. *Gutierrez v. Barclays Group*, 10cv1012 DMS (BGS), 2011 U.S. Dist. LEXIS 12546, 2011 WL 579238, at *2 (S.D. Cal. Feb. 9, 2011); *Van Sweden Jewelers, Inc. v. 101 VT, Inc.*, 1:10-cv-253, 2012 WL 4074620, 2012 U.S. Dist. LEXIS 85663 (W.D.Mich., June 21, 2012); *Green v. Service Master on Location Servs. Corp.*, 07 C 4705, 2009 WL 1810769, 2009 U.S. Dist. LEXIS 53297 (N.D. Ill. June 22, 2009); *Sadowski v. Med1 Online, LLC*, 07 C 2973, 2008 WL 2224892, * 3-4, 2008 U.S. Dist. LEXIS 41766 (N.D. Ill. May 27, 2008) (observing that issue of consent is an affirmative defense); *Hinman v. M & M Rental Ctr., Inc.*, 596 F. Supp. 2d 1152 (N.D. Ill. 2009) (finding that consent did not exist with respect to the class because the

TCPA allocates the burden of obtaining consent on the senders of unsolicited faxes, rather than requiring recipients to "opt-out"); *Lampkin v. GGH, Inc.*, 2006 OK CIV APP 131, 146 P.3d 847, ¶27 (Okla. Ct. App. 2006) (recipient should not be charged with proving the negative propositions that it did not give permission or did not have a business relationship with sender). This is consistent with the general rule that the party claiming the benefit of an exception in a federal statute, and the party who logically would have evidence of consent or an established business relationship, has the burden of coming forward with at least some evidence of the applicability of these exceptions. *E.E.O.C. v. Chicago Club*, 86 F.3d 1423, 1429-30 (7th Cir. 1996); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 128 S. Ct. 2395, 2400, 171 L. Ed. 2d 283 (2008) ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits."); *Irwin v. Mascott*, 96 F. Supp. 2d 968 (N.D. Cal. 1999).

Here, Biolase offers absolutely nothing to substantiate that anyone consented to receiving faxes from it. In addition, it does not state why it "believed" its faxes did not require an opt out notice. There is nothing in the Petition to indicate that Biolase read or relied on the Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005), or Junk Fax Order, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006), prior to sending its junk faxes. There is also *no* evidence that anyone involved in sending the faxes misunderstood anything about their obligation to include an opt-out notice. There is no opt out notice of any kind on the junk faxes

attached to plaintiff's complaint. "We emphasize, however, that simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for waiver." (FCC 14-164, at ¶ 26)

The Junk Fax Order requires that fax advertisements sent to recipients that provided prior express invitation or permission must include an opt out notice. 47 C.F.R. § 64.1200(a)(4)(iv); *see* Junk Fax Order, 21 FCC Rcd at 3812, para. 48; *See* Petition, p. 2. Petitioners may apply for a retroactive waiver "of the Commission's rules requiring an opt-out notice on fax ads sent with the prior express permission of the recipient..." *Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipients's prior Express Permission*, CG Docket No. 02-278, 05-338, Order, FCC 14-164, ¶ 22 (Oct. 30, 2014) (emphasis added)

On this record, no action by the Commission is warranted. There are no special circumstances to warrant a deviation from the general rule and a waiver would not serve the public interest. Biolase's petition should be stricken and/or denied. The petition is nothing more than a baseless attempt to complicate an enforcement action by the recipient of unsolicited advertising faxes.

Respectfully submitted,

s/ Daniel A. Edelman

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