

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

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

COMMENT TO PETITION OF NORTH AMERICAN BANCARD, LLC

The petition for retroactive waiver filed by North American Bancard, LLC is abusive and should be denied.

I. There Is No Evidence Of Consent

Remarkably, North American Bancard, LLC (“NAB”) *never* claims that it obtained express consent from plaintiffs, West Loop Chiropractic & Sports Injury Center, Ltd. and West Loop Health & Sports Performance Center, LLC (collectively, “Plaintiffs”), prior to sending its junk faxes. (Petition, pp. 3, 7) The complaint in the lawsuit that prompted this request alleges that North American Bancard, LLC sent Plaintiffs unsolicited fax advertisements on April 18, 2016 and April 26, 2016. (Appendix A to Comment, ¶¶ 11-12) In addition, Plaintiffs allege that the faxes do not contain an opt out notice in the form required by 47 U.S.C. § 227. (Appendix A to Comment, ¶ 18)

In its petition, NAB fails to supply any basis for its conclusory assertions that the faxes it sent were “solicited” or that it obtained “prior express permission” from anyone, including Plaintiffs. There is no Declaration from NAB attached to its petition. In sum, the Petition is bereft of any facts or details to support the assertion that NAB’s faxes were sent with prior express invitation or permission.

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, NAB offers absolutely nothing to substantiate that anyone consented to receiving faxes from it.

Dr. Alden Clendenin, on behalf of Plaintiffs, denies giving consent to the sender of the faxes. (Affidavit of Dr. Alden Clendenin, Appendix B). The faxes seek to establish a relationship with the recipient by selling credit card processing equipment and services. The faxes attached to plaintiff's complaint have every indication of a "blast fax" sent without consent or an established business relationship.

II. There Is No Factual Basis For Any Claimed Reliance

In addition, NAB does not state why it "believed" its faxes did not require an opt out notice. There is nothing in the Petition to indicate that NAB 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.

To the contrary, NAB has previously been sued for sending junk faxes, *Zoes v. North American Bancard, Inc.*, 03 CH 17879 (Cir. Ct. Cook Cty., Ill.), and other TCPA violations. *See Fountain v. North American Bancard, LLC*, 4:12-cv-00459 RAS-DDB (E.D. Tex.) (Alleged violation of the TCPA); *Mey v. North American Bancard, LLC*, 2:14-cv-11331-DPH-MJH (E.D. Mich.) (Alleged TCPA violation for telemarketing call to cell phone); *Mey v. Patriot Payment Group, LLC and North American Bancard, LLC*, 5:15-cv-00027-JPB-JES (N.D. W.Va.) (Alleged TCPA violation for telemarketing calls to cell phone); *Mey v. North American Bancard, LLC*, 5:14-cv-00022-FPS (N.D. W.Va.) (Alleged TCPA violation for telemarketing calls to cell phone). NAB was clearly on notice of the statute and regulations.

There is also no evidence that NAB misunderstood anything about its obligation to include an opt-out notice. While NAB claims that evidence is not required, citation of the above-referenced cases is convincing that NAB knew about the law, and failed to comply. There is no opt out notice of any kind on the junk faxes attached to plaintiffs' 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) This petition asserts nothing more than supposed ignorance of the law, which ignorance is most likely feigned.

III. No Grounds For Excusing Untimely Filing Are Alleged

NAB only seeks a waiver to those "solicited facsimiles that have been transmitted by or on behalf of NAB prior to April 30, 2015." (*Petition*, p. 3) NAB's request for consideration of its untimely Petition should be denied. As set forth above, NAB has been previously sued for TCPA violations in sending out junk faxes without opt out notices and it should have been aware that the FCC was permitting parties to petition for over a year and a half on this issue, allowing

the April 30, 2015 deadline for waiver requests to expire. NAB has sat idly by until it was served with another lawsuit and then sought to attempt to limit its liability by requesting a waiver.

Clearly, faxes sent after April 30, 2015, including the faxes sent to Plaintiffs, cannot be included in any waiver petition. NAB does not explain its inaction.

IV. There Is No Factual Basis For NAB's Other Assertions

NAB argues that granting its petition “would serve the public interest.” (*Petition*, p. 9) It is unclear how the public interest is served by allowing NAB, who has been sued multiple times for alleged TCPA violations, a “free pass”. In fact, this is exactly the type of petition that should be denied as NAB clearly believes it can repeatedly violate the TCPA, feign “confusion” and still get a “waiver.” It is clearly contrary to the public interest to allow serial TCPA defendants, such as NAB, to continue to violate the law willfully.

Finally, NAB does not give any indication of the number of junk faxes it sent. Instead, NAB argues that it “may be exposed to significant liability . . .” (*Petition*, p. 9) According to its website, www.northamericanbancard.com, NAB “process[es] over \$34 billion in transactions every year for some of the most recognizable companies in the country.” It is unlikely that any judgment entered against NAB in this case would drain its resources.

V. Conclusion

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. NAB's petition should be stricken and/or denied. The petition is nothing more than a baseless attempt to complicate an enforcement action by the recipients of unsolicited advertising faxes.

Respectfully submitted,

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