

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

<i>In the Matter of</i>)	
)	CG Docket No. 02-278
Petition of INTER-MED, INC. d/b/a VISTA)	CG Docket No. 05-338
DENTAL PRODUCTS for Retroactive Waiver of)	
47 C.F.R. § 64.1200(a)(4)(iv))	

COMMENT OF DR. CHARLES SHULRUFF, DDS
TO PETITION OF INTER-MED, INC. d/b/a VISTA DENTAL PRODUCTS

The petition for retroactive waiver filed by Inter-Med, Inc. d/b/a Vista Dental Products (“Inter-Med”) is abusive and should be denied.

I. There Is No Evidence Of Consent

Inter-Med acknowledges that it has been the subject of a class action lawsuit related to its faxing practices, pointing in its petition to the lawsuit filed against by Hannahan Endodontic Group, P.C. 9 months ago in the U.S. District Court for the Eastern District of Wisconsin. *Hannahan Endodontic Group, P.C. v. Inter-Med, Inc. d/b/a Vista Dental Products*, No. 2:15-cv-01038. While not referred to in its petition, a second, additional class action was also filed against Inter-Med related to its policies and practices on facsimile advertising, Specifically, *Dr. Charles Shulruff, D.D.S. v. Inter-Med, Inc. d/b/a Vista Dental Products*, No. 16-cv-999 was filed in the Northern District of Illinois, Eastern Division, on January 22, 2016, alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. §227 (“TCPA”), the Illinois Consumer Fraud Act, 815 ILCS 505/2 (“ICFA”) and Illinois common law (conversion, trespass to chattels, nuisance). A copy of the complaints filed against Inter-Med are attached as Appendices A-B.

Remarkably, Inter-Med never claims that it obtained express consent from Hannahan Endodontic Group, P.C. or Dr. Shulruff. (Petition, p. 2) Inter-Med states that its practice was to send faxes to potential customers and customers but it fails to provide any evidence that would tend to support an inference that the intended audience of the faxes attached to the Hannahan Endodontic and Shulruff complaint was anything other than potential customers with whom Inter-Med never had any previous contact.

In its petition, Inter-Med 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 the Plaintiffs. There is no Declaration from Inter-Med attached to its petition. In sum, the Petition is bereft of any facts or details to support the assertion that *any* of Inter-Med’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, Inter-Med offers absolutely nothing to substantiate that anyone consented to receiving its faxes.

Dr. Shulruff, DDS denies giving consent to the sender of the faxes. (Affidavit of Dr. Shulruff, DDS, Appendix C). The faxes seek to *establish* a relationship with the recipient by offering a new product. The faxes received by Hannahan Endodontic Group, P.C. and Dr. Shulruff make no reference to an existing relationship or prior contact nor are they specifically addressed to any person, which would normally be the case if consent to send the fax(es) had been obtained. In short, the faxes 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, Inter-Med does not state why it “believed” its faxes did not require an opt out notice. There is nothing in the Petition to indicate that it 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 Inter-Med, or anyone else that sent 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 plaintiffs’ complaints. “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 ignorance of the law.

III. No Grounds For Excusing Untimely Filing Are Alleged

Inter-Med only seeks a waiver to those faxes “sent by or on behalf of Vista Dental through April 30, 2015, with the recipients’ prior express invitation or permission.” (*Petition*, pp.

5-6) Inter-Med's request for consideration of its untimely Petition should be denied. Inter-Med sat idly by until it was served with a 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 each of the Plaintiffs, should not be included in any waiver petition. Inter-Med does not explain its inaction, most likely because if it was unaware of the deadline, it was also not aware of the FCC Order it allegedly "relied" on.

IV. There Is No Factual Basis For Inter-Med's Other Assertions

Finally, Inter-Med does not give any indication of the number of junk faxes sent, and as stated above, it has not yet filed a responsive pleading to either complaint. Instead, Inter-Med argues that it "potentially [could be] subject to significant damage awards under the TCPA's private right of action or possible Commission enforcement." (*Petition*, p. 5) Absent an indication of the quantity of transmissions at issue and assessment of Inter-Med's financial condition, Inter-Med's argument that it faces significant damages award is plainly unsupported.

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. Inter-Med'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,

s/ Daniel A. Edelman
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