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CAO Group, Inc.*

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

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CAO GROUP, INC., a Utah corporation,

Plaintiff,

v.

BIOLASE TECHNOLOGY, INC., a  
Delaware corporation,

Defendant.

**CAO GROUP, INC.'S  
SECOND AMENDED COMPLAINT**

Case No.: 2:12-cv-00388-CW-EJF

U.S. District Court Judge Clark Waddoups

Magistrate Judge Evelyn J. Furse

**JURY TRIAL DEMANDED**

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Plaintiff CAO Group, Inc., (“CAO”), through counsel of record, hereby files its Second Amended Complaint pursuant to Federal Rule of Civil Procedure 15(a)(2), against Defendant Biolase Technology, Inc., (“Biolase”) as follows:

**PARTIES**

1. Plaintiff CAO is a Utah corporation located at 4628 West Skyhawk Drive, West Jordan, UT 84084.

2. On information and belief, Biolase is a Delaware corporation with a principal place of business at 4 Cromwell, Irvine, CA 92618.

**NATURE OF THE ACTION**

3. This is an action for patent infringement arising under the Patent Laws of the United States 35 U.S.C. §§ 1 *et seq.*, including 35 U.S.C. § 271.

4. On information and belief, Defendant has infringed and continues to infringe, contribute to the infringement of, and/or actively induce others to infringe CAO's U.S. Patent No. 7,485,116 C1 (the "reexamined '116 Patent").

5. This is also an action for business disparagement and injurious falsehood under the Utah Common Law. This is further an action for unfair competition under 15 U.S.C. §1125(a).

**JURISDICTION AND VENUE**

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1338, and 1367.

7. This Court has personal jurisdiction over Biolase because, on information and belief, Biolase does and has done substantial business in this judicial District, including: (i) committing acts of patent infringement and/or contributing to or inducing acts of patent infringement by others in this judicial District and elsewhere in Utah; (ii) regularly conducting business in this State and judicial District; (iii) directing advertising to or soliciting business from

persons residing in this state and judicial District through at least in-person sales efforts and Biolase's worldwide commercial website; and (iv) engaging in other persistent courses of conduct, and/or deriving substantial revenue from products and/or services provided to persons in this District and State.

8. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391 and 1400(b).

9. In addition, Biolase has waived any potential challenge to venue in this Court by filing a Joint Status Report (Dkt. No. 36) in this Court, agreeing to mediation directed by this Court (*id.*; *see also* Dkt. No. 37), and not challenging venue in approximately eight months since the United States Supreme Court issued its *TC Heartland* decision on May 22, 2017. *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017); *see also InsideSales.com, Inc. v. SalesLoft, Inc.*, 2017 U.S. Dist. LEXIS 158994 at \*8-9, 2017 WL 428036 (D. Utah, Sept. 26, 2017) (finding waiver of venue challenge based on a delay of "several weeks" after *TC Heartland*).

### **FACTUAL BACKGROUND**

10. Plaintiff CAO designs, develops, manufactures, and markets various products for use in, *inter alia*, the dental industry.

11. CAO has sought protection for its technological innovations resulting in numerous issued patents, including the reexamined '116 Patent at issue in this action.

12. The original U.S. Patent No. 7,485,116 issued on February 3, 2009, with a filing date of September 22, 2004. The related reexamination certificate (i.e., the reexamined '116 Patent) issued on July 6, 2017.

13. CAO is the owner by assignment of the reexamined '116 Patent which is directed to "Laser Systems, with Fiber Storage Dispensing Unit, Useful in Medicine or Dentistry."

14. On information and belief, Biolase develops and markets worldwide a number of medical and dental laser devices, including the ezlase®, Epic®, Epic™ Pro, Epic™ 10, Epic™ S, Epic™ T, Epic™ V, and Epic™ X (the products beginning with "Epic" collectively referred to as "Epic") dental lasers (collectively, the "Accused Devices").

15. On information and belief, Biolase operates and maintains a website at www.Biolase.com, where Biolase's products and services, including the Accused Devices, are or have been marketed to consumers worldwide.

16. By way of example, with respect to claim 22 of the reexamined '116 Patent (which depends from claim 1 of the original '116 Patent), the Epic™ Pro device is a laser system that is useful (and actually used) in medicine or dentistry, and includes a housing, a laser module, and a fiber module.

17. The laser module of the Epic™ Pro device is within the housing, and is capable of (and actually does during operation) producing laser light that is usable for therapeutic purposes in medicine or dentistry.

18. The fiber module of the Epic™ Pro device has an outer casing that is attachable to and removable from the housing, and is configured to store amounts of extra fiber.

19. The fiber module of the Epic™ Pro device also includes fiber therein when in use, and the fiber has a proximal end and a distal end, the proximal end being in light communication with the laser module so that the fiber can receive laser light from the laser module and transport the laser light to the distal end of the fiber.

20. The Epic™ Pro device also includes an electronic display panel and an electronic control panel, at least in the form of a touchscreen.

21. The electronic display panel of the Epic™ Pro device is configured to electronically display (and actually does display during certain operational states) operation information of the laser module, including: laser module output power, continuous wave operation status, pulse operation status, laser module operation status, and laser module protection function status.

22. The electronic control panel of the Epic™ Pro device is configured to enable (and actually does enable during certain operational state) electronic adjustments, including: laser module output power selection, continuous wave operation selection, pulse operation selection, pulse rate selection, and emergency shutoff selection.

23. On information and belief, following CAO's filing of the original Complaint on April 24, 2012, Biolase made false and misleading statements regarding CAO and its products.

24. Specifically, on information and belief, on or about April 30, 2012, Chairman and Chief Executive Officer of Biolase, Federico Pignatelli, issued a series of statements identifying CAO as an "upstart newcomer" to Biolase's esteemed industry "who cannot fairly compete with Biolase," and as a result, "has turned to the court system with this lawsuit . . . in an attempt to exploit [Biolase] and to try and achieve what it clearly cannot accomplish in the marketplace." *See Exhibit A.* On information and belief, Mr. Pignatelli further stated that CAO's "diode is an inferior product manufactured in China" that is "costly," has "fewer features when compared to ezlase", and "has a large physical footprint and unpleasant design." *Id.*

25. These statements include factual inaccuracies and falsities that are disparaging to CAO and its diode product. These statements have caused and will likely continue to cause harm to CAO.

26. On information and belief, these statements were issued on behalf of Biolase with the clear intent to disparage and cause harm to CAO and CAO's diode product.

**COUNT ONE**

(Patent Infringement of U.S. Patent No. 7,485,116 C1 – 35 U.S.C. §§ 271 *et seq.*)

27. Plaintiff realleges and incorporates by reference the above paragraphs of this Complaint, inclusive, as though fully set forth herein.

28. On information and belief, Biolase has (1) infringed and continues to infringe at least claims 22-25 of the reexamined '116Patent by making, using, offering to sell, selling and/or importing, in this District and elsewhere in the United States, the Accused Devices and/or (2) contributed to the infringement of the reexamined '116Patent, and/or actively induced others to infringe the reexamined '116Patent, in this district and elsewhere in the United States.

29. Biolase's actions constitute infringement, active inducement of infringement, and/or contributory infringement of the reexamined '116Patent in violation of 35 U.S.C. § 271.

30. CAO has sustained damages and will continue to sustain damages as a result of Biolase's aforesaid acts of infringement.

31. CAO is entitled to recover damages sustained as a result of Biolase's wrongful acts in an amount to be proven at trial.

32. Biolase's infringement of CAO's rights under the reexamined '116Patent will continue to damage CAO's business, causing irreparable harm, for which there is no adequate remedy at law, unless it is enjoined by this Court.

33. Upon information and belief, Biolase has willfully infringed the reexamined '116Patent, entitling CAO to increased damages under 35 U.S.C. § 284 and to attorney fees and costs incurred in prosecuting this action under 35 U.S.C. § 285.

**COUNT TWO**

(Business Disparagement/Injurious Falsehood – Common Law)

34. Plaintiff realleges and incorporates by reference the above paragraphs of this Complaint, inclusive, as though fully set forth herein.

35. On information and belief, Biolase has issued a series of false statements, with malice, in an effort to disparage CAO and its products and to cause injury to CAO's reputation and economic relations.

36. As a result of Biolase's injuriously false statements, CAO's economic interests among the dental community and with customers have been harmed causing damage to CAO.

37. As a result of Biolase's conduct, CAO claims damages, including punitive damages, in an amount to be proven at trial.

**COUNT THREE**

(Unfair Competition - 15 U.S.C. §1125(a))

38. Plaintiff realleges and incorporates by reference the above paragraphs of this Complaint, inclusive, as though fully set forth herein.

39. On information and belief, Biolase has engaged in acts of unfair competition by using, in its commercial advertising or promotion, false designations of origin, false and misleading descriptions of facts, and false and misleading representations of fact, which misrepresent the nature, characteristics, qualities, and geographic origin of CAO and its diode laser product.

40. As a result of Biolase's actions, CAO's economic interests have been and will likely continue to be damaged.

41. CAO claims damages as a result of Biolase's unfair competition in an amount to be proven at trial.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff CAO asks this Court to enter judgment in its favor and against Biolase and grant the following relief:

A. An adjudication that Biolase has willfully infringed and continues to directly and/or indirectly infringe the reexamined '116Patent as alleged above;

B. Orders of this Court temporarily, preliminarily, and permanently enjoining Biolase, its agents, servants, and any and all parties acting in concert with any of them, from directly or indirectly infringing in any manner any of the claims of the reexamined '116Patent pursuant to at least 35 U.S.C. § 283;

C. An award of damages adequate to compensate CAO for Biolase's infringement of the reexamined '116Patent in an amount to be proven at trial;

D. A finding that this is an exceptional case and an award of Plaintiff's costs and attorney fees;



- E. A trebling of the damage award to Plaintiff;
- F. An adjudication that Biolase is liable for Business Disparagement/Injurious Falsehood and an award of damages, including punitive damages, to CAO;
- G. An adjudication that Biolase is liable for unfair competition pursuant to 15 U.S.C. § 1125(a) and an award of damages to CAO;
- H. An assessment and award of pre- and post-judgment interest on all damages awarded; and
- I. Any further relief that this Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a trial by jury as to all claims and all issues properly triable thereby.

Respectfully submitted on February 26th, 2018.

Signed: /s/ H. Dickson Burton

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 26, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following attorneys for Biolase Technology, Inc.:

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