

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

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

**COMMENT OF DR. GARY CLEMENS TO PETITION OF
DENTAL SOLUTIONS, INC. D/B/A HOGAN DENTAL LABORATORY**

The petition for retroactive waiver filed by Dental Solutions, Inc. is abusive and should be denied.

Dental Solutions, Inc. claims that (i) it is the sender of the fax and (ii) (Petition, p. 2) that many of the faxes at issue in the Bhatti litigation were in fact solicited, rather than unsolicited.

Dental Solutions, Inc., is not the defendant in the lawsuit it references and does not supply any basis for its assertions that either it is the sender or that it obtained consent from anyone.

The sender of the faxes — whoever that it — would certainly have knowledge of whether someone agreed to receive faxes from it. 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, Dental Solutions, Inc. offers absolutely nothing to substantiate that (a) it is the sender or (b) that anyone consented to receiving faxes from it.

Dr. Clemens denies giving consent to the sender of the fax. (Affidavit of Gary Clemens, Appendix A). The fax at issue does not purport to come from Dental Solutions, Inc. It purports to be a "new client offer" that seeks to establish a relationship and is not sent pursuant to any existing relationship. It is not specifically addressed to any person, which would normally be the case if consent to send it had been obtained. In short, the fax has every indication of a "blast fax" sent without consent or an established business relationship.

There is also no evidence that Dental Solutions, Inc. or anyone else that sent the fax misunderstood anything about its obligation to include an opt-out notice.

On this record, no action by the Commission is warranted. The petition is nothing more than a baseless attempt to complicate an enforcement action by the recipient of the fax.

Respectfully submitted,

/s/ Daniel A. Edelman
Daniel A. Edelman

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APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

GARY R. CLEMENS, D.D.S.,)	
on behalf of plaintiff and a class,)	
)	
Plaintiff,)	14-cv-9001
)	
v.)	
)	
GAGANDEEP BHATTI doing business as)	Honorable Judge Aspen
HOGAN DENTAL LABORATORY, INC.,)	Magistrate Judge Brown
and JOHN DOES 1-10,)	
)	
Defendants.)	

AFFIDAVIT OF GARY CLEMENS

Gary Clemens declares under penalty of perjury, as provided for by 28 U.S.C.

§1746, that the following statements are true:

1. I have personal knowledge of the facts contained herein.
2. I am the plaintiff in the above captioned case.
3. On July 12, 2013, I received a facsimile advertisement from defendant Gagandeep Bhatti, doing business as Hogan Dental Laboratory, Inc. ("Bhatti"), a copy of which is attached hereto as Exhibit A.
4. I have never had a prior business relationship with defendant Bhatti. I did not consent to receiving advertising faxes from defendant Bhatti.
5. Pursuant to 47 U.S.C. § 227 (b)(3), I am entitled to receive \$1,500 for the facsimile advertisement which was sent to me by defendant Bhatti.

Executed at Berwyn, Illinois, on Nov. 13, 2014



Gary Clemens
Gary R. Clemens, D.D.S.

Subscribed and sworn before me
this 13TH day of November, 2014



Notary Public
Executed on 11-13-14, 2014

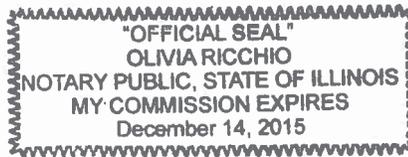


EXHIBIT A



Hogan Dental Laboratory
 7602 Talbert Ave. Suite F
 Huntington Beach, CA 92648
 Phone: 800-622-9592 • Fax: 714-589-2566
 Email: contact@hogadentallab.com
www.hogadentallab.com

For the past 26 years, we have been committed to providing high quality restorations and personalized customer service to our clients.

We are extending the following New Client Offer* including **FREE** Shipping & Handling::

PFM - \$59**
Veneer - \$99
IPS e.max® Crown - \$99
BruxZir® Solid Zirconia Crown - \$99
 (BruxZir® Authorized Dealer)

Free Shipping Both Ways!

*New client special valid for 3 months after receipt of 1st case.

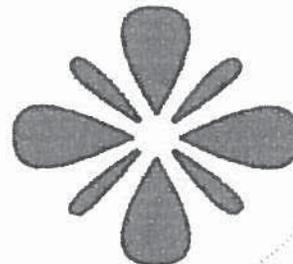
**There will be an extra charge for metal other than non-precious and extra services.

LAB SERVICES & FEATURES:

- PFM (base, noble & high noble alloys offered)
- IPS e.max®, Zirconia, Implants & VeneersP
- Medium sized lab with 12 personable staff
- Chair time 15 minutes
- Quick turn-around delivery
- All materials are manufactured in the United States
- Qualified technicians with CDT on board
- **FREE SHIPPING BOTH WAYS!**

We hope to begin a partnership with your office to present the quality craftsmanship of our certified, experienced technicians. I look forward to hearing from you soon.

Sincerely,
 John Potzler
 Marketing Representative
 1-800-622-9592
 Visit us at www.HoganDentallab.com



To receive your order: www.hogadentallab.com