

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

FEDERAL TRADE COMMISSION)	
)	
Plaintiff,)	
)	No. 6:09-cv-2021-ORL-28-KRS
v.)	
)	Judge Antoon
JPM ACCELERATED SERVICES INC.,)	
IXE ACCELERATED FINANCIAL)	Magistrate Judge Spaulding
CENTERS LLC,)	
IXE ACCELERATED SERVICES INC.,)	
IXE ACCELERATED SERVICE CENTERS INC.,)	
MGA ACCELERATED SERVICES INC.,)	
WORLD CLASS SAVINGS INC.,)	
ACCELERATED SAVINGS INC.,)	
B&C FINANCIAL GROUP INC.,)	
JEANIE B. ROBERTSON,)	
BROOKE ROBERTSON,)	
IVAN X. ESTRELLA,)	
JAIME M. HAWLEY,)	FTC'S RESPONSE TO THE
KIMBERLY NELSON,)	MOTION TO DISMISS
PAIGE DENT,)	FILED BY DEFENDANT
ALEXANDER J. DENT,)	KIMBERLY NELSON
MICHA S. ROMANO,)	
PAUL PIETRZAK, and)	
ASHLEY M. WESTBROOK,)	
)	
Defendants.)	

Plaintiff Federal Trade Commission (“FTC”) respectfully submits the following response to the Motion to Dismiss filed by defendant Kimberly Nelson (“Nelson”) on January 14, 2010 (Docket No. 51).

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This case involves a fraudulent telemarketing enterprise based in Orlando and Melbourne, Florida, that targeted consumers with “robocalls” offering substantially reduced credit card interest rates and thousands of dollars in savings in a short time. Consumers throughout the United States and Canada paid the defendants amounts ranging from \$495 to \$995 but did not receive the promised interest rate reductions or savings; and the defendants routinely failed to honor their money-back guarantee. As alleged in the FTC’s complaint, the defendants violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and numerous provisions of the Telemarketing Sales Rule, 16 C.F.R. Part 310.

The FTC filed this action on November 30, 2009, and sought an *ex parte* temporary restraining order with an asset freeze and the appointment of a receiver (“TRO”). The Court issued the TRO on November 30, 2009, and set a preliminary injunction hearing for December 10, 2009.

Defendants Nelson and IXE Accelerated Services Inc. were properly served on December 2, 2009 (Docket Nos. 20 & 22), but failed to appear at the preliminary injunction hearing on December 10, 2009. Following the hearing, the Court entered a Preliminary Injunction against most of the defendants, including Nelson and IXE Accelerated Services Inc. The following day, December 11, 2009, the Court issued an Amended Preliminary Injunction against the same defendants. On December 31, 2009, the Court entered a Stipulated Preliminary Injunction as to the two remaining defendants, IXE Accelerated Financial Centers LLC and Jaime M. Hawley.

On January 14, 2010, Nelson filed her Motion to Dismiss. On January 19, 2010, the FTC filed its First Amended Complaint for Permanent Injunction and Other Equitable Relief (“Amended Complaint”).¹

II. THE MOTION TO DISMISS SHOULD BE DENIED

While Nelson does not identify it as such, her Motion to Dismiss presumably is meant to be based on Rule 12(b)(6) of the Federal Rules of Civil Procedure. There is no basis, however, to dismiss the FTC’s claims against Nelson, and her motion should be denied.

The FTC’s Amended Complaint properly states claims upon which relief can be granted. The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is not to test the factual bases of the plaintiff’s case, but to determine whether the complaint contains “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). In considering a motion to dismiss under Rule 12(b)(6), the “court limits its ‘consideration to the well-pleaded factual allegations, documents central to or referenced in the complaint, and matters judicially noticed.’” *Perez-Santiago v. Volusia County*, No. 6:08-cv-1868-ORL-28-

¹ Although the FTC filed its Amended Complaint after Nelson filed her Motion to Dismiss, her Motion to Dismiss may still be considered and decided by the Court. The allegations in the Amended Complaint as to Nelson are unchanged from the original pleading, and, in such situations, “the court simply may consider the motion as being addressed to the amended pleading.” 6 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1476 (2009) (Effect of an Amended Pleading).

KRS, 2009 U.S. Dist. LEXIS 75350, *3 (M.D. Fla. Aug. 25, 2009) (Antoon, J.) (quoting *LaGrasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004)).

The FTC's Amended Complaint alleges that Nelson and her co-defendants operated a telemarketing enterprise using "robocalls" with prerecorded messages to sell credit card interest rate reduction services to consumers throughout the United States and Canada, and, in numerous instances:

- misrepresented that they would substantially lower consumers' credit card interest rates in all or virtually all instances (Amended Complaint, Counts One and Two, ¶¶ 26-33, 39-41, 54-55);
- misrepresented that they would save consumers thousands of dollars in a short time in all or virtually all instances as a result of lowered credit card interest rates (Amended Complaint, Counts One and Two, ¶¶ 26-33, 39-41, 54-55);
- misrepresented that they would enable consumers to pay off their debts much faster, typically three to five times faster, in all or virtually all instances, as a result of lowered credit card interest rates (Amended Complaint, Counts One and Two, ¶¶ 26-33, 39-41, 54-55);
- misrepresented that they would provide full refunds if consumers did not save thousands of dollars in a short time as a result of lowered credit card interest rates (Amended Complaint, Counts One and Three, ¶¶ 26-33, 39-41, 56-57);
- called consumers whose numbers were registered on the National Do Not Call Registry, and failed to honor consumers' requests not to receive further calls

(Amended Complaint, Counts Four and Five, ¶¶ 34, 48, 50-51, 58-59);

- unlawfully “abandoned” calls by failing to connect consumers to live representatives within two seconds (Amended Complaint, Count Six, ¶¶ 35, 49, 60);
- failed to transmit or falsified caller ID information (Amended Complaint, Count Seven, ¶¶ 34, 52, 61); and
- failed to promptly and clearly make required disclosures identifying the seller, the purpose of the call, and the nature of the goods and services (Amended Complaint, Counts Eight and Nine, ¶¶ 36, 46-47, 62-64).

The FTC’s Amended Complaint alleges further that:

- Nelson is President of corporate defendant IXE Accelerated Services Inc., which had the same principal place of business as corporate defendant IXE Accelerated Financial Centers LLC (Amended Complaint ¶¶ 7-8, 18); and
- Nelson formulated, directed, controlled, had the authority to control, or participated in the acts and practices of the corporate defendants (Amended Complaint ¶¶ 18, 24).

Nelson does not and cannot argue that these detailed allegations do not sufficiently allege violations of the FTC Act, 15 U.S.C. § 45(a), and the Telemarketing Sales Rule, 16 C.F.R. Part 310, for which she may be held individually liable. *See, e.g., FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (individuals liable for FTC Act violations if they participated directly in the practices or had authority to control them, and had “some

knowledge” of the practices); *FTC v. World Media Brokers*, 415 F.3d 758, 764 (7th Cir. 2005) (authority to control may be evidenced by “active participation in the corporate affairs, including assuming duties as a corporate officer”).

In fact, Nelson admits in her Motion to Dismiss that she set up the corporation IXE Accelerated Services Inc. in March 2008, and dissolved it in April 2009, a few months after the Florida Attorney General sued its affiliate, IXE Accelerated Financial Centers LLC.² Nelson argues, however, that the FTC’s case against her – and her corporation – should be dismissed because she “never started a business.”

This argument, however, goes beyond the well-pleaded facts in the FTC’s complaint, and thus provides no basis for dismissal under Rule 12(b)(6). While courts on occasion treat motions to dismiss that rely on arguments or evidence outside the pleadings as motions for summary judgment, *see Perez-Santiago*, 2009 U.S. Dist. LEXIS 75350, at *14-15, it would be inappropriate to do so in this case, particularly given that Nelson has filed no supporting evidence with her motion. Proceeding immediately to the merits against Nelson, moreover, would be inefficient in a case involving a large number of defendants alleged to be involved in the same conduct. Accordingly, Nelson’s arguments, and the factual questions they raise, should be considered “after the case has progressed and discovery has been conducted.” *Id.*

² *See State of Florida, Department of Legal Affairs, Office of the Attorney General v. IXE Accelerated Financial Centers, LLC, Jaime Hawley, an individual, and Ivan Estrella, a/k/a Ivan Torres, an individual*, Case No. 08-CA-6509-16-G (Circuit Court, 18th Judicial Circuit, Seminole County, Florida) (filed October 13, 2008).

at *15.³

With respect to Nelson's corporation, IXE Accelerated Services Inc., the Motion to Dismiss fails for an additional reason. The corporation is not represented by counsel, and therefore cannot move for dismissal. Pursuant to Middle District of Florida Local Rule 2.03(e), and well-settled authority, a corporation may be heard only through counsel admitted to practice in the forum. *See, e.g., Rowland v. California Men's Colony*, 506 U.S. 194, 202, 113 S. Ct. 716, 121 L. Ed 2d 656 (1993).

For all the foregoing reasons, the FTC respectfully requests that Nelson's Motion to Dismiss be denied.

Respectfully submitted,

WILLARD K. TOM
General Counsel

Dated: January 25, 2010

s/ Guy G. Ward _____
Guy G. Ward
Federal Trade Commission
55 W. Monroe Street, Suite 1825
Chicago, Illinois 60603
(312) 960-5612
Fax: (312) 960-5600
gward@ftc.gov

Attorney for Plaintiff
FEDERAL TRADE COMMISSION

³ The FTC's claims against Nelson, in the meantime, may be resolved through settlement. The FTC recently received and is evaluating the financial statement submitted by Nelson pursuant to Section IV of the Amended Preliminary Injunction.

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2010, I electronically filed the foregoing **FTC's Response To The Motion To Dismiss Filed By Defendant Kimberly Nelson** with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all of the attorneys of record. I further certify that I mailed the foregoing document, and the notice of electronic filing, by first-class mail to the following non-CM/ECF participants:

Kimberly Nelson
IXE Accelerated Services Inc.
908 Alaska Drive
Ocoee, Florida 34761

s/ Guy G. Ward
Guy G. Ward
Attorney for Plaintiff
Federal Trade Commission
55 W. Monroe Street, Suite 1825
Chicago, Illinois 60603
(312) 960-5612
Fax: (312) 960-5600
gward@ftc.gov