

March 31, 2003. *See* TSR Statement of Basis and Purpose, 68 Fed. Reg. 4580 (January 29, 2003). Under the abandoned call rule, 16 C.F.R. § 310.4(b)(1)(iv), it is an “abusive telemarketing act or practice” for a telemarketer to “[a]bandon[] any outbound telephone call.”¹ The regulation further states: “An outbound telephone call is ‘abandoned’ under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person’s completed greeting.” *Id.*²

B. Defendants’ Autodialing Business

Defendant SBN Peripherals, Inc. (“SBN”) operated an autodialer. (FTC 56.1 ¶ 9.) Johan Hendrik Duyzenkunst Smit (“Smit”) is the sole officer, director and shareholder of SBN. (*Id.* ¶ 3.) The autodialer delivered prerecorded messages in outbound telephone calls made to consumers between January 1, 2008 and August 31, 2009. (*Id.* ¶ 10.) The prerecorded messages delivered to consumers were the first thing that a call recipient heard after the call recipient’s completed greeting. (*Id.* ¶ 11.) Most, and perhaps all, of the prerecorded messages that consumers received lasted longer than two seconds. (*Id.* ¶ 12.) SBN and Smit provided substantial assistance and support to all sellers or telemarketers who, using the autodialer, made calls that violated 16 C.F.R. § 310.4, and SBN and Smit knew that the sellers or telemarketers were engaged in acts or practices that violated the regulation. (*Id.* ¶ 13.)³

¹ An “outbound telephone call” means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution. *See* 16 C.F.R. § 310.2(v).

² The abandoned call provision contains a safe harbor whereby liability is avoided if, among other things, a telemarketer abandons no more than three percent of all calls answered by a person, measured over the duration of a single calling campaign. *See* 16 C.F.R. § 310.4(b)(4). This safe harbor is inapplicable if the Court finds the delivery of prerecorded messages in outbound telephone calls to consumers to be abandoned calls because all of the calls would be abandoned.

³ The FTC merely has provided the Court with the factual predicate necessary to rule on the discrete legal issue identified by the Court and framed by the parties in their June 13, 2011 stipulation –
(continued...)

C. The FTC's Complaint

On May 24, 2010, the FTC filed its Complaint in this matter under Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, and the Telemarketing Act. *See* Docket Entry #1. The FTC's Complaint seeks, among other things, restitution, disgorgement of ill-gotten monies, and other equitable relief for Defendants' acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the TSR, 16 C.F.R. Part 310. *Id.* at pp. 1-2. Count VI of the Complaint alleges that Defendants violated the TSR's abandoned call provision, 16 C.F.R. § 310.4(b)(1)(iv). *Id.* at p. 15. Count X alleges that Defendants provided substantial assistance or support, including, but not limited to robocalling services, to sellers or telemarketers whom Defendants knew or consciously avoided knowing were engaged in violations of § 310.4 of the TSR, in violation of 16 C.F.R. § 310.3(b). *Id.* at p. 16.

II. STANDARD FOR SUMMARY JUDGMENT

A court should grant a motion for summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact only exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

III. ARGUMENT

As a matter of law, the delivery of the prerecorded messages in outbound calls to consumers from January 1, 2008 through August 31, 2009 violated the TSR's abandoned call

³(...continued)
namely, whether outbound telephone calls to consumers from the autodialer delivering prerecorded messages between January 1, 2008 and August 31, 2009 violated the abandoned call prohibition. The FTC reserves its right to submit facts at the appropriate time establishing all of the Defendants' liability with respect to all of the illegal conduct alleged by the FTC.

provision. The plain meaning of the regulation, and its consistent interpretation by the FTC, unambiguously requires outbound telephone calls to be delivered to a live person within two seconds.

A. The TSR's Abandoned Call Provision Is Unambiguous

The initial inquiry into the proper interpretation of a regulation is whether it is ambiguous. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). *See also Paragon Health Network, Inc. v. Thompson*, 251 F.3d 1141, 1145 (7th Cir. 1996) (“We first consider whether the regulation is ambiguous. If not, then we apply the regulation according to its plain meaning.”).

Here, the abandoned call regulation is clear and unambiguous. The regulation requires outbound telephone calls to be connected to a “sales representative” within two seconds. In common usage, a sales representative means a live person, not a recorded message. Thus, the regulation requires the calls to connect to a person within two seconds.

In a case involving nearly identical facts, a district court found that the common sense interpretation of “sales representative” in the abandoned call provision was a live person, not a recording. *See The Broadcast Team v. FTC*, No. 05CV1342, 2006 WL 321960, at *1-2 (M.D. Fla. Jan. 6, 2006) (Attachment A.). In that case, the Broadcast Team (“TBT”) sought a preliminary injunction prohibiting the FTC from enforcing the abandoned calls regulation in such a way as to prevent TBT from utilizing prerecorded calls to solicit funds on behalf of a charity. *Id.* at p. 1. Like SBN, TBT was a company that had the technological capacity to generate high volumes of automated telephone calls. *Id.* TBT stated that its “primary service [was] to allow entities access to [its] computerized systems by which they [could] send prerecorded telephone messages to designated telephone numbers.” *Id.*

TBT asserted that the FTC's interpretation of "sales representative" in § 310.4(b)(1)(iv) to mean an actual person and not a recording was incorrect. The court disagreed, stating:

TBT has not shown that it is likely to succeed on its argument that the term "sales representative" encompasses a recorded message, as distinguished from a living, breathing person. Or, stated another way, TBT has failed to demonstrate that the FTC's interpretation of "sales representative" is incorrect or unreasonable. To the contrary, the FTC's construction of the phrase seems to comport with common sense and ordinary usage.

Broadcast Team, 2006 WL 321960, at *2.⁴ See also *U.S. v. Dish Network, LLC*, 667 F. Supp. 2d 952, 955 (C.D. Ill. 2009) (noting that the abandoned call provision in the TSR "effectively prohibited use of a prerecorded sales pitch because the call must be connected to a sales representative within the two second time limit"). In short, the unambiguous meaning of the abandoned call provision is that the calls must be connected to a live sales representative within two seconds.

B. The FTC's Interpretation of the Abandoned Call Provision is Consistent With Its Plain Meaning

Even if the abandoned call regulation somehow could be considered ambiguous, the FTC consistently has interpreted the delivery of prerecorded messages to violate the rule. Courts defer to an agency's interpretation of its own regulations unless the interpretation is "plainly erroneous or inconsistent with the regulation[s]." *Chase Bank USA, N.A. v. McCoy*, ___ U.S. ___, 131 S.Ct. 871, 880-81 (2011); see also *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Here, the FTC's repeated formal statements about the regulation, as well as its consistent enforcement policy, demonstrate the FTC's unwavering position that the delivery of prerecorded messages like those made here were abandoned calls under the regulation.

⁴ The court later granted the FTC's motion to dismiss TBT's complaint on similar grounds. See *The Broadcast Team, Inc. v. FTC*, 429 F. Supp. 2d 1292, 1300-01 (M.D. Fla. 2006).

In formal rulemaking notices published in the Federal Register, the FTC repeatedly has interpreted the abandoned call regulation to prohibit most calls delivering prerecorded messages. Indeed, in the published notice adopting the abandoned call provision in 2003, the FTC stated:

[c]learly, telemarketers cannot avoid liability by connecting calls to a recorded solicitation message rather than a sales representative. . . . The Rule specifies that telemarketers must connect calls to a sales representative rather than a recorded message.

68 Fed. Reg. 4580, 4644 (January 29, 2003). In issuing a proposed revision to the TSR in October 2006 that would explicitly prohibit the delivery of prerecorded messages in most outbound telephone calls, the FTC noted:

[t]he Commission continues to think that the plain language of the call abandonment provision itself prohibits calls delivering prerecorded messages when answered by a consumer, a position it has repeatedly stated[.]”

71 Fed. Reg. 58716, 58726 (Oct. 4, 2006). In adopting the revision to the TSR in August 2008 explicitly making the delivery of prerecorded messages in most outbound telephone calls illegal effective September 1, 2009, the FTC reiterated that the prohibition was already “implicit in the TSR’s call abandonment prohibition.” 73 Fed. Reg. 51164, 51179 (Aug. 29, 2008).

In addition to its clear public pronouncements, the FTC has repeatedly taken the consistent position in law enforcement actions that the delivery of prerecorded messages in outbound telephone calls constituted abandoned calls. Dating back to 2005, the FTC, sometimes with the assistance of the U.S. Department of Justice, brought the following enforcement actions: (1) *U.S. v. The Broadcast Team*, 05-cv-1920 (M.D. Fla. Dec. 29, 2005) (Attachment B, Cmplt. ¶¶ 20-27, 34); (2) *U.S. v. Guardian Communications, Inc.*, No. 4:07-4070 (C.D. Ill. Nov. 6, 2007) (Attachment C, Cmplt. ¶¶ 11-21, 33); (3) *U.S. v. Voice-Mail Broadcasting Corp.*, No. 2:08-cv-521 (C.D. Cal. Jan. 28, 2008) (Attachment D, Cmplt. ¶¶ 7, 17-22); and (4) *FTC v. Voice*

Touch, Inc., No. 09 C 2929 (N.D. Ill. Sept. 16, 2009) (Attachment E, Sec. Amend. Cmplt. ¶¶ 24, 58). In each case, the complaint alleged that a company selling a computerized messaging service like Defendants' violated the abandoned call provision of the TSR when it delivered prerecorded messages in outbound telephone calls.⁵

In sum, the FTC consistently has interpreted the TSR's abandoned call provision to require outbound telephone calls to connect to a live sales representative within two seconds a requirement that is not satisfied when calls deliver prerecorded messages. When coupled with the FTC's consistent interpretation of the provision, it can have no other reasonable interpretation.

C. Summary Judgment is Appropriate

The undisputed facts establish that, as a matter of law, Defendants' autodialer delivered outbound calls to consumers between January 1, 2008 and August 31, 2009 that violated the abandoned call provision contained in the TSR, 16 C.F.R. § 310.4(b)(1)(iv). Defendants acknowledge that the autodialer delivered calls during which consumers first heard a

⁵ Like Defendants here, the defendants in these cases did not qualify for a forbearance policy announced by the FTC in November 2004. Under this policy, the FTC would refrain from bringing enforcement actions under the abandoned call provision in situations where: (1) sellers on whose behalf the telemarketing calls were placed had an existing business relationship ("EBR"), as defined by the TSR, with the called consumer; and (2) the activity conformed with a proposed amended call abandonment safe harbor. *See* 69 Fed. Reg. 67287, 67290 (Nov. 17, 2004). The safe harbor required, among other things, that within two (2) seconds after the call recipient's greeting, the seller or telemarketer promptly play a prerecorded message that presented an opportunity to assert an entity-specific Do Not Call request at the outset of the message, with only the prompt disclosures required by 16 C.F.R. § 310.4(d) preceding such opportunity. *Id.* at p. 67289. The FTC terminated the forbearance policy as of December 1, 2008, but allowed sellers and telemarketers, until September 1, 2009, to place calls delivering prerecorded messages to consumers with whom they had an EBR provided they did so in compliance with § 310.4(b)(1)(v)(B), which required the disclosures contained in Section 310.4(d), as well as a new requirement that the prerecorded messages include an automated interactive keypress or voice-activated opt-out mechanism. *See* 73 Fed. Reg. at 51164, 51188 (Aug. 29, 2008). Defendants have the burden of demonstrating that the FTC's forbearance policy is somehow applicable here. *See U.S. v. First City Nat. Bank of Houston*, 386 U.S. 361, 366 (1967) (where a party claims the benefit of an exception to the prohibition of a statute, that party carries the burden of proof).

prerecorded message lasting over two seconds. Because the calls were not connected to a live sales representative within two seconds, the calls violated the abandoned call prohibition. By virtue of the Court's May 25, 2011 ruling on the FTC's contempt motion, SBN and Smit are responsible at least as assistors and facilitators for those violations. The Court found that they provided substantial assistance and support to all sellers or telemarketers who, using the autodialer, made calls that violated 16 C.F.R. § 310.4(b)(1)(iv), and that SBN and Smit knew that the sellers or telemarketers were engaged in acts or practices that violated the regulation. Accordingly, this Court should enter partial summary judgment in favor of the FTC on liability on Count X of the Complaint.⁶

⁶ The FTC does not seek summary judgment as to Count VI (Abandoning Calls) at this time because, to be liable under Count VI, the Court would need to determine that Defendants were "telemarketers" under the TSR, an inquiry that is outside the scope of the discrete legal issue identified by the Court to be addressed by the parties. The FTC reserves its right to establish that Defendants are "telemarketers" under the TSR at the appropriate time. To the extent that the Court may only grant summary judgment as to certain parties, the FTC seeks that, at a minimum, for purposes of resolving the discrete legal issue before it, the Court grant summary judgment against: (1) SBN, which Defendants admit operated the autodialer; and (2) Smit, the sole officer, director and shareholder of SBN. *See FTC v. Bay Area Business Council, Inc.*, 423 F.3d 627, 636 (7th Cir. 2005) (individual liability demonstrated by individual's authority to control deceptive acts or practices and that individual knew or should have known of the practices). The FTC reserves its right to submit facts showing that summary judgment is equally appropriate as to Defendants Repo B.V. and Janneke Bakker-Smit Duyzentkunst with respect to Count X and all of the illegal conduct alleged in the FTC's Complaint. Similarly, the FTC will identify the specific calls that violated the abandoned call prohibition at the appropriate time.

III. CONCLUSION

For the reasons stated above, the FTC respectfully requests that this Court enter partial summary judgment on liability in favor of the FTC with respect to Count X of the FTC's Complaint.

Respectfully submitted,

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