

I. THE ABANDONED CALL REGULATION IS CLEAR AND UNAMBIGUOUS

A. Defendants Failed to Identify Any Ambiguity in the Language of the Abandoned Call Regulation

As the FTC demonstrated in its initial brief (*see* FTC Mem. at pp. 4-5), the abandoned call regulation clearly and unambiguously requires outbound telephone calls to be connected to a live person as opposed to a prerecorded message within two seconds. In their brief, Defendants did not assert that the language of the regulation is ambiguous or proffer an alternative interpretation of the language. Defendants also did not attempt to distinguish, or even address, the two district court opinions that interpreted the clear language of the regulation to prohibit the use of a prerecorded sales pitch. The Court need not go any further in discerning the meaning of the regulation than its plain language.

B. Defendants Mischaracterize the FTC's Interpretation of the Abandoned Call Provision

Defendants' analysis of the FTC's interpretation of the abandoned call regulation an exercise that this Court need not entertain in light of the regulation's unambiguous language contains glaring omissions and mischaracterizations. For example, Defendants represent that, in the FTC's 2003 published notice adopting the abandoned call provision, the "[t]he FTC did not specifically state that the Abandoned Call Rule was intended [to] or did preclude the use of recorded messages." (Def. Mem. at p. 9.) In fact, in an excerpt omitted by Defendants, the notice 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).

Similarly, Defendants falsely claim that the FTC's Report to Congress Pursuant to Do Not Call Implementation Act submitted in September 2003 ("DNCIA Report") "expressly sanctioned" the use of recorded messages. Def. Mem. at p. 11. In fact, the FTC explicitly stated in the following section of the DNCIA Report omitted by Defendants that employing recorded messages to present a sales pitch was not permitted under the TSR:

Under the amended TSR's call abandonment provisions, 97 percent of a telemarketer's calls that are answered by a live consumer *must be connected to a live representative* within two seconds after the called party completes his or her greeting. The safe harbor permits telemarketers to abandon 3 percent of calls answered by a live person, provided the telemarketer plays a short recorded message promptly after the called party completes his or her greeting. *Thus, the amended TSR imposes limits on telemarketing calls that employ recorded messages rather than live operators.* These limits are applicable to both commercial telemarketing calls to solicit sales of goods or services, and telemarketing calls by telefundraisers to solicit charitable contributions.

* * *

[C]allers subject to the FCC's regulations, *but not the FTC's amended TSR*, will continue to be able to run calling campaigns that employ a recorded message to present a sales pitch provided the campaign is directed solely to consumers with whom the seller has an existing business relationship. *Companies subject the FTC's amended TSR will not be permitted to conduct such campaigns because they would not be connecting the call to a live operator in all but 3 percent of cases.*

DNCIA Report at pp. 33-34 (emphasis added).

Defendants also mischaracterized the FTC's proposed revision of the TSR issued in October 2006. Defendants represent that, in this notice, "[t]he FTC again recognized that its Abandoned Call Rule was vague and uncertain with respect to whether recorded messages were permissible[.]" Def. Mem. at p. 13. As support for this proposition, Defendants quoted two excerpts from the notice contained at 71 Fed. Reg. 58716, 58726. *See* Def. Mem. at p. 13. Defendants, however, conveniently omitted to provide the Court with the sentence in between the two excerpts they noted, wherein the FTC stated:

[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).¹

Finally, Defendants' position that the FTC is enforcing the abandoned call regulation in this case in a way it "never has before" (Def. Mem. at p. 3) is belied by the various enforcement actions identified in the FTC's initial brief. *See* FTC Mem. at pp. 6-7 & Atts. B-E. Since 2005, the FTC repeatedly has enforced the abandoned call provision consistent with its plain language by suing entities delivering prerecorded messages in outbound telephone calls just like Defendants did. *Id.*

II. PARTIAL SUMMARY JUDGMENT IS APPROPRIATE

A. The Undisputed Facts Demonstrate that Defendants Delivered Illegal Abandoned Calls

Defendants admit all of the facts necessary for the Court to enter partial summary judgment as to liability. As Defendants concede, their autodialer "allowed sellers and telemarketers to deliver recorded messages . . . in outbound telephone calls made to consumers[.]" *See* Def. Mem. at p. 1. In other words, the autodialer made telemarketing calls.² Furthermore, consumers who received the calls immediately heard a prerecorded message, not a live operator. *See* FTC 56.1 ¶ 3. These facts along with the plain language of the abandoned

¹ As support, the notice cited to the 2003 original rulemaking and the DNCIA Report.

² Defendants' assertion that the FTC must "establish that the calls were indeed telemarketing calls" (Def. Mem. at pp. 19-20) is puzzling in light of Defendants' admission that their autodialer allowed sellers and telemarketers to use the autodialer to deliver recorded messages. Under the TSR, a "seller" is "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration." *See* 16 C.F.R. § 310.2(aa). A "telemarketer" is "any person who, in connection with telemarketing, initiates . . . telephone calls to . . . a customer or donor." *Id.* § 310.2(dd). Thus, it cannot be disputed that the autodialer delivered prerecorded messages that were telemarketing calls.

call regulation and the adverse inference ordered by the Court demonstrate that summary judgment is appropriate as to liability in Count X of the FTC's Complaint.

B. The Court Does Not Have to Resolve Any Other Factual Issues to Grant Summary Judgment

Defendants' suggestion that the FTC must prove certain additional facts for the Court to enter summary judgment—namely, whether the FTC has jurisdiction or whether certain exemptions to liability under the TSR apply—is mistaken. *See* Defs. Mem. at pp. 18-19. First, Defendants wrongly assert that the FTC may lack jurisdiction over certain telemarketing calls delivered by Defendants' autodialer. *See* Def. Mem. at pp. 18-19. Admittedly, the FTC does not have jurisdiction over certain entities such as banks and common carriers. However, the FTC and this Court have jurisdiction over Defendants, and Defendants can be held liable under the TSR for assisting and facilitating illegal telemarketing activities of third parties, regardless of whether jurisdiction exists over those third parties. *See* 16 C.F.R. § 310.3(b).

Second, Defendants have the burden of proving that calls made from their autodialer fall under TSR exemptions. The general rule of statutory construction is that the party that seeks to claim the benefit of an exception to the prohibition of a statute carries the burden of proof. *See U.S. v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967) (exception from prohibition on anticompetitive bank mergers); *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953) (statutory exemption from registration requirement under Securities Act of 1933); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) (exception from antitrust prohibition); *Sengenberger v. Credit Control Servs., Inc.*, 2010 WL 1791270, at *3 (N.D. Ill. May 5, 2010) (Zagel, J.) (defendant bears the burden of proving whether "prior express consent" was provided to creditor for illegal robocall exception under the TCPA to apply). Thus, Defendants, not the FTC, have

the burden of proving that any of the exemptions from liability under the TSR raised by Defendants were applicable here.³

In any event, the Court need not identify the exact number of the hundreds of millions of calls delivered by Defendants that were abandoned for purposes of entering summary judgment as to liability. The undisputed facts demonstrate that Defendants assisted and facilitated third parties to initiate illegal abandoned calls, and Defendants have not submitted evidence that any exemptions apply. Even assuming that Defendants could establish that a modicum of the calls delivered by their autodialer were outside the scope of liability under the TSR, summary judgment is still appropriate with respect to the bulk of the calls.

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.

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³ Similarly, Defendants have the burden of proving the applicability of the FTC's abandoned call forbearance policy, an enforcement safe harbor voluntarily imposed by the FTC. Even assuming that compliance with the FTC's forbearance policy could be considered an exception to liability under the abandoned call provision, Defendants clearly would have the burden of demonstrating the applicability of the forbearance policy pursuant to the legal authority discussed above. Defendants have not tendered any evidence supporting applicability of the forbearance policy.