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11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
San Francisco Division

13 FEDERAL TRADE COMMISSION,
14 Plaintiff,
15 v.
16 INC21.com CORPORATION, et. al.,
17 Defendants.

Case No. CV 10-00022 WHA

**FTC'S OPPOSITION TO
DEFENDANTS' MOTION
FOR SUMMARY
JUDGMENT**

Hearing Date: July 22, 2010
Hearing Time: 8:00 a.m.

19
20 The Federal Trade Commission ("FTC" or "Commission") hereby opposes Defendants'
21 Motion for Summary Judgment on Counts II, III, IV, and V of the FTC's Complaint. DE 125.
22 Defendants' summary judgment motion ("SJ Motion") rests on the erroneous contention that the
23 Telemarketing Sales Rule ("TSR" or "Rule"), 16 C.F.R. Part 310, does not apply to them, and
24 that the Complaint counts founded on violations of the TSR therefore must be dismissed. As an
25 initial matter, Defendants are flat wrong that Count II of the Complaint is based upon the TSR.
26 Count II alleges that Defendants engaged in "unfair acts or practices in violation of Section 5 of
27
28

1 the FTC Act, 15 U.S.C. § 45(a) and (n).” DE 1 at ¶ 33.¹ Because Count II is based on
 2 unfairness, and not the TSR, and because Defendants’ arguments in support of summary
 3 judgment apply exclusively to the TSR, their SJ Motion as to Count II is unsustainable.

4 Complaint Counts III, IV, and V do allege violations of the TSR, but Defendants’ SJ
 5 Motion fares no better as a consequence. Defendants’ argument for summary judgment claims
 6 to rely on the “plain meaning” of the TSR, and yet accepting their argument requires an
 7 untenable departure from the TSR’s express terms. Defendants’ SJ Motion should be denied
 8 because: (1) it misinterprets the exemption stated in 16 C.F.R. § 310.6(b)(7); and (2) the
 9 evidence shows that Defendants made non-exempted telemarketing calls to individuals and non-
 10 businesses. Thus, they have failed to establish their entitlement to judgment as a matter of law.²

11 **1. The TSR Exempts “Calls,” Not Parties.**

12 Defendants’ SJ Motion rests entirely on the misguided notion that *they* are “not subject to
 13 the TSR.” DE 125 at 4. Defendants derive this wishful conclusion by converting the narrow
 14 terms of a TSR exemption into a broad, imaginary loophole. The operative exemption reads as
 15 follows: “The following acts or practices are exempt from this Rule. . . (7) Telephone calls
 16 between a telemarketer and any business, except calls to induce the retail sale of non-durable
 17 office or cleaning supplies. . . .” 16 C.F.R. § 310.6(b)(7). The terms of the exemption clearly
 18 communicate that it applies to particular “*acts or practices*”– in this case, “calls between a
 19 telemarketer and any business.” *Id.* (emphasis added).³

20 A plain reading of the Rule thus shows that the TSR does not exempt parties, *i.e.*,
 21 Defendants, writ large. Defendants would have this Court believe that because they purportedly
 22 targeted businesses as potential customers, all their telemarketing calls, no matter to whom, are
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24 ¹ Defendants appear to have misread the Complaint, as their SJ Motion improperly cites ¶ 45
 25 rather than ¶ 33, in alleging that Count II is based on the TSR.

26 ² Summary Judgment is proper only “if the pleadings, discovery and disclosure materials on
 27 file, and any affidavits, show that there is no genuine issue as to any material fact and that the
 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c)(2).

28 ³ The other six exemptions under Section 310.6(b) similarly enumerate specific types of “acts
 or practices” that fall outside the TSR’s coverage.

1 exempt from TSR compliance. Such an interpretation not only diverges from the TSR's express
2 terms, but would allow the exemption to swallow the Rule. Based on its plain language,
3 application of the exemption is analyzed call-by-call. Thus, a call between a telemarketer and a
4 business is exempt, while a call between a telemarketer and any *non-business* is not.

5 Moreover, the FTC need not prove that Defendants made a particular number of calls to
6 non-businesses or that such calls comprise a large portion of their telemarketing. Indeed, the
7 TSR applies no matter the number of calls made to non-businesses, provided that Defendants
8 made "more than one," in satisfaction of the Rule's definition of "telemarketing."⁴ Therefore,
9 Defendants had to comply with the TSR whether they called 20 non-businesses or 20,000, and
10 whether those calls represented 0.01% or 100% of their total telemarketing. The TSR does not
11 discriminate by numbers. In fact, the Commission expressly rejected a *de minimus* call threshold
12 prior to formal adoption of the Rule. See Notice of Proposed Rulemaking, 60 F.R. 8313, 8332
13 (Feb. 14, 1995) (proposing to exempt "solicitation of sales by any person who engages in fewer
14 than ten (10) sales each year through the use of the telephone"); cf. Revised Notice of Proposed
15 Rulemaking, 60 F.R. 30406, 30423 (June 8, 1995) (deleting the proposed *de minimus*
16 exemption).

17 Therefore, Defendants are wrong to advise the Court that "it is manifest that the TSR is not
18 applicable to [them]." DE 125 at 3.⁵ Defendants were required to comply with the TSR on
19 every occasion that they telemarketed to a non-business, so long as they did so more than once.
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24 ⁴ "Telemarketing" is defined as "a plan, program, or campaign which is conducted to induce the
25 purchase of goods or services or a charitable contribution, by use of one or more telephones and
26 which involves *more than one interstate phone call.*" 16 C.F.R. § 310.2(cc) (emphasis added).

27 ⁵ In fact, Defendants stretch their argument even further by claiming that the FTC must prove
28 that "Defendants [*sic*] telemarketing campaign was aimed at or directed to private individuals in
the home to market consumer products." DE 125 at 4. This description of the FTC's burden is
completely untethered to the law.

1 Importantly, for Defendants to prevail on summary judgment, they need to show, not that they
 2 telemarketed mostly to businesses, but that they indisputably telemarketed *only* to businesses –
 3 an impossibility in light of the evidence.⁶

4 **2. Defendants Telemarketed to Individuals and Other Non-Businesses.**

5 Defendants do not and cannot show that they telemarketed exclusively to businesses.
 6 During the Preliminary Injunction phase of these proceedings, Defendants submitted a then-
 7 current list of customers to the Court. See DE 47-3.⁷ The FTC, in support of its own summary
 8 judgment motion, recently provided the Court with a highlighted copy of this customer list
 9 showing irrefutably that Defendants telemarketed to numerous individuals, public and
 10 government entities (schools, libraries, police departments, etc.), and churches. See DE 123-35.⁸
 11 Additionally, the record contains the signed declarations of Roger Gerber (DE 36-31), an
 12 individual consumer, and Diane Haney (DE 123-45), who works for a non-profit, victims who
 13 provide testimony of Defendants’ unlawful telemarketing practices. Thus, the uncontroverted
 14 material facts do not entitle Defendants to summary judgment on the TSR counts of the FTC’s
 15 Complaint.

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 18 ⁶ Because Defendants’ SJ Motion is based on a fallacy, it contains extended discussion of
 19 immaterial facts. It is irrelevant, for example, whether Defendants’ “ideal customer” is a small-
 20 to mid-sized business, whether the FTC is “aware that Defendants’ market and provide business
 21 services,” or whether Inspector Wong’s Affidavit states that Defendants’ “target customers were
 22 businesses.” DE 125 at 2-3. None of these alleged facts, even if properly supported, which they
 23 are not, establish that Defendants telemarketed only to businesses, and never to non-businesses.

24 ⁷ Defendants’ SJ Motion makes no mention of this customer list, referencing instead their
 25 “business leads.” Importantly, they fail to submit evidence of the *actual lead lists* they used,
 26 expecting the Court to trust Defendant John Lin’s testimony that these lists were comprised only
 27 of “small to mid-sized businesses.” See DE 125-1. John Lin previously submitted a declaration
 28 claiming that schools, banks, and franchises were filtered out of Defendants’ lead lists –
 testimony he admitted was false during his deposition. See Mem. Opinion and Findings in
 Support of Preliminary Injunction, DE 57 at 10. John Lin’s self-serving declarations therefore
 cannot be trusted.

⁸ Based on the FTC’s very conservative count (i.e., only counting entries that were indisputably
 non-businesses and excluding many that likely were non-businesses), 524 of Defendants’ then-
 current customers were non-businesses being billed for a product Defendants admittedly sold
 exclusively through telemarketing (i.e., a product other than GoFaxer).

1 Defendants' SJ Motion fails to establish indisputably that they did not telemarket to non-
2 businesses, and in fact, their own admissions, coupled with the FTC's submissions, provide
3 evidence of the opposite. Therefore, Defendants have not met their burden, based on the TSR
4 exemption stated in 16 C.F.R. § 310.6(b)(7), for judgment as a matter of law on Counts III, IV,
5 and V.

6 **3. Conclusion**

7 For the foregoing reasons, the FTC opposes, and requests denial of, Defendants' Motion
8 for Summary Judgment.

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10 Respectfully submitted,

11
12 Date: July 1, 2010

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PROOF OF SERVICE

I am a resident of the State of Virginia and over the age of 18 years, and I am not a party to the this action. My business address is 600 Pennsylvania Avenue, N.W., Mailstop M-8102B, Washington, DC 20580. On July 1, 2010, I caused to be served FTC'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and supporting documents as indicated on:

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