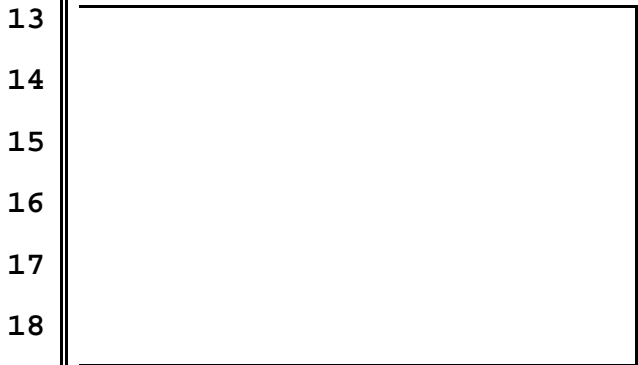


1 Douglas V. Wolfe
Sandhya P. Brown
2 600 Pennsylvania Avenue, NW
Mailstop M-8102B
3 Washington, DC 20580
Telephone: (202) 326-3113, -2040
4 Fax: (202) 326-2558
Email: dwolfe@ftc.gov, sbrown5@ftc.gov

5
6 Local Counsel
Kerry O'Brien (CSBN 149264)
901 Market Street, Suite 570
7 San Francisco, CA 94103
Telephone: (415) 848-5189
8 Fax: (415) 848-5184
Email: kobrien@ftc.gov

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10 Attorneys for Plaintiff
Federal Trade Commission

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



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1 the FTC Act, 15 U.S.C. § 45(a) and (n).” DE 1 at ¶ 3. 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

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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 a 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." 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 minimum 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

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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~~ businesses –
 3 an impossibility in light of the evidence.

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. 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.
 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 leads 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." 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 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, (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,

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12 Date: July 1, 2010

13 /s Sandhya P. Brown
14 Douglas V. Wolfe
15 Sandhya P. Brown
16 Federal Trade Commission
17 600 Pennsylvania Avenue, NW
18 Mailstop NJ-2122
19 Washington, DC 20580
20 Telephone: (202) 326-3113, -2040
21 Fax: (202) 326-2558 (fax)
22 Email: dwolfe@ftc.gov, sbrown5@ftc.gov

23
24 Local Counsel
25 Kerry O'Brien (CSBN 149264)
26 901 Market Street, Suite 570
27 San Francisco, CA 94103
28 Telephone: (415) 848-5189
29 Fax: (415) 848-5184
30 Email: kobrien@ftc.gov

31
32 Attorneys for Plaintiff
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PROOF OF SERVICE

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