

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
Miami Division**

<b>FEDERAL TRADE COMMISSION,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
v.	)	
	)	<b>Case No.: 18-61017-CIV-</b>
<b>POINTBREAK MEDIA, LLC, et al.,</b>	)	<b>ALTONAGA/Seltzer</b>
	)	
<b>Defendants.</b>	)	
	)	

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**DEFENDANTS JUSTIN RAMSEY AND DUSTIN PILLONATO’S  
MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

Defendants Justin Ramsey (“Ramsey”) and Dustin Pillonato (“Pillonato”), by counsel, hereby move this Court, pursuant to Federal Rule of Civil Procedure 12(c), for Partial Judgment on the Pleadings with respect to Counts III and IV of Plaintiff’s First Amended Complaint for Permanent Injunction and Other Equitable Relief for the reasons set forth in their Memorandum in Support contemporaneously filed herewith.

Dated: September 21, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of September 2018, I caused a copy of the foregoing document to be served via ECF on all parties entitled to receive notice.

/s/ Andrew N. Cove  
Andrew N. Cove

**IN THE UNITED STATES DISTRICT COURT  
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<b>Defendants.</b>	)	
	)	

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**DEFENDANTS JUSTIN RAMSEY AND DUSTIN PILLONATO’S  
MEMORANDUM IN SUPPORT OF THEIR MOTION  
FOR PARTIAL JUDGMENT ON THE PLEADINGS**

Defendants Justin Ramsey (“Ramsey”) and Dustin Pillonato (“Pillonato”), by and through counsel, submit this Memorandum in Support of their Motion for Partial Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c) and state as follows:

**I. INTRODUCTION**

Counts III and IV of the FTC’s Amended Complaint allege that the Corporate Defendants<sup>1</sup>, and Ramsey and Pillonato personally in their capacities as owners and managers of several Corporate Defendants, violated the Telemarketing Sales Rule, 16 C.F.R. § 310 *et.seq.* (“TSR”), by transmitting prerecorded messages and by placing telemarketing calls to telephone numbers on the national Do-Not-Call Registry. However, there are exceptions to the TSR’s prohibitions, including a specific exemption for calls made to businesses. *See* 16 C.F.R. §310.6(b)(7).

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<sup>1</sup> The Corporate Defendants, as defined in the Amended Complaint, are Pointbreak Media, LLC, DCP Marketing, LLC, Modern Spotlight, LLC, Modern Spotlight Group, LLC, Modern Internet Marketing, LLC, Modern Source Media, LLC, Perfect Image Online LLC, Allstar Data, LLC, National Business Listings, LLC and Pinnacle Presence LLC

The FTC erroneously seeks to recover for calls that – by the FTC’s own allegations – clearly were made to businesses to solicit the sale of business-related services, to wit, a “Google My Business” feature and business search engine optimization. Therefore, judgment on the pleadings as to Counts III and IV should be entered in favor of Ramsey and Pillonato because, quite simply, the claims fail as a matter of law on the facts plead.

## **II. FACTUAL AND PROCEDURAL HISTORY**

The FTC filed its Complaint for Permanent Injunction and Other Equitable Relief (“Complaint”) on May 7, 2018 (ECF No. 1). On July 3, 2018, the FTC filed its First Amended Complaint for Permanent Injunction and Other Equitable Relief (“Amended Complaint”) (ECF No. 109). Ramsey and Pillonato filed their Answers to the Amended Complaint on July 24, 2018. (ECF Nos. 138 and 139).

## **III. ARGUMENT**

### **A. Legal Standard**

“After pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). “Judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.” *Palmer & Clay, Inc. v. Marsh & McLennan Cos.*, 404 F.3d 1297, 1303 (11th Cir. 2005) (citing *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1291 (11th Cir. 2002)). The court must view the facts “in the light most favorable to the nonmoving party” and it can grant the motion only if the non-movant “can prove no set of facts” which would allow it to prevail. *Id.* (citing *Horsley v. Feldt*, 304 F.3d 1125, 1131 (11th Cir. 2002)).

The standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion for failure to state a claim and includes consideration of any

exhibits attached to the complaint. *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1321-22 (11th Cir. 2012); *Thaeter v. Palm Beach Cnty. Sheriff's Office*, 449 F.3d 1342, 1352 (11th Cir. 2006).

**B. The FTC Only Alleges Facts Suggesting that the Corporate Defendants Transmitted Prerecorded Messages and Telemarketing Calls to Businesses for Purposes of Counts III and IV.**

Count III of the Amended Complaint seeks damages for calls that transmitted prerecorded messages, *see* Am. Compl. ¶¶ 224-225, while Count IV seeks damages for calls placed to telephone numbers on the national Do-Not-Call Registry. *See id.* ¶¶ 226-227. The FTC also seeks to hold Ramsey and Pillonato personally liable for the actions of the Corporate Defendants because they allegedly formulated, directed, controlled, had authority to control, or participated in the practices of several Corporate Defendants. *See id.* ¶¶ 16-17, 27. Both counts rely solely upon the allegations contained in Paragraphs 35-46 of the Amended Complaint. *See id.* ¶¶ 224-227.

What those paragraphs make clear, however, is that the FTC alleges the Corporate Defendants initiated calls to businesses to sell business services; namely, “Google My Business” listings and search engine optimization services.<sup>2</sup> *See id.* ¶¶ 35-46. For instance, the FTC claims that the prerecorded messages stated the following:

Hi, this is Jennifer Taylor, data service provider for Google and Bing. This is an urgent message for the *business* owner. We have tried numerous times to contact you through mail and now by telephone *regarding your Google listing webpage*. This is your final notice. If you do not act soon, Google will label your *business as permanently closed*. Press one now to speak with me or another Google specialist.

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<sup>2</sup> “Google My Business” is a service that provides business owners with ways to increase their businesses’ visibility in Google search engine results. The service is exclusively used by businesses. About Google My Business, <https://support.google.com/business/answer/3038063?hl=en> (last visited September 19, 2018). Search engine optimization is “the method[s] used to boost the ranking or frequency of a website in results returned by a search engine, in an effort to maximize user traffic to the site.” *SEO*, DICTIONARY.COM (last visited September 20, 2018), <https://www.dictionary.com/browse/seo>.

Did you know that *74% of your customers* search online before making a purchase? If your Google listing is shut down, you will lose on all of those *potential customers*. It is critical that you, the *business* owner, take advantage of this rare opportunity to get ahead of your competition. Press one now to find out how to validate your free Google listing.

This message applies to all *business* owners. If you are the *business* owner, press one now. *Press two if this is not a business* or you would like to be removed from our calling list.

Am. Compl. ¶ 38 (emphasis added); *see also id.* ¶ 40 (transmitting a similar message to “business owners” and instructing the call recipient to “press two if this is not a business”); *id.* ¶ 39 (alleging that the message stated, “Your Google *Business* listing may be inactive. Immediate action is required.” (emphasis added)).

By way of further example, the FTC alleges that Corporate Defendants transmitted a prerecorded call stating the following:

Hey, this is Vincent with the Claims Center. Just giving you a call to let you know that it is imperative that you claim your Google listing. Otherwise, *your business runs the risk of being removed from Google*. Give me a call at your earliest convenience to resolve this matter at 855-900-1188. Thank you, talk to you soon.

*Id.* ¶41 (emphasis added).

Even when paraphrasing its own claims, the FTC repeatedly acknowledges that the purpose of the calls was to reach businesses. *See id.* ¶ 37 (“On these robocalls, Defendants deliver recorded messages . . . threatening that Google will label the consumer’s *business* ‘permanently closed’ unless the consumer takes action.” (emphasis added); *id.* ¶45 (“Defendants place their robocalls to many *business* owners who have, in fact, already claimed and verified their *businesses* through Google My Business.” (emphasis added)).

Simply put, the very facts upon which the FTC relies for purposes of Counts III and IV demonstrate that the alleged calls and messages were transmitted to businesses. Further,

common sense dictates that only businesses would have any interest in Google My Business listings and the ranking of internet search results for their business.

As discussed below, such calls and prerecorded messages are exempt under the TSR. Because the FTC alleges no other substantive facts in support of Counts III and IV, judgment should be entered in favor of Defendants Ramsey and Pillonato and Counts III and IV should be dismissed with prejudice.

**C. Counts III and IV Must Be Dismissed as a Matter of Law Because Calls to Businesses are Exempt from TSR Violations.**

16 C.F.R. § 310.6 exempts certain calls from the TSR's prohibitions, including the following :

*Telephone calls between a telemarketer and any business to induce the purchase of goods or services or a charitable contribution by the business, except calls to induce the retail sale of nondurable office or cleaning supplies; provided, however, that §§ 310.4(b)(1)(iii)(B) and 310.5 shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.*

16 C.F.R. §310.6(b)(7) (emphasis added). As one district court observed, although the TSR does not define “business,” “Under a natural and plain reading of the exemption, a telemarketer is exempt when it solicits a business regarding purchases on behalf of the business.” *FTC v. Publs. Bus. Servs.*, 821 F Supp. 2d 1205, 1220 (D. Nev. 2010).

As demonstrated above, the alleged calls unmistakably fall under such a plain reading of the exemption. *See id.* That is, the allegations make it plain that the calls were between telemarketers and businesses for the purpose of inducing the purchase of goods or services on behalf of the businesses – i.e, soliciting the businesses’ purchase of “Google My Business” accounts and search engine optimization services. Therefore, the exemption contained in 16 C.F.R. 310.6(b)(7) squarely applies and the alleged calls cannot constitute violations of the TSR. *See De Los Santos v. Millward Brown, Inc.*, CASE NO. 13-80670-CV-MARRA, 2014 U.S. Dist.

LEXIS 88711, at \*23 (S.D. Fla. June 30, 2014) (observing that 16 C.F.R. 310.6(b)(7) “expressly exempt[s] calls to businesses”); *Clauss v. Legend Secs., Inc.*, No. 4:13-cv-00381-JAJ, 2014 U.S. Dist. LEXIS 184286, at \*7 (S.D. Iowa Sept. 8, 2014) (stating that “[t]he law in question is inapplicable if Defendant was calling Plaintiff at his business phone number”); *see, e.g., Cellco P’ship v. Wilcrest Health Care Mgmt.*, CIVIL ACTION NO. 09-3534 (MLC), 2012 U.S. Dist. LEXIS 64407, at \*28 (D.N.J. May 8, 2012) (holding that the plaintiff’s claims were barred “by the exemption for calls between a telemarketer and any business” in 16 C.F.R. § 310.6(b)(7)); *cf. FTC v. Publr. Bus. Servs.*, 821 F Supp. 2d at 1220 (declining to apply the calls to businesses exemption where calls were made to consumers at their places of work soliciting the sale of consumer goods and services as opposed to soliciting purchases on behalf of the business). As a matter of law, the FTC cannot prevail on Counts III and IV and judgment should be entered in favor of Ramsey and Pillonato in regard to these counts.

#### **IV. CONCLUSION**

WHEREFORE, Defendants Dustin Pillonato and Justin Ramsey respectfully request that the Court enter judgment in their favor as to Counts III and IV of the First Amended Complaint and dismiss those counts with prejudice.

Dated: September 21, 2018

Respectfully submitted,

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