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

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

DEFENDANTS JUSTIN RAMSEY AND DUSTIN PILLONATO'S REPLY IN SUPPORT OF THE MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

COME NOW Defendants Justin Ramsey and Dustin Pillonato ("Defendants"), by counsel, and hereby file their Reply to Plaintiff's Opposition to the Motion for Partial Judgment on the Pleadings and, in support thereof, state the following:

I. INTRODUCTION

In a desperate attempt to avoid judgment on the pleadings as to Counts III and IV, the FTC points this Court to passing references in just 2 paragraphs out of the 232 (or more) paragraphs set forth in the First Amended Complaint. Despite its own substantive allegations that clearly establish that the alleged calls were business-to-business in nature, the FTC seeks to save its Telemarketing Sales Rule ("TSR") claims in Counts III and IV by relying on conclusions couched as fact – i.e., that "individuals" or "consumers" were called too. However, the FTC provides no substantive factual basis for this conclusory allegation. Supreme Court precedent is clear that such allegations should be ignored on a Motion for Judgment on the Pleadings. Therefore, without more, the FTC's TSR claims in Counts III and IV fail and judgment should be entered in favor of Defendants as to those claims.

II. ARGUMENT

A. If the Court Properly Disregards the FTC's Mere Recitation of the Elements of its Claims, It Is Clear That Counts III and IV Should Be Dismissed and Judgment Entered in Defendants' Favor.

As previously stated, Counts III and IV of the First Amended Complaint seek recovery for alleged violations of the TSR. As detailed in Defendants' Memorandum in Support of their Motion for Judgment on the Pleadings (ECF 177-1), the FTC's own allegations make clear that the calls at issue were business-to-business calls. Memo. in Supp. 3-5. Yet, business-to-business calls are exempt from the TSR. *See* 16 C.F.R. § 310.6(b)(7) (exempting "[t]elephone calls between a telemarketer and any business to induce the purchase of goods or services"); *see also* Memo. in Supp. 5-6.

In its Opposition brief (ECF 180), the FTC alleges that its claims are saved by its use of two buzzwords on two occasions, notwithstanding the overwhelming substantive allegations stating otherwise; that is, the FTC states that it alleges Defendants called "small businesses and other consumers" and that the "recipients . . . included individuals." Opp. 1, 3 (citing First Amended Complaint (ECF 109) at ¶¶ 35-36) (emphasis added). This is not enough to save its claims: Nowhere in the First Amended Complaint does the FTC provide any substance to support its conclusory allegations that "consumers" and "individuals" were called.

To state a claim for violations of the TSR, the FTC must substantively allege that the Defendants (i) initiated outbound telephone calls (ii) to persons (iii)(a) delivering prerecorded messages or (iii)(b) whose numbers were on the do-not-call list. *See* 16 C.F.R. § 310.4(b)(1)(v); 16 C.F.R. § 310.4(b)(1)(iii)(B). As this Court is aware, 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. *Dominguez v. Cent. Tire Corp.*, Case No. 12-22117-CIV-COOKE/TURNOFF, 2013 U.S. Dist. LEXIS 84882, at *8 (S.D. Fla. April 30, 2013).

Thus, this Court need only accept as true "'well-pleaded facts.'" *Dokes v. LTD Fin. Servs., L.P.*, Case No.: 1:18-CV-761-VEH, 2018 U.S. Dist. LEXIS 155908, at *2-3 (N.D. Ala. Sept. 13, 2018) (quoting *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1057 (11th Cir. 2007)). As the Supreme Court has made clear: "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (emphasis added) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Indeed, even though a court "must take all of the factual allegations in the complaint as true, [a court] [is] not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (quoting *Twombly*, 550 U.S. at 555 (internal quotation marks omitted)).

Because the FTC is merely reciting an element of its claim couched as a factual allegation, i.e., that "individuals" and "consumers" were also called, without any substantive factual support, its allegations do not suffice to state a *prima facie* case. Accordingly, judgment on the pleadings in favor of Defendants Ramsey and Pillonato is appropriate.

B. The FTC's Argument That the Business-to-Business Exemption Is an Affirmative Defense That Defendants Must Prove Is Inapposite; It Ignores the Fact That the FTC Must First State Its *Prima Facie* Case – and It Has Failed to Do So.

In *United States v. Dish Network, LLC*, the Central District of Illinois reiterated the burden shifting framework for cases involving exemptions to the TSR: "Once the United States has made its *prima facie* case, Dish may present evidence to establish available affirmative defenses" and that a TSR exemption is "treated as an affirmative defense." 75 F.Supp. 3d 942,

1008 (C.D. Ill. 2014), *vacated in part on other grounds*, 80 F. Supp. 3d 917 (C.D. Ill. 2015). Thus, the FTC's argument is inapposite at this pleadings stage. Indeed, as a prerequisite matter, the pertinent inquiry on a motion for judgment on the pleadings is the same as a motion to dismiss for failure to state a claim: whether the plaintiff alleged sufficient facts to state a plausible claim for relief. *Dominguez,* 2013 U.S. Dist. LEXIS 84882 at *8.

To reiterate, because the FTC "must plead all facts establishing an entitlement to relief with more than 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action," *Iqbal*, 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 555), the Government's argument that Defendants bear the burden of proof on the exemption is a nonstarter. Before proof comes into play, the "complaint must contain enough facts to make a claim for relief plausible on its face." *Id.* (emphasis added) (citing *Twombly,* 550 U.S. at 570). Because the FTC provides only two brief, passing references to "individuals" and "consumers" in the entire, voluminous First Amended Complaint, the FTC has not stated claims in Count III and IV that are plausible on their face and affirmative defenses need not be reached.

III. CONCLUSION

WHEREFORE, in light of the foregoing, and for the reasons set forth in the Defendants' Motion for Judgment on the Pleadings and Memorandum in Support, Defendants respectfully request that the Court grant its Motion, enter judgment in Defendants' favor, and dismiss Counts III and IV as to Defendants Ramsey and Pillonato.

Respectfully submitted,

JUSTIN RAMSEY & DUSTIN PILLONATO

By counsel

/s/ Mitchell N. Roth
Mitchell N. Roth
Virginia State Bar #35863
Pro Hac Vice
mroth@rothjackson.com
ROTH JACKSON
8200 Greensboro Drive, Suite 820
McLean, VA 22102
T: 703-485-3535
F: 703-485-3525

Andrew N. Cove
Florida Bar #0562122
anc@covelaw.com
Cove Law, P.A.
225 South 21st Avenue
Hollywood, FL 33020
T: 954-921-1121
F: 954-921-1621

CERTIFCATE OF SERVICE

I hereby certify that on this 9th day of October 2018, I caused a copy of the foregoing document to be served via ECF on all parties entitled to receive notice.

/s/Andew N. Cove____
Andrew N. Cove