

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 18-61017-CIV-ALTONAGA/Seltzer

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

POINTBREAK MEDIA, LLC, et al.,

Defendants.

ORDER

THIS CAUSE came before the Court on Defendants, Justin Ramsey and Dustin Pillonato’s Motion for Partial Judgment on the Pleadings [ECF No. 177-1], filed September 21, 2018. Defendants Ramsey and Pillonato seek a partial judgment on the pleadings as to Counts III and IV of the First Amended Complaint [ECF No. 109] (the “FAC”). On October 2, 2018, Plaintiff, Federal Trade Commission (the “FTC”), filed an Opposition [ECF No. 180], to which Defendants filed a Reply [ECF No. 185] on October 9, 2018. The Court has carefully considered the FAC, the parties’ written submissions, the record, and applicable law.

Under Federal Rule of Civil Procedure 12(c) “[a]fter the 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) (alteration added). “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 & Cay, Inc. v. Marsh & McLennan Cos., Inc.*, 404 F.3d 1297, 1303 (11th Cir. 2005) (quoting *Riccard v. Prudential Ins. Co.*, 307 F. 3d 1277, 1291 (11th Cir. 2002)).

The standard of review for a motion for judgment on the pleadings is “almost identical to the standard used to decide motions to dismiss.” *Doe v. Bd. of Cty. Comm’rs, Palm Beach Cty.*,

Fla., 815 F. Supp. 1448, 1449 (S.D. Fla. 1992) (citing *Miami Herald Pub. Co. v. Ferre*, 636 F. Supp. 970, 974 (S.D. Fla. 1985)). In ruling on the motion, “[a]ll facts alleged in the complaint must be accepted as true and viewed in the light most favorable to the nonmoving party.” *Scott v. Taylor*, 405 F.3d 1251, 1253 (11th Cir. 2005) (alteration added; citation omitted). Judgment on the pleadings should be granted where “there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.” *Id.* (citation omitted).

Plaintiff brings this action seeking injunctive relief, disgorgement of ill-gotten gains, and other equitable relief for Defendants’ alleged deceptive practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. section 45(a), and the Telemarketing Sales Rule (the “TSR”), 16 C.F.R. Part 310. (See FAC ¶ 1). In Count III, Plaintiff alleges Defendants violated the TSR through the use of unlawful pre-recorded telephone messages. (See *id.* ¶¶ 224–25). In Count IV, Plaintiff seeks damages for calls placed to telephone numbers on the national Do-Not-Call Registry. (See *id.* ¶¶ 226–27).

In their separate Answers, Defendants raise as affirmative defenses what is known as the business-to-business exemption, stating “[a]ny telephone calls placed by the Defendants were placed to businesses to induce the purchase of goods or services and are therefore exempt from the [TSR] under 16 C.F.R. [section] 310.6(b)(7).” (Ramsey Answer [ECF No. 138] 44); Pillonato Answer [ECF No. 139] 44 (alterations added)). In their Motion before the Court, Defendants re-assert this defense, contending they cannot be liable for violations of the TSR because the FAC only contains allegations that they called businesses. (See *generally* Mot.; Reply).

As Plaintiff notes, Defendants inaccurately describe the facts alleged in the FAC. (See *generally* Opp.). Plaintiff does not merely allege Defendants called businesses; rather,

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Plaintiff alleges Defendants placed threatening phone calls delivering pre-recorded messages, or robocalls, to “small business owners and other consumers” since November 2016. (FAC ¶ 35). Plaintiff also alleges the “recipients of Defendants’ robocalls have included individuals who have placed their phone numbers on the National Do Not Call Registry” (*Id.* ¶ 36 (alteration added)). Paragraphs 35 and 36 of the FAC are among the paragraphs incorporated into Counts III and IV of the FAC. (*See id.* ¶¶ 224, 226). These calls to non-businesses, a fact the Court must accept as true, are not subject to the business-to-business exemption. *See* 16 C.F.R. § 310.6(b)(7); *see also F.T.C. v. Publishers Bus. Servs., Inc.*, 821 F. Supp. 2d 1205, 1221 (D. Nev. 2010) (“The limited scope of the [business-to-business] exemption is apparent, to exclude only telemarketing calls to businesses for business purchases.” (alteration added)).

Defendants’ assertion Plaintiff is merely reciting an element of its claims couched in a factual allegation that lacks substantive factual support (*see* Reply 3), fails to persuade. That contention, without more, certainly fails to establish the absence of material facts in dispute and Defendants’ entitlement to judgment as a matter of law.

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendants, Justin Ramsey and Dustin Pillonato’s Motion for Partial Judgment on the Pleadings [ECF No. 177] is **DENIED**.

DONE AND ORDERED in Miami, Florida, this 10th day of October, 2018.


CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record